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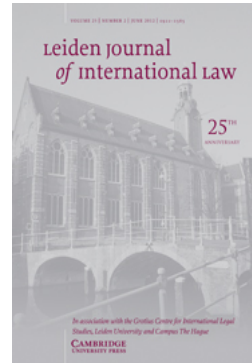
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## Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping

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# Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peacekeeping

BÉRÉNICE BOUTIN\*

## Abstract

In *Nuhanović* and *Mustafić* (5 July 2011), the Court of Appeal of The Hague held the Netherlands liable under Bosnian torts law in relation to acts of Dutchbat in the days following the fall of Srebrenica. The claims were brought by relatives of victims killed by Mladić’s troops after being evicted from the Dutchbat premises, where they had sought refuge. When resorting to international law to attribute the conduct to the Netherlands, the Court shed light on the concrete meaning of ‘effective control’ when a wrongful conduct does not result from direct orders, thereby clarifying some of the questions surrounding the determination of responsibility for conducts in the framework of international organizations.

## Key words

attribution; effective control; liability; responsibility; wrongfulness

## I. INTRODUCTION

Two important decisions holding the Netherlands responsible in relation to the conduct of a Dutch battalion of peacekeepers (Dutchbat) in the days that followed the fall of the city of Srebrenica in July 1995 were rendered by the Dutch Court of Appeal of The Hague on 5 July 2011.<sup>1</sup> In these two quasi-identical judgments, the Court held the Netherlands responsible for the death of Rizo Mustafić, Ibro Nuhanović, and Muhamed Nuhanović following their removal by Dutchbat from the compound in which they had sought refuge. By reversing the first-instance decisions,<sup>2</sup> the Court of Appeal allowed victims to engage the share of responsibility

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1 *Hasan Nuhanović v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN: BR5388; 200.020.174/01; ILDC 1742 (NL 2011), English translation available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388> (hereinafter, *Nuhanović*); *Mehida Mustafić-Mujić, Damir Mustafić, and Alma Mustafić v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN: BR5386; 200.020.173/01, English translation available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386> (hereinafter, *Mustafić*).

2 *H. N. v. the Netherlands*, District Court in The Hague, Civil Law Section (10 September 2008), LJN: BF0181; 265615/HA ZA 06-1671; ILDC 1092 (NL 2008), English translation available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0181> (hereinafter, *Nuhanović*, first instance); *M. M.-M., D. M. and A. M. v. the Netherlands*, District Court in The Hague, Civil Law Section (10 September 2008), LJN: BF0182; 265618/HA ZA

borne by the Dutch state in relation to the massacre of Srebrenica.<sup>3</sup> It should be insisted that the claims in the cases at hand did not focus on an alleged failure of Dutchbat to prevent genocide in Srebrenica, and concerned the fate of some of the civilians that had sought refuge in the premises where Dutchbat had pulled back.

The relatively well-known events that gave rise to the claims deserve to be briefly outlined, keeping in mind that some of the factual details were debated by the parties before the Court. Dutchbat was in charge of protecting the area of Srebrenica, as part of the efforts of the United Nations Protection Force (UNPROFOR) during the Yugoslav conflict. The city of Srebrenica and its surroundings were declared a 'safe area' by United Nations Security Council Resolution 819<sup>4</sup> after it had become a Muslim enclave besieged by the Bosnian Serb Army in 1993. The Netherlands was willing to provide a contingent for the implementation of the safe area and Dutchbat took charge of the Srebrenica zone in March 1994.<sup>5</sup> Most troops were not in the city itself but in an abandoned industrial compound in Potočari, in the city's surroundings. On 11 July 1995, the Bosnian Serb Army, under the command of Mladić, attacked and took over the city of Srebrenica. The Dutchbat troops present in the city retreated to the compound, followed by a flow of civilians seeking refuge in Potočari.<sup>6</sup> Only part of them could be admitted inside the premises, amongst whom was Hasan Nuhanović, who was working as an interpreter for Dutchbat employed by the United Nations, together with his parents Ibro Nuhanović and Nasiha Nuhanović-Mehinagić and his brother Muhamed Nuhanović,<sup>7</sup> as well as Rizo Mustafić, an electrician working for Dutchbat, with his wife Mehida Mustafić-Mujić and children Damir and Alma Mustafić.<sup>8</sup>

As military officials understood that the enclave was lost<sup>9</sup> and that the mission to protect Srebrenica had failed,<sup>10</sup> it was decided to withdraw Dutchbat and evacuate the compound. How this decision was taken and implemented was a central question in the cases before the Court of Appeal.<sup>11</sup> During the preparation of the evacuation, Commander of Dutchbat, Karremans, held meetings with Mladić to negotiate the modalities of the withdrawal. Mladić, who assured that he was not targeting the civilian population and was willing to help, became in charge of the evacuation of the refugees.<sup>12</sup> The Bosnian Serb Army started to take refugees away on 12 July 1995 but, the following day, Dutchbat had received various indications that refugees, specifically able-bodied men, 'were deported in order to be killed or to suffer serious

06-1672, English translation available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0182> (hereinafter, *Mustafić*, first instance).

3 The Court of Appeal has, however, not yet decided on the question of damages, as a time extension was granted to the victims for collecting evidence with regard to one of their claims concerning the replacement of a judge in the District Court trial; see *Nuhanović and Mustafić*, *supra* note 1, para. 8.5.

4 UN Doc. S/RES/819 (1993).

5 *Nuhanović and Mustafić*, *supra* note 1, para. 2.11.

