State liability for failure to protect others

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State Liability for Failure to Protect Others. Srebrenica Cases

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Abstract. Over recent years, a number of legal decisions have been taken that represent real novelties in the field. They address state liability towards foreigners in a realm where immunity has long prevailed. Dutch courts have condemned the Dutch state for failure to protect Bosniacs after the fall of the enclave of Srebrenica in 1995. The novelty of these court decisions is most apparent when they are compared to the previous investigations and reports on the fall of the Srebrenica enclave, which had the intended or de facto effect of leaving aside state liability. This article focuses on this comparison. The decisions of the Dutch court represent a change with regard to a trend in which collective responsibility was reduced to a scarecrow argument, where state liability for genocide was limited to the obligation to address criminal responsibility, and where co-agency was a shield preventing the attribution of state responsibility. Not only do these court decisions sanction state liability, they also address the victims and even grant them reparations.

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Over recent years, a number of legal decisions have been taken that represent real novelties in the field. They address state liability towards foreigners in a realm where immunity has long prevailed. They also take international commitments seriously, as more than a political nicety to appease a national audience, manage the good image of the government, and improve international standing. These cases, in 2013 and 2014, upheld in June 2017, are probably familiar to the readers of *Südosteuropa*: they are those of Srebrenica survivors against the Dutch state for sending their relatives to a probable death in July 1995. They are among the first cases in which a state is condemned for its failures during an international peacekeeping operation.[1] Previously, in Belgium on 8 December 2010, the Court of First Instance of Brussels had found that the failure by the UN peacekeeping contingent to prevent the killing of Tutsis in the 1994 Rwanda genocide could be attributed to the Belgian state. Following the

[1] Eric David, 8 décembre 2010. Premier jugement belge dans l'affaire dite de l'ETO (École technique officielle) au Rwanda, *Justice en ligne*, 6 January 2011, http://www.justice-en-ligne.be/article235.html. All internet references were accessed on 10 May 2018.

decision against the Dutch state, in June 2015 the Dutch government apologized for the first time to relatives of Bosnian Muslim men murdered at Srebrenica in 1995.[2]

Cases like those concerning the Netherlands are based on the principle that a government can be held legally accountable for not taking sufficient action to prevent foreseeable harm. The state of the Netherlands has been condemned for having knowingly exposed foreigners under its protection to serious dangers or predictable death. In legal terms, that is a wrongful act of the state. Such a qualification is in itself a shift in attitude compared to previous reports and legal decisions on similar matters, in which the tendency was to avoid not only state responsibility but also non-individual responsibility (be it institutional or political). The tendency was also to avoid gestures towards the victims, even symbolic ones such as apologies.

This paper focuses on the changes represented by the ascription of international and state responsibilities in the Srebrenica cases, as compared to the reports intended to address them. I analyse the specificity of these cases in a realm where immunity and diffusion of responsibility has been the norm, and rely on the findings of *Investigating Srebrenica: Institutions, Facts, Responsibilities*, a comparative study of the investigations and reports on Srebrenica that I co-edited with Xavier Bougarel and Jean-Louis Fournel.[3] In our book, the contributors analyse the procedures for establishing the facts and ascribing responsibility. Thanks to the range of contributions, we could show convergences in the reports' strategies for avoiding responsibility. The examination of these reports illustrates the

'gap between how they treat "doing" and how they approach "letting be done", between how they cast the establishing of facts and the seeking of responsibility and intelligibility concerning the massacre, on the one hand, and how they present the international abandonment of the enclave [… and how they] interpret and assign blame for international responsibility [on the other] […]. Neither the citizen of this or that country nor the citizen of the world will find the Kantian demands for cosmopolitan responsibility and republican control over foreign policy satisfied.'[4]

[2] Dutch State Apologises for Three Srebrenica Deaths, *Agence France Presse*, 25 June 2015, https://www.yahoo.com/news/dutch-state-apologises-three-srebrenica-deaths-174452543.html.

[3] Isabelle Delpla / Xavier Bougarel / Jean-Louis Fournel, eds, Investigating Srebrenica. Institutions, Facts, ,Responsibilities, New York, Oxford 2012.

[4] Quotation of the conclusion of my own contribution to this volume, Isabelle Delpla, Fact, Responsibilities, Intelligibility. Comparing the Srebrenica Investigation and Reports, in: Delpla / Bougarel / Fournel, eds, Investigating Srebrenica, 148-176, 164.

The first aim of this article, i.e. presenting an evolution in the ascription of responsibility, is modest and pedagogic. The second aim, which is more open to debate, is to propose an interpretation of this process. There has been some de facto confusion between collective responsibility and non-individual responsibility (i.e. institutional or state responsibility); this confusion has contributed to avoidance of the latter by shifting all 'sound' responsibility towards the individual.[5] To clarify the use of the term, responsibility can be either moral, political, or legal[6] and 'legal responsibility' can be either criminal or civil. Criminal responsibility requires both a mental element (the intention to commit a crime) and a physical element (e.g. a corpse) to the offence and can be ascribed only to individual persons. Civil responsibility (or liability) does not require criminal intention but only a causal relation with an injured party. Civil liability gives an injured party, who has suffered an actual loss, rights to obtain redress. Civil responsibility can be that of individuals or of institutions (hospitals, corporations, states, and so on). It is debatable whether this institutional responsibility is individual (i.e. the individual responsibility of an institution) or collective (i.e. the responsibility of the group represented by this institution).

In order to achieve its twofold goal, this study first sets the framework for its argument by outlining the supposed opposition between individual and collective responsibility, and then briefly summarizes the historical context of the Srebrenica massacre. It then focuses on the series of investigations and reports on the fall of Srebrenica and their way of (not) addressing responsibility. It tackles two intertwined issues: first, the de facto avoidance of state (and even non-individual) responsibility, and second, the possibility of assigning responsibility in a context of a multiplicity of agents. Finally, I discuss the broader significance and implications of these decisions for democratic responsibility towards international norms and foreign policy.

A Possible Interpretation

The Srebrenica investigations and reports have manifested a tendency and a paradox in the ascription of responsibility. The more there has been an individualization of responsibility in the fight against collective responsibility, the less non-individual responsibility has been addressed, even less sanctioned (be it institutional or state liability). This is a paradox: the reduction of all responsibility to individual criminal responsibility has occurred at a moment

[5] Isabelle Delpla, La justice des gens. Enquêtes dans la Bosnie des nouvelles après-guerres, Rennes 2014, concluding chapter 'En guise de conclusion. Une brouette pour le poids du passé', 479-495.

[6] For this distinction, see for instance Karl Jaspers, The Question of German Guilt, New York 1948; Paul Ricœur, Lecture II, Paris 1991.

when international criminal law has developed new tools to address the collective nature of mass crimes.

This tendency to confine responsibility to individual persons has deep roots. In 1948, the philosopher Hywel David Lewis wrote: 'It is the individual who is the sole bearer of moral responsibility. No one is morally guilty except in relation to some conduct which he himself considered to be wrong […]. Collective responsibility is […] barbarous.'[7] Promoters of international criminal justice, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), have constantly opposed individual to collective responsibility in similar terms.[8] According to its promoters, the ICTY and similar courts are supposed to fight against collective responsibility by assigning responsibility to specific individuals.[9] Thanks to the ICTY, only certain Serbs, for instance, are considered guilty of war crimes, rather than stigmatizing the Serb people or Serb individuals in general.[10] In this context, collective responsibility has not been conceived of as that of a state as a legal bearer of collective responsibility. Rather, collectivity is understood in terms of ethnic groups, that is, of a collective cultural, social, or psychological stigmatization of a given 'other'.

Collective responsibility in this case is understood as a form of backwardness and framed in terms similar to what Lucien Lévy-Bruhl almost a century ago described as 'the primitive mentality'.[11] 'Primitives' are unable to individualize persons or objects, and perceive them as belonging to a collective whole following a principle of participation, defying the laws of logic and causality. Likewise, the Yugoslav modern 'primitives' are seen as unable to individualize guilt: for them, people are guilty by mere participation in a family or a group, even if they did not cause any harm. The ICTY, by establishing the real causalities of individual action, thus revived the fight for enlightenment against obscurantism.

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[7] Hywel David Lewis, Collective Responsibility, *Philosophy* 23, no. 84 (1948), 3-18, 3, DOI: 10.1017/S0031819100065943.

[8] See Frédéric Mégret, Les angles morts de la responsabilité pénale individuelle en droit international, *Revue interdisciplinaire d'études juridiques* 71, no. 2 (2013), 83-136, DOI: 10.3917/riej.071.0083.

