

Dual Attribution

Liability of the Netherlands for Conduct of Dutchbat in Srebrenica

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Abstract

The Dutch Court of Appeal of The Hague recently held that the Netherlands committed a wrongful act by expelling four Bosnian nationals from the protected compound of Dutchbat after the fall of Srebrenica in 1995. In doing so, the Court of Appeal set out the test of attribution as one of effective control and diverged from the case law of the European Court of Human Rights. The Court held the standard of effective control must be assessed by the possibility for the state to exercise control over the actions of its nationals as well as in the concrete circumstances of each case. The Court thus reasoned that effective control in peacekeeping operations denotes both normative control and factual control by the troop-contributing state. The Court went on to examine the wrongfulness of the actions taken by Dutchbat and based its determinations of wrongfulness on national law as well as international human rights treaties. The criterion of effective control as laid down by the Court allows for the possibility of dual attribution between the United Nations and a troop-contributing state in peacekeeping operations.

1. Introduction

On 5 July 2011, the Court of Appeal of The Hague held that the state of the Netherlands had acted unlawfully and is liable, under Dutch law, for evicting four Bosnian nationals from the compound of Dutchbat (a Dutch battalion under the command of the United Nations (UN) peacekeeping force,

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UNPROFOR) in Srebrenica on 12 July 1995.¹ Ibro Nuhanović, Muhamed Nuhanović, Nasiha Nuhanović and Rizo Mustafić were subsequently killed by Bosnian Serbs, as part of what the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ) later found to be acts of genocide.²

The decisions of the Court of Appeal add another chapter to the tortuous attempt of the Netherlands to deal with the conduct of Dutch peacekeeping troops in Srebrenica in 1995. In 2002, the government of then Prime Minister Wim Kok resigned after a report held it partly to blame for the failure of Dutchbat to offer protection in Srebrenica.³ At the time, the government accepted political, but not legal responsibility. Almost 10 years later, the Court of Appeal now has decided that the responsibility is not only political, but that Dutch conduct in regard to some events in Srebrenica also engages the legal liability of the Netherlands.

If the decisions of the Court of Appeal are not overturned by the Supreme Court,⁴ they will stand as groundbreaking rulings on the possibility of dual attribution of conduct to the UN and a troop-contributing state. In this brief article, I will first summarize the relevant facts (Section 2) and the disputed conduct (Section 3) and subsequently discuss questions of attribution (Section 4) and wrongfulness (Section 5).

2. Facts

The decisions of the Court of Appeal concern two cases with largely comparable facts. The legal reasoning of the Court in both cases is identical.

The first case was brought by Hasan Nuhanović, an interpreter who worked for Dutchbat. Ibro Nuhanović, Nasiha Nuhanović and Muhamed Nuhanović were respectively the father, mother and brother of Hasan Nuhanović.

- 1 *Gerechthof's-Gravenhage* (Court of Appeal), *Hasan Nuhanović v. Netherlands*, appeal judgment, LJN: BR5388, 5 July 2011, also published as *Nuhanović v. Netherlands*, appeal judgment, LJN: R5388; ILDC 1742 (NL 2011), 5 July 2011 (hereafter '*Nuhanović v. Netherlands*'); *Gerechthof's-Gravenhage*, *Mustafić v. Netherlands*, appeal judgment, LJN: BR5386, 5 July 2011.
- 2 See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, at 166 (hereafter '*Genocide Case, 2007*'); Judgment, *Krstić* (IT-98-33), Appeals Chamber, 19 April 2004, § 37.
- 3 See NIOD Institute for War, Holocaust and Genocide Studies, *Srebrenica, a 'safe' area - Reconstruction, background, consequences and analyses of the fall of a safe area* (2002), available at <http://www.srebrenica.nl/Content/NIOD/English/srebrenicareportniod.en.pdf> (visited 31 August 2011); Letter of the Dutch Prime Minister offering the resignation of the cabinet of the Netherlands, 16 April 2002, *Tweede Kamer* (House of Representatives of the Netherlands), Session 2001–2002, *Kamerstuk* (Parliamentary Paper) 28334, No. 1.
- 4 As no final decision in the present cases has been rendered, it is not yet known whether the state of the Netherlands will appeal for cassation. The Court of Appeal has postponed a final judgment on reparation until it examines a possible breach of the right to a fair trial in connection with a replacement of a judge in the District Court of The Hague.

On 12 July 1995, he was with other refugees inside the compound protected by Dutchbat. After Srebrenica had fallen, refugees were taken away by Bosnian Serbs. Local staff of Dutchbat employed by the UN, and with a UN identity card, were allowed to stay in the compound. Hasan Nuhanović had such a card, but Ibro, Nasiha and Muhamed Nuhanović were compelled to leave the compound. All three were subsequently killed.

