Attributing Conduct in the Law of State Responsibility: Lessons from Dutch Courts Applying the Control Standard in the Context of International Military Operations

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ABSTRACT

In two decisions of 2019, the Dutch courts have come up with novel interpretations of the 'control-based' standard of attribution in the international law of State responsibility. This is a standard of attribution that is laid down in Article 8 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which is, by and large, reflective of customary international law. The traditional understanding of Article 8 ARSIWA is that it applies to relations between States and private persons or entities, in particular armed groups: conduct of a non-State armed group is attributed to a State to the extent that the State exercises control over that group. However, the Dutch courts have extended the scope of application of Article 8 ARSIWA to conduct of organs of international organisations (the UN) as well as foreign States (*i.e.*, States other than the Netherlands). Internationally speaking, this is a novel interpretation of Article 8 ARSIWA, for which there are no precedents. After introducing the Dutch courts' reasoning in these cases, the contribution zooms out and inquires what the Dutch evolutions imply for the development of the control-based attribution standard in the international law of State responsibility. The author argues that the relatively peculiar interpretation of Article 8 ARSIWA, as applying to interactions between States and international organisations and between States *inter* se, is practically viable in a narrow range of scenarios characterised by relatively strong politico-military relations and hierarchies.

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1. INTRODUCTION

In two decisions of 2019, the Dutch courts have come up with novel interpretations of the 'control-based' standard of attribution in the international law of State responsibility. This is a standard of attribution that is laid down in Article 8 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[1] which is, by and large, reflective of customary international law.[2] Article 8 ARSIWA 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.' The traditional understanding of this provision is that it applies to relations between States and private persons or entities, in particular armed groups: conduct of a non-State armed group is attributed to a State to the extent that the State exercises control over that group.[3] However, in *Mothers of Srebrenica v State of the Netherlands*[4] and *Jaloud v State of the Netherlands*,[5] Dutch courts have extended the scope of application of Article 8 ARSIWA to the conduct of organs of *international organisations* (the UN) as well as *foreign States* (*i.e.*, States other than the Netherlands). Internationally speaking, this is a novel interpretation of Article 8 ARSIWA, for which there are no precedents.

In *Mothers of Srebrenica*, which forms part of a long line of Srebrenica-related, tort law-based decisions of Dutch courts,[6] the Dutch Supreme Court (2019), citing Article 8 ARSIWA, attributed a number of failures of the UN peacekeeping operation Dutchbat to the Netherlands, on the ground that the Netherlands exercised control over the operation. *Jaloud* is an interlocutory decision by the Hague District Court (2019), which, again citing Article 8 ARSIWA, attributed to the Netherlands acts of Iraqi soldiers over whom the Netherlands exercised control when stabilising Iraq in the aftermath of the 2003 invasion.

After the introduction of the reasoning in those cases by the Dutch courts', the contribution zooms out and inquires into what the Dutch evolutions imply for the development of the control-based attribution standard in the international law of State responsibility. The author argues that the relatively peculiar interpretation of Article 8 ARSIWA, as applying to interactions between States and international organisations and between States *inter se*, is practically viable in a narrow range of scenarios characterised by relatively strong politico-military relations and hierarchies.

2. MOTHERS OF SREBRENICA

In a number of cases concerning the events in Srebrenica – *Mustafić* and *Nuhanović* on the one hand, and *Mothers of Srebrenica* ('*Mothers*') on the other – Dutch courts have grappled with the attribution of conduct in UN peacekeeping operations. Both cases, which have been addressed at great length in the literature,[7] concern the liability of the Dutch State for its alleged failure to protect Bosnian Muslims from atrocities committed by the Bosnian Serbs. At the time (1995), a Dutch UN peacekeeping contingent (Dutchbat) was stationed in the vicinity of Srebrenica. Dutchbat handed over a number of Bosnian Muslims to the Bosnian Serbs, who went on to kill them. *Mustafić* and *Nuhanović* concerned the sending away of an electrician and an interpreter working for Dutchbat/the UN on the Dutchbat compound. *Mothers of Srebrenica* concerned the delivery into the hands of the Bosnian Serbs of a number of Bosnian Muslim men who had sought refuge in the vehicle halls of the compound as well as in the mini safe area adjacent to the compound. A major legal issue in these cases was whether the conduct of Dutchbat could be attributed to the Netherlands rather than to the UN (only), and thus whether the Netherlands could be held responsible.

This difficulty of attributing wrongful conduct in UN peace operations is well-known.[8] Whereas the UN exercises command over such operations, troops are contributed by the member States and remain, at least in part, under the control of the troop-contributing State, which retains criminal and disciplinary jurisdiction over peacekeepers. In light of this apparently shared command and control, complex questions of apportioning responsibility arise in the event that wrongful acts are committed by a UN peacekeeping contingent. The International Law Commission (ILC) paid specific attention to this issue in Article 7 of the Articles on the Responsibility of International Organisations for Internationally Wrongful Acts (ARIO 2011),[9] which provides that '[t]he conduct of an organ of a State (…) that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.' The Commentary to this provision shows that the ILC considered it to be particularly relevant for UN peace operations, in the context of attribution of conduct to international organisations and States.[10]

Implied in Article 7 ARIO is that wrongful conduct committed in UN peace operations can be attributed to States to the extent that they exercise control over the conduct. This opens a window to hold States accountable before a court of law. In contrast, it is extremely challenging to hold international organisations to account in light of the current jurisdictional limitations of national and international courts with respect to the accountability of international organisations.