[9] This a common motto. See for instance the introduction of Carla Del Ponte in the Milošević trial: 'The accused […] is prosecuted on the basis of his individual criminal responsibility. No state or organisation is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes, even the crime of genocide […] Collective guilt forms no part of the Prosecution case.' International Criminal Tribunal for the Former Yugoslavia, transcript 4, 12 February 2002, http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020212IT.htm.

[10] Kora Andrieu, La justice transitionnelle. De l'Afrique du Sud au Rwanda, Paris 2012.

[11] Lucien Lévy-Bruhl, La mentalité primitive, Paris 1922.

In this context, refusing the collective responsibility of a people implicitly also clears the state.[12] Meanwhile, institutional responsibility tends to remain unaddressed, or, more precisely, reduced to individual criminal responsibility.[13] This way of depicting collective responsibility has spread well beyond the realm of the international criminal lawyer. Beyond the Yugoslav case, collective responsibility has been perceived foremost as that of groups, and not that of states. It is easy to ridicule the blaming of all Croats because of the Ustasha, or the blaming of all Serbs because of Slobodan Milošević, Radovan Karadžić, Ratko Mladić, and others. It would be much less ridiculous to address the issue of state liability for past wrongs, based not on an irrational contagion of guilt, but on the legal principle of state continuity. It sounds barbarian to have Serb, German, or French people pay for the fault of others because they are ethnic Serbs, Germans, or ethnic French (*Français de souche*). It is, however, much less unreasonable to have Serbian, German, and French citizens pay for state reparations through their taxes to compensate the wrong caused to others (in Europe, in Africa, or in the Pacific), whether or not they are ethnic Serb, German, or French.

This rhetoric of individual guilt to elude state liability has sound justifications. The focus on individual responsibility in criminal courts (starting with the Nuremberg tribunal after the Second World War) has aimed to avoid the disastrous politics of reparations imposed on Germany by the Treaty of Versailles in 1919. The motto 'L'Allemagne paiera' (Germany will pay) nourished the illusion that those reparations would solve French problems. Certainly, Bosniac authorities fostered unreasonable hopes that Serb reparations would not only bring financial support to all victims but also solve many Bosnian problems. However, that a politics of state reparation can have a disastrous outcome does not mean that its very idea is irrational, and a priori absurd. Not all state reparations have had such a negative outcome, as shown, for instance, by the reparations paid by Italy to Libya, intended to compensate for the harm caused during the colonial period.[14]

The paradox of this focus on individual criminal responsibility is that, meanwhile, the ICTY has developed new tools to address the collective nature of mass crimes. Indeed, mass crimes

[12] See Carla Del Ponte's declaration during a visit to Belgrade in 2001: 'I reject strongly notions such as collective guilt, and I do not intend to put the whole Serbian people on trial. On the contrary, I want to help Serbia turn the page and bring to justice those who, as individuals, are responsible for the crimes under our jurisdiction.' International Criminal Tribunal for the Former Yugoslavia, Statement by Prosecutor Carla Del Ponte on the Occasion of Her Visit to Belgrade, The Hague, 30 January 2011, http://www.icty.org/en/press/statement-prosecutor-carla-del-ponte-occasion-her-visit-belgrade.

[13] André Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law, *International and Comparative Law Quarterly* 52, no. 3 (2003), 615-640, DOI: 10.1093/iclq/52.3.615.

[14] Italy Agrees to $5 Billion Libya Reparations, *New York Times*, 30 August 2008, http://www.nytimes.com/2008/08/31/world/africa/31libya.html.

defy traditional conceptions of criminal responsibility. Such crimes require a great number of participants, a complex organizational system, a division of labour between those giving orders, intermediaries, camp guards, bureaucrats, killers, and so on. In ordinary contexts, the author of a crime is the one who pulled the trigger or committed any other lethal act. If several people killed someone, only this direct perpetrator is the author; other participants are merely accomplices. This conception of responsibility has been a hindrance for the judgement of mass crimes, leading to the direct perpetrators being considered the sole authors of the crime and the order-givers or intermediaries in the best case being considered only as accomplices. In postwar Germany, such an attenuation of responsibility for accomplices particularly benefitted the agents of the 'final solution', condemned to mild sentences of a few years of imprisonment.[15]

Accordingly, international lawyers have established new categories to take into account the collective nature of these crimes. The International Criminal Tribunals have developed the notion of Joint Criminal Enterprise, while the International Criminal Court has preferred the notion of co-action.[16] In spite of significant differences, they have in common the consideration of various participants of a mass crime as (co-)authors of the crime, rather than mere accomplices. These tools aim to avoid both the diffusion of responsibility in an impersonal and anonymous system, and the paradox of responsibility in case of multiple agents: 'As the responsibility for any given instance of conduct is scattered among more people, the discrete responsibility of every individual diminishes proportionately.'[17]

These tools have taken effect even beyond the legal realm. They have shaped not only the legal defence of the accused in The Hague, but also their social justifications outside the court. Strikingly, those accused by the ICTY gave up any Eichmann type of justification: they did not blame each other, and they did not plead that they were only cogs in the machine or part of a system. Indeed, blaming others or blaming an impersonal system would amount to self-incrimination when one is accused of joint criminal enterprise or co-action.[18]

This move has no equivalent in the ascription of responsibility to states. While the ICTY addressed the collective nature of those crimes, the reports on Srebrenica have diluted non-

[15] Guillaume Mouralis, Une épuration allemande. La RDA en procès, 1949-2004, Paris 2008.

[16] Olivier de Frouville, ed, Punir les crimes de masse. Entreprise criminelle commune ou co-action?, Brussels 2012.

[17] Mark Bovens, The Quest for Responsibility. Accountability and Citizenship in Complex Organisations, Cambridge 1998, 46, quoted by André Nollkaemper / Dov Jacobs, Shared Responsibility in International Law. A Conceptual Framework, *Michigan Journal of International Law* 34, no. 2 (2013), 391-392, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1005&context=mjil.

[18] Isabelle Delpla, Le mal en procès, Eichmann et les théodicées modernes, Paris 2011.

individual responsibility, and considered the collective action of international forces as exculpatory. Before turning to these investigations and reports, let us recall the context of the Srebrenica fall and massacre.

Historical Context of the Srebrenica Massacre

On 11 July 1995, the enclave and town of Srebrenica in eastern Bosnia fell into the hands of General Ratko Mladić's Serb nationalist forces. They organized the forced transfer of women and children, massacred approximately eight thousand Bosniacs,[19] and, in the months that followed, unearthed and transported the corpses to secondary graves in order to conceal evidence of their crime.

Although Srebrenica has been mainly associated with the 1995 massacre, its story of persecution started in 1992 with a violent campaign of ethnic cleansing in the whole region.[20] Unlike in other places, the Bosniacs of Srebrenica succeeded in organizing their defence under the improvised command of young Naser Orić. Bosniacs from other parts of eastern Bosnia sought refuge in the enclave, which became overpopulated. In March 1993, the Republika Srpska Army (*Vojska Republike Srpske*, VRS) launched an offensive against the Srebrenica enclave, considerably reducing its size and threatening to take the town. On 16 April 1993, however, General Philippe Morillon, commander of the United Nations Protection Force (UNPROFOR) deployed in Bosnia, intervened to ensure that humanitarian aid reached its destination. Following his move, the enclave was officially declared a 'safe area' by the United Nations in 1993, and its inhabitants—including thousands of refugees from across eastern Bosnia—were put under the protection of the international community, that is, a contingent of Blue Helmets and, if needed, NATO aircraft.

One month later, five additional 'safe areas' were created for Sarajevo, Tuzla, and the Bosniac enclaves of Bihać in western Bosnia and Goražde and Žepa in eastern Bosnia. Srebrenica was thus at the origin of a profound redefinition of the UNPROFOR mandate in Bosnia. Immediately, however, the 'safe areas' appeared highly vulnerable: of the 34,000 Blue Helmets requested by the UN to protect these zones, only 7,600 were granted and deployed. In Srebrenica, a battalion of Dutch Blue Helmets (Dutchbat) was deployed in 1995.

[19] The term 'Bosnians' (*Bosanci*) refers to all inhabitants of Bosnia while the term 'Bosniacs' (*Bošnjaci*) refers only to members of the nation that was called Muslim until 1993 and is distinct from the two other constituent nations of Bosnia (Serbs and Croats).