The second case was brought by relatives of Rizo Mustafić, who had since 1994 been working as electrician for Dutchbat. After the fall of Srebrenica, Rizo Mustafić had sought refuge on the compound with his family. Though he wanted to stay, he was removed from the compound. He was then separated from his family and killed by Bosnian Serbs.

The main claim in both cases was that the state had committed a wrongful act (tort) and that it should compensate any damage incurred as a consequence of that wrongful act.

In September 2008, the District Court of The Hague rejected the claims in both cases, holding that the acts of Dutchbat could only be attributed to the UN.⁵ Hasan Nuhanović and the family of Mustafić then appealed.

The Court of Appeal in The Hague quashed the first instance judgment of the District Court and found that the disputed conduct was attributable to the Netherlands, and that the Netherlands had acted wrongfully.⁶

3. The Disputed Conduct

The Court only ruled on the actual removal of the family of Hasan Nuhanović and Rizo Mustafić from the compound, not on any failure of the Netherlands to subsequently protect them. A claim that the Netherlands (and the UN) had failed to offer protection to Bosnian men has been made in a parallel, but otherwise unrelated, case brought on behalf of the group Mothers of Srebrenica.⁷

While in these present cases the plaintiffs based their claims on both the removal of Mustafić and the family members of Nuhanović from the compound and on the failure to intervene when Mustafić and the brother and father of

5 *Rechtbank's-Gravenhage* (District Court), *HN v. Netherlands* (Ministry of Defence and Ministry of Foreign Affairs), judgment, LJN: BF0181/265615; ILDC 1092 (NL 2008), 10 September 2008 (hereafter '*HN v. Netherlands*').

6 Below I will refer to the holdings in the *Nuhanović* case. As noted, the holdings of the Court in the *Mustafić* case are identical.

7 The application instituting proceedings is available online at [http://www.vandiepen.com/nl/srebrenica/detail/73-1-dagvaarding-\(4-juni-2007\).html](http://www.vandiepen.com/nl/srebrenica/detail/73-1-dagvaarding-(4-juni-2007).html) (visited 1 September 2011). The claim against the Netherlands has not yet been considered in first instance, while the claim against the UN is currently pending before the Dutch Supreme Court, after the Court of Appeal decided that it does not have jurisdiction to deal with the claim against the UN in view of the immunity of the UN, see *Gerechtshof's-Gravenhage, Mothers of Srebrenica v. the Netherlands and the United Nations*, appeal judgment, LJN: BL8979, 30 March 2010 (hereafter '*Mothers of Srebrenica*'); this will be discussed below. Section 4C.

Nuhanović were (outside the compound) separated from their relatives,⁸ the Court only ruled on the first of these claims. The plaintiffs asked the Court to establish that the state had committed a wrongful act (tort) and that it should compensate any damage incurred as a consequence of that wrongful act. Since the Court could sustain this request on the basis of its findings in regard to the first claim (concerning the removal), considering the second claim (concerning the failure to intervene) would not have led to a different outcome and thus the Court did not consider that claim.⁹ This means that the judgments in respect of the wrongfulness of the conduct of the Netherlands only concern the active removal of Mustafić and the family members of Nuhanović from the compound.

This limits the possible relevance of the decisions to other claims in connection with the conduct of Dutchbat in Srebrenica (notably the abovementioned parallel case brought by the *Mothers of Srebrenica*), as well as for other possible claims against states that contribute troops to peacekeeping operations. However, particular aspects of the decisions may still be relevant. For instance, the Court did discuss whether the Netherlands was obliged to prevent the concerned conduct, and whether it had the legal authority to do so — though not as a basis for a finding on wrongfulness, but as a basis for attribution.

4. Attribution of Conduct

A. Applicable Law

A preliminary issue was whether the question of attribution should be decided solely on the basis of international law or on the basis of national law (which, as a matter of Dutch private international law, then would have been Bosnian law).

The Plaintiffs argued that the question of attribution should have been decided on the basis of national (i.e. Bosnian) law, perhaps in view of the case law on attribution of the European Court of Human Rights (ECtHR), which presents substantial hurdles to a finding of attribution of conduct to a troop-contributing state.¹⁰ The Court held otherwise. It found that this involved a question of attribution between two subjects of international law, and that the question of whether troops have been put at the disposal of the UN, and what the contents and consequences of an agreement to that effect are (including the consequences for a civil liability claim) should be solely assessed on the basis of international law.¹¹

⁸ *Nuhanović v. Netherlands*, *supra* note 1, at 3.1.

