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THE CONTINUING SAGA OF STATE RESPONSIBILITY FOR THE CONDUCT OF PEACEKEEPING FORCES: RECENT PRACTICE OF DUTCH AND BELGIAN COURTS

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Abstract

In this contribution we reflect on two recent high-stakes cases before domestic courts on state responsibility for the actions and omissions of United Nations (UN) peacekeeping forces. Both cases are the result of efforts by surviving relatives of, respectively, victims of the Rwandan genocide in 1994 and victims of the Srebrenica genocide in 1995, to obtain reparation from troop-contributing states for the harm caused by UN peacekeeping troops' failure to protect civilians. While the facts of both cases display some striking similarities, the courts reached opposite conclusions, with the Dutch Court holding the Netherlands responsible, and the Belgium Court rejecting any responsibility of the Belgium state. We critically review the two cases, and analyse in particular the approach of each court regarding attribution of conduct, paying particular attention to the specific factual circumstances of transition and withdrawal in both cases, and to the issue of attribution of legal omissions. We further present observations as to the question of shared responsibility in the context of peacekeeping operations.

Keywords

state responsibility, attribution of conduct, peacekeeping operations, united nations, genocide, failure to protect, shared responsibility

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Nataša Nedeski and Berenice Boutin *

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Abstract In this contribution we reflect on two recent high-stakes cases before domestic courts on state responsibility for the actions and omissions of United Nations (UN) peacekeeping forces. Both cases are the result of efforts by surviving relatives of, respectively, victims of the Rwandan genocide in 1994 and victims of the Srebrenica genocide in 1995, to

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obtain reparation from troop-contributing states for the harm caused by UN peacekeeping troops' failure to protect civilians. While the facts of both cases display some striking similarities, the courts reached opposite conclusions, with the Dutch Court holding the Netherlands responsible, and the Belgium Court rejecting any responsibility of the Belgium state. We critically review the two cases, and analyse in particular the approach of each court regarding attribution of conduct, paying particular attention to the specific factual circumstances of transition and withdrawal in both cases, and to the issue of attribution of legal omissions. We further present observations as to the question of shared responsibility in the context of peacekeeping operations.

Keywords State responsibility · Attribution of conduct · Peacekeeping operations · United Nations · Genocide · Failure to protect · Shared responsibility

1. Introduction

In this contribution we reflect on two recent high-stakes cases before domestic courts on state responsibility for the actions and omissions of peacekeeping forces. Both cases are the result of efforts by surviving family members of, respectively, victims of the Rwandan genocide in 1994 and victims of the Srebrenica genocide in 1995, to obtain reparation from troop-contributing states for the harm caused by United Nations peacekeeping troops' failure to protect certain civilians who were under their care.¹

On 19 July 2019, the Dutch Supreme Court ruled² that the Netherlands bears some legal responsibility for the failure to take action by the Dutch contingent of the United Nations Protection Force (hereafter: Dutchbat), in the face of the real risk that Bosnian Muslim men who had taken refuge in a Dutchbat compound would be exposed to inhumane treatment or execution by the Bosnian Serb army upon Dutchbat's evacuation and withdrawal. When compared to the preceding Court of Appeal ruling, the Supreme Court judgment reduces the extent of responsibility of the Netherlands and puts forward a more conservative interpretation of the applicable international legal rules on responsibility for conduct occurring in the context

¹ It should be recalled that neither of the two cases was concerned with responsibility for the failure to prevent the commission of genocide as such, but concerned the specific issue of responsibility for failure to protect a number of civilians having sought refuge and protection at the encampments of UN troops.

² *The Netherlands v. Stichting Mothers of Srebrenica and others*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:1284, 19 July 2019, available (in English) at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:1284>, accessed 17 April 2020.

of collaborative military operations. We discuss the reasoning of the Dutch Supreme Court and highlight various aspects that deserve further scrutiny from the perspective of international law, focusing in particular on the Court's application and interpretation of the rules of attribution of conduct; its finding that Dutchbat's cooperation in the evacuation of male refugees by the Bosnian Serbs outside the Potočari compound was not wrongful; as well as its ruling on (partial) compensation.

The Dutch Supreme Court judgment was highly anticipated by international legal scholars and has received quite some attention in international media outlets.³ The same cannot be said for the ruling of the Brussels Court of Appeal, which on 8 June 2018 found⁴ that Belgium could *not* be held responsible for the failure to protect civilians by the Belgium battalion of the United Nations Assistance Mission for Rwanda (hereafter: Kibat).⁵ When on 11 April 1994, Kibat decided to evacuate their encampment at the *Ecole Technique Officielle* (ETO) before withdrawing from the mission, they left 2000 Tutsi and moderate Hutu refugees who had sought refuge at the ETO to their own devices. Almost all of them were killed by Interahamwe militias shortly thereafter.

As will be further discussed throughout this contribution, the facts of both cases display some striking similarities. It is therefore not surprising that the Brussels Court of Appeal discusses the (at that time most recent) ruling from the Court of Appeal of The Hague in the *Mothers of Srebrenica* case,⁶ which establishes (some) responsibility on the part of a troop-contributing state. In the end, however, the Brussels Court of Appeal finds that the facts underlying the Belgian case are different, building upon this finding to justify the conclusion that in the case before it, responsibility can be placed exclusively on the shoulders of the United Nations (UN).

³ See, e.g., A Holligan, Srebrenica massacre: Dutch state '10% liable' for 350 deaths, BBC News, 19 July 2019, <https://www.bbc.com/news/world-europe-49042372>, accessed 23 April 2020; P Karasz, Netherlands Was 10 Percent Liable in Srebrenica Deaths, Top Dutch Court Finds, New York Times, 19 July 2019, <https://www.nytimes.com/2019/07/19/world/europe/srebrenica-massacre-netherlands.html>, accessed 23 April 2020; I Rachidi, Holanda tiene un 10% de responsabilidad en las muertes de Srebrenica, El Mundo, 19 July 2019, <https://www.elmundo.es/internacional/2019/07/19/5d31a1c8fc6c834b7a8b45e0.html>, accessed 23 April 2020; Niederlande sind begrenzt haftbar für Morde von Srebrenica, Spiegel, 19 July 2019, <https://www.spiegel.de/politik/ausland/srebrenica-niederlande-laut-hoehstrichterlichem-urteil-begrenzt-haftbar-a-1278094.html>, accessed 23 April 2020.

⁴ *Mukeshimana-Ngulinzira and others v. Belgium and others*, 2011/AR/292 and 2011/AR/294, Brussels Court of Appeal, 8 June 2018 ('Mukeshimana 2018'). Unofficial publication (in French) available at <https://www.justice-en-ligne.be/IMG/pdf/bruxelles--2018-06-08--eto.pdf>, accessed 17 April 2020.

⁵ One commentary of the case was provided by Ruys (2020).

⁶ *Stichting Mothers of Srebrenica and others v. The Netherlands*, Court of Appeal of The Hague, ECLI:NL:GHDHA:2017:3376, 27 June 2017 ('Mothers of Srebrenica 2017'), available (in English) at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2017:3376>, accessed 17 April 2020.

We critically assess the reasoning that leads to this conclusion, and argue that the constellation of facts underlying the *Mothers of Srebrenica* and *Mukeshimana* cases are not so different that they justify the Brussels Court's conclusion of exclusive UN responsibility as the only possible outcome.