6 *Ibid.*, para. 2.14.

7 *Nuhanović*, *supra* note 1, para. 2.28.

8 *Mustafić*, *supra* note 1, para. 2.28.

9 *Nuhanović and Mustafić*, *supra* note 1, para. 2.19.

10 *Ibid.*, para. 5.11.

11 See section 3.2, *infra*.

12 *Nuhanović and Mustafić*, *supra* note 1, para. 2.18.

physical abuse'.<sup>13</sup> Nevertheless, the evacuation went on, and the last families of refugees left the premises. Rizo Mustafić asked to stay in the compound with his relatives but was ordered to leave. He was subsequently deported and killed.<sup>14</sup> Because he was employed by the United Nations, Hasan Nuhanović was allowed to evacuate with Dutchbat, but his parents and brother were compelled to leave and were subsequently deported and killed.<sup>15</sup>

The cases at hand concern claims brought by Hasan Nuhanović, Mehida Mustafić-Mujić, and Damir and Alma Mustafić before Dutch courts, intending to hold the Netherlands liable for the deaths of their relatives following their evacuation from the compound of Potočari. They raised difficult issues related to the allocation of responsibility for the wrongful acts of peacekeepers, notably on the attribution of their acts to the United Nations, which was the ground on which the District Court rejected the claims.<sup>16</sup> On appeal, the Court decided in favour of the victims and held the Netherlands liable for the wrongful removal from the compound of Rizo Mustafić, Ibro Nuhanović, and Muhamed Nuhanović.<sup>17</sup> Under a detailed application of the test of 'effective control', the Court found the conduct of Dutchbat to be attributed to the Netherlands. Further, it held that sending away the last refugees while being aware of the risks constituted a tortious act under Bosnian law, engaging the liability of the state.

This commentary provides an analysis of some of the most relevant features of the Court of Appeal decisions. Section 2 outlines the regime of responsibility that the Court untangled from the intricate claims of public and private international law presented by the parties. The attribution of the acts of Dutchbat to the Netherlands, and the Court's understanding of the notions of 'effective control' and 'ability to prevent' are analysed in section 3. Section 4 addresses the characterization of the alleged acts as tortious under Bosnian law. Section 5 presents critical remarks on the contribution of the decisions to the debate surrounding the allocation of responsibility between states and international organizations.

## 2. THE MIXED REGIME OF RESPONSIBILITY UNRAVELLED BY THE COURT

Before determining whether the Netherlands was liable, as alleged by the appellants, the Court needed to clarify the criteria for responsibility applicable to the case. The claims brought by the victims relied primarily on domestic torts,<sup>18</sup> whereby it suffices for a damage to be caused by Dutchbat for an obligation of reparation to occur. The arguments brought forward by the Dutch state, on the other hand, were firmly

<sup>13</sup> *Ibid.*, para. 6.7.

<sup>14</sup> *Mustafić*, *supra* note 1, para. 2.29.

<sup>15</sup> *Nuhanović*, *supra* note 1, para. 2.29.

<sup>16</sup> *Nuhanović*, first instance, *supra* note 2, para. 4.15; *Mustafić*, first instance, *supra* note 2, para. 4.17.

<sup>17</sup> See note 3, *supra*, and accompanying text.

<sup>18</sup> *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.2. In *Mustafić*, it was also submitted that the state was contractually liable for breach of a 'protection agreement' with *Mustafić* (para. 5.2), but this argument was dismissed, as the existence of such an agreement could not be established (para. 5.3.1).

grounded in public international law<sup>19</sup> under which the conduct of Dutchbat needs to be attributed to the Netherlands and in breach of its international obligations in order to possibly lead to reparation.<sup>20</sup> The Court assessed each argument and considered that the claims were to be entertained under private law (section 2.1), but would preliminarily have to pass a test of attribution under international law (section 2.2).

### 2.1. A responsibility assessed under domestic torts

The cases of *Nuhanović* and *Mustafić* are not per se judicial findings of international responsibility of a state for the acts of its peacekeepers. The appellants were seeking a pronouncement regarding the responsibility of the Netherlands for the allegedly tortious acts committed by Dutchbat, and accordingly invoked Bosnian legislation on civil obligations, which was applicable pursuant to Dutch private international law.<sup>21</sup> In their opinion, Bosnian law was applicable to all aspects of the determination of responsibility and its legal consequences, and the contention that the Netherlands was in breach of some international obligations was merely additional to the main liability claim.<sup>22</sup> The state, on the other hand, maintained that the attribution and wrongfulness of the conduct 'should only be judged in accordance with international law and therefore not according to any national law'.<sup>23</sup> The Court agreed with the appellants that the actions of Dutchbat in Bosnia were subject to local Bosnian law,<sup>24</sup> and entertained the claims under the provisions of this legal order. Accordingly, it determined the conditions under which an act engages liability by reference to the provisions of Bosnian law, notably on questions of causation,<sup>25</sup> or circumstances precluding wrongfulness.<sup>26</sup> Ultimately, the liability of the Netherlands was upheld under the law of Bosnia,<sup>27</sup> which states in a general provision that '[a] person who causes damage to the other is obliged to reimburse it, unless he proves that the damage is not his fault'.<sup>28</sup>

It should be underlined that the repeated references made by the Court in *Nuhanović* and *Mustafić* to a 'wrongful act' – or *onrechtmatige daad* in Dutch – should not be misunderstood as a reference to the notion of wrongful act as established in international law, and rather mean 'tort'.<sup>29</sup> The notion of wrongfulness is not explicitly

19 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.5.