⁹ *Ibid.*, at 6.22.

¹⁰ See e.g. *Behrami and Behrami v. France; Saramati v. France, Germany and Norway* (dec) [GC], App. Nos 71412/01 and 78166/01, 2 May 2007.

¹¹ *Nuhanović v. Netherlands*, *supra* note 1, at 5.3.2.

The Court did add, however, that even if it had answered the question under Bosnian law, the outcome would have been the same. Since it found that Bosnian law did not contain a relevant rule on attribution, the Court would have had to rely on international law to fill the gap.¹²

B. Basis of Attribution

Having determined that the question of attribution was a question of international law, the decision of the Court of Appeal rests on a two-fold construction of the principles of attribution.

First, the Court determined that the proper standard for attribution is 'effective control'.¹³ It rejected the standard for attribution of conduct that was used by the District Court ('operational overall control'),¹⁴ the standard used by the ECtHR in the joined cases of *Behrami and Saramati* ('ultimate authority and control')¹⁵ as well as the position taken by the UN that peacekeeping troops are to be considered as subsidiary organs of the UN.¹⁶ The Court thus aligned itself with the criterion formulated by the International Law Commission (ILC). It referred to what originally was Article 6 and is now in Article 7 of the Draft Articles of the ILC on the Responsibility of International Organizations (DARIO), as adopted by the ILC on second reading on 3 June 2011.¹⁷

Second, the Court took the position that in order to determine whether the state had effective control over an act, it is not only relevant whether that act was an implementation of a specific instruction by either the UN or the state but also whether, 'if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned'.¹⁸ Thus, the removal of Nuhanović's family members and Mustafić from the compound could be attributed to the Netherlands, if the Netherlands *was able to prevent that removal*. The language used by the Court is a matter of some importance. The Court says, in Dutch, that to determine whether there is effective control, it is relevant whether the UN or the Netherlands '*het in zijn macht had het het desbetreffende optreden te voorkomen*'.¹⁹ The Court itself translates this phrase as 'had the power to prevent the conduct concerned', but because of the various

12 *Ibid.*, at 5.4.

13 *Ibid.*, at 5.8.

14 *Genocide Case*, *supra* note 2.

15 *Mothers of Srebrenica*, *supra* note 7; The ECtHR also used both standards in the *Al-Jedda* case: *Al-Jedda v. United Kingdom* [GC], App. No. 27021/08, 7 July 2011, at 84 (hereafter '*Al-Jedda v. United Kingdom*').

16 *Responsibility of international organizations. Comments and observations received from international organizations*, UN Doc. A/CN.4/637/Add.1, 17 February 2011, at 10, § 3.

17 Draft Articles on the Responsibility of International Organizations, with commentaries, *Report of the International Law Commission on the Work of its Sixty-third Session*, UN Doc. A/66/10, 26 April–3 June and 4 July–12 August 2011 (hereafter 'DARIO, with commentaries'), at 69.

18 *Nuhanović v. Netherlands*, *supra* note 1, at 5.9.

19 *Ibid.*

connotations of ‘power’, the translation in terms of ‘being able’ is to be preferred. Both the Dutch words and the translation can either be interpreted in legal or factual terms, and indeed the Court interpreted them in this dual meaning.

The approach taken by the Court is quite close to a position defended by Tom Dannenbaum in a recent piece on attribution in peacekeeping operations.²⁰ This piece was relied on by counsel for the plaintiffs and is cited by the Court²¹ (though on another point). Dannenbaum writes that ‘effective control ... is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question’.²² His interpretation aims at ‘ensuring that the actor held responsible is the actor most capable of preventing the human rights abuse’.²³ The Court’s approach bears a close similarity to this reasoning.

Saying that a state exercises effective control in regard to a particular act if it is able to prevent that act may be opening a door rather wide. For it would seem that a troop-contributing state always has the possibility to send orders or instructions to its nationals who serve in a UN operation, if this is necessary to make them act in a certain way or to prevent them from acting in a certain way. If one accepts ‘ability to control’ as the relevant standard, the conduct of peacekeeping forces by definition can be attributed to the state (whether or not in parallel to the UN), since there is always the possibility for that state to exercise control in a way that prevents the impugned conduct from occurring. Indeed, it is on this basis some scholars have taken the position that the conduct of peacekeeping troops can always be attributed to both the sending state and the UN.²⁴

While there is much to say for this position from a theoretical and a normative perspective, there is little practice that supports this broad construction. Equally, the comments by states and international organizations to the DARIO do not offer much support for this construction.