We will start with a brief sketch of the factual and procedural background of the two judgments that are the subject of this contribution, before setting out to critically assess the legal reasoning employed by the courts, in particular with regard to attribution of conduct. We further present observations as to the question of shared responsibility in the context of peacekeeping operations.

2. Background

2.1. *Mothers of Srebrenica and Others*

The *Mothers of Srebrenica* case concerns the atrocities that took place in the context of the fall of the city of Srebrenica in 1995, during the armed conflict in the former Yugoslavia. Starting 3 March 1994, Dutchbat was installed in the Srebrenica enclave as a contingent of the UN peacekeeping force UNPROFOR, with its headquarters stationed in Potočari (*'the compound'*). Dutchbat was tasked with the protection of the Srebrenica safe area pursuant to, in particular, UNSC resolution 836,⁷ a mission that – in light of its unclear mandate and insufficient training and available resources – has been described as essentially impossible.⁸

On 6 July 1995, the Bosnian Serb army launched an attack on Srebrenica, and it took five days for the city to fall into their hands. After the fall of Srebrenica on 11 July 1995, Dutchbat set up a mini safe area that included (but was not limited to) the Potočari compound, in which at least 20,000 to 25,000 civilians sought refuge. About 5,000 of these civilians were admitted into the compound. Not all refugees ended up in the mini safe area: approximately 10,000 to 15,000 Bosnian men fled to the woods that surrounded the city of Srebrenica.⁹ On the same day – in light of the failure of the mission to protect Srebrenica – it was decided at 23:00 to have

⁷ *Mothers of Srebrenica* 2017, paras. 2.17 – 2.20.

⁸ NIOD Instituut voor Oorlogs-, Holocaust- en Genocidestudies, *Srebrenica: een 'veilig' gebied Reconstructie, achtergronden, gevolgen en analyses van de val van een Safe Area, 2002* ('NIOD report'), http://publications.niod.knaw.nl/publications/srebrenicarapportniod_nl.pdf, accessed 23 April 2020, at 3136

⁹ *Mothers of Srebrenica* 2017, paras. 2.29 – 2.43

Dutchbat prepare for the evacuation of Dutchbat and the refugees in the mini safe area; a decision that constituted the starting point of a period of transition and withdrawal.

Many of us know the ending to this story. The genocide¹⁰ that ensued is one of the darkest moments in modern European history, resulting in the deaths of over 7,000 Bosnian Muslim men. The victims consisted of men captured by the Bosnian Serbs in the woods surrounding Srebrenica, but also included a substantial number of men that had sought refuge in the mini safe area (either in – or outside the compound) but were subsequently separated from the other refugees and evacuated with the cooperation of Dutchbat. In the case currently under discussion, legal proceedings were instituted against the Netherlands by the family members of ten victims that had either fled to the woods or sought refuge in the mini safe area situated outside the compound, as well as by the Mothers of Srebrenica, a foundation under Dutch law representing the interests of approximately 6,000 surviving relatives of victims of the Srebrenica genocide.

It is worth noting that these same events have formed the basis for judgments delivered by the Dutch Supreme Court in two previous proceedings. In 2012, the Supreme Court ruled in proceedings instituted by the Mothers of Srebrenica and others against the UN that the latter has immunity from jurisdiction;¹¹ leaving open the question of UN responsibility for the actions and omissions of Dutchbat and prompting claimants to further pursue their case solely against the state of the Netherlands. In 2013, the Supreme Court confirmed in proceedings instituted by different claimants that the Netherlands was responsible in relation to the deaths of three specific individuals.¹² Muhamed Nuhanović, Ibro Nuhanović and Rizo Mustafić had been admitted into the compound after the fall of Srebrenica but were later forced to leave by

¹⁰ *Prosecutor v Krstić*, ICTY Appeals Chamber Judgment, Case No IT-98-33-A, 19 April 2004; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007 ('Bosnian Genocide'), at 376.

¹¹ *Stichting Mothers of Srebrenica and others v. The Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR:2012:BW1999, 13 April 2012 ('Mothers of Srebrenica 2012'), available (in Dutch) at <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2012:BW1999>, accessed 23 April 2020.

¹² *The Netherlands v. Nuhanović*, Supreme Court of the Netherlands, ECLI:NL:HR:2013:BZ9225, 6 September 2013 ('Nuhanović 2013'), available (in English) at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003324.pdf>, accessed 23 April 2020; and the identical case of *The Netherlands v. Mustafić*, Supreme Court of the Netherlands, ECLI:NL:HR:2013: BZ9228, 6 September 2013, available (in English) at [https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20\(1\).pdf](https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20(1).pdf), accessed 23 April 2020. See Boutin 2013.

Dutchbat;¹³ conduct which the Supreme Court found to be attributable to the Netherlands. As is further discussed below, in its 2019 ruling in *Mothers of Srebrenica*, the Supreme Court builds on much of the legal reasoning employed in the *Nuhanović* and *Mustafić* cases, though it also appears to depart from its 2013 ruling on several notable points.

Compared to the *Nuhanović* and *Mustafić* cases, which focused specifically on the deaths of three individuals that had been admitted into the compound, the claimants in *Mothers of Srebrenica* sought to significantly broaden the responsibility of the Netherlands in relation to the Srebrenica genocide. In essence, they based their claim on the argument that, in general, Dutchbat did too little to stop the advance of the Bosnian Serbs and protect the civilian population of the safe area around Srebrenica and, more specifically, that during the evacuation of refugees from the mini safe area Dutchbat had cooperated in the separation of male refugees from other refugees and had cooperated in the evacuation of male refugees that were staying in the compound.¹⁴ Throughout the various stages of legal proceedings that followed – which eventually culminated in the Supreme Court decision – it was accepted by Dutch courts that the Netherlands bore at least *some* responsibility in relation to these events. However, the extent of responsibility to be borne by the Netherlands turned out to be the main point of contention.

In first instance¹⁵ the District Court displayed a much more limited view on the responsibility of the Netherlands than the one promulgated by claimants. First, it held that none of Dutchbat's conduct before the decision to evacuate could be attributed to the Netherlands,¹⁶ finding that the Netherlands only exercised effective control over Dutchbat's conduct *after* it had decided (jointly with the UN) to evacuate the mini safe area.¹⁷ This view built on the Supreme Court's reasoning in *Nuhanović* and *Mustafić* – in particular the assertion that during this period of transition and withdrawal the situation 'differ[ed] in one important respect from the normal situation in which troops made available by a State function under the command of the United Nations'¹⁸ – and would be reiterated in the proceedings that followed. Second, after evaluating the range of actions and omissions that had followed the decision to evacuate, the Court

¹³ Ibro Nuhanović had been authorised to stay, but his wife and son were not, which pushed Ibro Nuhanović to decide to leave together with them.

¹⁴ *Mothers of Srebrenica* 2019, para. 2.2.2.

¹⁵ *Stichting Mothers of Srebrenica and others v. The Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2014:8748, 16 July 2014 ('*Mothers of Srebrenica* 2014'), available (in English) at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:8748>, accessed 23 April 2020.

¹⁶ *Mothers of Srebrenica* 2014, para. 4.79.

¹⁷ *Mothers of Srebrenica* 2014, para. 4.80.