Dutch courts have proved to be a fertile ground for the further development of the rules of State attribution in the context of UN peace operations. The Supreme Court in *Mustafić* and *Nuhanović*, as well as lower Dutch

courts in *Mothers of Srebrenica* considered Article 7 ARIO as governing the responsibility of the Dutch State in relation to wrongful acts committed during the UN peace operation in which the Netherlands participated. The ILC Commentary cited the decisions of the District Court and the Court of Appeal in *Mustafić* and *Nuhanović* approvingly, as evidence of the rule laid down in Article 7 ARIO.[11]

In *Mothers of Srebrenica*, however, the Supreme Court ruled that the ARSIWA, including its Article 8, governed the responsibility of States in relation to wrongful acts committed in UN peace operations, thereby sidelining the ARIO. In so doing, it distanced itself from the ILC and earlier Dutch case-law. This decision may decrease the relevance of the ARIO in cases brought against States interacting with international organisations. From a doctrinal perspective, it is striking, in any event, that the Supreme Court applied Article 8 ARSIWA to relationships between international organisations and States, rather than just to interactions between private non-State actors (armed groups notably) and States – which the article was originally intended for.

This part proceeds as follows. Section (a) seeks to understand how the Supreme Court in *Mothers* came to reject Article 7 ARIO in favour of Article 8 ARSIWA, and argues that the uncertain status of the ARIO may have caused the Court to apply only the ARSIWA. Section (b) reviews whether the scope of application *ratione personae* of Article 8 ARSIWA can indeed be extended to the conduct of (organs of) international organisations, and submits that it does indeed. Section (c) goes on to inquire whether the extension of the personal scope of the effective control standard has an impact on its *substantive* scope (*i.e.*, the content of the standard), and argues that it does not. Section (d) contains some concluding observations regarding the significance of *Mothers* for the rules of attribution under the law of international responsibility.

(A) THE SUPREME COURT'S REJECTION OF ARTICLE 7 ARIO

It was the Dutch courts' common understanding that Article 7 ARIO governed the question of attribution of conduct in UN peace operations, whether to the UN or the troop-contributing State. In *Mustafić* and *Nuhanović*, the Supreme Court explicitly applied Article 7 ARIO.[12] Also the District Court and the Court of Appeal in *Mothers of Srebrenica* were of the view that Article 7 ARIO governed attribution of conduct in UN peace operations.[13]

However, the Supreme Court in *Mothers of Srebrenica* breaks with this tradition. The Court held as follows:

> '[U]nlike in the [*Nuhanović* case], the question of whether making Dutchbat [*i.e.*, the Dutch contingent] available to the UN implies that Dutchbat's conduct can exclusively be attributed to the UN and not to the State, or that dual attribution (attribution to both the UN and the State) is possible, is not at issue. It was found in [*Nuhanović*] that the latter was the case. This is why the provisions in [ARIO] concerning the attribution of conduct to an international organization are not directly relevant in these proceedings.'[14]

Instead, according to the Court, the question of effective control is to be answered with reference to *Article 8 ARSIWA*.

It is decidedly surprising that the Supreme Court discarded Article 7 ARIO in the context of UN peace operations. This is not only because of consistent earlier Dutch case-law, in particular the Supreme Court's decision in *Nuhanović*, considered that provision to be relevant. It is also because as indicated above, Article 7 ARIO was specifically designed to apportion responsibility between international organisations and (member) States for wrongful conduct committed in UN peace operations.

The Supreme Court's own explanation of its rejection of Article 7 ARIO – namely that, unlike *Mothers*, *Nuhanović* concerned dual attribution – is hardly convincing. Also in *Nuhanović*, the UN was not a party to the proceedings, as a result of which the question of dual attribution was merely theoretical.[15] A more convincing argument is that the ARIO, in light of its very title, are only concerned with attribution of conduct to international organisations, not with attribution to States. Arguably, attribution to *States* is exclusively governed by the ARSIWA. However, also this argument has its weaknesses, as Article 1(2) ARIO states that '[t]he present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization'. In fact, the ILC devoted an entire Part Five of the ARIO to the 'responsibility of a State in connection with the conduct of an international organization'.[16] The most convincing explanation of the Court's approach arguably relates to the legal uncertainty surrounding the ARIO, which are buttressed by only limited practice.[17] The questionable legal status of these articles, in particular Article 7 ARIO, may have led the Court to resort to more widely accepted and practice-based rules, namely the rules of *State responsibility*, laid down in the ARSIWA.[18]

This uncertainty over the ARIO may also explain why the Court did not apply another potentially relevant ARIO rule concerning control-based attribution, namely Article 59(1) ARIO, which provides that '[a] State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (*a*) the State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State.' When conceptualising the control arguably exercised

over Dutchbat by the Netherlands, the Supreme Court could have applied Article 59 ARIO and have inquired whether the Netherlands 'directed and controlled' the UN in the commission of an internationally wrongful act, in the context of the Srebrenica evacuation.[19] That it chose not to do so, may be explained by the absence of international practice supporting the rule of Article 59 ARIO.[20] Also, the attribution of responsibility addressed by Article 59 ARIO may be considered as a lesser form of responsibility compared to responsibility based on attribution of conduct. In case of attribution of responsibility, the State is responsible 'not for the act of the principal wrongdoer, but for its own contribution' only.[21] Such responsibility may be considered as an 'ancillary, derivative or indirect' responsibility, whereas responsibility based on attribution of conduct is of a direct nature: the wrongful conduct is transformed into the State's *own* wrongful conduct.[22]

Accordingly, courts such as the Supreme Court in *Mothers* may prefer the control standard of Article 8 ARSIWA, which concerns attribution of conduct, to signal a higher degree of blameworthiness.

(B) EXTENDING THE SCOPE RATIONE PERSONAE OF ARTICLE 8 ARSIWA: ATTRIBUTING CONDUCT OF INTERNATIONAL ORGANISATIONS TO STATES

Having discarded the ARIO, the Supreme Court in *Mothers* went on to apply the ARSIWA, and in particular the relevant ARSIWA provision on control, namely Article 8. To remind the reader, Article 8 ARSIWA provides as follows: 'The 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.'

