



UvA-DARE (Digital Academic Repository)

George Floyd, Mitch Henriquez and criminal liability for police bystanders

Sluiter, G.

Publication date

2020

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Sluiter, G. (Author). (2020). George Floyd, Mitch Henriquez and criminal liability for police bystanders. Web publication or website, Rethinking SLIC.
<https://rethinkingslic.org/blog/criminal-law/72-george-floyd-mitch-henriquez-and-criminal-liability-for-police-bystanders>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



[Home](#) / [Blog](#) / [Criminal law](#) / [George Floyd, Mitch Henriquez and criminal liability for police bystanders](#)

Criminal law 22.06.2020 Göran Sluiter

George Floyd, Mitch Henriquez and criminal liability for police bystanders

The horrible death of George Floyd in the US has not only resulted in --rightful-- worldwide outcries of protest and indignation, but also raises important questions of criminal liability. The police officer who was directly responsible for the death of Floyd, by putting his knee on Floyd's neck and cutting off his breath, has been arrested and will face prosecution for committing murder and manslaughter. The other three police officers who were present at the moment of Floyd's death have also been arrested and are likely to be prosecuted for aiding and abetting murder and manslaughter.

The present blogpost will focus on that last category, that of police bystanders in situations of police brutality, especially when a person is killed in the course of it. I will offer a few reflections on the basis of a case comparable to that of George Floyd that took place in the Netherlands in 2015, which led to the death of Mitch Henriquez. In addition, I will reflect on the proper construction of police-bystander liability. It goes without saying that in the limited space available in this blogpost I will limit myself to a few main points.

Mitch Henriquez

The case of Mitch Henriquez may be unknown to many outside the Netherlands. It has a number of similarities to the case of George Floyd. Henriquez, a man of Aruban origin, was arrested at the end of an open-air music festival in The Hague, on 27 June 2015. He was drunk and refused to comply with police instructions to go home; the arrest as such was considered to be lawful.^[1]

Like in the case of Floyd, there was video-footage of the arrest. In addition, there were many witnesses. It follows from the evidence that Henriquez strongly resisted arrest and in order to break that resistance, a neck-hold was exerted on him. The neck-hold resulted in his death. The neck-hold, or 'neck restraint', as such is not prohibited in the Netherlands,^[2] but was applied in the wrong way (as a chokehold instead of stranglehold) and for a too lengthy period of time.^[3] The police officer applying the neck-hold was convicted for mistreatment, resulting in death.^[4]

The Court found that in the chaotic situation of the arrest, the police officer's intent --even in the form of conditional intent (*dolus eventualis*)-- to cause the death of the victim could not be proven beyond a reasonable doubt; therefore, the accused was acquitted on the count of manslaughter.^[5] The sentence imposed on the accused was a suspended prison sentence of six months.^[6]

Another police officer who applied force on Henriquez (keeping him on the ground with force and use of pepperspray) was acquitted; the Court of Appeal ruled that this police officer's use of force took place at the beginning of the struggle with Henriquez; the situation might have been different, and a conviction for coperpetration could have been entered, if this force were applied later on in the struggle when the neck-hold from the other police officer would have been in place for some time.^[7] However, the Court ruled that in light of the nature and timing of the violence coming from this police officer, it was proportionate and lawful.^[8] Therefore, he was acquitted of all charges.^[9]

Besides the one convicted and one acquitted police officers, three other officers were present at the death of Henriquez. In fact, the Court of Appeal referred to the presence of four police officers, other than the officer exerting the neck-hold, as 'four police officers who were also busy trying to bring the victim under control'.^[10] However, none of them were prosecuted for aiding and abetting their convicted colleague in the mistreatment of Henriquez. This begs the question: why not?

Bystander Liability

Should the bystander-police officers --in the cases of Floyd and Henriquez-- be held criminally liable for a possible contribution to the death of these victims?

It seems there are two possible bases for criminal liability for the police bystanders in the cases of Floyd and Henriquez.