¹⁸ *Nuhanović* 2013, para 3.12.2.

concluded that *only* Dutchbat's cooperation in the deportation of male refugees from the compound (and not the mini safe area as such) amounted to a wrongful act for which the Netherlands could be held liable; rejecting all other claims. This meant that the family members of approximately 350 men were entitled to monetary damages.¹⁹

The Court of Appeal set aside this judgment.²⁰ Contrary to the District Court, it *did* find that the Netherlands was responsible for Dutchbat's facilitation of the separation of male refugees in the mini safe area *outside* the compound.²¹ Nonetheless, the claim for monetary damages of surviving relatives was denied due to the lack of a causal relationship between wrongful act and injury: the Court found it plausible that the men in question would have been killed by the Bosnian Serbs even if the Netherlands would not have committed the wrongful act of facilitating their separation.²² Furthermore, the Court reaffirmed that the Netherlands had acted wrongfully by not giving the male refugees *inside* the compound the choice of staying. However, it agreed with the state that it had not been established with a sufficient degree of certainty that the men in the compound would have survived if Dutchbat had acted differently. The Court estimated that the Netherlands had deprived those men of a 30 per cent chance of escaping from inhumane treatment and executions, and limited the entitlement to compensation of their family members to 30 per cent of the loss incurred.²³

This judgment was – once again – set aside by the Supreme Court, which further limited the extent of responsibility by ruling that the Netherlands had only acted wrongfully towards the 350 male refugees *inside* the compound, and had deprived them not of a 30 per cent chance but a 10 per cent chance of escaping inhumane treatment and execution.²⁴ While the Supreme Court did in the end accept a limited responsibility on the part of the Netherlands, hence providing some redress for some victims, we argue below that in several respects its reasoning on attribution, wrongfulness and compensation has unreasonably limited the possibility of holding a troop-contributing state responsible for the failure to protect civilians under their care.

¹⁹ Mothers of Srebrenica 2014, para. 4.339.

²⁰ *Stichting Mothers of Srebrenica and others v. The Netherlands*, The Hague Court of Appeal, ECLI:NL:GHDHA:2017:3376, 27 June 2017 ('Mothers of Srebrenica 2017'), available (in English) at <http://deelink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2017:3376>, accessed 30 April 2020.

²¹ Mothers of Srebrenica 2017, para. 61.5.

²² Mothers of Srebrenica 2017, para. 64.2

²³ Mothers of Srebrenica 2017, para. 69.1.

²⁴ Mothers of Srebrenica 2019, para. 4.7.9. See Ryngaert and Spijkers 2019; Dannenbaum 2019.

2.2. *Mukeshimana and Others*

The factual background of the *Mukeshimana* case presents some clear similarities with the *Mothers of Srebrenica* and *Nuhanović and Mustafić* cases. The UNAMIR peacekeeping force was deployed in Rwanda with a limited mandate and limited resources while a genocide unravelled against Tutsi and moderate Hutu.²⁵ Belgium had contributed 370 troops, 90 of which (*'Groupe Sud'*) were stationed at the ETO.²⁶ At the beginning of April 1994, the situation rapidly deteriorated, with Interahamwe militias embarking in widespread ethnic cleansing, as well as the torture and murder of ten Belgian peacekeepers.²⁷ In this context, Rwandan civilians began to seek shelter at the ETO, with around 2000 refugees arriving at the encampment between 7 and 10 April.²⁸

It is also in this context that Belgium and other nations sought to evacuate from the country their expatriated nationals. France and Belgium deployed special forces under national command (thus distinct from UNAMIR chain of command) for this purpose.²⁹ On 11 April, expatriates, who had been gathered at the ETO to organise their repatriation, were safely evacuated. On the same day, after expatriates had left, the troops of *Groupe Sud*, under the command of Lieutenant Lemaire, left the ETO to gain the airport.³⁰ Lieutenant Lemaire had obtained approval from the commander of the Belgian contingent Kibat, Lieutenant-Colonel Dewez, and the commander of the Kigali sector (including Kibat), Colonel Marchal.³¹ Left to their own means, the 2000 refugees attempted to leave ETO. The majority of them were immediately massacred.³² A few days later, Belgium formally withdrew from the UN mission and repatriated its contingent.³³ The tragic events leading to the case have been recounted in the book by UNAMIR Force Commander General Dallaire *'Shake Hands with the Devil: The Failure of Humanity in Rwanda'* (2003), and the movie *'Shooting Dogs'* (2005).

²⁵ Mukeshimana 2018, para. 28. See, Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, 16 December 1999, UN Doc. S/1999/1257 Annex, p. 39.

²⁶ Mukeshimana 2018, paras. 10–11.

²⁷ Mukeshimana 2018, paras. 16 and 20.

²⁸ Mukeshimana 2018, para. 20.

²⁹ Mukeshimana 2018, paras. 18–19. Almost 1500 Belgian nationals were based in Rwanda at the time.

³⁰ Mukeshimana 2018, para. 20.

³¹ *Ibid.*

³² Mukeshimana 2018, para. 21.

³³ Mukeshimana 2018, para. 24.

In first instance, the Court had found that the decision to evacuate the ETO was attributable to Belgium and not to the UN.³⁴ The Court did not expressly refer to international law and the ILC Articles, but determined that, at the time of the evacuation, the Belgian contingent was in permanent liaison with Belgium top army staff, and that the decision to evacuate the ETO was taken without any consultation with UNAMID Force Commander General Dallaire. Therefore, the Court concluded that at the time of the evacuation the Belgian contingent was acting under Belgian command and not as UN peacekeepers under UN authority.³⁵ The Court further determined that there was a direct causal link between the evacuation of the ETO and the subsequent massacres, as the mere presence of peacekeepers would have protected the refugees.³⁶ The Court however did not address the question of reparation, leaving the issue aside for a future decision.³⁷

On appeal, the Court reversed the decision, holding that Belgium held no responsibility in relation to the ETO evacuation, which, according to the Court of Appeal, was a decision exclusively attributable to the UN.³⁸ It thereby followed the arguments of the state according to which Belgian commanders acted exclusively within the UNAMIR framework,³⁹ and rejected the claim from victims' relatives that the decision to leave the ETO without offering any protection to the refugees was taken without any coordination with UNAMID Force Commander General Dallaire, and that Lieutenant-Colonel Dewez and Colonel Marchal were at that time taking orders directly from Belgium.⁴⁰ Having determined that the conduct was not attributable to Belgium, the Court did not examine in more details the questions of breach and of reparation.

The decision of the Court of Appeal, which was not challenged in cassation,⁴¹ thereby closes the door to any opportunity for redress for the victims. Unlike the Dutch Supreme Court, which adopted a relatively narrow approach as to the extent of responsibility yet recognised that the Dutch state bore some responsibility in relation to the evacuation from the Potočari compound,

³⁴ *Mukeshimana-Ngulinzira and others v Belgium and others*, Brussels Court of First Instance, 04/4807/A and 07/15547/A, 8 December 2010 ('Mukeshimana 2010'), para. 38. See Ryngaert 2011.

³⁵ *Ibid.*

³⁶ *Ibid.*, para. 51.

³⁷ *Ibid.*, para. 52.

³⁸ Mukeshimana 2018, para. 70.

³⁹ Mukeshimana 2018, para. 32.

⁴⁰ Mukeshimana 2018, para. 35.

⁴¹ Ruys 2020, p. 271.

the Brussels Court of Appeal resolutely rejected any responsibility of the Belgium state for the failure to protect civilians at the ETO.

3. The Eternal Question: Attribution of Conduct in Peacekeeping Operations

One of the main questions put before each court was whether the conduct of Dutch and Belgian peacekeepers in Srebrenica and Rwanda could be attributed to their respective troop-contributing state; an issue central to the ongoing debate on the responsibility of states and international organizations for the conduct of peacekeeping forces.

