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Introduction: Special Issue 'The Legacy of the *Mothers of Srebrenica* Case'

EDITORIAL

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After twelve years of litigation, on 19 July 2019 the Dutch Supreme Court (*Hoge Raad*) rendered its final judgment in the *Mothers of Srebrenica* case.[1] *Mothers of Srebrenica* has left important footprints and triggered new questions on the issues of State responsibility, accountability, immunity, human rights and tort law.

In order to discuss these issues, on 12 November 2020, the Utrecht Centre for Accountability and Liability Law (UCALL), together with the Netherlands Institute of Human Rights (SIM), both from Utrecht University, as well as the Netherlands Network for Human Rights Research (NNHRR) hosted a workshop on 'The Legacy and Future of the *Mothers of Srebrenica* Case'. This special issue brings together a number of papers presented at the workshop.

The Dutch Supreme Court's decision in *Mothers of Srebrenica* brings to an end a case which was initiated as early as 2007 by survivors of the Srebrenica genocide. In this introduction, we sketch the timeline of the proceedings in *Mothers of Srebrenica*, we clarify the aim of this special issue, and briefly present the seven contributions.

In 1995, Bosnian Serb forces led by General Ratko Mladić attacked the enclave of Srebrenica in Bosnia Herzegovina, which the United Nations had declared a safe haven for Bosnian Muslims (Bosniacs). More than 8,000 Bosniac males were killed. Both the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia (ICTY) considered that the Bosnian Serb operation in Srebrenica amounted to genocide.[2] At the time, Dutch UN forces (Dutchbat) were based in the vicinity of Srebrenica, mandated to protect the Bosniacs. Plaintiffs sued both the UN and the State of the Netherlands, asking Dutch courts to hold both liable for the failure to prevent the genocide. In 2012, the Dutch Supreme Court threw out the case against the UN on grounds of immunity,[3] a decision that was confirmed by the European Court of Human Rights (ECtHR) in 2013.[4] Subsequently, the case continued against the State of the Netherlands only.

In 2014, the Hague District Court attributed relevant conduct of the UN peacekeeping mission to the Netherlands, and held the State liable, not for its overall failure to prevent the genocide, but for the damage caused by the wrongful deportation of 350 Bosniac males who had sought refuge in or around the Dutchbat compound.[5] In 2017, the Hague Court of Appeal also found the State liable for this action, but only for 30 pct. of the loss suffered by the relatives of the men who were killed.[6] Finally, in 2019, the Supreme Court lowered this 'loss of a chance'-based liability to 10 pct. for 350 Bosniac males deported from the compound, while rejecting wrongfulness and liability for the failure to protect thousands of males from the mini safe area outside the compound. In January 2020, the plaintiffs filed two applications against the Netherlands with the ECtHR. The first one, *Subašić and Others v. the Netherlands*, was submitted by 20 relatives of the deceased Bosniac males. The case is currently pending before the Strasbourg Court. The second one, *Stichting Mothers of Srebrenica v. the Netherlands,* was submitted by the foundation *Mothers of Srebrenica,* and was declared inadmissible on the ground that the foundation was not a victim of the alleged violations of the European Convention on Human Rights (ECHR). It must be recalled that already in 2013, the Strasbourg Court found that the foundation *Mothers of Srebrenica* had been "set up for the express purpose of promoting the interests of surviving relatives of the Srebrenica massacre… [H]owever, … [the foundation] has not itself been affected by the matters complained of under … the Convention".[7]

Mothers of Srebrenica is not the only Srebrenica-related tort case heard by Dutch courts. In an earlier set of cases, *Mustafić and Nuhanović v State of the Netherlands*, Dutch courts had already held the Dutch Government liable for the deportation of three Bosniac men from the compound, resulting in their death at the hands of the Bosnian Serbs.[8] *Mustafić and Nuhanović* laid the conceptual groundwork for the later *Mothers of Srebrenica* case, which concerned a far large number of victims.

