

# Mothers of Srebrenica v the Netherlands: The Law as Constraint for Peacekeeping?

Written by Lenneke Sprik

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The recent court ruling by the Hague District Court in *Mothers of Srebrenica v the Netherlands* once again illustrates how peacekeeping has turned into a precarious activity for a state. Concluding that the Dutch soldiers, the Dutchbat, unlawfully assisted the Serbs in deporting 300 Bosnian men from the United Nations (UN) compound in Srebrenica, the Court's judgment is part of a series of domestic verdicts that may form an important basis for the development of state practice in this regard (see *Mustafic v the Netherlands*, *Nuhanovic v the Netherlands*, *The Netherlands v Nuhanovic*, and *The Netherlands v Mustafic*). As such, troop-contributing states are faced with the reality presented to them by law: UN member states involved in peacekeeping may face tort claims if the state had the ability within their effective control to protect civilians from genocide (see Article 7 of DARIO 2011). This article addresses how this judgment may negatively affect the future of peacekeeping.

### The Srebrenica Judgments in Dutch Courts

Before placing this ruling within the broader picture of peacekeeping, it is important to first determine what exactly led the District Court to pin responsibility on the Netherlands. The Court found that two aspects of the course of events around the 13th of July 1995 were specifically blameworthy on the part of the state. These were, first, the decision taken by the Dutch to assist in the deportation of 300 men from the compound when they should have been aware that this would lead to their deaths, and second, the fact that the soldiers had full control over the compound. With the Bosnian men seeking refuge there, the compound had a special status. As such, the Court concluded that the men would probably have survived had they been allowed to stay at the compound. So, in building its argument, the Court used a form of counter-factual 'but for' reasoning. In other words, the responsibility of the state depends on whether the troops' conduct influenced the outcome for the victims. The Court therefore assessed whether protecting the men on the compound could have prevented their deaths, which was considered likely, or whether more effective reporting to higher chains of UN command would have provoked UN air strikes, which was deemed unlikely by the Court.

How does this argument relate to the previous domestic judgments regarding the genocide in Srebrenica? The degree of responsibility imposed here is, in a way, more restricted than it was in earlier case law. Unlike the *Nuhanovic* and *Mustafic* judgments, in which the Dutch state was held responsible for the deaths of three members of staff, the Court in its most recent judgment did not hold the state liable for the deaths of the 300 men, but for their deportation – something that can be considered a lower degree of liability. The Court has drawn clear lines demarcating the scope of the state's responsibility, plainly stating that there can be no mention of responsibility for the deaths of refugees residing outside the compound, the events taking place before the fall of the enclave, or the fall of the enclave itself. What does broaden the scope of this recent judgment, however, is the fact that it specifically confirms that Dutchbat had full control over the compound as a demarcated, fenced area. This is also what makes the verdict remarkable, enabling as it does the drawing of an analogy with situations of occupation where far-stretching forms of liability can not only be incurred on the state, but also on individuals representing the state, such as military commanders and political decision-makers (Wills 2009).

Clearly, Dutch domestic courts have initiated an approach to peacekeeping responsibility in which not only is the

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main actor responsible identified, but actors with only a limited share in the wrongful outcome may also face legal responsibility. Working under the umbrella of an international organisation such as the UN will not relieve a state from legal responsibility.

## Political Engagement in Peacekeeping

This verdict might result in a visible decline in the willingness of states to contribute troops to international peacekeeping missions. In itself, this is not an unexpected consequence of imposing legal sanctions on states contributing to peacekeeping, as it follows a trend that has already been visible for a while. Over the last twenty years, the number of troops contributed to peacekeeping missions by western states has decreased significantly. To illustrate, UN Security Council members only make up four per cent of the troops currently involved in peacekeeping operations, whereas the poorest countries contribute the most in terms of troop size (McCauley 2014). This is a concern when we take into account the fact that the best facilities for military operations are usually held by the richest countries. With less-developed countries providing most of current UN peacekeeping personnel – 39% of all U.N. forces are provided by Pakistan, India, Bangladesh, Fiji, Ethiopia, Rwanda, and the Philippines (McCauley 2014) – the overall quality of troops available may drop, which could become worse if the prospect of legal consequences further discourages developed states from taking part in these operations. The higher the international pressure on a state to engage in world politics, the higher the risk of losing prestige if it fails to succeed. The juridical verdict will only exacerbate this tendency.