Peacekeeping forces are composed of national contingents, which are state organs put at the disposal of the UN. Troop-contributing states typically transfer operational control over their troops to the UN, and retain other elements of command and control over their national contingents such as disciplinary authority, criminal jurisdiction, and the authority to withdraw forces. In practice, the division and exercise of command and control is not always clear-cut and may even deviate from what was formally agreed.⁴² In this context, where a peacekeeping contingent has formal ties to both a state and an international organization, different modalities of attribution become possible that are highly dependent upon factual circumstances: a particular course of conduct could be attributed to the troop-contributing state, the UN, or to both of them.

Article 7 of the ILC Articles on the Responsibility of International Organizations (ARIO)⁴³ was explicitly drafted to address attribution of conduct in peacekeeping operations.⁴⁴ Pursuant to this provision, the conduct of a state organ placed at the disposal of an international organization is attributable to the organization ‘if the organization exercises effective control over that conduct.’ In its commentaries, the ILC explains that, because in peacekeeping operations military contingents still act to a certain extent as organ of the seconding state, such contingents are not ‘fully seconded’⁴⁵ to the organization, and therefore do not qualify as organs of the organization which conduct would be attributed pursuant to Article 6 ARIO.⁴⁶ While the UN’s

⁴² Boutin 2017, at 157-159; Leck 2009, at 352.

⁴³ Articles on the Responsibility of International Organizations, 2(2) ILC Yearbook (2011), UN Doc. A/66/10, at 40–46 (‘ARIO’); and Articles on the Responsibility of International Organizations with commentaries, 2(2) ILC Yearbook (2011), UN Doc. A/66/10, at 46–105 (‘ARIO commentaries’)

⁴⁴ ARIO commentaries to Article 7, para. 1; Boutin 2017, at 161.

⁴⁵ ARIO commentaries to Article 7, para. 1.

⁴⁶ ARIO commentaries to Article 7, para. 1.

official position remains that, in principle, a peacekeeping force is a subsidiary organ of the UN and hence its conduct is always attributable to the organization,⁴⁷ the ILC, supported by a majority of scholars,⁴⁸ considers that ‘[t]he criterion for attribution of conduct either to the contributing State [...] or to the receiving organization is based, according to Article 7, on the factual control that is exercised over the specific conduct’.⁴⁹ This test is commonly referred to as one of ‘effective control’.

Nonetheless, some confusion still persists about the applicable control-based test to determine attribution of conduct in peacekeeping operations, as well as the substance of such test. We touch upon this ongoing saga of attribution below. We start with some remarks on the attribution of peacekeeping forces conduct in periods of transition and withdrawal, where states often resume – at least partially – control over their troops (3.1). The existence of such a transitional period is what unites the cases of *Mukeshimana* and *Mothers of Srebrenica*, though the two courts do not seem to give the same weight to the existence of such exceptional circumstances. We subsequently focus on the test for attribution applied by each court, which in their respective reasoning appear to deviate from the applicable legal framework set out above (3.2). Finally, we highlight what we believe to be an important drawback of the interpretations put forward by these two domestic courts, which essentially risks leaving the possibility of attributing omissions to troop-contributing states unresolved (3.3)

3.1. Attribution of Conduct in Periods of Transition and Withdrawal

An obvious similarity between the *Mukeshimana* and *Mothers of Srebrenica* cases is that they both address – in whole or in part – the question of attribution of conduct in the context of a period of transition, where the national contingent is in the process of withdrawing from a UN peacekeeping operation. Such a transitional period can be an indication of at least some involvement on the part of the troop-contributing state, which would usually at least partly resume the operational command over its contingent. This can have important implications for the question of attribution.

⁴⁷ ARIO commentaries to Article 7, para. 6.

⁴⁸ See, Boutin 2017, at 160, fn 25.

⁴⁹ ARIO commentaries to Article 7, para. 4.

In *Mothers of Srebrenica*, the transitional period that commenced after the decision to evacuate on 11 July 1995 at 23:00 provided an essential factor for the analysis of Dutch courts. Referring to the cases of *Nuhanović* and *Mustafić*, the District Court had established in first instance that after Srebrenica had fallen, the decision to evacuate Dutchbat and the refugees was taken jointly by the UN and the Netherlands,⁵⁰ triggering a transitional period – distinct from the situation in which troops placed under UN command normally operate – where the Netherlands exercised effective control over the evacuation in the mini safe area.⁵¹ This was reiterated by the Court of Appeal⁵² and not contested in cassation by the Dutch state, which is why the attribution of conduct to the state *after* the period of transition and withdrawal was not the subject of further discussion by the Supreme Court.

In *Mukeshimana*, claimants had argued that the conduct of Kibat, in particular the decision to leave the ETO and the subsequent failure to protect the individuals who sought refuge there, was to be attributed to the Belgian state, in view of the particular circumstances surrounding the evacuation of the ETO and the subsequent withdrawal of Belgium.⁵³ While in first instance Belgian courts had found that the factual circumstances justified attribution of conduct to the Belgian state, the Brussels Court of Appeal went to great lengths to arrive at the opposite conclusion. In the process, it underlined what it believed to be essential differences between the situation at the ETO in Rwanda and the situation at the Potočari compound in Srebrenica.

Essentially, the Court argued that a distinction should be made between the decision to withdraw from UNAMIR (which was taken by the Belgian state somewhere between 10 and 15 April), and the withdrawal of troops from the ETO on 11 April, which was not explicitly ordered by the Belgian government.⁵⁴ The utility of this distinction is rather doubtful, particularly if one considers that the evacuation of the ETO had taken place in the wider context of the decision of multiple states (including Belgium) to evacuate their nationals.⁵⁵ Moreover, as pointed out by Ruys, several features unique to the *Mukeshimana* case make the existence of factual control on the part of Belgium even more plausible.⁵⁶

⁵⁰ *Mothers of Srebrenica* 2014, paras. 4.80-4.83.

⁵¹ *Mothers of Srebrenica*, para. 4.87.

⁵² *Mothers of Srebrenica* 2017, para. 24.2.

⁵³ *Mukeshimana* 2018, para. 39.

⁵⁴ *Mukeshimana* 2018, para. 69.

⁵⁵ *Ibid.*

⁵⁶ Ruys 2020, at 274.

The reasoning of the Brussels Court of Appeal is equally unconvincing in holding that Belgian commanders were unaware of the imminent decision of Belgium to withdraw its contingent and thus remained acting exclusively within the UNAMIR framework under UN command. In its attempt to distinguish the *Mukeshimana* case from the *Mothers of Srebrenica* case, the Brussels Court of Appeal sought to demonstrate that Kibat remained under exclusive UN command up until its formal withdrawal from the mission. The Court dismissed the submissions of UNAMID Force Commander General Dallaire, according to whom Belgian Forces stationed at the ETO had progressively been withdrawn from its command,⁵⁷ and the decision to evacuate the ETO was taken under Belgium command.⁵⁸ However, the factual circumstances of the case hardly support the Court's findings. It is indeed undisputed that in the days preceding its formal withdrawal from UNAMIR, the Belgium government was in direct liaison with Belgian Kibat commanders and with the UN Secretary-General.⁵⁹ In this regard, the facts of *Mukeshimana* are undeniably comparable to the *Mothers of Srebrenica* case, in that a period of transition had been entered to, in which Belgium arguably exercised at least partial control over its forces. All in all, one cannot escape the feeling that the Court's resolute conclusion on this point might have been misplaced. This feeling is only exacerbated if one takes a closer look at the way in which it has interpreted the applicable test for attributing the conduct of peacekeeping forces.