[20] On the campaign of ethnic cleansing in 1992, see Cathie Carmichael, Ethnic Cleansing in the Balkans. Nationalism and the Destruction of a Community, London, New York 2002; United Nations, Security Council, Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Document S/1994/674, 27 May 1994, http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

The final attack on Srebrenica by the VRS began on 6 July 1995. Despite its status as a 'safe area', Serb forces advanced on the enclave, with no determined confrontation or response on the part of the Dutchbat. The Dutchbat fired no bullets at the Serb forces and failed to establish the blockade position that the French General Gobilliard had ordered. Despite several Dutchbat requests, NATO aviation barely intervened and thus 'no adequate air support was provided'.[21] On 11 July, General Ratko Mladić's soldiers entered the town, which had by then been abandoned by its inhabitants. Most Bosniacs (mainly men) attempted to escape through the woods towards Tuzla, the closest place under the control of the Bosnian government and the Army of Bosnia and Herzegovina (ABiH); others sought refuge in the Dutchbat compound. Serb forces captured men in the woods and asked the Dutchbat to hand over those who were at the UN base. Although evidence of cruel treatment, murders, and disappearances had already emerged, the commander of the Dutchbat ordered the Bosniac men to be handed down to Mladić's forces.

Within a few days, the Serb forces massacred approximately eight thousand Bosniac men, and the rest of the population of the enclave was expelled towards central Bosnia. Finally, on 14 July, the VRS attacked the enclave of Žepa, which fell on 25 July. There was a comparable lack of reaction from the UNPROFOR leadership, but the situation on the ground was different. The Bosniac resistance was more organized; the Blue Helmets and their commandant General Gobilliard steadily opposed Mladić's forces. A combination of factors allowed most of the population to escape or to be evacuated, while about one hundred persons were killed or went missing.

The capture of the Srebrenica and Žepa 'safe areas', and the massacre that followed in Srebrenica, marked a definitive failure of UNPROFOR. The horror of the massacre played an important role in NATO's decision to intervene against the Bosnian Serbs in late summer 1995. The weakening of the Serb positions led to peace negotiations and to the Dayton agreements, signed on 14 December 1995 in Paris. A territorial partition was thus established and BiH was divided between two constitutive entities: the Federation of Bosnia-Herzegovina and the Republika Srpska (RS). Srebrenica and Žepa were placed in the Republika Srpska, both geographically and politically.

Investigations, Commission, and Reports. The Art of Avoiding Responsibility

[21] De Val van Srebrenica. Luchtsteun en voorkennis in nieuw perspectief. Verkenning door het NIOD Instituut voor Oorlogs-, Holocaust- en Genocidestudies (English summary), Amsterdam 2016, 245-258, https://www.niod.nl/sites/niod.nl/files/Rapport-Verkenning-NIOD-De-val-van-Srebrenica-Luchtsteun-en-voorkennis-in-nieuw-perspectief.pdf.

The fall of the enclave and the massacre that followed have been the object of a large number of investigations and reports conducted by the institutions and countries that were party to the events, most notably the UN, the Netherlands, and France. In this respect the case of Srebrenica is exceptional: few events in contemporary history have given rise to so many reports from so many countries or institutions and with such different perspectives.

Starting in July 1995, the ICTY opened investigations into the Srebrenica massacre, which in 2001 led to the conviction for genocide of Radislav Krstić, former commander of the VRS's Drina Corps.[22] Several other defendants were also condemned for genocide in Srebrenica, including the President of the Republika Srpska, Radovan Karadžić in March 2016 and Ratko Mladić in November 2017.[23] Even if the testimony of thousands of victims and the rare survivors of the executions, as well as the writings of certain journalists,[24] had already informed the public about the scale of the crimes, it was only through the ICTY's investigative work that the various phases of this vast operation of forcible transport, massacre, and moving of corpses were successfully reconstructed (especially as the latter phase of dissimulation could not be established on the basis of victim testimony). Without the ICTY investigations, which allowed most of the primary and secondary graves to be found, it is very likely that the fate of the men of Srebrenica as well as the number of victims killed in the massacre would have remained a matter of speculation, rumour, and denial.

However important the investigations and judgements of the ICTY, this tribunal only judged the criminal responsibility of individuals in the massacre. It is not within its mandate to judge other legal responsibilities and even less moral or political ones for the enclave's fall, whether on the part of the Blue Helmets or that of the international leaders in charge of protecting the 'safe area'. Under pressure from survivors of Srebrenica, the Sarajevo authorities, public opinion, and various non-governmental organizations (NGOs), several investigative reports were carried out in the months and years that followed by international or state institutions involved in various ways in the course of events, such as the UN, France, the Netherlands, and the Republika Srpska.

[22] The conviction upheld after appeal was that of aiding and abetting genocide. United Nations, International Criminal Tribunal for the Former Yugoslavia, Case no. IT-98-33: Krstić, http://www.icty.org/case/krstic/4.

[23] For an overview of ICTY cases for Srebrenica, see An Overview of the Legal Proceedings Relating to the 1995 Genocide, The Hague Justice Portal, 7 August 2008, http://www.haguejusticeportal.net/index.php?id=9564.

[24] David Rohde, Endgame. The Betrayal and Fall of Srebrenica. Europe's Worst Massacre since World War II, New York 1997. See also Chuck Sudetic, Blood and Vengeance. One Family's Story on the War in Bosnia, New York 1998; Emir Suljagić, Postcards from the Grave, London 2005.

The main reports were produced by the UN in 1999,[25] the French National Assembly's Fact-Finding Mission in 2001,[26] the Netherlands Institute for War Documentation (NIOD), an independent historical research institute, at the request of the Government of the Netherlands in 2002,[27] followed by an additional report in 2016,[28] and the Dutch Parliament in 2003.[29] In Bosnia itself, major controversies within the Bosniac community led to a parliamentary debate being organized as early as 1996.[30] The Government of the Republika Srpska submitted several reports, including one that ended up recognizing the massacre in 2004.[31] The latter was in response to firm orders on the part of the Office of the High Representative (OHR) of the international community in Bosnia, which drew on decisions by that country's Human Rights Chamber demanding that the RS inform families concerning the fate of their missing loved ones.[32] Commemorative parliamentary resolutions on Srebrenica have followed, such as those adopted by the US Congress House of Representatives in 2005[33] and the European Parliament on 15 January 2009.[34]

Such a quantity of commissions, declarations, and reports is impressive. All of them provide for a symbolic recognition of the crime, of the tragedy of the victims, and of the suffering of the survivors. Some of them call for more symbolic gestures: the Srebrenica remembrance

[25] United Nations, General Assembly, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, The Fall of Srebrenica, 15 November 1999, http://repository.un.org/bitstream/handle/11176/227626/A_54_549-EN.pdf?sequence=3&isAllowed=y.

[26] Assemblée nationale, Rapport d'information déposé par la Mission d'information commune sur les événements de Srebrenica, no. 3413, Paris, 22 November 2001, http://www.assemblee-nationale.fr/11/rap-info/i3413-01.asp.

[27] Nederlands Instituut voor Oorlogsdocumentatie (NIOD), Srebrenica – A Safe Area. Reconstruction, Background, Consequences and Analyses of the Fall of a Safe Area, Amsterdam 2002, http://publications.niod.knaw.nl/publications/srebrenicareportniod_en.pdf.

[28] De Val van Srebrenica (English summary), 245-258.

[29] Parlementaire Enquêtecommissie Srebrenica, Missie zonder vrede (Mission without Peace), The Hague, 27 January 2003.

[30] See Xavier Bougarel, Reopening the Wounds? The Parliament of Bosnia-Herzegovina and the Question of Bosniac Responsibilities, in: Delpla / Bougarel / Fournel, eds, Investigating Srebrenica, 104-130.

[31] Republika Srpska Government – The Commission for Investigation of the Events in and around Srebrenica between 10th and 19th July 1995, The Events in and around Srebrenica between 10th and 19th July 1995, Banja Luka, 11 June 2004; Republika Srpska Government – The Commission for Investigation of the Events in and around Srebrenica between 10th and 19th July 1995, Addendum to the Report of the 11th June 2004 on the Events in and around Srebrenica between 10th and 19th July 1995, Banja Luka, 15 October 2004, http://balkanwitness.glypx.com/srebr_final_e.pdf .

[32] Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits – The 'Srebrenica Cases' (49 Applications) against the Republika Srpska, Case no. CH/01/8365 et al., Sarajevo, 7 March 2003, http://www.hrc.ba/DATABASE/decisions/CH01-8365%20Selimovic%20Admissibility%20and%20Merits%20E.pdf.

[33] US Congress House of Representatives, H.Res.199 – Expressing the Sense of the House of Representatives Regarding the Massacre at Srebrenica in July 1995, https://www.congress.gov/bill/109th-congress/house-resolution/199.

