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**A Failure to Protect in Peacekeeping Operations: A Commander's Responsibility?**

**Obligations and Responsibilities of Military Commanders in UN Peacekeeping Operations**

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Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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## Abstract

Inaction by UN peacekeeping troops in the face of the commission of genocide in Srebrenica and Kigali raised significant questions regarding the duty owed by UN peacekeeping forces to those under their protection. Recent court judgments have recognised that the Netherlands and Belgium were to a certain extent legally responsible to protect those under the care of each state's peacekeeping troops, and that also the role of individual peacekeeping commanders may be questioned. While peacekeeping commanders may have a moral responsibility to act, it is not realistic to argue that peacekeeping commanders have a legal duty to do so. As a result, the use of the existing options to establish criminal liability for a failure to act under domestic and international law would not be justified in relation to the conduct committed.

This thesis argues that alternative options to the existing forms of criminal responsibility for military commanders should be considered, possibly focusing more clearly on failing to fulfil a norm of protection that is specific to peacekeeping and distinct from protective obligations under international human rights law and international humanitarian law. Establishing law tailored to the context of peacekeeping would be an important step towards clarification of the obligations and responsibilities held by military commanders in UN peacekeeping missions.

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## Author's declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature \_\_\_\_\_

Lenneke Sprik

## Abbreviations

AFA	Armed Forces Act
ATS	Alien Tort Statute
BPC	Belgian Penal Code
BSA	Bosnian Serb Army
CCC	Canadian Criminal Code
DARIO	Draft Articles on the Responsibility of International Organisations
DCC	Dutch Criminal Code
DFS	Department of Field Support
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FC	Force Commander
FPC	French Penal Code
GCC	German Criminal Code
GMCC	German Military Criminal Code
HRDPP	Human Rights Due Diligence Policy
HVO	Croatian Defence Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
JNA	Yugoslav National Army
MONUC	United Nations Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
NZCA	New Zealand Criminal Act
NPC	Norwegian Penal Code
PKO	Peacekeeping Operation
R2P	Responsibility to Protect
ROE	Rules of Engagement
RS	Rome Statute
SCSL	Special Court for Sierra Leone
TCC	Troop Contributing Country
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMIR	United Nations Assistance Mission to Rwanda
UNGA	United Nations General Assembly
UNMISS	United Nations Mission in South Sudan
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council

US	United States
VJ	Yugoslav Army
VRS	Army of the Republika Srpska
VSK	Army of the Serbian Krajina

# Chapter 1: Introduction

## 1.1 Context

It is the duty of an individual, moreover a soldier and a peacekeeper, to ensure the protection of a defenceless civilian population under imminent threat of physical violence. Avoiding this responsibility is to avoid one's obligation to go to the assistance of someone whose life is under threat. [The Department of Peacekeeping Operations] must ensure that Troop Contributing Nations fully understand and fulfil their commitments when they sign up to providing troops. (...)<sup>1</sup>

Statements like the one above are undoubtedly associated with the failed peacekeeping operations (PKOs) in Rwanda and Bosnia and Herzegovina back in the 1990s. This however, was a comment made in the context of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC),<sup>2</sup> another example of an operation where peacekeeping troops could not protect the civilian population. The same report held that '[t]he behaviour of [the contingent], which was moreover meant to be an intervention battalion and MONUC's reserve, which [the troop-contributing country] deployed in full knowledge of the situation in DRC, and which raised objections and backed out of certain of its crucial obligations, was totally and utterly unacceptable (. . . )'<sup>3</sup>. The International Crisis Group referred to specific incidents involving MONUC:

On 10 May, MONUC was informed of the likely assassination of Nyakasanza's parish priest and other Hema clerics. It refused to intervene or even accompany the vicar-general to the parish after the massacre. On 11 May, a man was kidnapped from the MONUC compound. Uruguayan officers were informed but refused to intervene. The person was then executed less than 100 metres away. On 11 May MONUC refused to escort to its compound nineteen Catholic seminarians who were under death threat and in hiding.<sup>4</sup>

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<sup>1</sup> Victoria Holt and Glyn Taylor, 'Protecting Civilians in the Context of UN Peacekeeping Operations. Successes, Setbacks and Remaining Challenges' (Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs 2009) 252 quoting the first Force Commander of MONUC, End of Duty report, 31 December 2003, 8-10. The author was not able to access this report herself.