20 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. 53 II (Part Two), at 26; General Assembly Resolution 56/83 of 12 December 2001, Annex, UN Doc. A/RES/56/83, Art. 2.

21 Wet van 11 april 2001 houdende regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad, Stb 2001, 190 ('Wet conflictenrecht onrechtmatige daad'), Art. 3(1).

22 *Nuhanović* and *Mustafić*, *supra* note 1, paras. 6.3, 6.4.

23 *Ibid.*, para. 5.5.

24 *Ibid.*, para. 5.5: the actions of Dutchbat in Bosnia 'are not released from the scope of the national law of that country and may in principle give rise to . . . liability resulting from a wrongful act under Bosnian law.'

25 *Ibid.*, para. 6.14.

26 *Ibid.*, para. 6.9.

27 *Ibid.*, para. 6.20.

28 Art. 154(1) of the 1995 'Act on Obligations' of Bosnia and Herzegovina; translation reproduced in *Nuhanović* and *Mustafić*, first instance, *supra* note 2, at note 11.

29 *Onrechtmatige daad* was translated as 'tort' in J. Drion et al., *The Netherlands Civil Code, Book 6: The Law of Obligations: Draft Text and Commentary*, edited by the Netherlands Ministry of Justice (1977), 44; H. Warendorf et al., *The Civil Code of the Netherlands* (2009), 677.

present in all domestic tort laws,<sup>30</sup> in the sense that only some legal systems place the breach of a pre-existing legal obligation as a condition for responsibility.<sup>31</sup> In the present cases, the assessment whether the acts of Dutchbat were ‘wrongful’ was primarily based on a notion of fault.<sup>32</sup>

The choice for the application of Bosnian law was, besides, opportune for the Court, as it allowed it to give a strong political sign towards locals that peacekeepers are accountable for violations of local laws, while bypassing the difficult question of the extraterritorial applicability of human rights treaties.<sup>33</sup> Indeed, the Court found the International Covenant on Civil and Political Rights to have direct effect in the Bosnian legal order and hence to be applicable to the case.<sup>34</sup> The right to life and the prohibition of inhuman treatment were also found applicable ‘because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity’.<sup>35</sup> Substantively, however, the liability was upheld on the basis of a tort and the additional finding of a breach of international norms did not modify the outcome of the case.<sup>36</sup>

The Court entertained the claims primarily under Bosnian law, yet it followed the argument of the state and shifted to international law when deciding whether the acts of Dutchbat were to be attributed to the Netherlands.

## 2.2. The internationalization of the question of attribution

In the view of the victims, attribution of the conduct of Dutchbat should have taken place only according to national Bosnian law.<sup>37</sup> As maintained by the appellants, the scope of the applicable law determined under Dutch private international law can include the question of attribution.<sup>38</sup> The Court, however, chose to distinguish the question of attribution from the question of whether the acts were considered tortious under Bosnian law. It affirmed that the question of whether ‘the actions of these troops that are placed at the disposal of the UN should be attributed to the State, the UN or possibly to both’<sup>39</sup> was separated from the question of ‘whether the Dutchbat troops acted wrongfully with respect to Nuhanović [and Mustafić et al.]’.<sup>40</sup>

The Court hereby operated what private international lawyers refer to as a *dépeçage*, which consists of applying rules from several legal orders to a legal question normally governed by one coherent set of norms.<sup>41</sup> Applying rules from different

30 M. Fabre-Magnan, *Les obligations* (2004), 755; M. Puech, *L’illicéité dans la responsabilité civile extracontractuelle* (1973), 19.

31 H. Deschenaux and P. Tercier, *La responsabilité civile* (1975), 71.

32 See section 4, *infra*.

33 The District Court had denied applicability of the European Convention on Human Rights: *Nuhanović*, first instance, *supra* note 2, para. 4.1.2.3; *Mustafić*, first instance, *supra* note 2, para. 4.1.4.2.

34 *Nuhanović* and *Mustafić*, *supra* note 1, para. 6.4.

35 *Ibid.*, para. 6.3.

36 *Ibid.*, paras. 5.5, 6.8.

37 *Ibid.*, para. 5.2.

38 *Wet conflictenrecht onrechtmatige daad*, *supra* note 21, Art. 7.

39 *Nuhanović*, *supra* note 1, para. 5.3; *Mustafić*, *supra* note 1, para. 5.3.2.

40 *Ibid.*

41 P. Mayer and V. Heuzé, *Droit international privé* (2004), 525.

legal orders to the questions of attribution and wrongfulness challenges the relationship between, and the systemic character of, responsibility regimes and, even though it can well be defended as a substantive approach conducted by an internationalist court, the judges in *Nuhanović* and *Mustafić* could have more clearly justified the applicability of international principles of attribution.

The argument made by the Court that Bosnian law provided no specific answer to the question<sup>42</sup> was contradicted by the reference it later made to a Bosnian rule on attribution of the conduct of Dutchbat members, ‘who were employed by the State and who caused the damage “in the course of their work or in connection with work”’.<sup>43</sup> The consideration that international law contains developed principles adapted to ‘cases with transboundary elements’<sup>44</sup> regarding the attribution of the conduct of peacekeepers is not sufficient, in itself, to justify departing from the law normally applicable on the ground of ‘international harmonization’.<sup>45</sup> A stronger point can be implied from the Court’s analysis placing weight on the transfer of powers over military organs made by the Netherlands.<sup>46</sup> The international character of the troops materially affects the question of attribution, which is internationalized as a result of the transfer of authority over the troops. Under such a substantive approach, the modified status of the state’s organs justifies recourse to international law to appraise whether their acts can regardless be considered a conduct of that state.