[34] European Parliament, Resolution on Srebrenica, Strasbourg, 15 January 2009, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0028&language=EN.

resolution adopted by the European Parliament declared 11 July a European Union-wide Srebrenica remembrance day and called on the Western Balkans to adopt the resolution in their respective national parliaments. In the following years, several countries adopted this resolution, among them Montenegro and Croatia in 2009, Macedonia and Serbia in 2010, Canada in 2010 and in 2015,[35] Australia in 2012, and Luxembourg in July 2015 (to my knowledge neither France nor the Netherlands has adopted the resolution).[36]

However, these reports and resolutions do not go much further. Their outcome could even be considered quite meagre. In the best case, they have brought about a better understanding of the events and unearthed previously unknown documents. They are sometimes an important source of clarity (the UN report) or of factual knowledge (the NIOD report), rarely both. Most of them only quote the narrative of events established by the ICTY, without a more thorough attempt to unearth new aspects of the events.[37] While the issue and vocabulary of responsibility is at their core, it remains rhetorical.

How do these reports establish and ascribe responsibility? It would be impossible to enter here into the details of their procedures, their arguments, and their conclusions. The reports are indeed quite different in their purposes, in their means of investigation, and in style. The UN report was mainly established by two higher-level UN officers who had followed the events on the ground; the NIOD report by a group of academics, mostly historians of the Second World War; the French and Dutch parliament reports by MPs who were neither specialists nor had prior direct knowledge of Bosnia-Herzegovina. Some reports were completed within a few months (the UN and French reports), others over several years (the NIOD report). The specificities of these investigations and reports, their way of establishing facts and responsibility in the fall of the enclave, is the topic of our book *Investigating Srebrenica: Institutions, Facts, Responsibilities*. For detailed analyses of each report and their comparison, I refer the reader to this publication. For the purpose of this article, I will recall its conclusions in order to stress how the ascriptions of responsibilities in the reports differ from the more recent move of the Dutch court. These reports are indeed a good example of

[35] See Canadian 2. Resolution on Srebrenica Genocide, Official Website of the Congress of North American Bosniaks, 15 May 2015, http://www.Bosniac.org/canadian-2-resolution-on-srebrenica-genocide/.

[36] Hamra Karčić, Remembering by Resolution. The Case of Srebrenica, *Journal of Genocide Research* 17, no. 2 (2015), 201-210, DOI: 10.1080/14623528.2015.1027078. On the Serbian Parliament resolution in March 2010, see Jasna Dragović-Soso, Apologising for Srebrenica. The Declaration of the Serbian Parliament, the European Union and the Politics of Compromise, *East European Politics* 28, no. 2 (2012), 163-179, DOI: 10.1080/21599165.2012.669731.

[37] The factual basis and chronological sequence established by the 2001 Krstić judgement are, in their main lines, reiterated (sometimes verbatim) by the UN, French, and Dutch reports, the Selimović decision of the Chamber of Human Rights of Bosnia-Herzegovina, and the 2004 RS report.

(1) responsibility without accountability; (2) moral self-justification; and (3) avoiding and diffusing responsibility.

First, they are a case of responsibility without accountability. Their tone can be quite severe towards their own institution or country, particularly the UN report towards the UNPROFOR policy in Bosnia-Herzegovina, or the NIOD report towards Dutch politicians. Strikingly, however, they have not led to sanctions, or even blame. Those in charge of the events in the UN or Western countries were not even sanctioned in their professional contexts. The reports did not call for public apologies or acts of repentance. The most that has been obtained—a *mea culpa* from the UN—remained quite rhetorical.[38] One could point out that the Dutch government resigned after the publication of the NIOD report. However, this spectacular gesture is much less significant when one knows that the government was due to leave power two weeks later anyway.[39]

These reports brought neither reparations nor compensation. The RS report was accompanied by financial and memorial reparations, but it was not of the same nature:[40] the RS was condemned for its participation in the disappearance of Bosniac men, but not for the (international) responsibility for the abandonment of the enclave.[41] These reparations were also the outcome of a judicial condemnation of the RS by the Human Rights Chamber for Bosnia-Herzegovina, and not an outcome of the report itself.

Going back to the international responsibility for the fall of the enclave, although governments (and NGOs) have given money to the Srebrenica victims and their associations, or contributed to the building of a memorial, they have not done so as an obligation of (reparative) justice or as a political recognition of their failure to protect, but as a benevolent

[38] 'The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions […]. No one laments more than we the failure of the international community.' United Nations, General Assembly, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, 111.

[39] Pieter Lagrou, Reflecting on the Dutch NIOD Report. Academic Logic and the Culture of Consensus, in: Delpla / Bougarel / Fournel, eds, Investigating Srebrenica, 86-103.

[40] The Bosnian-Herzegovinian Human Rights Chamber 'ordered the RS to take four measures. The first was to transmit all information in their possession or under their control concerning the fate of the missing persons and the place where they were. […] The second measure was to conduct investigations into the Srebrenica events and to present a report on those events. The third measure was to publish the decision of the Human Rights Chamber in the official journal of the Republika Srpska. Finally, the authorities had to pay the Foundation of the Srebrenica-Potočari Memorial the first two million convertible Marks (KM) out of a total of four million KM (2,045,168 euros).' Michèle Picard / Asta Zinbo, The Long Road to Admission. The Report of the Government of the Republika Srpska, in: Delpla / Bougarel / Fournel, eds, Investigating Srebrenica, 131-147, quotation 135-136; see this article for the process that led from the Human Rights Chamber decision to the RS report.

[41] Since the Bosnian-Herzegovinian Human Rights Chamber depended on the Dayton agreement, posterior to the Srebrenica massacre, the Republika Srpska could not be sued for its participation in the massacre, but only for its post-Dayton attitude towards the survivors and its refusal to give information about the missing men. See the explanation in Picard / Zinbo, The Long Road to Admission.

gesture of generosity or conscience. One could also object that such was not the purpose of the parliamentary reports and that it was not within their power to do so. However, reparations or compensation are often the product of decisions by governments or parliaments, not only by legal courts. Moreover, the reports did not call for more significant gestures towards the victims, symbolic or otherwise.

A second difference between the reports and the court decision concerns the classification of actions and intentions. The reports did not consider the UN or state acts as wrong, even less intentional. Quite on the contrary, most of the efforts are to qualify their own behaviour in moral terms, in an obvious attempt at self-exoneration. Not only do they praise the courage of their troops (particularly the French report), but they also claim that their failures were the result of their virtues or, in the worst case, of a mistake in judgement in the choice of their moral model. This is particularly clear in the UN and NIOD reports, which invoke ethical models to explain the choices of their leaders or governments. The UN report questions its own culture of impartiality that led to its own blindness,[42] while the NIOD report blames the Dutch government's choice of an ethics of conviction, rather than an ethics of responsibility.[43] According to the NIOD, not only were their intentions good, but the Dutchbat did its best in dire circumstances; its bad reputation resulted mainly from mismanagement of its public image.

Third, these reports can also be seen a masterpiece in the art of diffusing political responsibility, leaving aside any legal responsibility assigned to a state. Their justifications remain basic, using worn-out devices, mixing self-exoneration and blaming of others. Three strategies are prevalent; a fourth (blaming the victims) is rarer. The easiest strategy is to blame one another: for instance, the French report blames the Dutch and British military leaders in charge, while the French and Dutch reports blame the UN. According to André Nollkaemper, Srebrenica is a typical case of 'multilevel accountability', including individual perpetrators, the UN, and its member states, 'straddling the boundaries between the national

[42] 'Certainly, errors of judgement were made—errors rooted in a philosophy of impartiality and non-violence wholly unsuited to the conflict in Bosnia.' United Nations, General Assembly, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, 110.

