

**Police Bystander Liability: A Comparative Perspective**  
**A Presentation by Professor Göran Sluiter hosted by the William & Mary Human Security**  
**Law Center**

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On April 14, 2022, the Human Security Law Center at William & Mary Law School hosted a presentation by renowned legal scholar Göran Sluiter, Professor of International Criminal Law at the University of Amsterdam. Professor Sluiter is also a Professor of Criminal Law and Procedure at Open Universiteit in The Netherlands and a practicing lawyer and partner at the firm Prakken D'Oliveira Human Rights Lawyers.

Professor Sluiter's talk was entitled "Police Bystander Liability: A Comparative Approach." The presentation is part of an ongoing research project on secondary liability for international crimes and human rights violations.<sup>1</sup> This presentation considered the legal liability of police officers who witness incidents of police brutality and fail to intervene.

Professor Sluiter compared the United States (U.S.) and The Netherlands through two instances of police brutality that resulted in death. Then, he discussed the aiding and abetting standard that the International Criminal Tribunal for the Former Yugoslavia (ICTY) applied to a military commander who witnessed his subordinate perpetrate a rape. Finally, Professor Sluiter made his recommendations for a liability standard to apply to police bystanders who witness abuse yet do nothing.

The tragic deaths of American George Floyd and Mitch Henriquez demonstrate the parallels and differences between the U.S. and Dutch responses to police brutality. On May 25, 2020, George Floyd, a 46-year-old black man, died after police officer Derek Chauvin handcuffed Floyd and pinned him to the ground by pressing his knee on Floyd's neck.<sup>2</sup> The killing sparked nationwide protests and garnered international attention, including in The Netherlands. As a result of the killing, Chauvin—who is white—and 3 other officers present at Floyd's death were fired and charged with several criminal offenses.<sup>3</sup> Almost one year later, on April 20, 2021, a jury found

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<sup>1</sup> "Rethinking the Outer Limits of Secondary Liability for International Crimes (SLIC) and Serious Human Rights Violations" is a VICI-funded project by The Netherlands Organisation for Scientific Research that aims to develop a legal framework of a reasonable attribution of liability for powerful actors who contribute to and facilitate the commission of (international) crimes. Nicknamed *Rethinking SLIC*, the project is led by Professor Sluiter as principal investigator and executed by an international team of researchers working at the University of Amsterdam and in partnership with Open Universiteit and the Amsterdam Center for International Law. For more information about *Rethinking SLIC*, visit <https://rethinkingslic.org>.

<sup>2</sup> Christine Hauser, Derrick Bryson Taylor, & Neil Vigdor, *'I Can't Breathe': 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html?searchResultPosition=4> (last updated June 15, 2020).

<sup>3</sup> Kim Barker, John Eligon, Richard A. Oppel Jr., & Matt Furber, *Officers Charged in George Floyd's Death Not Likely to Present United Front*, N.Y. TIMES (June 4, 2020) <https://www.nytimes.com/2020/06/04/us/george-floyd-police-records-chauvin.html?action=click&module=RelatedLinks&pgtype=Article> (last updated May 7, 2021); Carrie Johnson, *Justice Department Brings Federal Criminal Charges Against Derek Chauvin, 3 Others*, NPR (May 7, 2021, 12:29 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/05/07/987737695/justice-department-brings-federal-criminal-charges-against-derek-chauvin-3-other>.

Chauvin guilty of second-degree murder, among other crimes,<sup>4</sup> and sentenced him to a term of imprisonment of 22 ½ years.<sup>5</sup> In February 2022, a federal jury found the other three former officers guilty of federal civil rights offenses.<sup>6</sup> Their sentencing date has not yet been scheduled, and they still face state criminal charges for aiding and abetting the murder of Floyd.<sup>7</sup>

As George Floyd's story made waves worldwide, it likely reminded Dutch residents of another individual's untimely death at the hands of police. Five years before Floyd's killing, in 2015, Mitch Henriquez died in police custody in very similar circumstances to Floyd.<sup>8</sup> Henriquez, a 42-year old black man from Aruba, had been arrested at the Night of the Park Music Festival in The Hague by five white police officers, one of whom had employed the use of a forbidden chokehold.<sup>9</sup> Another had punched Henriquez in the face and sprayed him with pepper spray.<sup>10</sup> Henriquez became unresponsive during the arrest and later died in hospital due to the use of force.<sup>11</sup> After an investigation, the Openbaar Ministerie (OM)—The Netherlands' Public Prosecution Office—concluded that Henriquez's arrest was justified, but the means of restraint exerted by the police officers were not.<sup>12</sup> The five officers on the scene were initially suspended,<sup>13</sup> but only the two officers who used force on Henriquez were criminally charged.<sup>14</sup> The two officers, whose identities remain anonymous,<sup>15</sup> were found guilty of causing

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<sup>4</sup> John Eligon, Tim Arango, Shaila Dewan, & Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html> (last updated June 25, 2021).