The Court next had to ascertain under which international-law criterion attribution should operate, and correctly designated the principle of “‘effective control’ over the relevant conduct”,<sup>47</sup> as entrenched in Article 7 of the final Draft Articles on the Responsibility of International Organizations.<sup>48</sup> A few years after the disordered decision of the European Court of Human Rights in *Behrami*,<sup>49</sup> it is now agreed that the attribution of the conduct of troops placed at the disposal of an international organization should take place under the standard of ‘effective control’.<sup>50</sup>

42 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.4.

43 *Nuhanović* and *Mustafić*, *supra* note 1, para. 6.20, applying Art. 171(1) of the ‘Act on Obligations’ of Bosnia and Herzegovina.

44 A. Nollkaemper, ‘Internationally Wrongful Acts in Domestic Courts’, (2007) 101 AJIL 760, at 785.

45 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.4.

46 *Nuhanović*, *supra* note 1, para. 5.3; *Mustafić*, *supra* note 1, para. 5.3.2.

47 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.8.

48 ILC Draft Articles on the Responsibility of International Organizations, 2011 YILC, Vol. 63 II (Part Two), at 54 (hereinafter, DARIO). The text of the Article remained unchanged from the 2009 Draft Article 6 to which the Court refers: ‘The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.’

49 European Court of Human Rights, *Behrami and Behrami v. France*, App. No. 71412/01, and *Saramati v. France, Germany and Norway*, App. No. 78166/01 (2 May 2007).

50 ILC Draft Articles on the Responsibility of International Organizations with commentaries, 2011 YILC, Vol. 63 II (Part Two), 69, at 87 (hereinafter, ‘DARIO commentaries’), commentary to Art. 7, para. 1; 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’, (2010) 51 Harv. ILJ 113, at 140; B. Kondocho, ‘The Responsibility of Peacekeepers, Their Sending States, and International Organizations’, in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 515, at 521; N. Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, in M. Odello and P. Ryszard (eds.), *International Military Missions and International Law* (2011), 245, at 249.



The test of ‘ultimate authority and control’<sup>51</sup> obviously did not permit allocating responsibility to an entity truly linked with the alleged conduct, as such a test can arguably be used to attribute to the UN acts of British troops in Iraq.<sup>52</sup> The United Nations’ contention that Article 6 DARIO would be more relevant because peacekeepers are subsidiary organs of the United Nations<sup>53</sup> has also been decried, given that states can never fully delegate military organs and permanently retain full command over them.<sup>54</sup> This ambiguous organic status of UN peacekeepers, formally under the control of both the United Nations and the troop-contributing state, cannot genuinely answer the question of attribution, and justifies recourse to a factual criterion more adapted to determine which entity was truly in control of troops.<sup>55</sup> The appropriate determination of ‘effective control’ as the international standard of attribution for the conduct of peacekeepers by the Court in *Nuhanović* and *Mustafić* comes as a welcome affirmation by a domestic court of the opinion held by scholars.<sup>56</sup>

Under the mixed regime modelled by the Court, the alleged conduct of Dutchbat had to be attributed to the state under the test of ‘effective control’ and to be tortious under Bosnian law in order to engage the liability of the Netherlands. The application of these conditions by the Court is analysed in the following sections.

### 3. THE ATTRIBUTION OF THE CONDUCT OF DUTCHBAT TO THE NETHERLANDS BASED ON ITS CONTROL

The exact meaning of the standard of effective control, specifically in the context of peacekeeping, gave rise to many questions regarding the nature and extent of control required for attribution. In this regard, the detailed reasoning by the Court in the application of an unclear standard to concrete facts constitutes a crucial development that will help to better grasp this notion. The decision adopted a genuine and progressive understanding of the notion of effective control (section 3.1), whose detailed application to the cases led to the attribution of the alleged acts to the Netherlands (section 3.2). Implicitly, the Court established a causal relationship between the effective control of the Netherlands and the acts of its peacekeepers (section 3.3).

51 *Behrami*, *supra* note 49, para. 140.

52 This was unsuccessfully argued by the United Kingdom before the European Court of Human Rights in *Al-Jedda* (App. No. 27021/08, 7 July 2011); see M. Milanovic, ‘*Al-Skeini and Al-Jedda in Strasbourg*’, (2012) 23 EJIL (forthcoming), available at SSRN, <http://ssrn.com/abstract=1917395>, at 19.

53 ILC, ‘Responsibility of International Organizations, Comments and Observations from the UN’ (17 February 2011), UN Doc. A/CN.4/637/Add.1 (hereinafter, ‘UN Comments to DARIO’), comments to Draft Art. 6, para. 3.

54 L. Condorelli, ‘Le statut des forces de l’ONU et le droit international humanitaire’, (1995) 78 *Rivista di diritto internazionale* 881, at 886; Dannenbaum, *supra* note 50, at 148; M. Zwanenburg, *Accountability of Peace Support Operations* (2005), at 40. The Court likewise noted that soldiers ‘are and will remain employed by the state’, para. 5.10.

55 A. Orakhelashvili, ‘Division of Reparation between Responsible Entities’, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), 647, at 654; Tsagourias, *supra* note 50, at 249.

56 The decisions in *Nuhanović* and *Mustafić* are referred to in the DARIO commentaries, *supra* note 50, commentary to Art. 7, para. 14.