[43] A 'policy based on moral considerations had gained the ascendancy over a supposed policy based on realism and pragmatism. Human rights and the rule of international law had been proclaimed matters of national interest which should determine national policy […] this appraisal relies on a very specific view of moral politics, described by Max Weber as the *Gesinnungsethik* (ethics of conviction), in which morally pure intentions and the absence of ulterior motives are central.' NIOD report, Srebrenica – A Safe Area, 2002, 125, 867-868.

and international levels'.[44] The possibility of moving from one level to another can 'easily turn into blame-shifting and buck passing'.[45]

The second strategy is to blame the dysfunction of the UNPROFOR and the structural defects of an impersonal system. While these defects would point to UN leaders, the UN report admits its failures, but only in the name of a vague and collective 'we', designating its agents by job titles in place of proper names, thereby blurring individual responsibilities.[46]

The third strategy is a national bias that guides the data search and the interpretation of events: incriminating events and explanations are avoided in order to focus on exonerating ones. Such bias led to significant lacunae in the French and Dutch reports. The French report leaves aside the lack of reaction of General Janvier during the Žepa attack, at a time when the attack on Srebrenica was known, erasing the possibility of an excuse of ignorance about Mladić's aggressive intention. The Dutch reports leave aside the convergent explanations for the decision to commit the massacre put forth by the UN reports and other analysts: the massacre was decided upon because it was made *possible* by the lack of reaction of the Dutchbat and NATO, which triggered in Mladić a sense of omnipotence.[47] Their lack of reaction was therefore an essential part of the dynamics of the events. The more recent NIOD report (2016) pursues the same 'technical' line of reasoning. Considering the practical difficulties of close air support in and around Srebrenica, the report concludes that

'when deploying close air support in and around Srebrenica, it was necessary to take into account the physical proximity of civilians, UN troops, and soldiers of the warring parties. The uneven, densely forested and often foggy terrain certainly did not work to the advantage of UNPROFOR and NATO. This is sufficient reason to be sceptical about the feasibility of effectively defending the enclave through the use of air power. It is far from certain that a 'robust response' would have led to a better outcome and fewer casualties.'[48]

[44] André Nollkaemper, Multilevel Accountability. A Case Study of Accountability in the Aftermath of the Srebrenica Massacre, in: Tomer Broude / Yuval Shany, eds, The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity, Oxford, Portland/OR 2008, 345-367, 345.
[45] Nollkaemper, Multilevel Accountability, 346.
[46] This was not the intention of its main redactor, David Harland, a UN officer, former director of UN Civil and Political Affairs in Sarajevo from 1993 to 1999, who had been a vigorous critic of the UNPROFOR policy. The replacement of proper names by function was carried out after his final editing of the report.
[47] Delpla, Fact, Responsibilities, Intelligibility, 148-176.
[48] NIOD report, addendum, De Val van Srebrenica (English summary), 2016, 7.

This scepticism leaves aside the psychological or strategic effect of a 'robust response' on the protagonists, be they Mladić, the Bosniacs, or the Dutchbat, which could have been encouraged to oppose Mladić. On the contrary, the NIOD report favours explanations of the events that present the Dutchbat as mere bystanders of a dynamics whose only protagonists were the Bosniacs and the Serbs. One explanation is the hypothesis of Serb revenge for Bosniac past crimes; the other is a functionalist hypothesis that the decision to commit the massacre was triggered by the departure of the Bosniac column into the woods, presenting the Serbs with an unexpected 'problem'. This last move amounts to blaming the victims, a strategy mainly evident in the NIOD report.[49]

An Exaggerated Weight on the ICTY and Individual Criminal Responsibility

The investigations and reports on Srebrenica clearly distinguish the (criminal) responsibility of the Serb forces in the massacre and the (political and moral) responsibility of peacekeepers and international officials for letting the enclave fall and allowing the Bosniacs to be slaughtered. The ICTY, on the one hand, had the role of dealing with criminal responsibility. Indeed, this tribunal named victims and individual perpetrators, and qualified acts as crimes. On the other hand, moral and political responsibilities were supposed to be processed by the international reports, that is, by the reports of the UN, the French parliament, the NIOD, and the Dutch parliament. This wise distinction between criminal and non-criminal responsibility, however, has the effect of absolving non-criminal responsibility: the responsibility of individuals is blurred in structural or institutional defects, which are either unaddressed or diffused. Indeed, the UN has immunity; state liability (or other non-criminal legal responsibility) is not part of the mandate and power of these reports.

The de facto result of such an approach to responsibility, however, goes much further than a distinction between criminal and non-criminal responsibility. The ICTY and national criminal courts ended up being the only institutions in charge of all legal responsibility (not only criminal), implying that all legal responsibility had to be framed in criminal terms. These tribunals were the only institutions in charge of naming the guilty, and of sanctioning wrong acts.

This tendency to reduce all responsibility to individual criminal responsibility is manifest in the ruling of the Court of Appeals to reject the Mothers of Srebrenica procedure to sue the

[49] See also NIOD report, Srebrenica – A Safe Area, 2002, 470.

Netherlands and the UN.[50] One of the main arguments consisted in the UN's status: the UN was in command of UNPROFOR, and the UN has immunity, and thus cannot be sued. Such an argument left the victims without the right of access to a court of law, a right guaranteed by Article 6 of the European Convention on Human Rights and by Article 14 of the International Covenant on Civil and Political Rights. Indeed, the European Court on Human Rights has recognized that, in certain circumstances, immunity from jurisdiction can be set aside for the right of access to a court if the victim has no access to a reasonable alternative to protect his/her rights. However, the Court found that this exception was not applicable in this specific case, as the Mothers of Srebrenica could still bring the individual perpetrators of the genocide before a court of law.[51] Settling criminal responsibilities amounts to replacing other kinds of legal responsibility here.

The ICTY even ended up addressing political responsibility. This is particularly evident in regard to the determination of responsibility for the fall of the enclave and the abandonment of its population. For lack of any sanctions, reparation, or political decision, political responsibility has remained unaddressed. Despite a *mea culpa*, the only follow-up action from the UN has been to reaffirm its support for the ICTY; such support amounts to a final settlement in international responsibility. Even though the ICTY does not address international responsibility, it has nevertheless been paradoxically in charge of settling it. It ended up being the only token of justice or reparation given by the UN and involved states.[52]

This move can be found in the reports and parliamentary declarations, all of which (except for that by the RS) call for the judgement of the guilty and express their support for the ICTY or national war crime courts. This is the only manner in which they deal with specific actual responsibility, rather than rhetorical, vague, or impersonal responsibility.

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[50] Appeal Court of The Hague, Mothers of Srebrenica vs. The State of The Netherlands, Judgment, Case no. 200.022.151/01, 30 March 2010, http://www.asser.nl/upload/documents/20120420T023804-Decision%20Court%20of%20Appeal%2030%20March%202010%20(English).pdf.

[51] 'The Court of Appeal believes, however, that it has not been established for a fact that the Association et al. have no access whatsoever to a court of law with regard to what happened in Srebrenica. In the first place it has not clearly emerged from the Association's arguments why there would not be an opportunity for them to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law meeting the requirements of article 6 ECHR.' Appeal Court of The Hague, Mothers of Srebrenica vs. The State of The Netherlands (§ 5.11). As the international lawyer André Nollkaemper stresses, 'it is not really clear what the Court had in mind when it referred to possible claims against individual perpetrators'. André Nollkaemper, Dual Attribution. Liability of the Netherlands for Conduct of Dutchbat in Srebrenica, *Journal of International Criminal Justice* 9, no. 5 (2011), 1143-1157, 1155, DOI: 10.1093/jicj/mqr048.

[52] The International Court of Justice (ICJ) procedure is not originally part of the international response, as it results from the Bosnian-Herzegovinian suit against Serbia.

This finding is reinforced by the decision of the International Court of Justice (ICJ) in The Hague in the complaint for aggression and genocide filed by Bosnia and Herzegovina in 1993 against the Federal Republic of Yugoslavia (a decision made public in 2007).[53] The ICJ is the most suitable institution to judge state liability, in this case Serbia's. The decision of the ICJ is almost entirely based on the UN reports on the war in Bosnia-Herzegovina, including the one on the fall of Srebrenica, and the judgements of the ICTY, and seems guided by a desire to comply with their findings. Following the ICTY verdicts, the ICJ's decision has preserved the ICTY classification of genocide for Srebrenica. Serbia was blamed not for participation in genocide, but for failure to prevent it and failure to prosecute and judge those guilty of committing it. This decision was criticized on the basis that the ICJ made no effort to more thoroughly explore the role of Serbia in the Srebrenica massacre.[54] Allow me to leave aside this debate, however, and consider only the state responsibility for not preventing genocide and not judging the guilty. The ICJ's decision is significant: Serbia was condemned to cooperate fully with the ICTY. While such a sanction is coherent with the failure to prosecute and judge the guilty, concerning the failure to prevent genocide no other reparations, symbolic or otherwise, were considered. Again, any form of responsibility, including that of the state of Serbia, was boiled down to address individual criminal responsibility and to support the ICTY's efforts in assessing this.[55]

The ICJ's decision came as a shock and a disappointment for the Bosniac authorities and population, as well as for international lawyers[56] who had seen international criminal justice as the first step towards the end of state immunity for war crimes, crimes against humanity, and genocide.[57] Indeed, the Bosniac authorities had hoped that the criminal condemnation of

[53] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro), The Hague, 26 February 2007, http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf. Cf. Vojin Dimitrijević / Marko Milanović, The Strange Story of the Bosnian Genocide Case, *Leiden Journal of International Law* 21, no. 1 (March 2008), 65-94, DOI: 10.1017/S0922156507004736; Ademola Abass, Proving State Responsibility for Genocide. The ICJ in Bosnia vs. Serbia and the International Commission of Inquiry for Darfur, *Fordham International Law Journal* 31, no. 4 (2007-2008), 871-910, 871, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2105&context=ilj.