The drafters of Article 8 ARSIWA never designed this provision with attribution of *international organisations*' conduct in mind, however. In fact, going by the ILC Commentary, Article 8 ARSIWA specifically concerns the attribution of conduct of *private armed (opposition) groups*.[23] Also the relevant judgments of the International Court of Justice (ICJ) cited by the ILC in the Commentary, as well as by the Dutch Supreme Court in *Mothers*, pertain to such groups.[24] At the same time, the ARSIWA Commentary does not explicitly *exclude* attribution of conduct by other actors, such as international organisations. In fact, on a literal reading of Article 8 ARSIWA, the expression 'a person or group of person(s)' may well include 'entities belonging to an international organization', such as peacekeeping contingents. Applying Article 8 ARSIWA may perhaps be a very roundabout way of making conceptual sense of questions of attribution in UN peace operations but in light of the consensus before the Court that UN peace operations are, in the first place, subsidiary bodies of the UN rather than organs of States, the Court's reasoning is not without merit.

In extending the scope *ratione personae* of Article 8 ARSIWA to international organisations, the Dutch Supreme Court also demonstrates that Article 8 ARSIWA *can* sometimes successfully be invoked. It is recalled in this respect that the effective control standard under Article 8 ARSIWA, at least as interpreted by the ICJ, may be so strict as to become unworkable in practice. Instead, an overall control standard, as applied by the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case,[25] has been suggested to attribute acts of non-State actors to States.[26] Ultimately, for the law of State responsibility, this may be the most important legacy of the Supreme Court's judgment in *Mothers*: that the effective control standard *is* viable, at least in certain circumstances. In fact, the circumstances which lend themselves to a successful application of Article 8 ARSIWA may precisely be those involving States and international organisations. When States and organisations jointly set up complex multinational military operations, for political and strategic reasons, States may be unlikely to shift full control to international organisations. Even if peacekeeping contingents are formally considered as organs of an organisation, the reality is that States may continue to exercise influence and control over these contingents, which at the end of the day are composed of their own nationals. At one point, such control may rise to the level of effective control, triggering Article 8 ARSIWA. This is admittedly an exceptional scenario, but it played out in Srebrenica.[27]

(C) THE SCOPE RATIONE MATERIAE OF CONTROL PURSUANT TO ARTICLE 8 ARSIWA

If the effective control standard of Article 8 ARSIWA rather than Article 7 ARIO governs the attribution of conduct to States contributing to UN peace operations, the next question is whether a different substantive review standard applies. After all, Article 8 ARSIWA refers to control exercised by the State over a person or group of persons, while Article 7 ARIO refers to control exercised by the State over specific acts. Boutin and Nedeski, relying on the ILC Commentary to Article 8 ARSIWA, have argued that Article 8 ARSIWA in fact requires a relatively high threshold of 'actual participation of and directions given by [the] State',[28] whereas 'active participation and the explicit issuing of directions is not an absolute requirement for attributing conduct to the troop-contributing state' in the context of Article 7 ARIO.[29]

It may be the case that the content of the effective control standard in both ILC Articles differs. However, it is not certain that the Supreme Court actually *meant* to apply a more stringent standard. In fact, when applying Article 8 ARSIWA, the Court relied on the standard of effective control as enunciated in its earlier judgments

in *Mustafić* and *Nuhanović,* in which it did apply Article 7 ARIO, as well as on the meaning given to effective control by the ILC Commentary to Article 7 ARIO.[30] Regardless of the formal rules that may apply – either Article 7 ARIO or Article 8 ARSIWA – it appears that the Supreme Court may simply have applied a relatively strict version of the effective control standard when attributing conduct to States in the context of UN peace operations.[31] This is a version that is based on factual rather than legal control,[32] but does not include the 'power to prevent'.[33] While the Court cited the ILC Commentary to Article 8 ARSIWA to justify the rejection of the more liberal 'power to prevent' standard,[34] the inapplicability of this standard need not be based on that provision. Several authorities have based a strict standard for attribution to States on other considerations. Okada, for instance, rejects the power to prevent standard on functional grounds, namely on the ground that it 'fail[s] to strike a fair balance between the institutional considerations and the need to provide remedies for victims of peacekeepers' misconduct'.[35] Similar concerns are echoed in the *Leuven Manual on the International Law Applicable to Peace Operations,* which suggests a presumption that national contingents operate in an international capacity on behalf of the organisation; accordingly, their acts are attributable to the organisation, unless it can be established that they acted under the effective control of the State contributing the contingent.[36]

The rejection of the power to prevent standard implies that acts of peacekeepers will only exceptionally be attributed to the State, possibly alongside the UN (dual attribution). Such an exceptional situation manifested itself in *Mothers*: '[i]n the period starting from 23:00 on 11 July 1995, after Srebrenica had been conquered and after it was decided to evacuate the Bosnian Muslims who had fled to the mini safe area, the State did have effective control of Dutchbat's conduct', 'conduct [which] can be attributed to the State for that reason'.[37] Conspicuously, this is the same conclusion as reached by the Court of Appeal, which had applied Article 7 ARIO rather than Article 8 ARSIWA. If anything, by applying Article 8 ARSIWA, which is hardly ever successfully invoked to attribute conduct to States, the Dutch Supreme Court sends a clear signal that strict attribution standards apply when attributing conduct to States.