Direct criminal liability for failure to intervene

First, certain criminal justice systems have directly penalized the violation of a duty to act in cases when someone's life is at risk. In the Netherlands this is penalized in art. 450 of the Dutch Penal Code. Pursuant to this provision, there has to be an immediate life-threatening situation and assistance could have been provided without endangering oneself or others.

The duty to assist in emergencies is also available in certain US States and is generally referred to as a Good Samaritan Law. It exists in the State of Minnesota, where Floyd died. However, it is not a basis for criminal liability and also contains a number of exceptions, which could lead to *de facto* immunity for law enforcement officials.

Looking holistically at the Good Samaritan duty in the context of the cases of Floyd and Henriquez, it seems like an obligation that could be applicable to all nearby police bystanders, and, at least in the Netherlands, could also be a plausible basis for their prosecution. Looking at the evidence in these cases, each and every police bystander could have intervened, and saved Floyd and Henriquez, without any concrete danger to themselves. Looking at the concerns and increasing indignation coming from the public present in the vicinity of the arrests of Floyd and Henriquez, intervention and ending the stranglehold was arguably even the safer thing to do,

avoiding possible action from an increasingly angry crowd. In addition, in both cases there appeared to be only a minimal risk of the accused escaping arrest as a result of the intervention, as he was in both cases substantially outnumbered by all police officers present.^[11]

The most difficult aspect of the Good Samaritan's duty application to the cases of Floyd and Henriquez appears to be to determine the moment of 'grave physical harm' (Minnesota) or 'immediate danger to life' (article 450 Dutch Penal Code), which triggers the obligation to assist. Wisely, the Minnesota law prescribes that obligation sooner in time, because requiring assistance 'only' in case of *immediate* danger to life, carries with it a significant risk that such assistance, even when provided, may come too late. The determination of the moment triggering the duty to assist will, in practice, depend on several facts and circumstances.

It can, first of all, be said that trained police officers should be better at determining the moment of 'grave physical' harm occurring, than civilians are. The police have the monopoly on the lawful use of force, but this obviously should come with knowledge and understanding of the nature of the violence that may be used and the physical harm that it may occasion; this is, or should be, a matter of elementary training. Interestingly, this 'responsibility-dimension' regarding the monopoly of violence does not tend to lead to heightened scrutiny, at least not in the Henriquez case. The Court of Appeal found that police tasks entail the use of violence and sometimes the use of violence is inescapable; as the Court reasoned, the fact that the police can, contrary to ordinary citizens, not run away from situations in which the use of force is necessary, means that courts should exercise restraint in evaluating, or evaluate in a marginal fashion, the use of violence by police officers in concrete cases.^[12]

That said, bearing in mind the special training police officers have had (or should have had) regarding the use of force, it then makes sense that the bystander-police officer should have noticed that the violence used against Floyd and Henriquez was, after the first initial period, extremely dangerous, and actually life-threatening. An additional indicator of this peril in the case of Floyd were the words he uttered: 'I can't breathe'. In the case of Henriquez, witnesses made mention of the strength exerted in the strangulation, its long duration and the fact that the victim was trying to breathe.^[13] This must have been noticeable to the police officers who were present as well and, in my opinion, triggered their obligation by law to intervene.

It should be acknowledged, however, that both timing and the intervention itself require a great deal from a bystander law enforcement official. Both collegiality and a broader *esprit de corps* will make it hard to assist a victim of an arrest if the circumstances so require. In addition, in case the intervention is untimely, i.e. it comes too soon, --or not necessary at all-- the intervening police officer could risk charges of interference with a lawful arrest or mistreatment of a police officer (when the intervention would necessitate some use of force); in practice, there are also reports of intervening police officers having been fired over this.

In this delicate balancing exercise, where intervention being absent or too late will result in death, the cases of Floyd and Henriquez show us that a shift in favour of the interests of the victim appears warranted. The time has come to send out the message that victims of police brutality are entitled to an increased duty of intervention on the part of police bystanders, which in turn would call for changing the (legal) culture which until now fosters reluctance amongst police bystanders to intervene when they witness an arrest going dramatically wrong.