20 K.T. Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’, 51 *Harvard International Law Journal* (2010) 113–192.

21 *Nuhanović v. Netherlands*, *supra* note 1, at 5.8.

22 Dannenbaum, *supra* note 20, at 158.

23 *Ibid.*

24 See e.g. L. Condorelli, ‘Le statut des forces de l’ONU et le droit international humanitaire’, 78 *Rivista di diritto internazionale* (1995) 881–906; *Idem*, ‘Le statut des forces des Nations Unies et le droit international humanitaire’, in C. Emmanuelli (ed.), *Les casques bleus: policiers ou combattants?* (Montréal: Wilson & Lafleur, 1997) 87–113. Condorelli argues that while it is correct to state that the conduct of peacekeeping forces is attributable to the UN, it is not correct to thereby exclude the simultaneous responsibility of the troop-contributing state. ‘Il y a au contraire double imputation, et ceci pour deux raisons: la première est que les casques bleus, tout en étant mis à la disposition de l’Organisation par les Etats, restent soumis de façon continue à l’autorité nationale; la seconde est que par leurs actions s’exprime la puissance publique tant des N.U. que des Etats d’envoi’. *Ibid.*, at 897.

The Court backs away from this purely normative construction and emphasizes that effective control should be assessed in the concrete circumstances of the case, not (only) in terms of an abstract possibility to exercise control.²⁵ In its reasoning, whether control is effective control depends both on normative and factual control.

1. Normative Control

As to *normative control*, the Court connected the ability to prevent an act (and thus the existence of effective control) with the *legal power* (or the normative control) to do so. On this point three aspects should be distinguished.

First, the Court emphasized that a troop-contributing state retains formal power in regard to personal and disciplinary matters, as well as the ability to withdraw its troops.²⁶ It stated in connection with this that the removal of the family of Nuhanović and Mustafić from the compound was contrary to the instructions of General Gobillard to protect refugees, and that the state had the authority (or the legal power) to take disciplinary measures against these acts.²⁷ This points directly to possible attribution to the state. This finds some support in the ILC's commentary, which argues that attribution based on effective control is linked with the retention of these powers by the state.²⁸ This construction is also in line with the abovementioned construction of attribution by Dannenbaum, who argues that effective control is held by the entity that is best positioned to act effectively '*and within the law* to prevent the abuse in question'.²⁹

Second, the above reference to the instructions of General Gobillard suggests that the Court attributed legal relevance to the existence of legal obligations to prevent this conduct. It may be speculated that what the Court meant is that when a battalion fails to act to protect civilians in a situation where it *should* offer such protection (certainly if this is required by its mandate or by specific instructions given by the UN), the state not only can act, as a factual matter, but also has the legal authority to do so. While in this particular case, this reasoning has a rather narrow scope (it is limited to conduct in which specific individuals were evicted from the compound against the orders of the UN to protect them and indeed against both Bosnian law and international law) this would give the decisions a much wider relevance. If we accept an obligation of peacekeeping forces to protect (for instance on the basis of the

25 *Nuhanović v. Netherlands*, *supra* note 1, at 5.9.

26 *Ibid.*, at 5.10.

27 *Ibid.*, at 5.18.

28 DARIO, with commentaries, *supra* note 17, § 7 of Commentary to Art. 7. Here, the ILC states that '[a]ttribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect'.

29 Dannenbaum, *supra* note 20, at 158 (emphasis added).

Genocide Convention),³⁰ it may be argued that the state should on this basis intervene or at least take disciplinary measures against those who act contrary to this obligation. Such an obligation thus could not only provide a ground for wrongfulness but in the reasoning of the Court, also a ground for attribution. The decision is not very clear on this point, however, and one should be careful not to read too much into this, though it certainly is a matter that deserves further theoretical examination.

Third, the Court attributed legal relevance to the fact that the peacekeeping operation had entered a new phase on 11 July 1995. The Court found that during this process of evacuation, not only the UN but also the government of the Netherlands formally had authority (*'zeggenschap'*) over Dutchbat, because this concerned the preparation of the withdrawal of Dutchbat from Bosnia–Herzegovina.³¹