There is one final issue regarding the substantive scope of the control standard of Article 8 ARSIWA, as applied by the Supreme Court in *Mothers*, that needs to be clarified. In one passage, the Court considers that the question of effective control 'must be answered in order to determine whether Dutchbat's conduct in fact took place *under the direction or control of the State* within the meaning of Article 8 [ARSIWA]'.[38] Simon van Oort, commenting on the judgment, observed that this passage may unduly limit the scope *ratione materiae* of the control standard of Article 8 ARSIWA, and was concerned that this limitation may be followed in other jurisdictions.[39] It is true that the review standard put forward by the Court departs from the standard actually laid down in Article 8 ARSIWA, which conditions attribution to the State on a person or group persons 'in fact acting *on the instructions of, or under the direction or control* of, that State in carrying out the conduct.'[40] If the Supreme Court were indeed to consider that 'acting on the instructions of' the State does not lead to attribution, the scope of attribution may be significantly narrowed. Arguably, the standard of 'instructions' is premised on more tenuous connections with the State compared to the standard of 'direction or control'.[41] This restriction may make it more difficult to attribute acts to States. This does not just extend to acts of international organisations, but also to acts of private entities, such as armed groups. From an accountability perspective, this may be undesirable.

However, on closer inspection, it is more likely that the relevant passage in the Supreme Court's judgment was just a slip of the pen. The Supreme Court may not have meant to limit the substantive scope of Article 8 ARSIWA and to initiate the formation of a new, more narrowly framed customary international norm on effective control. Indeed, elsewhere, the Court states that '[i]t follows from [Article 8 ARSIWA] that the conduct of Dutchbat may be attributed to the State … if Dutchbat was in fact acting *on the instructions, or under the direction or control* of the State (Article 8 [ARSIWA]).'[42] Also, the Court cites approvingly the ICJ judgment in *Bosnia Genocide*, which explicitly refers to the 'instructions' standard.[43] Seen in this light, it is unlikely that the Supreme Court wished to reject attribution in case of (mere) instructions. The better view is that Dutch and foreign courts should disregard the relevant passage.

(D) THE SIGNIFICANCE OF MOTHERS OF SREBRENICA FOR THE INTERNATIONAL LAW OF RESPONSIBILITY

The main contribution of the Supreme Court's judgment in *Mothers of Srebrenica* to the international law of responsibility appears to be that, in UN peace operations, control-based attribution of conduct to States is arguably governed by the law of State responsibility as laid down in the ARSIWA (Article 8) rather than the law of responsibility as laid down in the ARIO (Article 7).[44] This goes against the grain of the dominant trend to apportion responsibility in UN peace operations – to the UN, the Member State, or both – on the basis of Article 7 ARIO only.[45] It may cast further doubt on the customary international law nature of the rule laid down in that provision.[46]

More fundamentally, *Mothers* signals that Article 8 ARSIWA may have relevance beyond the narrow confines of State attribution of conduct of non-State armed groups. Instead, it may also extend to State attribution of conduct of organs of international organisations insofar as such entities 'act on the instructions of, or

under the direction or control of, that State in carrying out the conduct'.[47] Such a scenario is certainly unusual. Notably, in UN peacekeeping operations, the UN rather than the troop-contributing State is supposed to exercise command and control over the operation. However, in the rare scenario of this command structure being upended and the State taking control as a result of quickly changing circumstances on the ground, acts of the organisation may well exceptionally be attributed to the State per Article 8 ARSIWA.

In terms of the scope *ratione materiae* of the control standard applied by the Supreme Court in *Mothers*, it does not appear that the Court departed from the traditional understanding of the standard laid down in Article 8 ARSIWA, as encompassing effective control and the giving of instructions. Nor does it appear that the Court, by relying on Article 8 ARSIWA, intended to apply a control standard that would substantially differ from – notably be stricter than – the Article 7 ARIO control standard. In fact, in the particular context of State attribution in UN peace operations, there may be good arguments for giving a restrictive interpretation to any version of the control standard, whether under Article 7 ARIO or Article 8 ARSIWA. Indeed, in light of countervailing institutional considerations, the conduct of UN peacekeeping contingents may well be attributed to the State only on an exceptional basis, possibly alongside the UN itself.

It remains now to be seen whether Dutch courts' peculiar interpretation of the control standard will be followed elsewhere. From the perspective of the sources of international law, it takes more than one swallow to make a summer. Sufficient State practice and *opinio juris* are needed for a norm of customary international law to crystallise. Accordingly, Dutch practice would need a following abroad before it can confidently be stated that the Dutch version of the control standard reflects customary international law. Alternatively, it can be argued that the application of Article 8 ARSIWA to relationships between States and international organisations may simply be a matter of *interpretation* of customary international law rather than *ascertainment* of a novel customary norm.[48] The argument would then be that the core customary norm enshrined in Article 8 ARSIWA has already crystallised, whereas its exact scope of application, *e.g.*, *ratione personae*, follows from interpretation. Still, also for a particular interpretation of customary international law to be internationally acceptable, at least some foreign State practice may be required.[49] The development of foreign State practice in this field may prove particularly challenging. However, this is not because multi-actor military operations are necessarily rare, but mainly because in many jurisdictions, disputes relating to wrongful acts committed in the course of military operations abroad are not justiciable, or at the very least, plaintiffs would need to overcome major litigation obstacles.[50] Accordingly, many foreign courts may not even have the very opportunity to consider the application of Article 8 ARSIWA to interactions between public actors. Possibly, more could be expected from the European Court of Human Rights, which has in the meantime developed sizeable case-law on the responsibility of States for violations committed in armed conflicts and foreign military operations.[51]

3. JALOUD

Dutch courts have not only extended the scope *ratione personae* of Article 8 ARSIWA to the relationships between international organisations and States, but also to the relationships between States *inter se.* Also in 2019, the District Court of The Hague, in the case of *Jaloud v State of the Netherlands*, applied Article 8 ARSIWA when attributing acts of Iraqi troops, who manned a checkpoint in Iraq, to the Dutch State on the ground that the Netherlands exercised control over the checkpoint at the time.[52] In so doing, the Court further unlocked the potential of Article 8 ARSIWA for scenarios other than those involving interactions between private actors and States. As *Jaloud* appears to be the first case in which a court applied Article 8 ARSIWA in the context of inter-State relationships, a closer analysis of the decision is called for.[53]

This part is structured as follows. Section (a) briefly explains the facts and procedural background of the *Jaloud* litigation in the Netherlands. Section (b) assesses the Hague District Court's reliance on Article 8 ARSIWA in the rather peculiar context of relations between organs of different States. Section (c) discusses the significance of the decision for attribution of conduct in the law of State responsibility.