3.2 Persisting Meanderings on the Applicable Test for Attributing Conduct of Peacekeeping Forces

Both the Dutch Supreme Court and the Brussels Court of Appeal did not unequivocally apply the established test of effective control of Article 7 ARIO. In *Mothers of Srebrenica*, the Court maintained that Article 8 of the ILC Articles on the Responsibility of States (ARSIWA)⁶⁰ was applicable to determine whether the conduct of Dutchbat could be attributed to the Netherlands. In *Mukeshimana*, the Court formally upheld that Article 7 ARIO was applicable, but put forward a very narrow interpretation that in some respects echoes the standard of Article 8 ARSIWA, and also appears to draw from the much criticized test of 'ultimate authority and

⁵⁷ *Mukeshimana* 2018, para. 62.

⁵⁸ *Mukeshimana* 2018, para. 68.

⁵⁹ *Mukeshimana* 2018, paras. 47-48.

⁶⁰ Articles on the Responsibility of States for Internationally Wrongful Acts, 2(2) ILC Yearbook (2001), UN Doc. A/56/10, pp. 26–30 ('ARSIWA'); and Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries thereto, 2(2) ILC Yearbook (2001), UN Doc. A/56/10, pp. 31–143 ('ARSIWA commentaries').

control’ formulated by the European Court of Human Rights in the cases of *Behrami and Saramati*.⁶¹

After many years of academic and judicial debates on the applicability and interpretation of Article 7 ARIO, it is surprising that both courts in the cases at hand did not follow the mainstream approach and maintained a persisting confusion between different iterations of ‘effective control’ as an attribution test. This is particularly surprising when it comes to the Dutch Supreme Court, which in its earlier rulings in the *Nuhanović* and *Mustafić* cases had proceeded primarily from Article 7 ARIO when deciding on the attribution of Dutchbat’s conduct to the Netherlands.⁶²

In *Mothers of Srebrenica*, the Supreme Court’s analysis of the issue of attribution focused exclusively on Dutchbat’s conduct up until 11 July 1995 at 23:00, which, it should be recalled, is the date and time of the decision to evacuate the compound. The victims had directed complaints specifically against the Court of Appeal’s ruling that conduct *prior* to the decision to evacuate – which set in motion the abovementioned period of transition and withdrawal – could not be attributed to the Netherlands. In the end, the Supreme Court’s decision reaffirmed the Court of Appeal’s finding that in light of all of the factual circumstances and the special context of the case, the state did not have factual control over the conduct of Dutchbat until the formal decision to evacuate and, accordingly, its conduct during the preceding period was not attributable to the Netherlands.⁶³ While the Supreme Court’s conclusion on this point is certainly defensible, we wish to reflect on the road travelled to reach this conclusion, which reveals some confusion as to the applicable test for attribution.

The Supreme Court’s choice not to explicitly engage with Article 7 ARIO as a basis for the attribution of Dutchbat’s conduct to the Netherlands was based on its view that this provision solely serves to determine whether a given conduct is attributable to the UN, but is not relevant to decide whether a conduct is attributable to the state.⁶⁴ In its reasoning, the Supreme Court

⁶¹ *Behrami and Behrami v. France*, European Court of Human Rights, 2 May 2007, Application No. 71412/01; and *Saramati v. France, Germany and Norway*, European Court of Human Rights, 2 May 2007, Application No. 78166/01 (‘Behrami and Saramati’).

⁶² *Nuhanović* 2013, para. 3.11.3. However, in para. 3.13, it takes into account Article 8 ARSIWA as well, concluding that ‘the Court of Appeal was able to find on the basis of the attribution rule of article 7 DARIO, which is applicable to this case, partly in view of what is provided in the attribution rule of article 8 DARS — that Dutchbat’s disputed conduct can be attributed to the State’

⁶³ *Mothers of Srebrenica* 2019, para. 3.5.5.

⁶⁴ *Mothers of Srebrenica* 2019, para. 3.3.5.

seems to assume that the ARIO deals exclusively with the responsibility of international organisations and is therefore not relevant for state responsibility; and hence the question of attribution of Dutchbat's conduct to the Netherlands should be resolved exclusively on the basis of the ARSIWA. However, such a formalistic distinction between the two sets of ILC Articles amounts to a severe oversimplification. In scenarios where both a state and an international organization are involved, the ARIO can be directly relevant for the determination of state responsibility. We can point, for instance, to Articles 58-62 ARIO that address the responsibility of a state in connection with the conduct of an international organization. Besides, as noted above, the commentary to Article 7 ARIO clearly provides that effective control is '[t]he criterion for attribution of conduct either to the contributing State [...] or to the receiving organization'.⁶⁵

The Court's mistaken assumption that Article 7 ARIO was not relevant to the case before it steered it towards engaging exclusively with Article 8 ARSIWA,⁶⁶ which provides that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' This finding of the Supreme Court is particularly criticisable, and stems from a confusion between what are conceptually different types of control-based tests for attribution of conduct.

While the tests enshrined in Article 8 ARSIWA and Article 7 ARIO are both referred to as tests of 'effective control', each provision has been drafted to address substantially different types of situations, and the tests enshrined in these two provisions do not have an identical content. Article 8 ARSIWA applies to the conduct of *private* persons or entities which, as a general rule, is not attributable to the state.⁶⁷ This provision can be seen as an exception to the aforementioned general rule, recognizing that circumstances may arise where the conduct of private actors is nevertheless attributable to the state. Therefore, attribution in this context only occurs upon achievement of a relatively high threshold of 'actual participation of and directions given by [the] State'.⁶⁸ This test was first fleshed out by the International Court of Justice in

⁶⁵ ARIO commentaries to Article 7, para. 4.

⁶⁶ Mothers of Srebrenica 2019, para. 3.4.2.

⁶⁷ ARSIWA commentaries to Article 8, para. 1.

⁶⁸ ARSIWA commentaries to Article 8, para. 4.

the *Nicaragua* case,⁶⁹ which concerned the conduct of irregular armed forces, and essentially revolves around positive acts of control.

The question whether the conduct of non-state actors with no formal link to a state can be attributed to that state at all is to be distinguished from the question of attribution in peacekeeping operations where state organs have been partially delegated to an international organization and have formal links to at least two international actors.⁷⁰ As made clear by the ILC in its commentaries to Article 7 ARIO, '[i]n the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct has to be attributed.'⁷¹ The test developed by the International Court of Justice (ICJ) in *Nicaragua* is thus not of the same nature and threshold as the test of effective control in the context of peacekeeping.⁷²

Essentially, the test of effective control in Article 7 ARIO 'attempts to verify whether the formal delegation of control by the state to the international organisation was genuine or whether control was actually retained or resumed by the state.'⁷³ In a context where troops have been placed at the disposal of the UN but the state in fact retains or resumes control, active participation and the explicit issuing of directions is not an absolute requirement for attributing conduct to the troop-contributing state. This is of particular relevance, as is further discussed in section 3.3, when it comes to the attribution of conduct consisting of omissions.

The Brussels Court of Appeal's ruling in *Mukeshimana* also reveals much confusion about the substance of the test applicable to the attribution of conduct in peacekeeping operations. Formally, the Court recognised the relevance of the test of effective control of Article 7 ARIO to attribute the conduct of Kibat to the Belgian state. However, it considered that it would only be in the circumstances where Belgium would have given direct and precise instructions to its

⁶⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, ICJ, Judgment, 27 June 1986 ('*Nicaragua*'), para. 115. The test was reiterated by the ICJ in *Bosnian Genocide*, at 399-400.