### 3.1. The meaning of ‘effective control’ according to the Court

As demonstrated by the opposite conclusions based on the same standard reached by the District Court<sup>57</sup> and the Court of Appeal in regard to the present claims, the precise meaning of the principle of effective control is debated. From the International Law Commission’s (ILC’s) commentaries, it can be asserted that the control must be factual,<sup>58</sup> exercised in respect of the specific allegedly wrongful conduct,<sup>59</sup> and assessed with full account of the circumstances and context of the case.<sup>60</sup> However, the extent to which the control by the state over an act must be established is unsettled. The position advocated by the United Nations<sup>61</sup> and adopted by the District Court,<sup>62</sup> according to which only direct contradictory orders can give a state effective control over its troops, has been rejected by the Court of Appeal,<sup>63</sup> as well as by a number of scholars who admitted that a state can exercise some effective control over an act that it did not directly order.<sup>64</sup> Besides, the Court agreed with the appellants that ‘the decisive criterion for attribution is not who exercised “command and control”, but who actually was in possession of “effective control”’.<sup>65</sup> The legal notion of effective control should indeed be distinguished from the military concepts of command and control, but the two are not mutually exclusive. The Court’s formulation is in that sense slightly misleading, for the actual exercise of command and control powers is very relevant to inform the legal criterion of effective control. The elements of command and control specifically possessed and employed by each party in relation to the unlawful act reveal the degree of control effectively exercised over a wrongful conduct.<sup>66</sup>

Importantly, the Court upheld two points debated in scholarship: that the notion of effective control over a conduct goes beyond ordering it<sup>67</sup> and that control can possibly be exercised by both the state and the United Nations,<sup>68</sup> opening the way to dual attribution.<sup>69</sup> First, the Court affirmed that:

57 *Nuhanović*, first instance, *supra* note 2, paras. 4.10, 4.11; *Mustafić*, first instance, *supra* note 2, paras. 4.12, 4.13.

58 DARIO commentaries, *supra* note 50, commentary to Art. 7, para. 9.

59 *Ibid.*, paras. 4, 8.

60 *Ibid.*, para. 4; Giorgio Gaja, Eighth Report on Responsibility of International Organizations by the Special Rapporteur, UN Doc. A/CN.4/640 (2011), para. 34.

61 The UN is reluctant to admit the possibility of not controlling its troops and maintains the view that, as long as the state’s authority ‘does not interfere with the United Nations operational control, it is of no relevance for the purpose of attribution’ (UN Comments to DARIO, *supra* note 53, comments to Draft Art. 6, para. 4).

62 *Nuhanović*, first instance, *supra* note 2, para. 4.14.1; *Mustafić*, first instance, *supra* note 2, para. 4.16.1.

63 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.9.

64 B. Amrallah, ‘The International Responsibility of the United Nations for Activities Carried Out by UN Peace-Keeping Forces’, (1976) 32 *Revue égyptienne de droit international* 57, at 66; Condorelli, *supra* note 54, at 897; Dannenbaum, *supra* note 50, at 154; C. Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’, (2009) 10 *Melb. JIL* 346, at 359; J.-M. Sorel, ‘La responsabilité des Nations Unies dans les opérations de maintien de la paix’, (2001) 3 *International Law Forum du Droit International* 127, at 137.

65 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.7.

66 B. Cathcart, ‘Command and Control in Military Operations’, in Gill and Fleck, *supra* note 50, 235, at 236; Leck, *supra* note 64, at 363; Tsagourias, *supra* note 50, at 249.

67 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.9.

68 *Ibid.*

69 See A. Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, (2011) 9 *JICJ* 1143, at 1157.

significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN 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.*<sup>70</sup>

This interpretation acknowledges the limitations of relying on direct orders, given that ‘in many cases, human rights abuses occur at the foot-soldier level, having been ordered neither by the United Nations nor by the relevant state’.<sup>71</sup> Accordingly, the various ways in which a state uses its authority and influences operations on the field can place it in the position to ensure that no wrongful conduct is committed by peacekeepers.<sup>72</sup>

Second, the Court rejected the concept of exclusive attribution that had been upheld in the first instance<sup>73</sup> by considering that ‘the possibility that more than one party has “effective control” is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party’.<sup>74</sup> Informed by the increasing number of situations where competences and powers are shared between states and international organizations,<sup>75</sup> there is indeed growing doctrinal support for multiple attribution,<sup>76</sup> notably in the paradigmatic example of peacekeeping operations.<sup>77</sup> On the basis of this understanding, the Court demonstrated that the Netherlands was indeed exercising effective control over the alleged acts of Dutchbat.

### 3.2. The factual analysis conducted by the Court

The Court’s analysis purported to determine ‘which entity was positioned to have acted differently in a way that would have prevented the impugned conduct’.<sup>78</sup> It engaged in a very detailed analysis of the facts in order to determine whether and to what extent the Dutch state had effective control over the alleged conducts, notably over the act of evicting the victims from the compound. Particular importance was

70 *Nuhanović and Mustafić*, *supra* note 1, para. 5.9 (emphasis added). The Court’s language is very close to that used in the argument of Dannenbaum, *supra* note 50.

71 Dannenbaum, *supra* note 50, at 156.

72 *Ibid.*, at 157; see also, Leck, *supra* note 64, suggesting to ‘take into account various factors, such as whether the parties exercised due care in preventing wilful or negligent actions or omissions and the degree to which they did’, at 359.

73 *Nuhanović*, first instance, *supra* note 2, para. 4.15; *Mustafić*, first instance, *supra* note 2, para. 4.17.

74 *Nuhanović and Mustafić*, *supra* note 1, para. 5.9.