(A) THE JALOUD CASE

The case of *Jaloud* concerns the 2004 death of Mr Jaloud due to gunfire at a vehicle checkpoint which was at the time under the authority and control of Dutch troops participating in the Stabilization Force in Iraq (SFIR). The death of *Jaloud* led to a rather famous judgment of the ECtHR, *Jaloud v Netherlands* (2014).[54] In that judgment, the ECtHR held that the Dutch investigation into the circumstances surrounding Jaloud's death failed to meet the standards required by Article 2 of the European Convention on Human Rights (ECHR), and thus that the Netherlands had breached its procedural obligations regarding the right to life.

The ECtHR's judgment paved the way for further litigation regarding Jaloud's violent death. Subsequent to the judgment, Jaloud's father filed a civil suit against the Dutch State in the District Court of The Hague, which rendered an interlocutory judgment of 20 November 2019.[55] In this judgment, the Court attributed relevant

conduct to the Netherlands, and went on to hold the Netherlands liable for wrongful acts surrounding Jaloud's death.[56] Just like in *Mothers of Srebrenica*, the 2019 District Court in *Jaloud* held that the question of attribution to the Netherlands – in this case of the conduct of the military and security personnel who fired at the vehicle in which Jaloud perished – was governed by the international law of State responsibility.[57] The conduct of the Dutch troops who manned the checkpoint alongside the Iraqi troops could obviously be attributed to the Netherlands per Article 4 ARSIWA. But could the conduct of these Iraqi troops also be attributed to the Netherlands under the rules of attribution of the law of State responsibility?[58] Those troops were? members of the Iraqi Civil Defense Corps (ICDC), which is, per Order no 28 of the Coalition Provisional Authority (CPA 2003), 'a security and emergency service agency for Iraq … composed of Iraqis who will complement operations conducted by Coalition military forces in Iraq'.

In its 2014 *Jaloud* judgment, the ECtHR had appeared to touch on the attribution to the Netherlands of acts of ICDC personnel, where it held that Dutch military personnel 'oversaw the ICDC at the checkpoint', 'had been in control of the vehicle checkpoint, and had authority over the Iraqi personnel manning it', and that 'the ICDC was supervised by, and subordinate to, officers from the Coalition forces'.[59] However, on closer inspection, these considerations only served the purpose of ascertaining whether Jaloud fell within the *jurisdiction* of the Netherlands per Article 1 ECHR (and thus whether the Netherlands owed any human rights obligations to Jaloud), rather than of attributing acts of the ICDC to the Netherlands.[60] Insofar as the ECtHR did discuss attribution of conduct, this pertained only to the question whether Dutch troops' acts could possibly be attributed to the *United Kingdom*, which occupied southern Iraq at the time (the question was answered in the negative).[61] On the merits, the ECtHR only addressed conduct of the Netherlands itself, namely the violation of its positive obligations under Article 2 ECHR. The ECtHR did not address the responsibility of the Netherlands for breaches of its negative obligations under Article 2 ECHR, and it did not inquire whether the Netherlands was internationally responsible for wrongful conduct of ICDC personnel that could be attributed to it.

(B) ASSESSING THE DISTRICT COURT'S APPLICATION OF ARTICLE 8 ARSIWA

Under the law of State responsibility, conduct performed by actors other than the (Dutch) State is, in principle, only exceptionally attributable to the Netherlands, pursuant to the principles laid down in Articles 5–11 ARSIWA. The parties in *Jaloud* did not dispute that Article 8 ARSIWA, which lays down the control standard, was the most pertinent provision to address the attribution of ICDC conduct to the Netherlands, and thus the Court went on to apply only that article. According to the District Court, Article 8 ARSIWA requires 'a specific factual relationship between the person or entity engaging in the conduct and the State', rather than a formal delegation of competences.[62] Applying this factual test, the Court was of the view that there are 'sufficient factual circumstances indicating the direction and control of the State over the ICDC members at the checkpoint'.[63] Accordingly, it attributed the ICDC's acts to the Netherlands.

Reliance on Article 8 ARSIWA has the distinct advantage that there was no need to inquire whether particular legal arrangements had been concluded to allow the ICDC to exercise elements of Dutch governmental authority, or to place the ICDC at the disposal of the Netherlands. If this had been the case, the conduct of the ICDC would have been attributable to the Netherlands pursuant to Articles 5 or 6 ARSIWA, which provide that '[t]he conduct of a person or entity which is not an organ of the State … but which is empowered by the law of that State to exercise elements of the governmental authority', respectively that '[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. However, it was apparently unclear whether the Administrator of the Coalition Provisional Authority had formally delegated competences *vis-à-vis* the ICDC to the Dutch military on the basis of CPA Order No 28.[64] Thus, the ICDC may not have exercised elements of Dutch governmental authority per agreement between the Netherlands and Iraq. This renders Articles 5 and 6 ARSIWA inapplicable,[65] and increases the relevance of the factual control standard under Article 8 ARSIWA.

If Article 8 ARSIWA indeed lends itself to application in a State-to-State context, as is the District Court's assumption, subsequent questions arise as to the relationship between Article 8 ARSIWA and Article 17 ARSIWA. Article 17 ARSIWA, just like Article 59 ARIO, discussed in the context of *Mothers of Srebrenica*, concerns attribution of responsibility rather than conduct. It provides as follows: 'A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.' This article has specifically been designed to hold one State responsible in connection with the acts of another State. This begs the question why the Hague District Court did not rely on Article 17 ARSIWA. Three explanations could be given for its reluctance.