⁷⁰ Montejo 2013.

⁷¹ ARIO commentaries to Article 7, para. 5.

⁷² Boon 2014, p. 354.

⁷³ Boutin 2017, at 160.

contingent that countermand the UN command structure that attribution could shift from the UN to Belgium.⁷⁴

The Court thereby applied a very narrow interpretation of Article 7 ARIO, where only direct orders countermanding the UN command structure justify attribution to a state. As support for this assertion, the Court refers to the Hague Court of Appeal's ruling in *Mothers of Srebrenica*,⁷⁵ but fails to acknowledge that Dutch courts have never accepted such a narrow approach. It is worth recalling that in the case of *Nuhanović*, the Supreme Court precisely noted that '[f]or the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently.'⁷⁶ The interpretation of effective control under Article 7 ARIO in *Mukeshimana* is in a way reminiscent of Article 8 ARSIWA, which requires specific instructions and directions. However, as explained above, Article 8 ARSIWA serves an entirely different purpose and its interpretation is not transposable to the situation of UN peacekeeping. While direct instructions from troop-contributing states in contravention of the UN chain-of-command clearly warrant attribution to the state, the potential circumstances in which a state exercises effective control over its contingent are much broader. In particular during periods of transition and withdrawal, where lines of command become blurred, it cannot be ignored that a state can at least partially resume control over its troops.

Further confusion is brought by the Brussels Court in adding that the UN retained 'ultimate control' over Kibat.⁷⁷ In the decried cases of *Behrami* and *Saramati*, the European Court of Human Rights had followed a similar approach, holding that that effective control in the ARIO was the applicable test, yet concluding that conduct was attributable to the UN on the basis of the 'ultimate authority and control' that it retained over the conduct of UN-led or UN-authorized forces.⁷⁸ Since Article 7 ARIO calls for a factual and context-specific analysis of control, while ultimate control 'hardly implies a role in the act in question',⁷⁹ this interpretation of the

⁷⁴ *Mukeshimana* 2018, paras. 44 and 65.

⁷⁵ *Mukeshimana* 2018, para. 44.

⁷⁶ *Nuhanović* 2013, para. 3.11.3.

⁷⁷ *Mukeshimana* 2018, para. 65.

⁷⁸ *Behrami and Saramati*, para. 133.

⁷⁹ ARIO commentaries to Article 7, para. 10.

European Court was widely criticised as unable to grasp the nuances and realities of control in peacekeeping operations.⁸⁰

3.3. Unresolved Issues on the Attribution of Omissions

In light of the Dutch and Belgian courts' approach to the question of attribution of conduct, we wish to highlight what we believe to be an important limitation of interpreting effective control as requiring actual participation of and directions given by the State. Such an interpretation falls short of providing answers when the conduct at stake consists of omissions resulting from a lack of operational instructions. This is particularly relevant with respect to failures to protect or other breaches of positive obligations to take action. Such breaches of positive obligations can be conceptualised as 'legal omissions', which themselves can be the result of either factual actions or factual omissions. On the one hand, a positive obligation to protect might often be breached through passive conduct or, in other words, by failing to take any action. On the other hand, positive obligations can be breached by active conduct. In both the *Mothers of Srebrenica* and the *Mukeshimana* cases, the failure to protect civilians resulted from active conduct that consisted in the evacuation respectively of the ETO encampment and the Potočari compound (and in the case of Dutchbat, the active cooperation in the evacuation of refugees by the Bosnian Serbs), as well as passive conduct, namely the lack of any protection offered to refugees.

Since attribution of conduct is more straightforward with regards to actions than when it comes to factual omissions, courts faced with the issue of attribution of conduct in relation to breaches of positive obligations tend to focus their analysis on identifiable active conduct, and thus seek to determine whether direct orders were given by a state leading to such conduct. This approach however fails to address violations of positive obligations in peacekeeping operations resulting from purely passive conduct that was neither ordered by the UN nor by a state. How can conduct be attributed in the case where peacekeepers simply stood by doing nothing?

In previous decisions in the *Nuhanović* case, Dutch courts had attempted to address omissions by putting forward the test of the 'power to prevent'.⁸¹ Under this relatively broad standard, which was inspired by scholarship,⁸² conduct would be attributed to the state if 'it could have

⁸⁰ See, e.g., Larsen 2008, Milanović M and Papić T (2008), Messineo 2011.

⁸¹ Nuhanović 2013, paras. 3.12.2 and 3.12.3.

⁸² Dannenbaum 2010, at 157.

prevented the conduct in question'.⁸³ However, this standard was expressly rejected by the Supreme Court in *Mothers of Srebrenica* when it concluded that 'the argument that effective control can also be evident from the circumstance that the State was in such a position that it had the power to prevent the specific acts of Dutchbat [...] is also based on an incorrect interpretation of the law'.⁸⁴ At the same time, as it focused its analysis on Article 8 ARSIWA and active participation, the Court was unable to formulate a nuanced position on attribution of omissions.

The question of attribution of omissions is more than simply an abstract point of critique, and on that point the Dutch Supreme Court establishes a potentially dangerous precedent, whereby a troop-contributing state can hardly be held responsible for passive conduct in breach of an international obligation. In order to push forward the debate on attribution of omissions, we wish to discuss a number of different approaches that could allow establishing state responsibility for the omissions of peacekeepers.

One option for courts faced with the issue of omissions in peacekeeping operations would be to put forward a less far-reaching interpretation of the power to prevent standard. While it would go too far to claim that wrongful conduct can always be attributed to a state if it could have hypothetically prevented it (which will probably always remain a theoretical possibility for a troop-contributing state, for instance by resuming command), the notion of 'power to prevent' can be relevant in cases where failures to act are to be attributed, in particular if the state is in the process of resuming control, such as is typically the case during periods of transition and withdrawal. As previously argued by one of the authors of this Chapter, the essence of the power to prevent standard in the context of peacekeeping is not 'that conduct would always be attributable to a state on the ground that it could always hypothetically exercise control' but that 'the failure of a state to exercise the operational control that it has delegated only becomes relevant when its causal link to the wrongful conduct is proximate enough, such as when a state is in the process of resuming control'.⁸⁵

⁸³ Nuhanović 2013, para. 3.12.2; *Nuhanović v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section LJN:BR5388, 5 July 2011, available (in English) at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSGR:2011:BR5388>, accessed 17 April 2020 ('Nuhanović 2011'), para. 5.18.

⁸⁴ *Mothers of Srebrenica* 2019, para. 3.5.3.

⁸⁵ Boutin 2017, at 174.

Another approach would be to proceed from the assumption that as soon as it has been established that a state is bound by a positive obligation to take action, and no action is taken whatsoever, it is the state that was bound to act that has breached its obligation through its own omission. Indeed, it has been noted that ‘by its very nature a failure on the part of the state to fulfil a positive obligation is conduct of that state. All of the legwork in such a case is done in determining the specific content of the specific obligation to take action and whether it was discharged.’⁸⁶ For instance, in *Mothers of Srebrenica*, Dutch courts had ruled that through Dutchbat, the Netherlands had jurisdiction in the compound from 23:00 on 11 July 1994 within the meaning of Article 1 ECHR,⁸⁷ triggering a range of positive human rights obligations for the Dutch state. If one considers that as a result of this exercise of jurisdiction the Netherlands became bound to the positive obligation to take action prevent violations of the right to life enshrined in Article 2 ECHR and the right not to be subjected to torture or to inhuman or degrading treatment in Article 3 ECHR, it becomes difficult to maintain that a total lack of action on part of the Dutch state – whether through Dutchbat or otherwise – would *not* be attributable to the Netherlands.