75 See, generally, on shared responsibility, [www.sharesproject.nl](http://www.sharesproject.nl).

76 See, e.g., C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), 281; S. Besson, ‘La pluralité d’États responsables: Vers une solidarité internationale?’, (2007) 17 *Revue suisse de droit international et de droit européen* 13; A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Concept Paper’, (2011) ACIL Research Paper No 2011-07 (SHARES Series); A. Orakhelashvili, ‘Division of Reparation between Responsible Entities’, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), 647, at 654; S. Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’, in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008), 185.

77 C. Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision’, (2010) 42 *NYUJILP* 501; Dannenbaum, *supra* note 50; Kondoch, *supra* note 50, at 593; K. Larsen, ‘Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test’, (2008) 19 *EJIL* 509, at 518; Leck, *supra* note 64, at 363; Tsagourias, *supra* note 50, at 253; Zwanenburg, *supra* note 54, at 103.

78 Dannenbaum, *supra* note 50, at 157.

placed on the circumstances that led the state to assert control over its soldiers. After the fall of Srebrenica, the situation indeed differed ‘in a significant degree from the situation in which troops placed under the command of the UN normally operate’,<sup>79</sup> for Dutchbat was going to withdraw from the mission after evacuating the refugees.<sup>80</sup> During what the Court referred to as a ‘transition period’,<sup>81</sup> national interests were directly involved,<sup>82</sup> which prompted the Dutch state to exert substantial influence over the evacuation of the refugees that amounted to effective control.

The Court demonstrated that, during this transition period and specifically with regard to the evacuation of the refugees, Dutchbat was acting under the joint command of the United Nations and the Netherlands. The state was fully and directly implicated in the decision-making at all levels.<sup>83</sup> The decision that both Dutchbat and the refugees needed to be evacuated was jointly taken at the highest level by the UNPROFOR force commander, General Janvier, the Dutch defense chief of staff, Van den Breemen, and the deputy commander of the Royal Netherlands Army, Commander Van Baal,<sup>84</sup> thus on behalf of both the United Nations and the Netherlands.<sup>85</sup> On the field, Brigade General Nicolai, who was chief of staff of HQ UNPROFOR, the division of UNPROFOR located in Sarajevo, ‘fulfilled a double role’,<sup>86</sup> acting on behalf of both the United Nations and the Dutch state,<sup>87</sup> because he was the highest-ranking Dutch military official close to the situation.<sup>88</sup> The commander of Dutchbat, Lieutenant Colonel Karremans, ‘also held the view that he was now (jointly) under command of the Dutch Government’.<sup>89</sup> Accordingly, the victims were evacuated by Dutchbat following a decision jointly taken by the Netherlands and the United Nations. The Court also established the specific and effective control of the state over the modalities of the evacuation. Through several channels, including calls from Minister of Defense Voorhoeve, instructions were passed to Dutchbat, notably to not ‘cooperate in a separate treatment of the men’<sup>90</sup> and to ‘save as much as possible’.<sup>91</sup> As insisted in the decisions, ‘it was a matter of orders being given’<sup>92</sup> and, accordingly, the control of the Netherlands ‘was not only theoretical, this control was also exercised in practice’.<sup>93</sup>

The Court considered that the eviction by Dutchbat of the victims in these cases was ‘directly related to the Dutch Government’s decisions and instructions’ before concluding that the conduct was attributed to the state.<sup>94</sup> In the closure of

79 *Nuhanović and Mustafić*, *supra* note 1, para. 5.11.

80 *Ibid.*, paras. 5.11, 5.17.

81 *Ibid.*, para. 5.17.

82 *Ibid.*, paras. 5.12, 5.13.

83 *Ibid.*, para. 5.13.

84 *Ibid.*, paras. 5.11, 5.12.

85 *Ibid.*, para. 5.12.

86 *Ibid.*, para. 5.18.

87 *Ibid.*, para. 5.13.

88 *Ibid.*, para. 5.15.

89 *Ibid.*, para. 5.18.

90 *Ibid.*, para. 5.18.

91 *Ibid.*, para. 5.18.

92 *Ibid.*, para. 5.18.

93 *Ibid.*, para. 5.18.

94 *Ibid.*, para. 5.20.

its reasoning, the Court thereby seems to imply that attribution resulted from the correlation between the control exercised by the Netherlands and the act of evicting the victims. This implicit causal link established by the Court is discussed in the following section.

### 3.3. The underlying determination of a causal link between the control of the state and the conduct by Dutchbat

Any claim for responsibility is based on one or more specific acts that are contended as tortious or wrongful, which means that the determination of the alleged conduct is a preliminary step in assessing liability. Particularly, when applying Article 7 DARIO, a court is required to apply the test to each ‘specifically impugned conduct’.<sup>95</sup> For that purpose, several acts of Dutchbat were invoked by Nuhanović and Mustafić et al. on the basis of their claims, amongst which figured (i) the act of sending the victims away from the compound, (ii) the failure to take action when the males and females were separated under the eyes of Dutchbat, and (iii) the omission to report human rights violations.<sup>96</sup> In its reasoning on attribution, the Court focused on the decision to evacuate and more importantly on ‘the manner in which the evacuation of the refugees was carried out’<sup>97</sup> by Dutchbat, which encompasses the acts alleged by the victims. The Court demonstrated the exercise of a close control by the Netherlands over Dutchbat with regard to the evacuation but, to attribute the specific act of evicting the victims of the cases, which did not result from a direct order, the Court had to take a further step.