Firstly, Article 17 ARSIWA requires that the Netherlands have exercised actual direction and control over the commission of an internationally wrongful act. Article 8 ARSIWA, in contrast, appears to be less strict insofar as

proof only needs to be adduced that the State directed or controlled a specific *operation* of which the conduct was an integral part.[66] Under Article 8 ARSIWA, the State need not have directed or controlled the conduct or the wrongful act as such. Arguably, the Netherlands did not direct or control the very shots being fired at Jaloud by the ICDC, but it did direct and control the ICDC members.[67] Secondly, Article 17 ARSIWA requires that the dominant State have 'knowledge of the circumstances making the conduct of the dependent State wrongful', *i.e.*, a subjective requirement which erects an additional barrier for the attribution of responsibility to the dominant State.[68] Thirdly, the examples which the ILC cites in its commentaries to Article 17 ARSIWA are mainly of historical significance. They relate to international dependency relationships such as 'suzerainty' or 'protectorate', or situations of belligerent occupation.[69] The provision may possibly not lend itself to situations falling short of dependency or occupation. After all, the Netherlands did not occupy southern Iraq, nor was Iraq a protectorate of the Netherlands. Therefore, given the additional limitations of Article 17 ARSIWA, it was understandable for the District Court to resort to the control standard of Article 8 ARSIWA.[70]

(C) THE SIGNIFICANCE OF JALOUD FOR THE LAW OF STATE RESPONSIBILITY

Just like *Mothers*, the case of *Jaloud* stands out as a unique case of attributing conduct to a State pursuant to Article 8 ARSIWA outside the traditional context of non-State actors controlled by States. As explained in Part 1, Article 8 ARSIWA may perhaps not have been drafted with attribution of conduct of one State's actors to another State in mind. However, neither does it exclude that foreign governmental officials, such as foreign soldiers, qualify as 'a person or group of persons' under Article 8 ARSIWA. The scope *ratione personae* of Article 8 ARSIWA is relatively open-ended. On a plain reading of the provision, also conduct of foreign governmental officials can be attributed to a State exercising control over them.

It is no coincidence that Article 8 ARSIWA has not yet been invoked with respect to State-to-State relations. It will indeed be a rare occasion for Article 8 ARSIWA to apply in this context, as other provisions of ARSIWA are specifically designed to address the interactions of States *inter se*, in terms of both attribution of conduct and attribution of responsibility (indirect State responsibility). However, as *Jaloud* shows, there is a small window of opportunity for the invocation of Article 8 ARSIWA in respect of such interactions. This will be the case where States cooperate closely, but have not formally delegated governmental powers, or where one State does not formally make available one of its organs to another State. In these scenarios, Articles 5 and 6 ARSIWA cannot apply. This will also be the case where the threshold for attribution of responsibility is considered as too high. As discussed in Section (b), actual control and direction, as well as knowledge are required to attribute responsibility under Article 17 ARSIWA. Even where these requirements were met, courts may be hesitant to apply this provision. This may not just be for lack of practice underpinning the relevant rule, but also because, as noted in Part 1, international responsibility flowing from attribution of responsibility may be perceived as somewhat less severe than responsibility flowing from attribution of conduct, *e.g.*, under Article 8 ARSIWA.

4. CONCLUDING OBSERVATIONS

For the international law of (State) responsibility, two interrelated lessons can be drawn from the Dutch Supreme Court's decision in *Mothers of Srebrenica* and the Hague District Court's decision in *Jaloud*. First, the decisions demonstrate that also conduct of organs of international organisations or foreign States can be attributed to the State pursuant to the control of Article 8 ARSIWA. This means that the scope *ratione personae* of Article 8 ARSIWA may not be limited to private actors, or just armed opposition groups. In *Jaloud*, the relevant actor was an Iraqi government agency, whereas in *Mothers* it was – somewhat ironically perhaps – a Dutch peacekeeping contingent considered as a UN organ. Second, the decisions show that, under Article 8 ARSIWA, conduct cannot just in theory, but also in practice, be attributed to States, in spite of the strict interpretation of control that is typically espoused, *e.g.*, by the ICJ. The successful invocation of Article 8 ARSIWA in fact appears to be related to its expanded scope *ratione personae*. In light of the typically strong relations and hierarchies among various public actors participating in complex multinational military operations, it may be more likely that one of them will direct or control another than it is for a State to direct or control a *private* actor, which ordinarily and deliberately operates at arm's length from the State. Accordingly, conduct may be more readily attributable to States under Article 8 ARSIWA in operations involving other States or international organisations.

NOTES

1 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10).

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [26 February 2007] ICJ Rep 2007 [401]. See for criticism, however: Richard Mackenzie-Gray Scott, 'State responsibility for non-state actors in international law' (PhD thesis, University of Nottingham, 2020) Chapter 3.

3 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', commentary (2) to Article 8, 47. ('Most commonly, cases of this kind will arise where State

organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State.').

4 Supreme Court of the Netherlands 19 July 2019, ECLI:NL:HR:2019:1284 (*The Netherlands v. Stichting Mothers of Srebrenica and others*).

5 District Court of The Hague 20 November 2019, ECLI:NL:RBDHA:2019:1223 (*Jaloud v State of the Netherlands*).

6 See also Supreme Court of the Netherlands 6 September 2013, ECLI:HR:2013:BZ9225 (*The Netherlands v. Nuhanović*); Supreme Court of the Netherlands 6 September 2013, ECLI:HR:2013:BZ9228 (*The Netherlands v. Mustafić*).

7 See André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9(5) *Journal of Law and Criminal Justice* 1143; Paolo Palchetti, 'Attributing the Conduct of Dutchbat in Srebrenica: the 2014 Judgment of the District Court in the *Mothers of Srebrenica* Case' (2015) 62(2) *Netherlands International Law Review* 279; Cedric Ryngaert and Otto Spijkers, 'The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgment in Mothers of Srebrenica' (2019) 66 *Netherlands International Law Review* 537.