4. Further Exploring the Avenue of Shared Responsibility

4.1. Multiple Attribution of Conduct

While domestic courts faced with claims of responsibility and questions of attribution understandably focus on determining whether conduct occurring in the context of peacekeeping operations is attributable to the troop-contributing state – an inevitable result of the limits of their jurisdiction – under the law of international responsibility it remains possible for the same conduct to be attributed to more than one state or international organization.⁸⁸ Accordingly, in the context of peacekeeping, it cannot be excluded that conduct attributed to a state is also attributable to the UN, and vice versa. This is particularly true during transition and withdrawal periods, which are archetypical scenarios of blurred and joint control, often resulting in shared responsibility of the UN and the troop-contributing state for the same conduct.

⁸⁶ Jackson 2015, at 195. See also Stern 2010, at 209, who notes that where there is an omission to act ‘it is not a question of attribution of the act of a private party, but rather *a failure of the State itself* to comply with its primary obligations’ (emphasis added).

⁸⁷ *Mothers of Srebrenica* 2019, para. 4.2.1.

⁸⁸ ARSIWA commentaries to Article 1, para. 6; ARSIWA commentaries to Article 47, para. 3; ARIO commentaries to Part Two, Chapter II ARIO, para. 4.

Dutch courts have since 2011 explicitly recognized the possibility of dual attribution of Dutchbat's conduct to both the UN and the Netherlands.⁸⁹ Although the courts had to decline to exercise jurisdiction over claims against the UN due to the immunity of the organization, they openly engaged with the issue of multiple attribution of conduct, notably in response to argument of the Dutch state that Dutchbat's conduct could not be attributed to the Netherlands because it was attributable to the UN. This argument was rejected by Dutch courts, which considered 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'.⁹⁰

In *Mukeshimana*, the Court did not explicitly discuss multiple attribution, reasoning mainly in terms of exclusive attribution to either the UN or Belgium,⁹¹ and seemed to implicitly reject the possibility of dual attribution in the case, holding that at no point was there a joint control of Belgium and the UN over Kibat.⁹² In addition, the Court's interpretation of the applicable test for attribution as requiring Belgium to have given direct instructions to Kibat that would have countermanded the UN command structure in order for responsibility to shift from the UN to Belgium (which we have argued to be an incorrect interpretation) is not particularly open to the possibility of dual attribution.⁹³

Yet, the facts of the case, where both the UN and the Belgium state arguably exercised some degree of control over the operations preceding Belgium's withdrawal, are archetypal of scenarios where multiple attribution can be argued convincingly. The Court acknowledged that, at the time of the evacuation of expatriates, the UN peacekeepers, including Kibat, were directly collaborating with French and Belgian special forces, but rejected that this resulted in a joint control of UN and Belgium over Kibat.⁹⁴ It is regrettable that the Brussels Court did not examine more closely whether certain conduct could be jointly attributed to the UN and Belgium, and opted instead to attribute all actions and omissions of Kibat to the UN.

⁸⁹ Nollkaemper 2011.

⁹⁰ Nuhanović 2011, para. 5.9.

⁹¹ This also results from the parties' arguments, which respectively put forward that the conduct of Kibat was attributable exclusively to the UN (para. 32, argued by Belgium) or to the Belgium state (para. 39, argued by the victims' relatives).

⁹² *Mukeshimana* 2018, para. 65.

⁹³ Dannenbaum 2015, at 410-412.

⁹⁴ *Mukeshimana* 2018, para. 65.

Arguably, in both cases, it could have been concluded that conduct was attributable to both the troop-contributing state and the UN, resulting in shared responsibility.

4.2. The Obligation of Reparation in Situations of Multiple Causes

An important question that arises in any scenario of shared responsibility is how the obligation to make full reparation is to be distributed when harm suffered by injured parties is the result of multiple causes. In both cases under discussion domestic courts were confronted with claims of surviving family members seeking justice for the victims of a genocide that had resulted from the actions and omissions of a plurality of actors, including the non-state armed groups that actively engaged in the horrendous killings of thousands of civilians and the peacekeeping troops whose failure to protect the civilians under their care could arguably be attributed to both the UN and the troop-contributing state.

In this final subsection we evaluate the approaches by Dutch and Belgian courts to the question of reparation in situations of multiple causes, with a particular focus on the *Mothers of Srebrenica* case. Whereas in *Mukeshimana* it was established in first instance that there was a causal link between Kibat's withdrawal and the massacres committed by Interahamwe militias, the Brussels Court of Appeal's ruling contains no discussion of reparation – an obvious consequence of the Court's conclusion that Belgium did not bear any responsibility.

The extent of responsibility and the corresponding reparation due by the Netherlands was one of the main points of contention throughout the proceedings in *Mothers of Srebrenica*, clearly illustrating the difficulties with adjudicating reparation claims when there are multiple causes of a single damage. Dutch courts engaged with the issue of multiple causes in their discussion of two separate grounds for responsibility of the Netherlands: Dutchbat's cooperation in the evacuation of refugees outside and inside the Potočari compound.

First, contrary to the District Court's ruling, the Court of Appeal had ruled that the responsibility of the Netherlands extended to Dutchbat's cooperation in the separation of male refugees in the mini safe area *outside* of the Potočari compound. Because Dutchbat knew or should have known of the real risk that male refugees would be exposed to a breach of their fundamental rights under Articles 2 and 3 ECHR, it should have ceased its cooperation in the evacuation. However,

the existence of multiple causes was an important factor that prompted the Court to issue a declaratory judgment rather than an order for compensation. It considered that even though Dutchbat's cooperation in the evacuation had facilitated the serious breaches of fundamental human rights committed by the Bosnian Serbs, these violations would have occurred even if Dutchbat had acted differently.⁹⁵

Interestingly, this approach resembles that of the ICJ in the *Bosnian Genocide* case. In that case, the ICJ considered that the state of Serbia and Montenegro was responsible for its failure to prevent the Srebrenica genocide, but ruled that financial compensation was not an appropriate form of reparation because there was no 'sufficiently direct and certain causal nexus' between the breach of the obligation to prevent genocide and the injury caused by Srebrenica genocide. The ICJ found the causal nexus to be lacking because it could not be established that 'the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations',⁹⁶ essentially adopting the but-for (or *sine-qua-non*) test of causation. This approach to causation in a situation where the same injury can be linked to more than one cause has been critiqued as essentially unconvincing.⁹⁷ While concepts of causation in international law remain unsettled,⁹⁸ various commentators have argued that the but-for test of causation is unhelpful in many cases of multiple causes and other causation tests might be more appropriate.⁹⁹

In cassation, the Dutch Supreme Court found the existence of multiple causes to be a reason to even further limit responsibility of the Netherlands for the conduct of Dutchbat outside of the compound. In light of pronouncements by the European Court of Human Rights that the positive obligation to protect the right to life must be interpreted 'in a way which does not impose an impossible or disproportionate burden on the authorities',¹⁰⁰ the Court concluded that Dutchbat had been entitled to continue to cooperate in the evacuation of male refugees 'in order to prevent chaos and accidents',¹⁰¹ reversing the Court of Appeal's declaration of wrongfulness on this point. In coming to this conclusion, however, the Court did not convincingly explain how ceasing to cooperate with the Bosnian Serbs would have put an

⁹⁵ Mothers of Srebrenica 2017, at 64.2

⁹⁶ Bosnian Genocide, at 462.