<sup>2</sup> This quote refers to the atrocities that were committed by Hema and Lendu militias in the Ituri area of the DRC after Uganda withdrew from the region.

<sup>3</sup> End of Tour Report, 8-10 (n 1).

<sup>4</sup> International Crisis Group, 'Congo Crisis: Military Intervention in Ituri', Africa Report no. 64 (ICG, 13 June 2003) 12.

Other more recent examples of peacekeepers not intervening in situations in which this may have been expected are the mass killings in Darfur (2004) and the execution of 150 civilians in the Congolese area of Kiwanja, and the lack of protection offered to civilians in both South Sudan (2008)<sup>5</sup> and North Kivu (DRC, 2008).<sup>6</sup>

The more prominent examples that will be key to this thesis are the failures to intervene in Kigali and Srebrenica. On 11 April 1994, the Belgian peacekeeping battalion (Kibat) based in Kigali (Rwanda) withdrew from a school where protection had been offered to 2000 civilian refugees. The next day, these refugees were brutally killed by the militia who had been waiting outside for the Belgians to leave. On 11 July 1995, history seemed to repeat itself. The Bosnian Serb Army (BSA) overran Srebrenica (Bosnia and Herzegovina), which had been designated a UN safe haven. The Dutch peacekeeping battalion (Dutchbat) felt it had no option other than to allow the BSA to evacuate the compound. Under the pressure of BSA commander Colonel General Ratko Mladić, Dutchbat expelled hundreds of men from their compound and refused entry to thousands of others. In the following days, about 8000 Muslim men and boys were killed near the enclave. In answering the question whether these people could have been successfully protected by the Dutch battalion, differing views were held by the respective courts. Where the Hague District Court found that the killings would have been substantially less likely had the troops offered protection,<sup>7</sup> the Hague Court of Appeal thought this could not be said with enough certainty and therefore estimated that the chances of survival would have been 30 per cent.<sup>8</sup> The decisions to withdraw (Kigali) and surrender (Srebrenica) were subject to critical scrutiny, since the peacekeepers had already witnessed crimes being committed against the ethnic group under their protection at the time of that decision.

These two cases have become symbolic of the difficulties faced by UN peacekeeping operations in fulfilling the expectations of protection that their very presence raises. The other examples

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<sup>5</sup> Erin a Weir, 'The Last Line of Defense: How Peacekeepers Can Better Protect Civilians' [2010] *Refugees International* 1, 13.

<sup>6</sup> *Ibid* 4.

<sup>7</sup> The Hague District Court 16 July 2014 (*Mothers of Srebrenica v the Netherlands 2014*), ECLI:NL:RBDHA:2014:8562, paras 4.331-4.333.

<sup>8</sup> The Hague Court of Appeals 27 June 2017 (*Mothers of Srebrenica v the Netherlands 2017*), ECLI:NL:GHDHA:2017:1761, para 67.1.

mentioned above can therefore only be seen in the light of what happened in Kigali and Srebrenica. The emerging case law on state responsibility in which the Netherlands and Belgium were held responsible for their failures to act against genocide yielded different results. The most recent judgment handed down in June 2017<sup>9</sup> confirmed the partial responsibility of the Netherlands for its role in the deportation of 300 men from the Dutch United Nations (UN) compound in Srebrenica. With that judgment, the Appellate Court of the Hague overruled an earlier judgment of 2014 by the Hague District Court in which a full causal nexus between the Dutch troops' conduct and the killings was established.<sup>10</sup> In contrast, an interim judgment in *Mukeshimana-Ngulinzira and others v Belgium and others* (hereafter: *Mukeshimana*) handed down by the Brussels District Court held the Belgian state responsible for failing to act against genocide. In this judgment, the Belgian commanders were furthermore held responsible under civil law for failing to act in the face of war crimes being committed.<sup>11</sup> As such, the Brussels District Court implicated that the Belgian commanders should have acted and that legal consequences may arise where a commander failed to do so.