While this new situation (transition from Dutchbat as a functioning peacekeeping mission to its evacuation) primarily is relevant to explain the factual involvement of the Netherlands, it also has direct legal relevance. It allowed the Court to distinguish this case from the facts in the *Behrami and Saramati* case, which the Court considered as an example of the 'normal situation' in which troops have been put at the disposal of the UN. The distinguishing factor was that after 11 July 1995 the mission to protect Srebrenica had failed. As Srebrenica had fallen into the hands of the Bosnian Serbs, Dutchbat or UNPROFOR, would no longer continue the mission.³² The decision to evacuate Dutchbat and the refugees was taken in mutual consultation between UN Force Commander Janvier (on behalf of the UN) and high representatives of the Netherlands.³³

It is noted that it is by no means to be accepted as a given that in the 'normal' *Behrami and Saramati* type of situation acts would be exclusively attributed to the UN. Even in such cases a strong argument can be made that there can be dual attribution, and the judgment of the ECtHR was problematic on this point.³⁴

The judgments of the Court of Appeal bear some similarity to the decision of the Belgium Court of First Instance in Brussels of 8 December 2010. The Court found that the failure by the UN peacekeeping contingent in Rwanda to prevent the killing of Tutsis in the 1994 Rwandan genocide could be attributed to Belgium in a situation where the Belgian government had decided to

30 See e.g. Art. 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 11 July 1996, at 616, in which the ICJ notes that 'the obligation each State... has to prevent and to punish the crime of genocide is not territorially limited by the Convention', thereby indicating that third states (such as in this case the Netherlands) are under an obligation to prevent genocide.

31 *Nuhanović v. Netherlands*, *supra* note 1, at 5.18.

32 *Ibid.*, at 5.11.

33 *Ibid.*, at 5.12.

34 See e.g. A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami and Saramati* Cases', 8 *Human Rights Law Review* (2008) 151–170.

withdraw itself from the peacekeeping operation.³⁵ The Court of Appeal did not refer to this case.

It is to be added that while this legal context gave the Netherland legal authority to act, and allowed the Court to find that the Netherlands had effective control, it does not follow that in the *absence* of legal authority a troop-contributing state cannot exercise effective control. This was accepted by the District Court (which on this point was relied upon by the ILC), when it held that conduct of Dutchbat might have been attributable to the state:

[I]f Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands... The same is true if Dutchbat to a greater or lesser extent backed out of the structure of UN command, with the agreement of those in charge in the Netherlands, and considered or shown themselves as exclusively under the command of the competent authorities of the Netherlands for that part.³⁶

Thus, an (effective) instruction to the peacekeeping force will in all cases lead to a finding of effective control and thus to attribution to the troop-contributing state — with or without legal authority. What is specific for the cases at hand is that there was no instruction, but instead involvement combined with legal authority enabled the Netherlands to act — it was this ability that formed the basis of attribution.

2. Factual Control

As to *factual control*, the Court examined effective control *in concreto* and held that the disputed conduct in question (the removal of Nuhanović's family members and Mustafić from the compound) was directly connected to decisions and instructions of the government of the Netherlands.³⁷ After 11 July 1995, the UN and the Dutch government decided to evacuate Dutchbat as well as the refugees. The Court found that during this process of evacuation, the Netherlands was actively involved in the process itself. For instance, the Court noted that together with the UN Force Commander Janvier, two Dutch military officials took, on behalf of the Dutch government, the decision to evacuate Dutchbat and the refugees.³⁸ The Court concluded that the government in The Hague actually instructed the Dutch military officials. It also noted that the Dutch General Nicolai fulfilled a double role because he acted both for the UN and for the government of the Netherlands.³⁹

It is in this factual context that the removal of Mustafić and the family members of Nuhanović from the compound had to be assessed. The Court found

35 Belgium Court of First Instance, *Mukeshimana-Ngulinzira and others v. Belgium and others*, judgment, R.G. n° 04/4807/A and 07/15547/A; ILDC 1604 (BE 2010), 8 December 2010.

36 *HN v. Netherlands*, *supra* note 5, at 4.14.1.

37 *Nuhanović v. Netherlands*, *supra* note 1, at 5.19.

38 *Ibid.*, at 5.12.

39 *Ibid.*, at 5.18.

this removal was a consequence of the way in which the evacuation from the compound was organized and the way the instructions from the government were implemented.⁴⁰ The Court thus inferred from the fact that the government was closely involved in the evacuation that the removal of Mustafić and Nuhanović's family members from the compound should be attributed to the Netherlands. It significantly noted that if the government had given Dutchbat the order to keep Mustafić and Nuhanović's family on the compound, that order would have been implemented.⁴¹

In other words, it is not the abstract possibility that the state could intervene and order its nationals who act as part of a peacekeeping mission to act in a particular way that triggers effective control. Rather, it is the specific factual situation, in which the government in fact was so involved with the evacuation that it must be assumed that its orders are effective, that triggers effective control.

