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The Netherlands Found Liable for Srebrenica Deaths

By Cees van Dam



Introduction

In a decision early this summer that stunned even the plaintiffs and their lawyers, the Netherlands Court of Appeal in The Hague found the Dutch State liable for the death of three Bosniak^[1] men who had taken refuge with the Dutch battalion (“Dutchbat”) under command of the United Nations peacekeeping force

UNPROFOR^[2] in Srebrenica in 1995. Dutchbat troops refused to put the men on the list of local personnel that was to be evacuated with Dutchbat. As they were not on the list, the men were told they could not stay inside the compound and had to leave. All three were subsequently killed in the Srebrenica massacre by the Serb forces led by Ratko Mladic.

The decision is remarkable in that it takes a clear position in one of the most sensitive political issues in Dutch politics in the past decades. In 2002, Prime Minister Wim Kok and his cabinet resigned after an inquiry concluded that the government was partly to blame for the failure to offer Srebrenica refugees protection.^[3] In his resignation speech, Kok said that he accepted political but not legal responsibility.

Against this backdrop, Dutch attorney Liesbeth Zegveld lodged liability claims against the Dutch State on behalf of the relatives of the three Bosniak men. In 2008, the District Court dismissed the claims, but on July 5, 2011, the Court of Appeal quashed this decision and allowed the claims to go forward.^[4]

Factual Background

In July 1995, the task of Dutchbat was to protect the Muslim-enclave Srebrenica in Bosnia and Herzegovina. When the Serbian army, led by General Mladic, took over Srebrenica on July 11, Dutchbat retreated to a nearby compound. About 5,000 Srebrenica refugees were admitted to the Dutchbat compound, 239 of them men, ages sixteen to sixty. Meanwhile, most men that age outside the compound were deported by Serbian troops and killed.

The case in The Hague concerned Rizo Mustafic, a Dutchbat electrician, and two relatives

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of Hasan Nuhanovic, a Dutchbat interpreter: his younger brother Muhamed and his father Ibro. On July 13, 1995, Dutchbat troops told Rizo and Muhamed they could not stay inside the compound and had to leave. Muhamed's father chose to accompany his son. All three men were killed.

Attribution of Dutchbat's Conduct to the UN, the Dutch State, or Both

In 2008, the District Court in The Hague rejected the relatives' claims against the Dutch State alleging that it had acted wrongfully by refusing to put the men on the list of local personnel, by telling them to leave the compound, and by omitting to interfere when Dutchbat troops witnessed the men being separated from their relatives outside the compound. The District Court held that the acts of Dutchbat could only be attributed to the United Nations and not to the Dutch State.^[5]

The Court of Appeal took a different view. First, it considered that the attribution question had to be decided on the basis of international law. Referring to public international law literature^[6] and the Draft Articles on the Responsibility of International Organizations of the International Law Commission, in particular Article 6, the Court concluded that the decisive question was who had "effective control"^[7] over the individual troops. Although Article 6 only mentions "effective control" in relation to attribution to international organizations, the Court assumed that the same standard applied to the question whether the troops' conduct could be attributed to the State.^[8]

The Court thus aimed to answer the question whether the State owed the three men a tort law duty. It would not owe them such duty if it did not exercise effective control over its troops. This would be the case if it had lost the legal authority and factual ability to instruct and supervise its troops (because this authority and ability was entirely with the United Nations). However, the Court held that in the circumstances of the case the State still had effective control.^[9]

The Court then concluded that effective control goes beyond the implementation of a specific instruction by the United Nations or the State. According to the Court, effective control existed if the United Nations or the State had the ability to prevent the conduct in question. This broad reading of the term implies that more than one party can have effective control, meaning that dual attribution is possible.