The aim of this special issue is to take stock of the Dutch *Mothers of Srebrenica* litigation, especially the Dutch Supreme Court's judgment, and to examine its legacy. What can domestic courts dealing with tort-based mass atrocity cases learn from the Dutch experience? What are the challenges into which courts hearing such cases risk running? What impact has the litigation had on the development or refinement of legal doctrines, under domestic law, ECHR law, and public international law?[9]

This special issue features seven contributions, focusing on the *Mothers of Srebrenica* case and the legal issues surrounding it. The first three contributions critically examine the (in)compatibility of the judgment with the standards of protection under the ECHR. They also touch upon on the relationship between the ECHR and Dutch tort law. The next three contributions zoom out and engage not so much with the reasoning of the *Mothers of Srebrenica*, but rather with the legal issues pertinent to the case, such as the immunity of international organisations, attribution of conduct in the law of State responsibility and the use of tort law to remedy violations of international law in foreign military operations. The last contribution addresses the connection between the city of The Hague and the Srebrenica genocide through the lens of 'legal monuments'.

Kushtrim Istrefi argues that in the *Mothers of Srebrenica* the Dutch Supreme Court did not follow the ECHR standards of protection under the provision on the right to life and the prohibition of torture, and reversed the test of positive obligations under Articles 2 and 3 ECHR from the duty of means to that of a result. In particular, the Supreme Court did not carefully examine,

inter alia, the decision-making, planning and operations to determine whether the State did all it could have reasonably done to protect or, at the least, minimise the risk to life and the prohibition of torture. Instead, *Mothers of Srebrenica* is based on a post-factum assessment (or assumption) that thousands of Bosniac males who sought refuge at the Dutch compound in Srebrenica would have died anyway. On this ground, the Supreme Court diminished any responsibility of the Dutchbat for such actions as facilitating the wrongdoer (i.e. separation of males) or the failure to take actions to minimise the risk to life (i.e. failure to report war crimes). In his view, the reasoning in *Mothers of Srebrenica* contradicts not only the standard of the duty of care but also the spirit of Articles 2 and 3 of the ECHR, which promote the ideals and values of a democratic society and oppose any appearance of tolerance of unlawful acts by the public authorities.

Rianka Rijnhout explores the notion of the loss of chance of survival under the Dutch theory of partial liability and argues in favour of its application in the *Mothers of Srebrenica* case. She submits that the application of the loss of chance of survival made it possible to establish liability of the Netherlands without having to determine the causal relationship between the wrongdoing and the original damage. She then looks at the tension between the Dutch tort law and the ECHR. In relation to awarding just satisfaction, by means of damages, she suggests that the ECtHR is not very clear which specific causal concept applies. She also notes the difficulties that domestic judges have to reconcile the tort and ECHR requirements regarding the right to an effective remedy.

Zane Ratniece provides a close inspection of the fairness of proceedings in the *Mothers of Srebrenica*. In particular, she looks at how the Supreme Court determined that there was a 10% chance of survival in relation to 350 Bosniac males who had been admitted inside the compound of the Dutch battalion and subsequently removed and handed over to Bosnian Serbs. She calls this 'a reasoned guess'. Zane looks at whether the parties to the proceedings had an opportunity to present their arguments on facts and evidence as to such specific percentage of the State's liability for damages and whether the Supreme Court engaged with the parties' complaint about the lack of such opportunity. By looking at the case against the ECHR standards of fair trial, Zane argues that the domestic courts neglected the fair trial guarantees as regards the determination of the Netherlands' responsibility in respect of the 350 Bosniac males.

Luca Pasquet provides a critical assessment of the European case-law on immunities of international organisations. He explores the inherent conflict between immunities of international organisations and access to justice of human beings – 'flesh and blood' to use his words, and demystifies the devastating effects that the former can have on the latter. He then explains how the *Waite and Kennedy* case of the Strasbourg Court has partly mitigated this problem by encouraging domestic courts to recognise a breach of the ECHR when claimants do not have access to an alternative remedy. He acknowledges the humanising potential of the *Waite and Kennedy* approach but also warns of its limitations.