It might be argued that even if the Netherlands had until that moment not been involved at all, an order from The Hague to keep Mustafić and Nuhanović's family members on the compound would have been implemented in any case. In such a case, the Netherlands would not yet have exercised any form of control, but it always could have done so. However, that mere possibility would not have been sufficient as a basis of attribution in terms of the ILC's construction, and it appears that likewise for the Court it was not the abstract possibility of control that mattered, but the actual exercise of control, that made the possibility of prevention more than a theoretical one.

C. Dual Attribution

The choice for the criterion of effective control, in the way construed by the Court, implies that, in the words of the Court, 'it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party'.⁴² This part is one of the most important and potentially innovative aspects of the judgment. The Court's observation that the possibility of dual attribution is 'generally accepted'⁴³ may be somewhat of an overstatement. Though the possibility of dual attribution has indeed been acknowledged in legal scholarship,⁴⁴ and also recognized by

40 *Ibid.*, at 5.19–5.20.

41 *Ibid.*, at 5.18.

42 *Ibid.*, at 5.9.

43 *Ibid.*

44 See e.g. Condorelli, *supra* note 24; N. Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello and R. Piotrowski (eds), *International Military Missions and International Law* (Leiden: Martinus Nijhoff Publishers, forthcoming), who discusses the criterion of effective control as a prerequisite for attribution of wrongful conduct and recognizes the possibility of multiple attribution of conduct to both international organizations and troop-contributing states in case of application of this criterion; Sari, *supra* note 34; Dannenbaum, *supra* note 20.

the ILC,⁴⁵ the proper basis for such dual attribution is not well established. Indeed, the definition of effective control given by the ILC is unclear on whether there can be dual attribution if one of the actors involved exercises effective control. The ILC emphasized 'the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal',⁴⁶ and the question is whether and in what case such factual control over specific conduct can be exercised simultaneously by two actors.

Moreover, practice has provided little support for a general acceptance of dual attribution. The case law of the ECtHR, notably the *Behrami and Saramati* judgment, points in a different direction.⁴⁷ The ECtHR may have come back somewhat from its decision in the *Al-Jedda* case, rendered two days after the Nuhanović decision, which may be interpreted as recognizing the possibility of exclusive attribution.⁴⁸ In examining whether conduct of the Multi-National Force in Iraq could be attributed to the UK, the Court held that it 'does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or — more importantly, for the purposes of the case — ceased to be attributable to the troop-contributing nations.'⁴⁹ The Court did not state that where these acts *were* to be attributed to the UN, they would cease to be attributable to the troop-contributing state, and in that respect it may not have excluded the possibility of dual attribution,⁵⁰ as it did quite explicitly in *Behrami and Saramati*. However, the fact that the Court eventually based (part of) its finding on attribution on both the criterion of effective control and that of 'ultimate authority and control'⁵¹ may speak against this interpretation. Whereas it may be possible that more than one actor has effective control over acts of someone else (effective control, certainly as interpreted by the Court of Appeal in the present decisions, does not need to be exclusive control),⁵² it is more difficult to see that two different actors could both have 'ultimate' control.

45 See e.g. Art. 19 and Art. 63 of DARIO, with commentaries, *supra* note 17; see also DARIO, with commentaries, *supra* note 17, § 4, at 83.

46 DARIO, with commentaries, *supra* note 17, § 4, at 87–88.

47 In particular *Behrami and Behrami v. France; Saramati v. France, Germany and Norway* (dec) [GC], App. Nos 71412/01 and 78166/01, 2 May 2007, at 133.

48 *Al-Jedda v. United Kingdom*, *supra* note 15.

49 *Ibid.*, at 81.

50 M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg', 23 *European Journal of International Law* forthcoming (2012), at 19, states that '[This] is a crucial development, as the Court now essentially admits the possibility of dual or multiple attribution of the same conduct to the UN and to a state, a possibility that it did not entertain in *Behrami*'.

51 *Al-Jedda v. United Kingdom*, *supra* note 15, at 85, the ECtHR states that '[t]he internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom'.

52 As indicated above, this may be different from the ILC's interpretation, which emphasized 'the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'. However, note also that the ILC did attribute value to normative control, see DARIO, with commentaries, *supra* note 17, which in combination with factual control would provide a basis for dual attribution.