[54] The Court refused Bosnia-Herzegovina's request to order Serbia to furnish the ICJ with the minutes of the Supreme Defense Council, the body in charge of the Yugoslav army. These minutes had been delivered to the ICTY in the framework of the Milošević trial on condition of confidentiality and were available to the judges when they decided to refuse to acquit Milošević of charges of genocide in several municipalities of Bosnia. See Richard Ashby Wilson, Writing History in International Criminal Tribunal, Cambridge et al. 2011, 42.

[55] In 2017, the Bosniac authorities appealed the ICJ court ruling, an appeal that was rejected. Bosnia Appeal in Genocide Case against Serbia Rejected, *BalkanInsight*, 9 March 2017, http://www.balkaninsight.com/en/article/bosnia-appeal-in-genocide-case-against-serbia-rejected-03-09-2017.

[56] Marko Milanović, State Responsibility for Genocide. A Follow-Up, *European Journal of International Law* 18, no. 4 (2007), 669-694, DOI: 10.1093/ejil/chm043; Caroline Tosh, Genocide Acquittal Provokes Legal Debate. ICJ Ruling Prompts Claims That the Standard of Proof Required Was Too High, Institute for War & Peace Reporting, 4 March 2007, https://iwpr.net/global-voices/genocide-acquittal-provokes-legal-debate.

[57] See for instance Rafaëlle Maison, La responsabilité individuelle pour crime d'État en droit international

Serbs and Bosnian Serbs for genocide would be leverage for the ICJ suit against Serbia for aggression and genocide, leading to financial reparation. They had also expected that these condemnations would weaken the Republika Srpska as an entity founded on genocide and would thus help the construction of a stronger and unified state of Bosnia-Herzegovina. Following the ICJ's decisions, some Srebrenica Bosniacs tried to obtain special status for their municipality, possibly on the model of Brčko, so that it would no longer belong to the RS.[58] None of this happened, and Srebrenica remains in the RS. Condemnations of individuals for genocide do not affect political balances and territorial gains.[59]

Since they had founded their national construction and legitimacy on international law, the Bosniac authorities had an objective alliance with international lawyers who were hoping for the creation of a new cosmopolitan order via international criminal courts, whereby state immunity would no longer amount to impunity for mass crimes. Not only were they hoping for the condemnation of political leaders, who would have lost the shield of their immunity, but they were also hoping for a limitation of state sovereignty by international (criminal) law. Such cosmopolitan views of state sovereignty limitation by human rights have not proved relevant concerning the ICTY developments. More classical views of international law as a tool of states to legitimize and strengthen their sovereignty have proven to be more appropriate.

The developments of the ICTY since 2013 exemplify this tendency to such an extent that it approaches caricature. In a series of astonishing decisions, the ICTY entered a process of overturning its own jurisprudence. Ante Gotovina and Mladen Markač, Momčilo Perišić, Jovica Stanišić, and Franko Simatović,[60] as well as Vojislav Šešelj, were acquitted.[61] These decisions triggered quite violent dissident opinions from ICTY judges.[62] Observers wisely

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public, Brussels 2004.

[58] Lara J. Nettelfield / Sarah E. Wagner, Special Status for a Special Crime, in: Lara J. Nettelfield / Sarah E. Wagner, Srebrenica in the Aftermath of Genocide, New York 2014, 109-144, 111.

[59] The issue is still ongoing. See Denitsa Koseva, Bosnian Muslims Initiate Referendum on Srebrenica's Secession from Republika Srpska, *bne IntelliNews*, 12 August 2016, http://www.intellinews.com/bosnian-muslims-initiate-referendum-on-srebrenica-s-secession-from-republika-srpska-104021/?source=bosnia-and-herzegovina; Rodolfo Toe, Bosnie-Herzégovine. Un référendum pour soustraire Srebrenica à la Republika Srpska ?, *Courrier des Balkans*, 15 August 2016, http://www.courrierdesbalkans.fr/le-fil-de-l-info/srebrenica-referendum.html.

[60] There is a retrial in the Stanišić and Simatović case, so this may change.

[61] On this turn-around, see Jean-Arnault Dérens, Acquittements en série. À quoi sert le TPIY?, *RFI*, 1 June 2013, http://www.rfi.fr/europe/20130601-acquittements-serie-tpiy-balkans-stanisic-justice-serbie-croatie; Isabelle Delpla, La guerre toujours juste, par définition, *Grief* 1 (2014), 199-208.

[62] Especially from Judge Carmel Agius and Judge Fausto Pocar in the Gotovina and Markač Judgment, United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case no. IT-

noted that this self-destructive process occurred when ICTY jurisprudence could have been used against Western powers in their foreign interventions and their war on terrorism.[63] Others have stressed that there is a pattern to these ICTY acquittals: on the one hand, defendants continued to be condemned for the war inside one country, i.e. Bosnia-Herzegovina; on the other hand, defendants who waged war in a foreign territory were acquitted.[64] Such is also the case for Stanišić and Simatović, the latter of whom was head of the Serbian secret service during wars in Croatia, Bosnia, and Kosovo. Serbian defendants whose actions could have been proof of aggression or intervention in a foreign state (Croatia or Bosnia) ended up being acquitted. The ICTY rewrote its previous account of the war in a way that presents the war in Bosnia as an inside affair, in which Serbian leaders did not take part. All possible links between individual criminal responsibility and state responsibility in foreign affairs have in practice been severed.

Blaming Others and Refusing Co-Responsibility

To go back to the logic of the reports and previous court decisions, their first move was to present the ICTY as the only institution in charge of settling all issues of responsibility. The second move was to present the responsibility of the UN or of states in the choice between acting alone and independently on the one hand or acting in a collective or in cooperation on the other hand. Again, all collective responsibility has been avoided. Collective here, however, needs to be taken in a different way.

Previously, individual criminal responsibility meant the responsibility of one or several human individuals—not institutions—indicated by singular terms and proper names, as opposed to (a) a blurry collective to be described in mass terms; and (b) institutions and institutionalized groups, especially states. In a second sense, relevant here, individual responsibility means that of one actor or one legal subject (individual or institution), acting independently and not in cooperation with others: 'If individual causal contribution could be determined, the allocation of responsibility could fully be based on principles of individual

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06-90-A, 16 November 2012, http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf; as well as Michèle Picard in the Simatović and Stanišić Judgment, United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case no. IT-03-69, 30 May 2013, www.icty.org/x/cases/stanisic_simatovic/tjug/en/130530_judgement_p2.pdf.

[63] Florence Hartmann, Une justice internationale en crise, *Place Publique*, 9 September 2013, https://www.place-publique.fr/index.php/2013/09/09/une-justice-internationale-en/.

[64] Joël Hubrecht, Tribunal pénal international pour l'ex-Yougoslavie. La justice internationale est-elle en train de faire fausse route?, Institut des Hautes Études de la Justice, 4 July 2013, http://forumdelajustice.fr/ihej_wp/wp-content/uploads/2013/07/Joel_Hubrecht_TPIY_justice_internationale.pdf.

responsibility.'[65] What is the difference? In the second case, the responsibility is only that of an independent legal person.[66] Here, blaming others amounts to self-exoneration. To the contrary, however, in the first case, the responsibility of individuals can be that of multiple individuals acting with various degrees of (loose) association or subordination. Here, accusing others does not amount to self-exoneration; it might even lead to self-incrimination.

In the second sense, that is, the case of independent responsibility, the reports are also remarkable in their way of (not) addressing co-responsibility, meaning the responsibility of multiple agents acting more or less together. Again, the contrast with criminal responsibility at the ICTY is telling considering the development of international criminal law to address collective actions, with the categories of joint criminal enterprise, co-action, or command responsibility. There is nothing comparable in the reports on Srebrenica. Among the strategies previously indicated, the prevalent ones are to blame one another or to blame the UN system: if others are to blame, then I am not. Another is a national bias which leads to isolating one's actions and responsibility from those of others. This last move can lead to a form of isolationism or political solipsism when this national filter amounts to an entire disregard of the outside world, as happened in the Dutch parliament commission. As Chris Klep emphasizes, the Dutch parliamentary report operates in splendid isolation. The report interviews and addresses only Dutch citizens, as if Srebrenica had become an entirely Dutch internal affair:

'This was very much a *national* process, almost entirely isolated from foreign influences. This "splendid isolation" also applied to the parliamentary commissions. Connected to this self-serving attitude was the tendency *not* to take foreign or UN reports as a starting point for debate or to invite foreign officials to testify before commissions. Out of forty-one witnesses to appear before the full Parliamentary Inquiry Commission only one was a foreign official, UNPROFOR commander General Sir Rupert Smith. Reports would usually refer to foreign and UN reports on Srebrenica only in their introduction or in footnotes. […] This "isolationist" approach also lessened the need to articulate an "official" Dutch point of view with regard to the role of the Bosniacs themselves […] the Srebrenica aftermath ended in the

[65] Nollkaemper / Jacobs, Shared Responsibility in International Law, 10.