Aiding and abetting liability for police bystanders

As a second possibility of criminal liability, it will be examined whether failure to intervene can be categorized under aiding and abetting liability. In most legal systems, aiding and abetting liability requires assistance that substantially contributes to, or at least facilitates, the commission of a crime, and this assistance must be provided with the knowledge of its contribution to the crime.

The applicability of aiding and abetting liability to police bystanders appears problematic at first sight. Aiding and abetting liability requires assistance and intuitively it may be felt that a failure to act, an omission, cannot be considered as such. But this does not have to be the case. The most obvious example in which assistance by omission can greatly help principals in their commission of crimes is the security guard who deliberately fails to sound the alarm during a burglary.

But clearly this is not the type of assistance we are talking about when discussing the role of police bystanders. The question is rather whether the situation of police bystanders bears similarities with bystanders who have been held criminally liable as so-called 'approving' or 'encouraging' spectators. In the case law of international criminal tribunals, the case of Furundzija at the International Criminal Tribunal for the former Yugoslavia (ICTY) offers an interesting example where the presence of the accused at the scene of the crime resulted in aiding and abetting liability.^[14] Furundzija was present when his co-commander and a subordinate tortured and raped the victim.^[15] Analysing quite a number of national and international judgements on the matter of aiding and abetting liability for bystanders, the Trial Chamber concluded that '[w]hile 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'.^[16] In respect of Furundzija, the Trial Chamber found this to be the case and convicted him for aiding and abetting, through his legitimising and encouraging presence, the commission of the crimes by others.

Clearly, one may argue that the situation of police bystanders differs greatly in one important respect. The force used by the police is often not criminal from the beginning, but rather, as in the cases of Floyd and Henriquez, it can start with a lawful arrest which at some point in time turns into a crime. But I do not feel that this fact alone should thwart aiding and abetting liability in the police-bystander context altogether. It should furthermore be noted that in the Furundzija case the ICTY Trial Chamber was applying a high *actus reus*-standard for the assistance provided, namely that it should have had a *substantial effect* on the commission of the crime.^[17] Many criminal justice systems, such as that of the Netherlands, use a clearly lower standard, namely that the assistance only *facilitates* the commission of the crime.

As follows from the Furundzija judgement, the status of the bystander and her or his relationship to the principals is vital to the determination of the existence of any legitimising or encouraging effect on the principal(s). Not knowing the principal and/or having a role in a system without influence would not be enough to attract aiding and abetting liability.^[18]

If we try to extrapolate and apply these principles to the situation of police bystanders in cases of police brutality, the following could be said. The presence of a policeman who is a direct and long-time colleague and who is superior in rank to the principal committing the crime can be said to have a stronger legitimising or encouraging effect and will sooner attract aiding and abetting liability than if the opposite were the case.

But there are in my view additional considerations to be borne in mind when considering possible legitimising and encouraging effects of police bystanders.

The police operate on the streets, in the public domain. Both Floyd and Henriquez were killed in the public domain. In both cases there were a good number of spectators present, who could -- potentially-- interfere with the arrest. The mere presence of colleagues, and bearing in mind the strong *esprit de corps* within the police force, must have given the police officers who were physically arresting --and causing the death of-- the victims the reassurance that their colleagues would take measures against any possible interference with the arrest. Their presence can thus not only be seen as 'moral encouragement', but can in a given situation also be seen as simply necessary to ensure the arresting officer's security which was a pre-requisite for his continuation of the fatal arrest. Under these circumstances, the presence of colleagues, other police officers who 'have your back', is undeniably a relevant form of assistance in the commission of these crimes, regardless of whether they are superiors to the arresting police officer or not.

I believe that every police officer is aware of this 'security-effect' of his or her mere presence on her or his colleague who is directly interacting with a civilian. As a result, he or she knows that his or her presence has an effect on the commission of any crime beyond mere 'moral encouragement' of someone's presence. This is especially the case when the act of police brutality is taking place in the public domain and when civilians are present.