8 The literature on this issue is vast. See Berenice Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control' (2019) 18(2) *Melbourne Journal of International Law* 154; Tom 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(1) *Harvard International Law Journal* 113; Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10(1) *Melbourne Journal of International Law* 346.

9 ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc. A/66/10 [87] (ARIO).

10 ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries' (2011) UN Doc. A/66/10, 56.

11 ibid 56–60.

12 Supreme Court of the Netherlands *The Netherlands v. Stichting Mothers of Srebrenica and others* (n 4) [3.10.2].

13 District Court The Hague 16 july 2014, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica v State of the Netherlands*); Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica v State of the Netherlands*).

14 *Stichting Mothers of Srebrenica* (n 4) [3.3.5].

15 Ryngaert and Spijkers (n 7) 545.

16 ARIO, Articles 58–63. Perhaps the fact that Article 7 ARIO does not feature in this Part Five, but rather in Part Two, which bears the title 'the internationally wrongful act of an *international organization*' (emphasis added), may explain why the Supreme Court was of the view that Article 7 ARIO was only relevant for international organisations, and not for States. However, going by the ILC Commentary, Article 7 ARIO was *also* supposed to govern the responsibility of *States*. Indeed, while the text of Article 7 ARIO does not refer to State responsibility, commentary (5) states that it is concerned with the question of 'to which entity — the contributing State or organization or the receiving organization — conduct has to be attributed', 57. Commentary (14) explicitly refers to the responsibility of the Dutch State in the *Mustafic* and *Nuhanovic*, 59. See also Berenice Boutin and Natasa Nedeski, 'The Continuing Saga of State Responsibility for the Conduct of Peacekeeping Forces: Recent Practice of Dutch and Belgian Courts (2020) 50 *Netherlands Yearbook of International Law* 1, 15 (forthcoming) ('[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').

17 See on the lack of practice buttressing the rules of the ARIO also Jan Wouters and Jed Odermatt, 'Are All International Organizations Created Equal?' (2012) 9 *International Organizations Law Review* 7.

18 See Terry D. Gill and others (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press 2017) 279–282 (questioning whether the attribution standard of Article 7 ARIO reflects current customary international law).

19 Similarly, also Article 58(1) ARIO could be applied, pursuant to which, under the same conditions as Article 58, '[a] State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so'.

20 The Commentary to Article 59 ARIO fails to cite any practice from which the rule would be derived. The text of the provision is more or less copy-pasted from Article 17 ARSIWA, as admitted by the ILC in Commentary (1) to Article 59 ARIO, 157.

21 Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (1st edn, Hart 2016), 4–5 (in the context of complicity).

22 That this makes such responsibility somewhat less serious has been assailed in the literature, however. See Lanovoy (n 21) 10 ('[T]he qualification of responsibility for complicity as derivative diminishes the reprimand associated with it. However, as a matter of principle, there is nothing less reprehensible of complicity than of the principal wrongdoing it occasions.')

23 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10) commentary (2) to Article 8, 47.

24 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 1986, 14; *Bosnia and Herzegovina v Serbia and Montenegro* (n 2) 43.

25 *The Prosecutor v. Duško Tadić* (judgement) ICTY-94-1-A (15 July 1999).

26 See Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) *European Journal of International* Law 649.

27 Court of Appeal The Hague, *Mothers of Srebrenica v State of the Netherlands* (n 13) [24.1] [24.2] ('In the newly developed situation in which Srebrenica had fallen and the UN mission had essentially failed, the State decided together with the UN to evacuate the population from the mini safe area. The Dutch government participated in this decision-making process at the highest level. With this decision a transition period set in, in which operations in Potočari were wound up and Dutchbat would focus on its humanitarian task and the preparation of the evacuation of Dutchbat and the refugees from the mini safe area. To that extent, the State had effective control.').

28 Boutin and Nedeski (n 16) 15, citing ILC Commentary (4) to Article 8.

29 Boutin and Nedeski (n 16) 16.

30 Supreme Court of the Netherlands *The Netherlands v. Stichting Mothers of Srebrenica and others* (n 4) [3.5.4].

31 I take my cue from the US school of 'legal realism', which is distrustful of formal legal distinctions, notably Oliver Wendell Holmes Jr., 'The Path of the Law' (1897) 10 *Harvard Law Review* 457; Karl Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review* 1222.

32 Supreme Court of the Netherlands *The Netherlands v. Stichting Mothers of Srebrenica and others* (n 4) [3.5.4]. ('what matters is *factual control* of the specific conduct, in which all factual circumstances and the special context of the case must be considered') (original emphasis).

33 ibid [3.5.3] ('In so far as the complaints … are based on 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 act or acts of Dutchbat, this is also based on an incorrect interpretation of the law.'). See in favour of this standard: Tom 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(1) *Harvard International Law Journal*; Tom Dannenbaum, 'A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands' (*EJI:Talk!*, 23 juli 2019). See for a 'less far-reaching interpretation of the power to prevent standard: Boutin and Nedeski (n 16) 19 (arguing that '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').

34 f this standard were to be applied, a larger number of acts could be attributed to the Netherlands, including acts that have been carried out *before* the transition period. Note that the District Court espoused a version of this standard and attributed a host of acts to the Netherlands. See District Court of The Hague, *Mothers of Srebrenica v State of the Netherlands*, judgment of 16 July 2014—Introductory note by Cedric Ryngaert (2014) 61 *Netherlands International Law Review* 365–454.

35 Yohei Okada, 'Effective control test at the interface between the law of international responsibility and the law of international organizations: Managing concerns over the attribution of UN peacekeepers' conduct to troop-contributing nations' (2019) 32 *Leiden Journal of International Law* 275.