[66] To avoid confusion, Nollkaemper and Jacobs propose to call it independent responsibility, rather than individual responsibility.

Netherlands after eight long years—always in "splendid isolation" from Srebrenica aftermaths and reports in other countries and at the UN.'[67]

These strategies have one thing in common: they do not take seriously the specificity of acting together and the need for specific forms of responsibility, or at least of justification, in collective action. Responsibility remains dependent on one's own mastery of one's independent action; the multiplicity of actors amounts only to a limitation or dilution of responsibility. This is no wonder: there is no mechanism for state liability comparable to those of international criminal law such as joint criminal enterprise or co-action. For lack of tools to address multiple or shared responsibility, shifting the blame onto others remains the easiest escape.

Suing the Dutch State. What Has Changed?

Such strategies of avoidance largely explain the insistence of the Srebrenica victims on using legal courts to obtain answers, apologies, and compensation. Indeed, what was not obtained in court was definitely not obtained by means of the political reports. For instance, attempts to sue French General Janvier failed and the French parliamentary mission is quite evasive on his precise role and responsibility in the fall of Srebrenica and Žepa. Conversely, what happened in the reports has also long happened in the legal cases: as Nollkaemper argues, 'in the Srebrenica cases, which sought to hold the Netherlands and the United Nations responsible in relation to the eviction of persons from the UN compound in Srebrenica, both defendants denied responsibility; they thus effectively placed the blame on each other'.[68]

As a result, the various attempts by victims of Srebrenica to pursue legal proceedings remained unsuccessful for a long time. In a number of civil court cases, judges consistently dismissed their claims. According to the Dutch courts, victims would have to address the UN headquarters in New York, since the Dutchbat had been part of the UN chain of command. However, the UN itself relied on its immunity, as it also does in the case of cholera spreading in Haiti, for example. At this stage, the issue of the wrongfulness of UN or Dutch state acts was not even addressed, as Dutch courts argued that they could not hear the case.[69]

[67] Chris Klep, A Tale of Two Commissions. Dutch Parliamentary Inquiries during the Srebrenica-Aftermath, in: Delpla / Bougarel / Fournel, eds, Investigating Srebrenica, 79-82.
[68] Nollkaemper / Jacobs, Shared Responsibility in International Law, 391-392.
[69] On this immunity, see Guido den Dekker, Immunity of the United Nations before the Dutch Courts. The District Court of The Hague Judgment (Mothers of Srebrenica et al. vs. State of the Netherlands and United Nations), The Hague Justice Portal, 10 July 2008, http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Den_Dekker_Srebrenica_HJP.pdf.

In the case concerning Hasan Nuhanović,[70] on 5 July 2011 the Court of Appeal found the Dutch government responsible for what happened to his family, a ruling affirmed by the Supreme Court on 6 September 2013.[71] In 2013, a similar decision was adopted concerning the Rizo Mustafić case.[72] Mustafić worked as an electrician on the compound, but he was not employed directly by Dutchbat and therefore was not registered on the list of UN personnel. Sent away from the compound, he later died at the hands of the Serbs. His surviving wife, son, and daughter brought proceedings against the Dutch state. On 16 July 2014, the District Court of The Hague decided in the civil case filed by the Mothers of Srebrenica against the Dutch state that the Netherlands are liable for the loss suffered by relatives of the more than three hundred Muslim men who were deported by the Bosnian Serbs from the Dutchbat compound in Potočari on the afternoon of 13 July 1995, the majority of whom were then killed.[73] This verdict was largely upheld on 27 July 2017 by the Hague Court of Appeal.[74]

So, what has changed in the decisions holding the Netherlands liable? Those courts answered in the positive to the following questions: Can Dutchbat's actions be attributed to the state? Were Dutchbat's actions wrongful? In the decisions, it is established for the first time, firstly, that there was a level of state control in the unfolding of the Srebrenica events. According to these decisions, from 11 July, the Dutch state had effective control over Dutchbat and is therefore accountable for the actions of the battalion. Secondly, responsibility is attributed to a state: according to the Supreme Court, public international law allows conduct to be attributed not only to the UN (in charge of the peace mission) but also to the Dutch state

[70] For his story and point of view, see Hasan Nuhanović, Under the UN Flag. The International Community and the Srebrenica Genocide, Sarajevo 2007.

[71] Supreme Court of The Netherlands, The State of the Netherlands vs. Hasan Nuhanović, Judgment, Case no. 12/03324, 6 September 2013, http://www.internationalcrimesdatabase.org/Case/1005/The-Netherlands-v-Nuhanovi%C4%87/.

[72] Case 12/03329, 2013, The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) vs. Mustafić and Others.

[73] The Hague District Court, Judgment, The Case of Mothers of Srebrenica vs. the State of the Netherlands Judgment, Case no. /C/09/295247 / HA ZA 07-2973, 16 July 2014, http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748.

[74] Gerechtshof Den Haag, Afdeling Civiel recht, Cases no. 200.158.313/01 and no. 200.160.317/01, 27 June 2017, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2017:1761. For a summary in English, see Sewell Chan, Netherlands Partly Liable for 1995 Massacre of Bosnian Muslim Men, Court Rules, *The New York Times*, 27 June 2017, https://www.nytimes.com/2017/06/27/world/europe/srebrenica-bosnia-dutch-netherlands.html. As Chan points out, the Appeal judgement largely upheld the judgement, but with a difference: 'But unlike that judgment, the new ruling limits the Dutch government's liability to 30 percent of the damages, based on its assessment that the victims would have had a 70 percent chance of being killed even if Dutch peacekeepers had not wrongfully ordered them, on July 13, 1995, to leave a United Nations compound after the area was overrun by Bosnian Serb paramilitary forces.'

because the latter had effective control over Dutchbat's disputed conduct.[75] This is an application of the principle of dual attribution,[76] which means, thirdly, that the wrongfulness of the acts is recognized: the Dutchbat troops received reports at various times that the Bosnian Serbs were committing crimes against the male refugee population and therefore knew of the risks the Bosniac men were exposed to. Indeed, the minutes of the Dutch cabinet meetings held in July 1995 reveal that the state—and not only the Dutchbat on the ground—had knowledge of the high risk of genocide on 11 July 1995.[77] The Dutchbat actions were wrongful according to domestic Bosnian-Herzegovinian law and violated the victims' right to life.[78]

The decision also offers answers to the predictable objections: Why should the Netherlands have to 'pay' for Srebrenica? Why not others?[79] As these courts stress, the Dutchbat was not in the position of a mere bystander simply witnessing the events. Not only did the Dutchbat have an active role in expelling a number of Bosniacs from the compound and in handing them over to the Serb forces; it also had legal obligations to protect the population, especially since it had received the order from French General Gobilliard to do so. As Nollkaemper puts it,

'the reference to the instructions of General Gobilliard suggests that the Court attributed legal

[75] For the legal debate concerning the criteria of effective control and that of acts of states, and the possibility of dual attribution for the case of Hasan Nuhanović and Mustafić, see Kristen Boon, Supreme Court Decision Rendered in Dutchbat Case. The Netherlands Responsible, *Opinio Juris*, 6 September 2013, http://opiniojuris.org/2013/09/06/supreme-court-decision-srebrenica-massacre-netherlands-responsible/. For the Mothers of Srebrenica case, see Kristen Boon, Mothers of Srebrenica Decision. Dutch Court Holds the Netherlands Responsible for 300 Deaths in 1995 Massacre, *Opinio Juris*, 17 July 2014, http://opiniojuris.org/2014/07/17/mothers-srebrenica-decision-dutch-high-court-holds-netherlands-responsible-300-deaths-1995-massacre/. See also Otto Spijkers, Emerging Voices. Responsibility of the Netherlands for the Genocide in Srebrenica – The Nuhanović and Mothers of Srebrenica Cases Compared, *Opinio Juris*, 23 July 2014, http://opiniojuris.org/2014/07/23/emerging-voices-responsibility-netherlands-genocide-srebrenica-nuhanovic-mothers-srebrenica-cases-compared/.

[76] See Nollkaemper, Dual Attribution.