Conclusion

The tragic deaths of Floyd and Henriquez compel us to critically assess the availability and adequacy of forms of criminal liability. It is only fair and legitimate to explore the prospects of not only holding accountable the principal perpetrator, but also to consider options of criminal liability for the police officers who stood idly by and did nothing to intervene and rescue the victims.

Both Good Samaritan Laws and aiding and abetting liability are suitable bases for criminal liability that could and should be applied more often in practice to situations of police brutality.

I acknowledge that it is difficult for the bystander-police officer to intervene and to decide on the right moment. However, the police have the monopoly on lawful force and this comes with a responsibility to use that force wisely and proportionally and to know when it will start to have grave and irreparable effects on victims. In addition, the police officers as bystanders have an important effect on the commission of unlawful, or even criminal, acts by other police officers in their presence. This presence is because of the nature and role of the police in society, more than mere 'moral encouragement'; it is a 'security reassurance', regrettably not so much for the victim of the police brutality, but for the principal committing it.

Future instances of police brutality could be reduced by acknowledging the importance of the police bystanders and also by paying more attention to their individual criminal accountability.

[1] For an overview of the facts, prior, during and following arrest, see [The Hague District Court, 21 December 2017 \(ECLI:NL:RBDHA:2017:15095\)](#), paras. 29 – 67; and [The Hague Court of Appeal,](#)

19 June 2019 (ECLI:NL:GHDHA:2019:1532), paras. 10 – 66. The latter being the final instance, the discussion will focus on the Appeals Court judgement.

[2] But following the death of Floyd, and also after the death of Eric Garner in 2014 at the hands of police choking him, the neck-hold has been banned in France and various US states.

[3] See The Hague Court of Appeal, supra note 1, para. 69.

[4] Id., para. 120.

[5] Id., para. 118.

[6] Id., dictum, and for motivation, paras. 128 – 137.

[7] Id., para. 35.

[8] Ibid.

[9] Under Dutch criminal law, the second policeman was not formally acquitted, but his case was dismissed from all legal proceedings, on account of the applicability of the excuse -or ground excluding criminal liability- of having acted in accordance with the law.

[10] See The Hague Court of Appeal, supra note 1, para. 69.

[11] In this vein, see also The Hague Court of Appeal, supra note 1, para. 69, saying that the neck-hold was -imputably- disproportionate and, therefore, unlawful, because there were four other police officers present to hold one suspect under control.

[12] Id., paras. 23 and 24. See also para. 132 of the sentencing considerations in which the fact that the police officer cannot run away from trouble and incidents is explicitly mentioned as a mitigating factor in sentencing.

[13] Id., paras. 48 – 57.

[14] ICTY, Judgement, Prosecutor v. Furundžija, 10 December 1998, Trial Chamber, Case No. IT-95-17/1-T (Trial Judgement); ICTY, Judgement, Prosecutor v. Furundžija, 21 July 2000, Appeals Chamber, Case No. IT-95-17/1-A (Appeals Judgement).

[15] Trial Judgement, paras. 120 – 130.

[16] Id., para. 232.

[17] Id., para. 234.

[18] Id., para. 233.

Criminal law

Aiding and abetting

police brutality

ICTY

bystander liability

◀ Prev

Next ▶

Related articles

- Recent Domestic Developments on Corporate Criminal Assistance in Atrocity Crimes
- The Cases of Kouwenhoven and Poch and the Fine Line Between Guilt and Innocence for Assisting in the Commission of War Crimes
- Autonomous Weapons Systems and the Liability Gap, Part One: Introduction to Autonomous Weapons Systems and International Criminal Liability
- Secondary Liability and Terrorism – Spill-over to other international crimes?
- Re-innovating the grapes of wrath: the responsibility of Russian cluster munitions manufacturers under the Rome Statute
- Aiding and abetting liability for social media platforms in relation to ‘image-based sexual abuse’ – a way around Article 14 (1) of EU Directive 2000/31?

Tag cloud



contact/ colophon/ disclaimer



Netherlands Organisation
for Scientific Research



UNIVERSITY
OF AMSTERDAM



Open Universiteit
www.ou.nl



Rethinking
SLIC*