36 Terry D. Gill and others (n 18) 279 and 282.

37 Supreme Court of the Netherlands *The Netherlands v. Stichting Mothers of Srebrenica and others* (n 4) [5.1].

38 Supreme Court of the Netherlands *The Netherlands v. Stichting Mothers of Srebrenica and others* (n 4) [3.3.4] (emphasis added).

39 Simon van Oort, 'Staatsaansprakelijkheid en rechtstreekse werking in HR Mothers of Srebrenica', *NTM/NJCM-bull.* 2020/4.

40 Emphasis added.

41 Van Oort (n 39) 2–3 (pdf file).

42 Supreme Court of the Netherlands *The Netherlands v. Stichting Mothers of Srebrenica and others* (n 4) [3.3.2] (original emphasis).

43 ibid [3.4.3], citing *Bosnia Genocide*, [400] ('It must however be shown that this "effective control" was exercised, or that the State's instructions were given …').

44 Note that in *Mukeshimana*, the Brussels Court of Appeal cited both Article 8 ARSIWA and Article 7 ARIO under the heading 'applicable principles'. *Mukeshimana-Ngulinzira and others v. Belgium and others*, 2011/AR/292 and 2011/AR/294, Brussels Court of Appeal, 8 June 2018. Unofficial publication (in French) available at *https://www.justice-en-ligne.be/IMG/pdf/bruxelles--2018-06-08--eto.pdf*, paras. 42–43. However, in its actual reasoning, the Court does not explicitly apply Article 8 ARSIWA to the facts of the case. See also Tom Ruys, 'Mukeshimana-Ngulinzira and Others v. Belgium and Others' (2020) 114 *American Journal of International Law* 268–275.

45 See the introduction of this Part (discussing the ILC's position) and Section (a) (flagging the Dutch courts' traditional approach).

46 In an earlier publication, I observed that domestic courts' application of Article 7 ARIO 'may in due course start to reflect customary international law'. Given the Dutch Supreme Court's rejection of the rule of Article 7 ARIO as the relevant rule for apportioning responsibility or attributing conduct in UN peace operations, this moment may not come to pass. See Cedric Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after *Behrami*' (2012) 45 *Israel Law Review* 151–178.

47 The formulation of Article 8 ARSIWA is used.

48 See on interpretation of customary international law notably Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19(1) *International Community Law Review* 126, 136.

49 See Odile Ammann, *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example* (Brill/Nijhoff 2020); Cedric Ryngaert, 'Customary International Law Interpretation: The Role of Domestic Courts', TRICI-Law Paper No. 006/2019 (December 2019), forthcoming in P. Merkouris, J. Kammerhofer and N. Arajärvi (eds), N. Mileva (ass ed), *The Theory and Philosophy of Customary International Law and its Interpretation* (2021).

50 See, Heike Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts as a Way to Avoid UN Reform?' (2015) 62 Netherlands International Law Review 259. See on the situation in the UK Ugljesa Grusic's contribution to this special issue.

51 See for an overview: European Court of Human Rights, Factsheet – Armed Conflicts, March 2020, available at *https://www.echr.coe.int/documents/fs_armed_conflicts_eng.pdf*.

52 District Court of The Hague, *Jaloud v State of the Netherlands*, judgment of 20 November 2019, ECLI:NL:RBDHA:2019:12231.

53 This part draws on a blogpost published in 2019: C. Ryngaert, 'State Liability for Wrongful Conduct in Extraterritorial Military Operations: the Challenge of Attribution in Jaloud v the Netherlands', *Ucall blog*, 2 December 2019.

54 European Court of Human Rights, *Jaloud v the Netherlands*, Application no. 47708/08, Judgment of 20 November 2014. See for a commentary F.A. Haijer, C.M.J. Ryngaert, 'Reflections on Jaloud v. the Netherlands: Jurisdictional Consequences and Resonance in Dutch Society', 19 *Journal of International Peacekeeping* 174–189 (2015). The ECtHR's judgment is best known for the development of the standard of control for purposes of the extraterritorial application of the ECHR. In *Jaloud*, the Court derived jurisdiction from a State's extraterritorial control over a checkpoint.

55 District Court of The Hague, *Jaloud v State of the Netherlands* (n 5).

56 In a later decision of 2020, it quantified the damages. District Court of The Hague 7 October 2020, ECLI:NL:RBDHA:2020:10058 (*Jaloud v State of the Netherlands*).

57 District Court, *Jaloud* (2019) [4.2.3].

58 Assessing the facts of the case, the court concluded that both a Dutch lieutenant and one or more ICDC members had shot at the vehicle (even if it could not be established whether Jaloud's death was the consequence of the lethal force exercised by the lieutenant or the ICDC).

59 *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014) [129], [135], [150].

60 In this sense also Jane Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*' (2015) 62(3) *Netherlands International Law Review* 407.

61 ibid 151.

62 District Court, *Jaloud* (2019) [4.25].

63 ibid.

64 ibid.

65 Compare also the UK court's rejection of attribution on the basis of Article 6 ARSIWA, in respect of the relations between the British forces and the State of Iraq, in *R (Al-Saadoon) v Secretary of State for Defence* [2008] EWHC 3098 (Admin) (Iraq), [80] ('That is not the position of the British forces in Iraq, which have not been placed at the disposal of the state of Iraq in the sense envisaged by article 6 and which remain under British direction and control.').

66 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10) commentary (3) to Article 8 ARSIWA, 47.

67 District Court, *Jaloud* (2019) [4.25].

68 The requirement that the act 'be internationally wrongful if committed by that State' is of lesser relevance in the context of multilateral obligations, such as international human rights obligations. ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10) commentary (8) to Article 17 ARSIWA, 69.

69 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10) commentaries (2) and (4) to Article 17 ARSIWA, 68.

70 Note that the District Court itself does not discuss Article 17 ARSIWA in its judgment.

COMPETING INTERESTS

The author has no competing interests to declare.

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