Cedric Ryngaert focuses on how the Supreme Court in *Mothers of Srebrenica* attributed the acts of the UN peacekeeping contingent to the Netherlands. This legal operation of attribution was the first step in holding the Netherlands liable for the deportation of the Bosniac males from the Dutchbat compound. Just like the lower Dutch courts in *Mothers of Srebrenica*, the Supreme Court held that the relevant acts could be attributed to the Netherlands on the grounds that it exercised effective control. Unlike the lower courts, however, attribution was not based on the control standard of Article 7 of the International Law Commission (ILC)'s Articles on the Responsibility of International Organizations (ARIO), but rather on the control standard of Article 8 of the ILC's Articles on the Responsibility of States (ARSIWA). Cedric argues that reliance on Article 8 ARSIWA in the specific context of UN peacekeeping operations is novel, as that provision was meant for the attribution of acts of armed opposition groups to States. Instead, Article 7 ARIO was meant to govern the apportionment of responsibility between States and international organizations in the context of UN peace operations. Cedric highlights that this experimental approach to Article 8 ARSIWA was later followed by the Hague District Court in another case concerning complex multinational operations (*Jaloud v the Netherlands*), in which the Court attributed acts of Iraqi service-members to the Netherlands.

Ugljesa Grusic's contribution addresses the complex relationship of tort and international law in the context of gross violations of international human rights law and international humanitarian law. His paper focuses on the United Kingdom, and explores the wealth of UK cases and doctrine on the use of tort law to address international wrongs committed in overseas operations. He looks at how English law distinguishes between human rights claims and tort claims, and specifically at issues that arise when English courts are asked to decide on tort claims that concern external exercise of UK public power. The legal issues addressed in his paper are closely connected to the legal issues raised in the *Mothers of Srebrenica* case. After all, *Mothers of Srebrenica* is as much a case of international law as is a case of tort law.

In the last contribution, **Otto Spijkers** takes a fresh look at the unique connection between the city of the Hague and Srebrenica genocide, and suggests ways in which the former can utilise law to remember the latter. He argues

that the premises of the ICTY and the Hague based court rulings related to Srebrenica genocide, can themselves be considered as 'legal monuments'. Regarding the former, he argues that the ICTY, though not limited to the events surrounding Srebrenica, has convicted the masterminds and some of the implementers of Srebrenica genocide, and thus presents an emblematic institution to remember Srebrenica genocide. He recommends that the ICTY building include a library, museum and/or art installations to achieve the desired effects of a monument of remembrance. Regarding the court rulings, Otto argues that each judgment of the Hague based domestic or international courts has the potential to serve as a legal monument for Srebrenica. Otto's comment on legal monuments is built on the premise that a monument can constitute any object or place that preserves a memory of remembrance. He is mindful that legal monuments inherently have certain limitations and cannot serve as the only means of remembrance. Legal monuments must be complemented by monuments from history, arts and other disciplines.

We trust that these contributions foster a better understanding of the Dutch Supreme Court's judgment in *Mothers of Srebrenica*, and give insight into approaches that could be followed when litigating atrocity-based tort claims against States.

NOTES

1 Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (English translation ECLI:NL:HR:2019:1284).

2 ICTY Appeals Chamber, *Prosecutor v Radislav Krstić*, Case IT-98-33-A, Judgment of 19 April 2004; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43. Mladić was also convicted by the ICTY. ICTY Trial Chamber, *Prosecutor v Ratko Mladić*, Case IT-09-92-T, Judgment of 22 November 2017.

3 Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999.

4 *Stichting Mothers of Srebrenica and Others v the Netherlands* (ECtHR, 11 June 2013).

5 District Court of The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562 (English translation ECLI:NL:RBDHA:2014:8748).

6 Court of Appeal of the Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (English translation ECLI:NL:GHDHA:2017:3376).

7 *Stichting Mothers of Srebrenica* (n 4) para 116 [emphasis added].

8 See Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225.

9 We do not address the much wider question of how international legal responses to the Srebrenica genocide, including of the ICJ and the ICTY, have shaped international law. This question is addressed in the special issue *Srebrenica, Twenty Years Later*, (2015) 62(1) *Netherlands International Law Review* (2015) (co-edited by one of the editors of this special issue).

COMPETING INTERESTS

The authors have no competing interests to declare.

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