By affirming ‘that the Dutch Government . . . would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time’<sup>98</sup> and ‘that, in case the Dutch Government would have given the instruction to Dutchbat not to allow [the victims of the cases] to leave the compound or to take [them] along respectively, such an instruction would have been executed’,<sup>99</sup> the Court gave a concrete meaning to the notion of effective control in the absence of direct orders. When asking whether the state had had ‘the power to prevent the alleged conduct’,<sup>100</sup> the Court in effect determined that the conduct was *caused by* the state. Indeed, the question ‘whether the State had the power to prevent the conduct by Dutchbat’ becomes, in other words, ‘whether the State caused the conduct by Dutchbat by the control it exercised’.<sup>101</sup> This causal link is what the Court determined when concluding that the evacuation of the victims was ‘related to’<sup>102</sup> the control over the evacuation. The Court’s holding on this point illustrates that, even though causation

95 Dannenbaum, *supra* note 50, at 141; see also Leck, *supra* note 64, at 348.

96 Nuhanović and Mustafić, *supra* note 1, para. 6.1.

97 *Ibid.*, para. 5.19.

98 *Ibid.*, para. 5.18.

99 *Ibid.*

100 *Ibid.*

101 See also Orkhelashvili, *supra* note 55, at 654: ‘a substantial degree of factual control over the contingent or the relevant situation allows identifying a link of cause-and-effect between the entity and the wrongful act.’

102 Nuhanović and Mustafić, para. 5.19.

is not expressly required by the ILC Draft Articles, it becomes inescapable to consider it with regard to attribution of conducts that were not ordered.

#### 4. THE ASSESSMENT OF THE TORTIOUS CHARACTER OF THE CONDUCT

As explained above,<sup>103</sup> the Court assessed the wrongfulness of the attributed conduct under the provisions of Bosnian law.<sup>104</sup> For the purpose of upholding the claims of the victims, it only needed to qualify the alleged conduct as constituting a tort and not, as argued by the state, to demonstrate the breach by the state of a specific subjective right owned by the victims.<sup>105</sup> Since the Court found the alleged act of evicting the victims to be wrongful and upheld the liability claims on this ground, it did not further enquire whether the passive attitude towards the separation of men and the failure to report human rights abuses were also tortious.<sup>106</sup>

The tortious character of the conduct was mostly characterized by the knowledge of the risks that Dutchbat had at the time the Nuhanović and Mustafić families had to leave the compound.<sup>107</sup> The specific context of the cases was again notably relevant, as both families were the very last to leave the premises in the evening of 13 July 1995.<sup>108</sup> By that time, various military officers had reported that male refugees taken by Mladić were executed or tortured, establishing the fact that Dutchbat was aware of the risks faced by the refugees after their evacuation.<sup>109</sup> Regarding the eviction of Nasiha Nuhanović-Mehinagić, however, the Court found no fault because the risk was lower for women.<sup>110</sup>

Muhamed Nuhanović and Rizo Mustafić were evicted against their will, following an explicit refusal by deputy commander of Dutchbat Major Franken to take them along.<sup>111</sup> Besides, none of the justifications brought forward by the state held ground, notably, as, under a test of reasonableness, the decision to not take Muhamed Nuhanović and Rizo Mustafić along could not be vindicated by the Netherlands.<sup>112</sup> According to the Court, 'Dutchbat should have reconsidered that decision according to the current situation at that time'<sup>113</sup> and committed a tort by sending away Muhamed Nuhanović and Rizo Mustafić despite the real risks they ran.<sup>114</sup> The required causal link between the act and the damage<sup>115</sup> was demonstrated by the

103 See section 2.1, *supra*.

104 *Nuhanović and Mustafić, supra* note 1, para. 6.3.

105 *Ibid.*, para. 6.14: 'Although the State disputes that Dutchbat had the obligation to take [the victims of the cases] along to a safe area, in establishing the causal relationship it is not relevant – also under Bosnian law – whether the State had the obligation to take [them] to a safe area, but to find out what would have happened if the State had not acted wrongfully.'

106 *Ibid.*, para. 6.22.

107 *Ibid.*, para. 6.11.

108 *Ibid.*, paras. 6.7, 6.11.

109 *Ibid.*, para. 2.27.

110 *Nuhanović, supra* note 1, para. 6.20.

111 *Nuhanović and Mustafić, supra* note 1, para. 6.10.

112 *Ibid.*, para. 6.18.

113 *Ibid.*, para. 6.11.

114 *Ibid.*, para. 6.14.

115 *Ibid.*, para. 6.5.

consideration that Muhamed Nuhanović and Rizo Mustafić would still be alive if they had not been forced to leave.<sup>116</sup> The situation of Ibro Nuhanović slightly differed, as he had been allowed to evacuate with Dutchbat, but decided to leave when his son and wife were evicted. The Court found the state liable regarding his death on the grounds that it had been caused by the eviction of his son.<sup>117</sup>

Additionally, the Court considered the wrongfulness of the conduct with regard to the international principles of the right to life and the prohibition of inhuman treatment. The Court mentioned without further elaboration that the conduct of Dutchbat incidentally breached the obligation not 'to surrender civilians to the armed forces if there is a real and predictable risk that the latter will kill or submit these civilians to inhuman treatment'.<sup>118</sup> For these reasons, the Court concluded that the Netherlands was responsible for the deaths of Muhamed Nuhanović, Ibro Nuhanović, and Rizo Mustafić.