For effective control by the State to exist, the Court considered it relevant that the State keeps control over the personal affairs of the troops and possesses formal power to take disciplinary measures. The Court also considered that the fall of Srebrenica brought the peacekeeping operation to an end, and that from July 11, 1995, onwards Dutchbat's only aim was to evacuate the refugees in a way that ensured their safety.^[10] Thus the Court distinguished this situation from a normal peacekeeping operation.^[11] Moreover, the Court noted that during the transition period, the Dutch government was actively involved in the Dutchbat operation. The control over Dutchbat was not only theoretical, it was exercised in practice: the Dutch government, represented by its two highest-ranking officers, had taken the decision to evacuate Dutchbat and the refugees, and the Minister of Defense had ordered Dutchbat not to cooperate in the separation of male Muslim refugees in Srebrenica.^[12]

The Court concluded that Dutchbat's conduct was directly linked to the decisions and instructions of the Dutch government. Dutchbat's refusal to put the men on the list of local personnel and telling them to leave the compound was directly linked to the way Dutchbat's

[Al-Skeini & Others v. United Kingdom](#)

[Draft Articles on the Responsibility of International Organizations of the International Law Commission](#)

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evacuation was to be executed, namely by following the instructions as to who was going to be included in the evacuation operation. According to the Court, this implied that the alleged wrongful conduct was within the State's effective control and could therefore be attributed to the Dutch State.[13]

The Wrongfulness of the Conduct

The Dutch conflict of laws holds that the law applicable to a claim against the State is the law of the place where the wrongful act took place.[14] Therefore, the Court had to decide the wrongfulness on the basis of Bosnian law. It also referred to the legal principles embodied in Articles 2 and 3 of the European Convention on Human Rights ("ECHR") and Articles 6 and 7 of the International Covenant on Civil and Political Rights ("ICCPR") concerning the protection of the right to life and the protection against inhuman treatment. The Court held that the principles behind these rules are rules of customary international law, which are universally applicable. The Court also noted that in 1995, the ICCPR was in force for Bosnia and Herzegovina, and that Articles 6 and 7 of the ICCPR directly applied pursuant to Article 3 of the Constitution of Bosnia and Herzegovina.[15]

The Court concluded that when the Bosnian men were told to leave, Dutchbat had sufficient information about incidents outside the compound, which implied that men, ages sixteen to sixty, who left the compound, ran a real risk of being killed or treated inhumanely by the Serb forces. Had the State not breached its duty to ensure the safety of the male refugees inside the compound by allowing them to remain, these men would still be alive, as was the case with all refugees who were allowed to stay inside the compound. Therefore, the Court of Appeal found that a causal link between the breach of duty to protect and the death of the victims existed.[16]

The Court concluded that the State acted wrongfully by not allowing the men to remain in the safe area. Their expulsion was a violation of both Article 154 of the Act on the Law of Obligations of Bosnia and Herzegovina and the right to life and the right to be protected against inhuman treatment of the ECHR and the ICCPR. The Court found the Dutch State liable under Article 171(1) for the conduct of Dutchbat, which was employed by the State. However, while the State did not act wrongfully against Ibro Nuhanovic, who was allowed to stay inside the compound, his death could be attributed to the wrongful expulsion of his son, whom he accompanied. In the given circumstances, it was understandable and foreseeable that Ibro would choose to accompany his minor son. The State was therefore also liable for the damage Hasan suffered because of his father's death.

State Liability

Usually courts are reluctant to impose liability on public bodies. When public entities respond to complex situations, or when their conduct is policy related, they typically enjoy a wide margin of discretion.[17] This reluctance finds its limits in the protection of human rights, particularly the right to life,[18] as clearly illustrated in this case. The Court found that: (a) the life of the victims was in danger; (b) the tortfeasor (the Dutch State) was aware of the danger; (c) the tortfeasor had the legal authority to intervene; and (d) the tortfeasor had the ability to intervene. Such circumstances trigger the State's duty to actively protect the right to life. Equally, a state will be held liable for the consequential damage if it fails to comply with its duty to protect.

Permeating Borders

The Court's decision also illustrates the increasingly open borders between national and international law. The Court decided the issue of "attribution" on the basis of international law and based its conclusion regarding wrongfulness on both national and international law. Specifically, the attribution issue was answered on the basis of what the agreement between the United Nations and the Dutch State provided with respect to the command and the control over the peacekeeping operation. One may compare this with a joint venture between companies, where the joint venture agreement usually provides rules on the legal and factual control over the joint venture's operations. From a national tort law perspective, the "joint venture" agreement between the United Nations and the Dutch State was therefore of primary importance for the question of control.

Scope of the Decision

Although the psychological and political impact of the Court's decision cannot be underestimated, the practical scope of the decision is limited. The case neither concerned a combat situation nor a regular peacekeeping situation. In Srebrenica, the focus had shifted from peacekeeping to evacuation and protection of refugees.