The Court of Appeal thus deviated from the approach of the ECtHR, and held that, based on its combined construction of normative and factual control, it is possible that one and the same act is attributed both to the UN and to the Netherlands. In view of its finding on the possibility of dual attribution, the Court of Appeal could leave aside the question of whether the UN possessed effective control,⁵³ and proceeded to examine whether the Netherlands had exercised effective control over the disputed action. That it could do so follows from the individual nature of attribution. In such a case of possible dual attribution, the question whether an act can indeed be attributed to the UN would not affect its attribution to the Netherlands.⁵⁴

The questions of the liability of the Netherlands and of the UN are not entirely unrelated, however. As noted above, parallel claims, pertaining to different facts were filed by the group, Mothers of Srebrenica, against both the Netherlands and the UN. In regard of the latter claim, the same Court of Appeal that rendered the decisions discussed here affirmed in 2010 that it did not have jurisdiction to evaluate the merits of the claim against the UN, in view of the immunity of the UN.⁵⁵ In that decision, the Court of Appeal recalled that the ECtHR 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 or her rights.⁵⁶ The Court found that this exception was not applicable since the Mothers of Srebrenica could still bring the individual perpetrators of the genocide, possibly including those responsible for the genocide, and the state of the Netherlands before a court of law.⁵⁷ This is a odd construction which totally deviates from the case law of the ECtHR, which was based on possible remedies within international organizations themselves. Moreover, in this particular case, with a very different factual situation from the *Mustafić* and *Nuhanović* cases, this may overestimate the legal strength of the claim against the Netherlands. However, one might read the Court's legal and factual findings in the present case (accepting liability of the Netherlands) as partly delivering on the expectations it created when it denied to judge on the responsibility of the UN by affirming its immunity.

53 *Nuhanović v. Netherlands*, *supra* note 1, at 5.9.

54 Compare Art. 19 and Art. 63 of DARIO, with commentaries, *supra* note 17, but note that a comparable article is not included in Chapter 2 of DARIO.

55 *Mothers of Srebrenica*, *supra* note 7. The plaintiffs have instituted proceedings in cassation with the Dutch Supreme Court. The application instituting proceedings in cassation is available online at [http://www.vandiepen.com/nl/srebrenica/detail/112-8\)-cassatiedagvaarding.html](http://www.vandiepen.com/nl/srebrenica/detail/112-8)-cassatiedagvaarding.html) (visited 1 September 2011).

56 *Ibid.*, at 5.2.

57 *Ibid.*, at 5.11–5.12.

5. Wrongfulness

Having found that the Netherlands had effective control and that the disputed conduct was attributable to the Netherlands, the Court then proceeded to consider the wrongfulness of the act.

The preliminary question was on the basis of which law such an examination should be made. The state of the Netherlands argued that the acts of Dutchbat in Bosnia–Herzegovina should be exclusively assessed on the basis of international law — as part of its attempt to convince the Court that the entire dispute was governed by international law and that a domestic court had no business in adjudicating these claims. The Court rejected that argument. It found that apart from questions of immunity, the conduct of peace-keeping forces remains subject to the national legal order, and in principle thus can lead to liability in a tort action under Bosnian law (which was the applicable law on the basis of Dutch rules of private international law).⁵⁸

The Court's handling of the applicable law (international or national) for the determination of wrongfulness thus differs from that pertaining to attribution. While the Court based attribution on international law, it based its finding on wrongfulness primarily on national law. This can be explained in part by the fact that the Court found that Bosnian law did not contain a relevant rule on attribution.⁵⁹ But as indicated above, for the Court this was only a subsidiary argument; its prime argument being that attribution between two subjects of international law should be decided on the basis of international law. While this may be true, the question should be raised whether the legal status of individuals in international law implies that the question of wrongfulness, and responsibility, should also be considered under international law, which would allow the Court to maintain a connection between primary and secondary rules. For the outcome this probably would not have made a difference, but from the perspective of international law it would have been a more consistent approach.

The Court did however recognize the possibility of basing wrongfulness on international law. Even though the Court opted for a determination of wrongfulness under Bosnian law, it added that the acts were also wrongful based on a breach of the principles contained in Articles 2 and 3 of the European Convention on Human Rights (ECHR) and Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) (right to life and right to freedom from inhuman treatment), arguing that these principles have to be considered as part of customary international law that binds the state of the Netherlands.⁶⁰ The Court added that it assumed the state of the Netherlands, which had argued that these treaties were not applicable to acts of Dutchbat in Bosnia, did not aim to argue that it should not comply with the principles contained in Articles 2 and 3 of the ECHR and Articles 6 and 7

⁵⁸ *Nuhanović v. Netherlands*, *supra* note 1, at 5.5.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 6.3.

of the ICCPR during peacekeeping missions, such as that of Dutchbat.⁶¹ Given the controversial nature of the applicability of human rights standards in (by definition extraterritorial) peacekeeping operations, this seems a somewhat bold assumption, but the state of the Netherlands did not have the opportunity to prove this assumption wrong.