⁹⁷ Gattini 2007, at 710.

⁹⁸ Plakocefalos 2015.

⁹⁹ Plakocefalos 2015, at 477, Pusztai 2017, at 190, Nollkaemper et al 2020, at 11.

¹⁰⁰ Finogenov and others v. Russia, European Court of Human Rights, 23 October 2002, Applications Nos. 18299/03 and 27311/03, para. 209; Mothers of Srebrenica 2019 at 4.4.2

¹⁰¹ Mothers of Srebrenica 2019, at 4.5.4.

impossible or particularly cumbersome burden on Dutchbat. Instead, it repeatedly emphasized that ceasing to cooperate would not have affected the risk that male refugees outside the compound were facing,¹⁰² leaving us with the impression of an unclear fusion of causation and wrongfulness that unjustifiably limits the responsibility of the Netherlands. The inability of a state to prevent human rights violations committed by others simply cannot entitle it to actively facilitate those same violations.

The second basis for responsibility of the Netherlands that prompted Dutch Courts to engage with the issue of multiple causes was Dutchbat's cooperation in the evacuation of 350 refugees *inside* the Potočari compound. While the responsibility of the Netherlands in this respect was upheld throughout all stages of the proceedings, claimants gradually saw the extent of reparation due by the Netherlands become more and more limited. In first instance, the District Court had ruled that the Netherlands was bound to pay full compensation for Dutchbat's cooperation in the deportation of male refugees from the Potočari compound, finding a causal link between Dutchbat's conduct and the killings and ill-treatment of those same refugees.¹⁰³ On appeal, the obligation to pay compensation was reduced 'in proportion to the probability that these men would have had to safely escape and survive had Dutchbat not acted wrongfully',¹⁰⁴ a chance that was set at 30 per cent. This was further reduced by the Supreme Court, which estimated the chance that the male refugees could have escaped the Bosnian Serbs had they been offered the choice of remaining in the compound to be 10 per cent.¹⁰⁵

While the precise method used to arrive at these percentages remains elusive, the link made by Dutch courts between the probability of escape and the extent of compensation was based on the Dutch tort law 'loss of a chance' concept, which clearly reflects the idea that the conduct attributable to Netherlands was not the sole cause of the injury suffered, and that this should be directly reflected in the amount of compensation that victims can claim from one responsible party.

From an international law perspective, Articles 31 ARSIWA and ARIO provide that a responsible state or international organization is under an obligation to make full reparation for

¹⁰² Mothers of Srebrenica 2019, at 4.5.4.

¹⁰³ Mothers of Srebrenica 2014, at 4.330, 4.338.

¹⁰⁴ Mothers of Srebrenica 2017, at 69.1.

¹⁰⁵ Mothers of Srebrenica 2019, at 4.7.9.

the injury caused by the internationally wrongful act for which it is responsible. This obligation is an expression of the remedial function of the law of international responsibility, which has as one of its main goals to restore the *status quo ante* and place the injured party ‘in the position which would, in all probability, have existed if that act had not been committed.’¹⁰⁶ In cases of shared responsibility of multiple states or international organisations for the same injury, the principle of full reparation in international law implies an obligation to make full reparation incumbent on each responsible actor.¹⁰⁷ In other words, international law accommodates a principle of joint and several liability when several subjects of international law contribute to the same injury. As confirmed by the ILC ‘international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.’¹⁰⁸ Such a shared obligation of reparation would enable injured parties to claim full reparation from each responsible state or international organization, and does not leave them with the burden of pursuing all of the actors that have contributed to the harm that they have suffered.

It is unclear, however, whether the obligation of joint and several liability as such applies to non-state actors. In the two cases of *Mothers of Srebrenica* and *Mukeshimana*, the conduct of non-state actors who perpetrated genocide was without a doubt a significant cause of the damage suffered by victims. This could explain the position of the Dutch Supreme Court, which allowed surviving family members to claim only 10 per cent of their damage from the Netherlands and thereby seemed to have apportioned reparation between international subjects on the one hand and non-state actors on the other hand. While this approach certainly remains unsatisfactory from the point of view of victims who cannot easily claim reparation from non-state actors,¹⁰⁹ it can be noted that the Dutch Supreme Court interpretation is consistent with a notion of joint and several liability of the Netherlands and the UN for the 10 per cent of damage ascribed to the conduct of peacekeepers.

5. Conclusions

¹⁰⁶ ARSIWA commentaries to Article 31, at 91.

¹⁰⁷ Nollkaemper et al 2020, at 39-45.

¹⁰⁸ Commentaries to Article 31 ARSIWA, at 92.

¹⁰⁹ The Mothers of Srebrenica have brought this case before ECHR, and the issue of reparation for the remaining 90 per cent of the harm suffered appears to have been the main motivation for it.

This Chapter reflected on two recent cases from Dutch and Belgian courts that concerned international responsibility in the context of peacekeeping operations respectively in Srebrenica and in Rwanda. In view of the UN's immunity from jurisdiction, instituting proceedings before the domestic courts of troop-contributing states remain one of the rare paths for victims to seek reparation for wrongdoing during UN peacekeeping missions. Yet, in both cases, the courts provided either limited or no reparation at all for the victims.

In reaching their decisions, both courts exhibited a certain degree of confusion regarding attribution of conduct in peacekeeping. Despite decades of scholarly debates and judicial practice, and notwithstanding the ILC codification work on the issue, the courts erred in determining and interpreting the applicable test for attribution of conduct. Instead of applying a factual test of effective control in line with Article 7 ARIO and taking full account of the specific circumstances preceding the withdrawal of respectively the Netherlands and Belgium from the UNPROFOR and UNAMIR missions, the Dutch Supreme Court applied Article 8 ARSIWA and sought to establish direct orders and active participation of the Netherlands, while the Brussels Court of Appeal indecisively applied two opposite tests of direct state orders and overall UN control. Further, the issue of attribution of omissions – in particular failures to protect – remains unresolved. This Chapter offered some guidance and suggest possible approaches for the attribution of omissions in peacekeeping operations.

When it comes to reparation, both courts failed to provide full reparation for the victims' injuries. In this regard, we argued in this Chapter that, in view of the specific circumstances of both cases, the conduct of peacekeepers in each case could have been jointly attributed to the troop-contributing state and the UN, and that such scenarios of multiple attribution of conduct entail an obligation of each the state and the UN to provide full reparation for the injury caused. There is growing acceptance in international law for a principle of joint and several liability in situations of shared responsibility,¹¹⁰ and the application of such principle is particularly valuable when the UN shares responsibility with a state. Indeed, claiming full reparation from the state is the only option for victims as the UN remains shielded by its immunity. States on whom an obligation of full reparation is imposed are in a position to either seek contribution from the UN for part of the compensation, or to press the UN to change its policy for instance by providing a reparation fund for victims of internationally wrongful acts on peacekeeping

¹¹⁰ Nollkaemper et al 2020, at 41-43.

operations. Such progressive changes would be a clear step forward, moving away from the current situation where the UN in principle claims authority over its forces and professes to assume responsibility for their conduct, yet does not indemnify victims.

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