Moreover, the decision does not relate to the men outside the compound or to those who had left the compound at an earlier stage. This latter group probably concerned the vast majority of the victims of the massacre. Plaintiffs also based their claims on the State's failure to intervene when Mustafic and Nuhanovic were separated outside the compound. However, the Court of Appeal did not deal with these issues as they were irrelevant for the outcome of the case.^[19]

Considering the specific facts of this case, the decision is thus not a real surprise from a purely legal point of view. The impact of the decision on the much broader Srebrenica case, currently pending before the District Court of The Hague, remains to be seen. In that case, a group of some 6,000 surviving relatives, also known as the "Mothers of Srebrenica", are claiming that the United Nations and the Dutch State are jointly liable for the death of their family members.

By early September 2011, the State still had to decide whether or not to appeal this decision before the Supreme Court. The State's main legal difficulty is that the Supreme Court will not revisit the facts, and the application of foreign (Bosnian) law is considered to be a factual matter. The Supreme Court will thus only focus on the application of international law.^[20]

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Endnotes:

[1] Bosnian Muslims are commonly referred to as Bosniaks.

[2] UNPROFOR [United Nations Protection Force], www.un.org/en/peacekeeping/missions/past/unprofor.htm.

[3] Neth. Inst. for War Documentation [NIOD], Srebrenica: A "Safe" Area (2002), *available at* www.srebrenica.nl/Pages/OOR/23/379.bGFuZz1OTA.html.

[4] Court of Appeal The Hague, LJN: BR0132 (July 5, 2011), *available at* www.rechtspraak.nl/ljn.asp?ljn=BR0132 [hereinafter *Srebrenica* Appeal Decision].

[5] District Court The Hague, LJN: BF0187 (Sept. 10, 2008), available at www.rechtspraak.nl/ljn.asp?ljn=BF0187.

[6] Moshe Hirsch, *The Responsibility of International Organizations Towards Third Parties* 64 (1995); Francesco Messineo, *The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to Unauthorised Forces and the Power of the Security Council to Displace Human Rights*, 56 *Neth. Int'l L. Rev.* 35, 41-42(2009); Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 *Hum. Rts. L. Rev.* 151, 164 (2008); Karl T. Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 *Harv. Int'l L.J.* 113, 140-141(2010).

[7] See *Behrami v. France*, App. No. 71412/01, ¶ 133 (Eur. Ct. H.R. May 2, 2007) (the Court considered decisive who had the “ultimate authority and control”).

[8] *Srebrenica* Appeal Decision, *supra* note 4, ¶ 5.8.

[9] Cees van Dam, *European Tort Law* (2006), 1601ff.

[10] *Srebrenica* Appeal Decision, *supra* note 4, ¶ 5.11.

[11] The Court of Appeal distinguished *Behrami*, *supra* note 7. It should be noted that the Court of Appeal did not consider the question whether dual attribution is possible in “normal” peacekeeping situations.

[12] *Srebrenica* Appeal Decision, *supra* note 4, ¶ 5.18.

[13] *Id.* ¶¶ 5.19, 5.20.

[14] Unlawful Act (Conflict of Law) Act art. 3(1) [Wet conflictenrecht onrechtmatige daad], available at http://www.st-ab.nl/wetten/0458_Wet_conflictenrecht_onrechtmatige_daad.htm.

[15] *Srebrenica* Appeal Decision, *supra* note 4, ¶ 6.4. Two days after the Court of Appeal decision, the European Court of Human Rights held that the European Convention is directly applicable when a State exercises effective control of an area outside its national territory. See *Al-Skeini & Others v. United Kingdom*, App. No. 55721/07, ¶ 138. (Eur. Ct. H.R. July 7, 2011).

[16] *Srebrenica* Appeal Decision, *supra* note 4, ¶¶ 6.10-6.14.

[17] Van Dam, *supra* note 9, 1809-1810.

[18] *Id.* 1807.

[19] *Srebrenica* Appeal Decision, *supra* note 4, ¶ 6.22.

[20] See also André Nollkaemper, *Dual Attribution: Liability of the Netherlands for Removal of Individuals from the Compound of Dutchbat* (Amsterdam Ctr. of Int'l L.), available at www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat.