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Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica

André Nollkaemper*

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 command of the United Nations peacekeeping force 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 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 cope 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 no legal responsibility. Almost ten years later, the Court of Appeal now has decided that the responsibility is not only political, but that the Dutch conduct in regard to some events in Srebrenica also has engaged the legal liability of the Netherlands.

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¹ *Gerechtshof '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; *Gerechtshof 's Gravenhage* (Court of Appeal) *Mustafić v Netherlands*, Appeal judgment, LJN: BR5386, 5 July 2011.

² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (2007) 43, at 166; Judgment, *Krstić* (IT-98-33), Appeals Chamber, 19 April 2004, § 37.

³ See Report by the 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 online 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.

When not overturned by the Supreme Court,⁴ the decisions of the Court of Appeal will stand as groundbreaking rulings on the possibility of dual attribution of conduct to the United Nations (UN) and a troop contributing state. In this brief case-note, 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 Appeals 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. On 12 July 1995, he was with other refugees inside the compound protected by Dutchbat. After Srebrenica had fallen, the refugees were taken away by the Bosnian Serbs. Local staff of Dutchbat who were employed by the UN and had 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 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, Mustafić had sought refuge on the compound with his family. Though he wanted to stay, he was removed from the compound. He then was 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.

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 Appeals has postponed a final judgment on reparation until has examined a possible breach of the right to a fair trial in connection to a replacement of the judges in the District Court – a matter that is left aside in this commentary.

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 Nuhanović and Mustafić then appealed.

The Court of Appeal in The Hague quashed the first instance judgment of the District Court. It found that the disputed conduct was attributable to the Netherlands, that the Netherlands had acted wrongfully, and that Nuhanovic has suffered and will yet suffer as a result from the death of Muhamed and Ibro Nuhanovic.⁶

3. The Disputed Conduct

The Court only ruled on the actual removal of Nuhanović and 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 of Bosnian men has been made in a parallel, but otherwise unrelated case brought on behalf of the Mothers of Srebrenica.⁷

While in the present cases plaintiffs based their claims on both the removal of Mustafić and Nuhanović from the compound and on the failure to intervene when Mustafić and Nuhanović were (outside the compound) separated from their relatives,⁸ the Court only ruled on the first of these claims. The plaintiffs had 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 the Court thus did not

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

⁶ *Gerechtshof 's Gravenhage* (Court of Appeal) *Hasan Nuhanović v. Netherlands*, Appeal judgment, LJN: BR5388, 5 July 2011, at 6.21. 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* (Court of Appeal), *Mothers of Srebrenica v. the Netherlands and the United Nations*, Appeal judgment, LJN: BL8979, 30 March 2010; this will be discussed below, section 4.C.

⁸ *Gerechtshof 's Gravenhage* (Court of Appeal) *Hasan Nuhanović v. Netherlands*, Appeal judgment, LJN: BR5388, 5 July 2011, at 3.1.

consider that claim.⁹ This means that the judgment in respect of the wrongfulness of the conduct of the Netherlands only concerns the active removal of Nuhanović and Mustafić from the compound.

This limits the possible relevance of the decision for other claims in connection to 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 who contribute troops to peacekeeping operations. However, particular aspects of the decision may still be relevant. For instance, the Court did discuss whether the Netherlands was obliged to prevent, 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 should have been Bosnian law).

Plaintiffs had 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 on Human Rights (ECtHR), which present 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 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 solely be assessed on the basis of international law.¹¹

The Court did add, however, that even if it would have answered the question under Bosnian law, the outcome would have been the same. Since it found that Bosnian law

⁹ *Ibid.*, at 6.22.

¹⁰ See e.g. *Behrami and Behrami v France; Saramati v France, Germany and Norway* (dec) [GC], no. 71412/01 and no. 78166/01, 2 May 2007.

¹¹ *Supra* note 8, at 5.3.2.

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 *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 what is now in Article 7 of the Draft Articles of the ILC on the Responsibility of International Organizations, as adopted by the ILC on second reading on 3 June 2011.¹⁷

Second, the Court took the position that for determining 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 United Nations or the state,

*‘but also to the question 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 and Mustafić from the compound could be attributed to the Netherlands, if the Netherlands *was able to prevent that removal*. The language

¹² *Ibid*, at 5.4.

¹³ *Ibid*, at 5.8.

¹⁴ *Supra* note 2.

¹⁵ *Supra* note 7. The ECtHR also used both standards in the *Al-Jedda* case; *Al-Jedda v. United Kingdom* [GC], no. 27021/08, 7 July 2011, at 84.

¹⁶ *Report of the International Law Commission on the Work of its sixty-first Session (Draft Articles on the Responsibility of International Organizations, with commentaries)*, UN Doc A/64/10, 4 May to 5 June and 6 July to 7 August 2009, §5, at 64.

¹⁷ *ILC Draft Articles on Responsibility of International Organizations*, UN Doc A/CN.4/L.778, 30 May 2011 (DARIO).

¹⁸ *Supra* note 8, para 5.9.

used by the Court is a matter of some importance. The Court says, in Dutch, that for determining whether there is effective control, it is relevant whether the UN or the Netherlands ‘het in zijn macht had het desbetreffende optreden te voorkomen’.¹⁹ The Court itself translated this by ‘had the power to prevent the conduct concerned’, but because of the various 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 on 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 open a wide door. Does a troop contributing state not always have the possibility to send orders or instructions to its nationals who serve in a UN operation if that is necessary to make them act in a certain way or to prevent them from acting in a certain way? If one accepts this position, conduct of peace keeping forces almost by definition can be attributed to the state (whether or not in parallel to the UN), since there was always the possibility for that the state to exercise control in a way that prevents the impugned conduct from occurring. Indeed, on this basis some

¹⁹ *Ibid.*

²⁰ 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* (*Harv. Int’l L.J.*), (2010), 113-192.

²¹ *Supra* note 8, at 5.8.

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

²³ *Ibid.*

scholars have taken the position that conduct of contributing 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 has been little practice that supports this broad construction. Likewise, the comments by states and international organizations to the DARIO do not offer much support for this construction.

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 the *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 to withdraw the troops.²⁶ It stated in this connection that the removal 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: 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 argued that attribution based on

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 ; id, ‘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 United Nations, it is not correct to hereby 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.’

²⁵ *Supra* note 8, at 5.9.

²⁶ *Ibid*, at 5.10.

²⁷ *Ibid*, at.5.18.

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 (emphasis added).

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. 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 that is required by the mandate or by specific instructions given by the UN), the state not only can as a factual matter act, 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 by which specific individuals were evicted from the compound against orders of the UN to protect them and indeed against both Bosnian 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 Genocide Convention³⁰), 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. Such an obligation thus could not only provide a ground for wrongfulness but, in the reasoning of the Court of Appeals, 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. The Court found that during this process of evacuation, not only the United Nations but also the government of the Netherlands

²⁸ *Supra* note 16, §6, at 65. 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.

³⁰ See e.g. Article 1 *1948 Convention on the Prevention and Punishment of Genocide; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (1996) 595, 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’, hereby indicating that third states (such as in this case the Netherlands) are under an obligation to prevent genocide.

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 of a functioning peace keeping mission to the evacuation of Dutchbat) 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* case, that the Court considered as an example of the 'normal situation' in which troops that have been put at this disposal of the UN function. The distinguishing factor was that after July 11 the mission to protect Srebrenica had failed. As Srebrenica had fallen in 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 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* type of situation the acts would exclusively be attributed to the UN. Even in such cases a strong argument can be made that there can be double attribution, and the judgment of the ECtHR was problematic on this point.³⁴

The judgment of the Court of Appeals bears some similarity to the decision of the Belgium Court of First Instance of Brussels of 8 December 2010. That Court found that the failure by the UN peacekeeping contingent to prevent the killing of Tutsis' in the 1994 Rwanda genocide could be attributed to Belgium in a situation where the Belgian government had decided to withdraw itself from the peacekeeping operation.³⁵ The Court 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), that held that conduct of Dutchbat might have been

³¹ *Supra* note 8, 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 (H.R.L.Rev.)* (2008) 151-170.

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

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 Dutchbat will in all cases lead to a finding of effective control and thus to attribution to the Netherlands – with or without legal authority. What is specific for the case at hand is that there was no instruction, but an involvement combined with legal authority that enabled the Netherlands to act – it was that ability that was the basis of attribution.’

2. *Factual control*

As to the *factual control*, the Court appreciated effective control *in concreto* and states that the disputed conduct in question (the removal of Nuhanović and Mustafić from the compound) was directly connected to decisions and instructions of the government of the Netherlands.³⁷ After 11 July, the UN and the Dutch government had decided to evacuate Dutchbat with the refugees. The Court found that during this process of evacuation, the Netherlands was actively involved in the process of evacuation. For instance, the Court noted that together with 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 notes 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 Nuhanović and Mustafić from the compound has to be assessed. The Court found this to be a consequence of the way in which the evacuation from the compound was organized and the way the instructions

³⁶ *Supra* note 5, at 4.14.1.

³⁷ *Supra* note 8, at 5.19.

³⁸ *Ibid*, at 5.12.

³⁹ *Ibid*, at 5.18.

from the government were implemented.⁴⁰ The Court thus inferred from the fact that the Netherlands Government in fact was closely involved in the evacuation that the removal of Mustafić and Nuhanović from the compound had to be attributed to the Netherlands. It tellingly noted that if the Government would have given Dutchbat the order to keep Mustafić and Nuhanović on the compound, that order would have been implemented.⁴¹

In other words: it was 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 was the specific factual situation in which the government in fact was so involved with the evacuation that it has be assumed that its orders would have been 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 on the compound would have been implemented just as well. 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.

⁴⁰ *Ibid*, at 5.19-5.20.

⁴¹ *Ibid*, at 5.18.

⁴² *Supra* note 8, at 5.9.

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 the ILC recognized the possibility of dual attribution,⁴⁵ the proper basis for such dual attribution is not well established. Indeed, the definition of effective control given by the ILC makes it unclear 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 cases such factual control over specific conduct can be exercised simultaneously by two actors.

Moreover, practice has provided little support of a general acceptance of dual attribution. The case-law of the ECtHR, notably the *Behrami*, judgment, points in a different direction.⁴⁷ The ECtHR may have come back somewhat from that decision in the *Al-Jedda* judgment, rendered two days after the *Nuhanović* decision, which may be interpreted as recognizing the possibility of dual attribution.⁴⁸ In examining whether conduct of the Multi-National Force in Iraq could be attributed to the United Kingdom, the Court did not consider that 'as a result of the authorization 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 in case these acts *were* to be attributed to the UN, they would cease to be attributable to the troop-contributing states, and in that respect it may not have excluded the possibility of dual attribution,⁵⁰ as it did quite explicitly in *Behrami*.

⁴³ *Ibid.*

⁴⁴ See e.g. Condorelli, *supra* note 24; N. Tzagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello, and R. Piotrowski (eds.), *International Military Missions and International Law* (Brill, forthcoming), whom 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.

⁴⁵ See e.g. Articles 19 and 63 *ILC Draft Articles on the Responsibility of International Organizations*, UN Doc A/CN.4/L.778, 30 May 2011 (DARIO); see also *supra* note 16, §4, at 56.

⁴⁶ *Supra* note 16, §3, at 63.

⁴⁷ In particular *Behrami and Behrami v France; Saramati v France, Germany and Norway* (dec) [GC], no. 71412/01 and no. 78166/01, 2 May 2007, at 133.

⁴⁸ *Al-Jedda v. United Kingdom* [GC], no. 27021/08, 7 July 2011.

⁴⁹ *Ibid.*, at 81.

⁵⁰ M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg', 23 *European Journal of International Law (EJIL)* (2012, forthcoming) at 19, states that '[This] is a crucial development, as the Court now

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 Appeals in the present decision, does not need to be exclusive control),⁵² it is more difficult to see that two different actors could both have ‘ultimate’ control.

The Court of Appeals thus deviated from the approach of the ECtHR, and held, based on its combined construction of normative and factual control, that it is well 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 whether the United Nations 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 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 ‘Mothers of Srebrenica’ against both the Netherlands and the United Nations. In regard of the latter claim, the same Court of Appeals 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 United Nations.⁵⁵ In that

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 *Supra* note 48, 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 for 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 *supra* note 28, which in combination with factual control would provide a basis for dual attribution.

⁵³ *Supra* note 8, at 5.9.

⁵⁴ Compare Articles 19 and 63 *ILC Draft Articles on Responsibility of International Organizations*, UN Doc A/CN.4/L.778, 30 May 2011 (DARIO), but note that a comparable article is not included in Chapter 2 of the DARIO.

⁵⁵ *Gerechtshof ‘s Gravenhage* (Court of Appeal), *Mothers of Srebrenica v. the Netherlands and the United Nations*, Appeal judgment, LJN: BL8979, 30 March 2010. The plaintiffs have instituted proceedings in cassation with the Dutch Supreme Court. The Application instituting proceedings in

decision, the Court of Appeals 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 its 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 perpetrators, and the state of the Netherlands before a court of law.⁵⁷ In that particular case, with a very different factual situation than in the Mustafić and Nuhanović cases, this may overestimate the legal strength of the claim against the Netherlands, and it is not really clear what the Court had in mind when it referred to possible claims against individual perpetrators. 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 may have created when it denied to judge on the wrongfulness of conduct of the UN by affirming its immunity.

5. Wrongfulness

Having found that the Netherlands had effective control and that the disputed conduct had to be attributed to the Netherlands, the Court then proceeds to consider the wrongfulness of the act.

The preliminary question was on the basis of what law such an examination had to be made. The state of the Netherlands had argued that the acts of Dutchbat in Bosnia-Herzegovina should exclusively be assessed on the basis of international law – as part of its attempt to convince the Court that the entire dispute was governed by questions of international law and that a domestic court had no business in adjudicating the claims. The Court rejected that argument. It found that apart from questions of immunity, 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 (that was the applicable law on the basis of Dutch rules of private international law).⁵⁸

The Court's handling of applicable law (international or national) for determination of wrongfulness thus differs from that pertaining to attribution. While the Court bases

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.

⁵⁸ *Supra* note 8, at 5.5.

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, and it thus had to resort to international law.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.

The question should be raised whether the legal status of individuals in international law should not imply that also the question of wrongfulness, and responsibility, should be considered under international law, which would allow the Court to maintain a connection between primary and secondary rules.

The Court did recognize the possibility of basing wrongfulness on international law. Even though the Court opts for determination of wrongfulness under Bosnian law, it adds that the acts were also wrongful based on a breach of the principles contained in Articles 2 and 3 ECHR and 6 and 7 ICCPR (right to life and right to freedom from inhumane treatment), arguing that these principles have to be considered as part of customary international law that bind the state.⁶⁰ The Court adds that it assumes that the state, which had argued that the 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 ECHR and 6 and 7 ICCPR during peacekeeping missions such as that of Dutchbat.⁶¹ Given the controversial nature of the applicability of human rights standards in (by definition extra-territorial) peace keeping operations, this seems a somewhat bold assumption, but the state did not have a chance to prove that assumption wrong. In any case, while the Court thus recognized that it could determine not only attribution but also wrongfulness on the basis of international law, it does not appear that the Court viewed its conclusion as a determination of responsibility under international law, but rather as a determination of wrongfulness, and a tort, or liability, under national law.⁶² The Court did not consider the argument

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 6.3.

⁶¹ *Ibid.*

⁶² This is indeed suggested by par. 6.20 of the Judgment. Note that the Court uses the term liability as a concept of domestic tort law, distinct from 'international responsibility' or from liability as it has been used in international law discourse, and as it has been proposed in the Shares Project, as referring to reparations. See on the latter A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Concept Paper' (2011). Available at SSRN: <http://ssrn.com/abstract=1916575>, par. 3.4.

that the human rights treaties may have been applicable based on effective control on the compound – an argument that was supported by the judgment of the ECtHR two days later in *Al-Skeini and Others v. the United Kingdom*.⁶³ Perhaps to protect itself against claims that the application of human rights standards to extraterritorial military actions is controversial, the Court stated that principles of the ECHR and the ICCPR were part of customary law (leaving aside whether in this move from treaty law to customary law the jurisdictional aspect could be disconnected from the substantive rights) and moreover added that on the basis of art. 3 of the Constitution of Bosnia-Herzegovina, the rights in question have direct effect and that since in any case the ICCPR was in force for Bosnia in 1995, Articles 6 en 7 ICCPR are part of the Bosnian law and have supremacy over any conflicting rules of Bosnian law.⁶⁴

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 inhumane treatment.⁶⁵ It followed that Dutchbat on the basis of Bosnian law, as well as the directly applicable rights of the ICCPR, was not allowed to send Mustafić and Nuhavonić from the compound and that the state thus acted wrongfully. The Court added that Mustafić and Nuhanović would have been alive if they would not have been removed, and that there thus was a causal connection between the removal and their death.⁶⁶ In contrast to the ICJ’s consideration of the relationship between Serbia’s failure to prevent and the eventual genocide that occurred, the Court did not consider any possible intervening factors that broke the causal chain.⁶⁷

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 damages suffered by the plaintiffs.

⁶³ *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011.

⁶⁴ *Supra* note 8, at 6.4.

⁶⁵ *Ibid*, at 6.7.

⁶⁶ *Ibid*, at 6.14.

⁶⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (2007) 43, at 234.

The Court did not yet make a final ruling on compensation due to the fact 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.

6. Conclusion

In many respects, this was a ‘hard case’. The voluntary eviction of own employees, in the face of clear evidence of threatened death and genocide, while there were ample possibilities 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 the decision will survive a possible cassation with the Supreme Court remains to be seen, but it should be observed that the Supreme Court cannot revisit the facts, and the judgment is very much ‘facts-driven’. Likewise, the Supreme Court cannot revisit questions of foreign (Bosnian) law. If the Supreme Court would annul the decision, 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 decision of the Court of Appeal in large part is solidly based in positive international law. It is not without problems or unclarity, in particular in its 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 *Behrami*, 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 judgment 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 extremes 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.

The reasoning of the Court of Appeals is largely determined and coloured by its consideration of Dutch law and, under the rules of Dutch international private law, Bosnian national law. Thus, while it used international principles of attribution and at least as a subsidiary argument considered international human rights as basis for a determination of wrongfulness, its conclusion on wrongfulness (tort, or liability) was based on national, not international law. However, this does limit the relevance of the case from the perspective of international law.

First, once the conditions of attribution and wrongfulness are satisfied, this would also as a matter of international law result in an internationally wrongful act, and thus in the international responsibility of a state that could be shared with the responsibility of the United Nations. Also in this respect, though grounded in domestic law, the judgment of the Court of Appeals has a relevance for the law of international responsibility and more in particular for the possibility of shared responsibility.⁶⁸

Second, it can be argued that liability under national law, certainly if in part based on international principles, is a part of the accountability puzzle caused by the osmosis between international and national legal orders, and that such determinations of liability thus are only one set of possible responses to transgressions of international obligations, that should be considered in conjunction with responsibility under international law proper.⁶⁹

⁶⁸ See Nollkaemper and Jacobs, *supra* note 62, par. 4.3.

⁶⁹ *Id.*, par. 5.1.3 (referring in this context to ‘shared accountability’).