The Court did not consider the argument that these human rights treaties may have been applicable based on effective control of the compound — an argument that was supported by the judgment of the ECtHR two days later in the case of *Al-Skeini and others*.⁶² Perhaps to protect itself against claims that the application of human rights standards to extraterritorial military actions is controversial, the Court stated that the rights contained in the ECHR and the ICCPR are part of customary international law (leaving aside whether, in this move from treaty law to customary law, the jurisdictional aspect can be disconnected from the substantive rights) and moreover added that, on the basis of Article 3 of the Constitution of Bosnia–Herzegovina, the rights in question have direct effect. The Court also stated that since in any case the ICCPR was in force for Bosnia in 1995, Articles 6 and 7 of the ICCPR are part of Bosnian domestic law and have supremacy over any conflicting rules of Bosnian law.⁶³

The Court determined on the basis of the facts that the commanders in question (Karremans and Franken) should have known that the Bosnian men who were to be ‘evacuated’ from the compound faced a real risk of being killed or at least being subjected to inhuman treatment.⁶⁴ It followed that Dutchbat, on the basis of Bosnian law, as well as the directly applicable rights contained in the ICCPR, was not allowed to send Mustafić and the family members of Nuhanović out of the compound and that the state had thus acted wrongfully. The Court added that Mustafić and Nuhanović’s family members would have been alive if they had not been removed, and that thus there was a causal connection between the removal and their death.⁶⁵ In contrast to the ICJ’s consideration of the relationship between Serbia’s failure to prevent and the eventual genocide, the Court did not address the possible intervening factors that could have broken the causal chain.⁶⁶

The Court concluded that, on the basis of Article 155 of the Law of Contracts of Bosnia and Herzegovina, the Netherlands is liable for the immaterial damage to the plaintiffs in this case.

The Court has not made a final ruling on reparation due to the fact, referred to above, that it still wishes to examine a possible breach of the right to a fair trial in connection to a replacement of the judges in the District Court.

61 *Ibid.*

62 *Al-Skeini and others v. the United Kingdom* [GC], App. No. 55721/07, 7 July 2011.

63 *Nuhanović v. Netherlands*, *supra* note 1, at 6.4.

64 *Ibid.*, at 6.7.

65 *Ibid.*, at 6.14.

66 *Genocide Case*, *supra* note 2, at 234.

6. Conclusion

In many respects, this was a 'hard case'. The voluntary eviction of Dutchbat's own employees and their family members, in the face of clear evidence of threats of death and genocide, while there were ample opportunities to offer protection, constitutes a rather unique and extreme set of facts. It seems inevitable that these facts influenced the interpretation and construction of the relevant legal principles.

Whether these decisions will survive a challenge in the Dutch Supreme Court remains to be seen, but it should be observed that the Supreme Court cannot revisit the facts, and the judgments are very much 'facts-driven'. Similarly, the Supreme Court cannot revisit questions of foreign (Bosnian) law. If the Supreme Court annuls these decisions, it would have to be based on a different interpretation of the principles of international law — something that the Supreme Court has not often done. The decisions of the Court of Appeal in large part are solidly based in positive international law. The decisions are not without problems or unclarity, in particular in the construction of effective control and the relevance of obligations for attribution, but on the whole it is an important contribution to the clarification and development of the principles pertaining to the (dual) attribution of acts of peacekeeping troops. In particular the departure from the dominant black and white approach that was adopted in the *Behrami and Saramati* case, is to be welcomed.

Given the unique facts, and given the fact that attribution was based on the active involvement of the Netherlands in the evacuation process (a mere possibility to intervene would not have been enough) and that the case rests largely on the fact that the mission *de facto* had been completed, one should be very cautious in using the judgments as a possible basis for other claims in regard to liability of troop-contributing countries.

However, the main message of the Court of Appeal (effective control, and thus attribution, depends on a test of 'appreciation *in concreto* of the ability to prevent') may apply to broader situations. Depending on the facts, attribution can be approached as a sliding scale that includes on its far side exclusive attribution to the UN and exclusive attribution to a troop-contributing state. In the middle of this continuum, in factual situations where both the state and the UN have normative control and are factually involved, dual attribution is the proper approach, allowing for a responsibility that is shared between multiple actors.⁶⁷

67 See generally A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Concept Paper', (2011), available at SSRN: <http://ssrn.com/abstract=1916575> (visited 5 October 2011).