<sup>5</sup> Bill Chappel, *Derek Chauvin is Sentenced to 22 ½ Years for George Floyd's Murder*, NPR (June 25, 2021, 6:02 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder>.

<sup>6</sup> Press Release, Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd, U.S. DEP'T OF JUST. (Feb. 24, 2022), <https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death>.

<sup>7</sup> ASSOCIATED PRESS, *Plea Deal Rejected by 3 Ex-Officers in George Floyd's Death*, NBC NEWS (Apr. 11, 2022, 11:57 PM), <https://www.nbcnews.com/news/crime-courts/plea-deal-rejected-3-ex-officers-george-floyds-death-rcna23983>.

<sup>8</sup> *Man Dies in Custody After Aggressive Arrest*, NL TIMES (June 29, 2015, 9:16 AM), <https://nltimes.nl/2015/06/29/man-dies-custody-aggressive-arrest>; Gordon Darroch, *Mass Arrests in The Hague as Clashes Over Death in Police Custody Continue*, THE GUARDIAN (July 3, 2015, 5:43 AM), <https://www.theguardian.com/world/2015/jul/03/the-hague-arrests-protest-death-police-custody-mitch-henriquez>.

<sup>9</sup> *OM Vervolgt Twee Agenten Voor Dood Mitch Henriquez*, NU (Sept. 19, 2016, 12:11 PM), <https://www.nu.nl/binnenland/4323712/vervolgt-twee-agenten-dood-mitch-henriquez.html> (last updated Sept. 16, 2016, 2:41 PM).

<sup>10</sup> *Id.*

<sup>11</sup> Anthony Deutsch, *Riots in The Netherlands After Caribbean Man Mitch Henriquez Dies in Police Custody*, HUFFINGTON POST (July 2, 2015, 9:03 AM), [https://www.huffpost.com/entry/netherlands-riots-police-mitch-henriquez\\_n\\_7712962](https://www.huffpost.com/entry/netherlands-riots-police-mitch-henriquez_n_7712962) (last updated Dec. 6, 2017).

<sup>12</sup> *OM Vervolgt Twee Agenten Voor Dood Mitch Henriquez*, *supra* note 9.

<sup>13</sup> REUTERS, *Police Suspended in Hague Following Aruba Man's Death*, DW AKADEMIE (Jul. 1, 2015), <https://p.dw.com/p/1FrHd>.

<sup>14</sup> *OM Vervolgt Twee Agenten Voor Dood Mitch Henriquez*, *supra* note 9. *Three Cops Won't Be Prosecuted for Police Chokehold Death: Court*, NL TIMES (Mar. 30, 2017, 12:35 PM), <https://nltimes.nl/2017/03/30/three-cops-wont-prosecuted-police-chokehold-death-court>.

<sup>15</sup> *Cops Involved in Aruban Man's Chokehold Death to Remain Anonymous: Court*, NL TIMES (June 27, 2017, 12:45 PM), <https://nltimes.nl/2017/06/27/cops-involved-aruban-mans-chokehold-death-remain-anonymous-court>.

Henriquez's death by assault and sentenced to a suspended term of six months imprisonment.<sup>16</sup> Notably, the court ruled that the two officers did not have the requisite intent to kill Henriquez and therefore acquitted them of manslaughter.<sup>17</sup> And, while the police department had subjected all five officers to internal discipline, none had been dismissed from their positions at the time of the verdict.<sup>18</sup>

The comparison of the Floyd and Henriquez cases demonstrates key differences between the American and Dutch criminal systems. What factors contributed to these divergent outcomes? Professor Sluiter noted that cases like that of Mitch Henriquez are exceptional in The Netherlands, while unjustified killings by police are far more common in the United States. Professor Sluiter also highlighted a critical contextual difference between the two countries: police officers in The Netherlands face fewer security risks when arresting individuals. In the United States, an average of approximately 5 out of 100,000 people are murdered whereas the figure for The Netherlands is only 0.6 out of 100,000.<sup>19</sup> This difference stems primarily from the fact that the mere possession or ownership of a gun in The Netherlands is a serious crime. So, unlike American police officers, Dutch police need not perpetually anticipate their suspect to possess a dangerous weapon.