The Court insisted that it was not taking any position regarding other victims of the evacuation and only looked at the situation of the four victims for which liability of the Netherlands was alleged.<sup>119</sup> The eviction of refugees who left earlier or voluntarily would not necessarily be tortious;<sup>120</sup> nonetheless, possibly, further claims against the Dutch state with regard to the evacuation could be envisaged. The conclusions of the Court of Appeal regarding attribution admitted that the failure of Dutchbat to take action when the Nuhanović and Mustafić families were separated by the Bosnian Serb Army was also attributable to the Netherlands<sup>121</sup> – conduct that the District Court had acknowledged as wrongful.<sup>122</sup> Arguably, relatives of victims who were forcibly evacuated on 13 July 1995 while Dutchbat was aware that the Bosnian Serb Army was committing crimes against the evacuated refugees could successfully invoke the liability of the Netherlands.

## 5. CONCLUDING REMARKS

The cases of *Nuhanović* and *Mustafić* are firstly remarkable for having provided remedies to victims of acts of peacekeepers. Given the glaring lack of judicial forum to bring claims against the United Nations,<sup>123</sup> engaging the liability of a troop-contributing state practically enables victims to obtain redress for the wrongful conduct of peacekeeping forces. Besides, further similar decisions holding troop-contributing states responsible could possibly prompt states to develop more effective mechanisms of redress within the United Nations.

Furthermore, the Court's interpretation of Article 7 DARIO in terms of 'power to prevent' that enabled engaging the responsibility of the state presents substantial

<sup>116</sup> *Ibid.*, para. 6.14.

<sup>117</sup> *Nuhanović*, *supra* note 1, para. 6.20.

<sup>118</sup> *Nuhanović* and *Mustafić*, *supra* note 1, para. 6.8.

<sup>119</sup> *Ibid.*, para. 6.11.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, para. 5.19.

<sup>122</sup> *Nuhanović*, first instance, *supra* note 2, para. 4.14.6; *Mustafić*, first instance, *supra* note 2, para. 4.16.6.

<sup>123</sup> Dannenbaum, *supra* note 50, at 124.

value for the ongoing debate on the notion of effective control. Not only did the decisions discard formalist interpretations of effective control, but they adopted a progressive view that broadens the scope of responsibility of troop-contributing states.<sup>124</sup> Upholding the responsibility of states for the troops they put at the disposal of the United Nations could be feared as resulting in an unwillingness of states to participate in UN operations. However, under the interpretation of ‘effective control’ maintained by the Court, acts are only attributed to states in circumstances under which they actually exercised control over their troops. Accordingly, this standard for attribution ensures that ‘the actors concerned exercise due precaution in making sure that breaches do not occur’<sup>125</sup> in the first place, thereby ‘structuring incentives so as to minimize violations’.<sup>126</sup>

Although the Court did not expressly take a position on the matter, the attribution to the United Nations of the same acts is conceivable under the circumstances of the cases.<sup>127</sup> When assessing damages under Bosnian law in its final decision,<sup>128</sup> the Court will dispose of domestic tools under which the possible responsibility of the United Nations does not impair the amount of the reparations to be paid. An international court reaching a similar conclusion of shared responsibility between a state and an organization could, on the contrary, face obstacles regarding the allocation of damages between the responsible entities.<sup>129</sup> A discussion of the consequences of situations of shared responsibility between a state and the United Nations would go beyond this case note, but it is worth briefly mentioning that the question of apportionment of remedies for a wrongful act for which more than one entity is responsible receives no answer in international law.<sup>130</sup> Authors advocating dual attribution in peacekeeping usually maintain joint and several liability as an obvious consequence;<sup>131</sup> however, the implementation of such a principle in international law is not without difficulties.<sup>132</sup>

It is notable that, while, during the first peacekeeping operations, the question was whether the United Nations could be responsible,<sup>133</sup> the issue has nowadays reversed. The general debate on the conditions under which member states could be responsible for the acts they accomplish in the framework of an international organization is illustrated in the cases of *Nuhanović* and *Mustafić*, in which the Court of Appeal reached beyond the formal transfer of authority to the United Nations. In

124 Ibid., at 114.

125 Leck, *supra* note 64, at 363.

126 Dannenbaum, *supra* note 50, at 157.

127 *Nuhanović* and *Mustafić*, *supra* note 1, para. 5.18.

128 Ibid., para. 6.21.

129 See A. Nollkaemper, ‘Issues of Shared Responsibility before the International Court of Justice’, (2011) ACIL Research Paper No 2011-01 (SHARES Series).

130 I. Brownlie, *System of the Law of Nations, Part I: State Responsibility* (1983), 189; J. Noyes and B. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’, (1988) 13 Yale JIL 225, at 225.

131 Dannenbaum, *supra* note 50, at 169; Leck, *supra* note 64, at 363; Orakhelashvili, *supra* note 55.

132 See *International Tin Council* case, [1990] 2 AC 418, at 480: Lord Templeman expressed the view that ‘[a]n international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice’.

133 Amrallah, *supra* note 64, at 58.



that sense, effective control was 'construed so as to claim reparation from the very same entity which has effectively perpetrated the breach in question, whatever the relevance of the corporate veil'.<sup>134</sup>

For all the complex issues they discuss in international terms, the domestic cases of *Nuhanović* and *Mustafić* are without a doubt a significant contribution to the settlement of the international law of responsibility, providing appealing insights to the concrete signification of principles recurrently debated in literature. Courts that will subsequently be faced with the application of the test of 'effective control' would be inspired to take into account the present decisions.

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<sup>134</sup> Orakhelashvili, *supra* note 55, at 654.