[77] Marco R. Gerritsen / Simon van der Sluijs, Inside the Legal Battle of the Mothers of Srebrenica against the Dutch State, website of the lawyers' office Van Diepen – Van der Kroef, no date, http://www.vandiepen.com/actueel/publicaties/single-view/inside-the-legal-battle-of-the-mothers-of-srebrenica-against-the-dutch-state-1.html.

[78] In legal terms, on 6 September 2013, the Supreme Court affirmed the Mustafić ruling and added that, because of Dutch effective control of the compound, extraterritorial human rights obligations resulting from the European Convention on Human Rights were fully binding at the time. On the criterion of wrongfulness and the difference of approach of the courts in the Nuhanović case and the Mothers of Srebrenica case, see Spijkers, Emerging Voices.

[79] For this kind of objection, see Ruben de Graaff, State Liability for Srebrenica, *Leiden Law Blog*, 23 September 2013, http://leidenlawblog.nl/articles/state-liability-for-srebrenica; and also Spijkers, Emerging Voices.

relevance to the existence of legal obligations to prevent. […] If we accept an obligation of peacekeeping forces to protect […], it may be argued that the state should on that basis intervene or at least take disciplinary measures against those who act contrary to that obligation.'[80]

Why not others, too, then? The criterion of effective control makes it difficult to condemn other states on the same legal basis. General Janvier's faults cannot be extended to a French state liability, since the French Blue Helmets did not have effective control over the Srebrenica enclave. Following this criterion, in the Mothers of Srebrenica case, the Dutch District Court cleared the Netherlands for the deaths of the thousands of other victims who tried to escape through the woods. The court found the Netherlands partly responsible for the deaths of those three hundred in the UN compound because they were within its effective control.

Shrunken Isolation or Multiagency?

A question thus arises: Has the phenomenon of multiple agency and co-responsibility been addressed? Nollkaemper sees in the principle of dual attribution 'one of the most important and potentially innovative aspects of the Judgment'.[81] Indeed, this dual attribution means that it is possible to attribute the same act both to the UN and to the Netherlands. Therefore, the question of whether an act can be attributed to the UN would not affect its attribution to the Netherlands. UN responsibility can thus be set aside to address the sole Dutch responsibility. This represents a significant change in modes of defence and justification: blaming the UN and blaming others no longer represents a mode of escape from responsibility and liability.

It was this dual attribution that made it possible to overcome the obstacle of UN immunity for the hearing of the cases in Dutch courts. It could, however, be objected that responsibility is only formally multilevel, and that the principle of independent responsibility materially still prevails. Indeed, what was sanctioned was only the independent Dutch responsibility in the compound.

Does this mean that, as in the Dutch parliamentary report, Srebrenica is reduced to a mainly domestic affair that can be treated in isolation? It is indeed ironic that this solipsist political trend to avoid responsibility in the Srebrenica massacre backfired indirectly. After all, this isolationism has its flip side: it has proved that Srebrenica could also be treated as part of

[80] Nollkaemper, Dual Attribution, 9.
[81] Nollkaemper, Dual Attribution, 12.

Dutch (domestic) politics and could be sanctioned under Dutch state liability.

That said, are these decisions thus instances of national isolationism? Certainly, it was a Dutch court that condemned the Dutch state, with Dutch judges and lawyers. However, the process was quite different from that of the Dutch parliamentary commissions. The Bosniacs now were no longer secondary characters in a background setting; they were real actors as plaintiffs, in the position of addressors and addressees. The Dutchbat interactions with French Generals Gobilliard and Janvier were scrutinized. The legal decisions rely on international, European, and domestic law, and manifest the 'accountability puzzle caused by the osmosis between international and national legal orders'.[82] International law and commitments are not just niceties that can be used for international standing, image management, and political advertising.

Conclusion

This article has explained the change in the ascription of responsibility for the fall of Srebrenica brought about by Dutch court decisions that condemned the Dutch state for failure to protect foreigners. These decisions are novel on several grounds: they sanction state liability and state liability in co-agency; they address the victims and even grant them reparations. This article has also suggested an interpretation of this process. The previous investigations and reports on the fall of Srebrenica had the intended (for the ICTY) or de facto effect of leaving aside state liability. They ended up building a wall between criminal (and even all legal) responsibility of individuals and moral or political responsibility of states, which in itself was diluted. This (implicit) process had two sides. First, it consisted in reducing all reasonable responsibility to the individual level, that is, of human individuals, something that is best achieved by reducing all individual responsibility to criminal responsibility. Indeed, institutions in general, and states in particular, cannot pull a trigger; in the end, only individuals can. Furthermore, state responsibility was reduced to political and moral responsibility: a series of political and legal decisions led to the paradox that the ICTY ended up being in charge of addressing all responsibility for the Srebrenica fall and massacre, either directly by judging the guilty, or indirectly. All other non-individual and non-criminal responsibility (political and legal) was reduced to support for the ICTY. Second, state responsibility could only be the personal and independent responsibility of an agent (the state) considered to be acting alone, not in cooperation with others. The Dutch court decisions

[82] Nollkaemper, Dual Attribution, 19.

therefore represent a change with regard to a trend in which collective responsibility was reduced to a scarecrow argument, where state liability for genocide was boiled down to the obligation to address criminal responsibility, and where co-agency was a shield preventing the attribution of state responsibility.

What, therefore, is the wider significance of these decisions? Even though they represent a step forward in the responsibility to protect, it seems unlikely that such a step is part of a wider and glorious progression of international justice. The International Criminal Court (ICC) developments[83] certainly contradict such a view: with the recurrent fiascos of its trials, we are witnessing a period of retraction rather than improvement of international (criminal) justice.

Are these decisions in line with a Kantian notion of cosmopolitism, which pleads for the application of the same norms to foreign and domestic politics and for democratic control of foreign policy? Certainly, the reports had already represented an attempt at publicity as applied to foreign policy and, in the court decision, no dual standard was used regarding foreigners and Dutch citizens and the responsibility to protect. In this sense, the same norms have been applied to domestic and foreign policy. It is important to underline, however, that the Dutch apologies and reparations to the victims followed a court decision rather than a parliamentary resolution or a democratic debate on foreign policy.

In another context, i.e. the trial of French ministers in the tainted blood scandal,[84] the French philosopher Paul Ricoeur, following Karl Jaspers, stressed the distinction between political and legal responsibilities, especially criminal responsibilities. He regretted the judiciarization of political responsibility; for citizens, belonging to a political body whose bad politics has caused grave wrongs should not lead to legal and even less to criminal sanctions but to an obligation to repair. For leaders, political responsibility should be addressed in political terms through political procedures. Political faults should lead to political reparations debated and decided by democratic elected bodies. That political issues end up being addressed and decided in courts exhibits the deficiencies and weaknesses of political arenas such as parliaments. Ricoeur dreamt of stronger democratic controls and institutions, 'of an instance of investigation, of contradictory debates, something like a civic court, which is the reign of

[83] Stéphanie Maupas, Le Joker des puissants. Le grand roman de la Cour pénale internationale, Paris 2016.

[84] This refers to the tainted or contaminated blood scandal of the 1990s. Due to a lack of security measures, haemophiliacs were infected with HIV. See the Wikipedia entry on the matter, https://en.wikipedia.org/wiki/Infected_blood_scandal_(France). Victim associations claim that more than 1,300 people were contaminated and that 1,000 died from AIDS. Three ministers were charged with manslaughter in 1999.

advertising against opacity, of celerity against procrastination, of the prospective against a past that does not want not pass'.[85]

Mutatis mutandis, the comparison of the reports and judicial decisions on Srebrenica leads me to a similar finding. Parliamentary commissions, UN and government-driven reports mainly served the purpose of avoiding sanctions.[86] In this attempt, they also avoided political responsibility that would have led to political reparations, material or symbolic. Such reparations were partially granted, but only following a court decision, and only in the Netherlands. One could wish for a strong enough democratic control on foreign policy that would address political responsibility in political terms as an autonomous decision of political leaders and the institutions representing their citizens.

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[85] Paul Ricœur agreed to testify for the defence of one of these ministers, cf. Le procès du sang contaminé. 8e jour. 'On laisse le système institutionnel sans remède.' Paul Ricœur, philosophe, était cité comme témoin par Georgina Dufoix. Extraits, *Libération*, 20 February 1999, http://www.liberation.fr/societe/1999/02/20/le-proces-du-sang-contamine-8e-jour-on-laisse-le-systeme-institutionnel-sans-remede-paul-ricoeur-phi_265493. The quote, taken from this article, was translated from the French by the author.

[86] See Klep, A Tale of Two Commissions, 82.