Although adverse police interactions are rare in The Netherlands, it and the United States nonetheless confront many similar problems, including societal racism, insufficient diversity in the police force, and ethnic profiling by law enforcement. Indeed, the treatment meted out to the two police officers in the Henriquez case may exemplify many of these problems. Specifically, a sentence of six months' imprisonment was considered an unusually low punishment and inadequate, even within the context of the Dutch criminal justice system. At the same time, recent local efforts to hold police officers accountable stem from the political energy stimulated by the Black Lives Matter Movement and similar political initiatives. Professor Sluiter wondered out loud if Mitch Henriquez's killers would have received more substantial punishment if Henriquez's death had postdated Floyd's.

Turning to accountability, historically, police were not prosecuted even for the abuse they themselves perpetrated, and it was virtually unheard of for police bystanders to be held accountable. For one thing, American criminal law rarely prohibits omissions. In The Netherlands, article 450 of the Dutch Penal Code provides that an individual who fails to intervene upon witnessing an immediate danger to another's life can be punished by a maximum of three months' imprisonment or a monetary fine, but *only* if he can intervene without endangering himself or others.<sup>20</sup> Professor Sluiter explained that this makes it difficult to

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<sup>16</sup> *Mitch Henriquez Case Police Officers Get Six Months Suspended Jail Terms for Assault*, DUTCH NEWS (Dec. 21, 2017), <https://www.dutchnews.nl/news/2017/12/mitch-henriquez-case-police-officers-get-six-months-suspended-jail-terms-for-assault/>.

<sup>17</sup> Abuzer van Leeuwen, *Breaking: Agents of Mitch Henriquez Death Are Sentenced to 6 (Suspended) Months of Prison*, DUTCH REV. (Dec. 21, 2017), <https://dutchreview.com/news/breaking-agents-mitch-henriquez-death-sentenced-6-suspended-months-prison/>.

<sup>18</sup> *Mitch Henriquez Case Police Officers Get Six Months Suspended Jail Terms for Assault*, *supra* note 15. *Three Cops Won't Be Prosecuted for Police Chokehold Death: Court*, *supra* note 13.

<sup>19</sup> UN OFFICE ON DRUGS & CRIME, *Intentional Homicides (Per 100,000 People) 2018*, in INT'L HOMICIDE STAT. DATABASE, WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5> (last visited Apr. 19, 2022).

<sup>20</sup> Artikel 450 SR.

determine the precise moment when the duty to intervene would (and should) apply in a case of police brutality. A bystander may be deemed to have obstructed a lawful arrest if he interferes too soon, which raises an even more significant challenge in a law enforcement official's duty to intervene and may even perpetuate a 'bystander effect.'<sup>21</sup>

Another avenue of accountability is to prosecute bystanders under aiding and abetting standards. In most legal systems (though not in the U.S.), aiding and abetting liability requires assistance that substantially contributes to the commission of a crime. This assistance must be provided with the requisite knowledge of its contribution to the crime. In the international criminal context, the International Criminal Tribunal for the Former Yugoslavia (ICTY) applied that standard in *Furundzija*, where the Trial Chamber considered the liability of a commander who, during the Bosnian war, was present when one of his subordinates tortured and raped a female detainee.<sup>22</sup> Although *Furundzija* did not himself perpetrate any acts of rape or torture, the Trial Chamber found that he nonetheless aided and abetted the horrific crimes, explaining:

While any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals.<sup>23</sup>

Although the outcome in *Furundzija* was objectively just, Professor Sluiter reasoned that the *Furundzija* standard for bystander liability remains too high and that a lower, more reasonable standard should be adopted in the context of police brutality. Given that police are agents of authority for law and order, their duty to protect should be heightened.

Professor Sluiter called for a paradigm shift—one that focuses more attention on the victims of police brutality and the protections they should be afforded as opposed to emphasizing the challenges facing the police. Aiding and abetting liability provides a respectable starting point because, given their official position and duties, police who stand by while their colleagues perpetrate abuse effectively facilitate brutality. The hope is that such a shift will promote a trickle-down effect such that more attention will be paid to law enforcement training. More broadly, any changes must stem from a more significant shift in societal thinking, particularly in highly politicized systems like that of the United States, which have movements like Black Lives Matter that highlight to the world the injustices faced by individuals like George Floyd, Mitch Henriquez, and others to effectuate change.

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<sup>21</sup> The *bystander effect* refers to “the inhibiting influence of the presence of others on a person’s willingness to help someone in need.” Robert D. Blagg, *Bystander Effect*, ENCYCLOPEDIA BRITANNICA (last updated Jan. 7, 2019), <https://www.britannica.com/topic/bystander-effect/>. Research on the subject has shown that “even in an emergency, a bystander is less likely to extend help when he or she is in the real or imagined presence of others than when he or she is alone.” *Id.* The more bystanders present leads to less assistance, although the impact of each additional bystander has a diminishing effect on acting. *Id.*

<sup>22</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 282 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>23</sup> *Id.* ¶ 232.