This impact will not only be visible on the state level, but also on the individual level. Attaching legal consequences to peacekeeping failures may potentially also obstruct the recruitment of new generations of soldiers. After all, overexposure of the negative aspects of military activity is likely to diminish the heroic status attached to the military profession, which is still considered one of its appealing factors. Overall, it does not seem unlikely that future peacekeeping missions will face more challenges in the build-up phase if strong political commitment is lacking from the UN member states (Tugendhat and Croft 2014).

## Effects Beyond Peacekeeping

It should be noted that the effects of legal accountability in relation to military activities are not limited to peacekeeping per se, but are likely to affect military operational effectiveness as a whole. The increased extraterritorial application of human rights law on military operations has especially been a concern, as demonstrated by the *Smith and Ors v Ministry of Defence* case in the United Kingdom. Military decisions are often taken on or near the battlefield, whereas the legal responsibility lies with higher political organs, such as the ministries or the state. Making deliberate decisions and considering the legal provisions applicable to those missions may not be as realistic on the ground as it seems to be in theory. It is a complicating factor for the military commander who is expected to exercise his profession with due care, and may form another obstacle in the effective execution of a military operation in general.

Furthermore, recent developments in domestic law may also reflect on the protection of civilians as an objective in UN law generally. The failed peacekeeping mission in Srebrenica highlighted the need for clearer language in UN mandates and for the definition of clear objectives with regard to the protection offered to the civilian population. With the UN Assistance Mission to Sierra Leone in 1999 being the first peacekeeping operation with an explicit mandate to protect civilians, the UN set a new standard for these types of operations. However, the current legal developments may, ironically, reverse the progress achieved so far. In order to avoid a peacekeeping failure, the UN or the states may feel the incentive to reformulate the objectives of peacekeeping to a lower standard that is more easily reached. This could become a feasible alternative to legal accountability. The price for such a development would be paid by the civilian populations at risk in fragile post-conflict situations.

Looking at the broader picture, a parabolic development has taken place. Although the genocide in Srebrenica may be regarded as an all-time low in UN peacekeeping, it has also been an incentive for the UN to give peacekeeping more direction. Most of all, it has reinforced the formulation of clear peacekeeping objectives in the UNSC mandates. However, as mentioned, with the possible effects of legal consequences for such efforts, the future of UN

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peacekeeping is rather unstable. Ultimately, the UN may face a considerable loss of credibility when it proves unable to effectively contribute to the maintenance of international security.

## A Limitation to Peacekeeping?

Taking all of the above into consideration, one might wonder whether the law itself can be considered a limitation to peacekeeping. Although it confronts lawyers and scholars with challenges, the law, on any level, is supposed to regulate societal relations. This recent judgment is one of many steps needed to develop a clear framework for legal responsibilities in peacekeeping conduct. It might also reflect developments that are not desirable for peacekeeping law. So far, at least, many questions, especially regarding the scope of the control required for responsibility to be imposed on a state, remain in place. It is by no means certain how these judgments will ultimately reflect on international law nor is it clear whether any short-term solutions exist to overcome the negative impact that these legal implications could have on peacekeeping.

A long-term solution is required to avoid further devaluation of peacekeeping efforts. It is then not so much desirable to strive for changes in the practice of peacekeeping, but rather to focus on a change of the norms applicable to peacekeeping. Although the existing laws, such as DARIO and Draft Articles on the Responsibility of States (DARS), provide the judiciary with yardsticks for determining the responsibility of a state or organisation, the articles were not specifically established with peacekeeping in mind. It is not, therefore, clear what degree of responsibility is assigned to the state, and whether this is proportionate to the wrongfulness committed. There is a need for further crystallisation of the legal provisions that are specifically designed to deal with peacekeeping conduct. These laws should assess the possibilities for shared forms of responsibility and create the degrees of responsibility as deemed appropriate. Balancing the expectations raised by peacekeeping and the legal remedies available to the parties involved should make future tort claims as a response to failed peacekeeping missions less plausible. After all, the law's aim has never been to limit the international community in promoting peace and security. On the contrary, the law is there to regulate conduct in distinguishing between right and wrong. This can only lead to justifiable outcomes if the parameters are defined with peacekeeping in mind.

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