In a similar vein, a committee of the most eminent criminal law experts in the Netherlands advised the Dutch Public Prosecutor to bring charges against the Dutchbat officials in relation to criminal complaints by Hasan Nuhanović and the Mustafić family against the Dutchbat commanders to the effect that they were at least partly responsible for the genocide and/or war crimes committed in Srebrenica.<sup>12</sup> The committee saw scope for criminal responsibility. Five years later however, on 29 April 2015, the Arnhem Court of Appeal dismissed an appeal made against the Public Prosecutor's refusal to file charges against Karremans *cum suis*.<sup>13</sup> Some suggested that the decision might have been political, given that the Public Prosecutor and later

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<sup>9</sup> The Hague Court of Appeals 27 June 2017 (*Mothers of Srebrenica v the Netherlands 2017*), ECLI:NL:GHDHA:2017:1761.

<sup>10</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.182.

<sup>11</sup> *Mukeshimana-Ngulinzira and others v Belgium and others*, Brussels Court of First instance, RG No 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010), 8th December 2010.

<sup>12</sup> NOS Redactie Binnenland, 'Vervolging Karremans dichterbij', 9 May 2012 <<http://nos.nl/artikel/371427-vervolging-karremans-dichterbij.html>> accessed 25 April 2017. The advisory opinion given by the Committee was an internal matter and has therefore not been published. Even the parties to the complaints procedure were not able to access the Committee's report. As such, the exact reasoning of the Committee cannot be discussed. Its general conclusions were, however, publicly available. See also *Mustafić-Mujić and others v the Netherlands* App No 49037/15 (30 August 2016) paras 35-37.

<sup>13</sup> Court of Appeal Arnhem-Leeuwarden 29 April 2015 (*Mustafić & Nuhanović v Karremans, Franken & Oosterveen*), ECLI:NL:GHARL:2015:2968.

the Arnhem Court of Appeal disregarded the opinion of the expert committee. However, in 2016 the European Court of Human Rights (ECtHR) did not find ‘that the investigations were ineffective or inadequate’,<sup>14</sup> arguing that

[t]he composite result of all these investigations is that specific and detailed official records now exist reflecting the circumstances in which Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović fell into the hands of the VRS and there is no lingering uncertainty as regards the nature and degree of involvement of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen respectively.<sup>15</sup>

On that note the ECtHR dismissed any critique regarding the political reluctance of the Dutch state to prosecute the Dutchbat officials. However, this does not take away the concern that the exclusive assignation of criminal jurisdiction to the troop contributing country (TCC) is a potential weakness of the legal framework applicable to peace support operations.<sup>16</sup> Where the effectiveness of disciplinary sanctions in deterring future misconduct is questionable,<sup>17</sup> the Zeid report flags out another ‘fundamental problem’: ‘In respect of military members of national contingents, troop-contributing countries are often reluctant to admit publicly to acts of wrong doing and consequently lack the will to court-martial alleged offenders’.<sup>18</sup> The same report notes that

troop-contributing countries frequently complain that evidence gathered by mission boards of inquiry and in prior preliminary investigations is either not sufficient under their national law for use in subsequent judicial or court martial proceedings or has not been gathered in a manner required by their law. (...) In addition, peacekeeping missions do not have available on a routine basis expert personnel to assist in their investigations, nor do they have assistance from an expert prosecutor from the troop-contributing countries concerned who could advise on the requirements for subsequent action.<sup>19</sup>

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<sup>14</sup> *Mustafić-Mujić and others v the Netherlands* (n 12) para 106.

<sup>15</sup> *Ibid.*

<sup>16</sup> Roisine Burke, ‘Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity’ (2011) 16 *Journal of Conflict and Security Law* 63, 67; Richard J Wilson and Emily Singer Hurvitz, ‘Human Rights Violations by Peacekeeping Forces in Somalia’ (2014) 21 *Human Rights Brief* 2, 3-4.

<sup>17</sup> Zsuzsanna Deen-Racsmay, ‘The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?’ (2011) 16 *Journal of Conflict and Security Law* 321, 331.

<sup>18</sup> UNGA ‘A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations’ (24 March 2005) UN Doc A/59/710 (‘Zeid Report’) para 67 (a).

<sup>19</sup> *Ibid* para 28.

In the light of the Kigali and Srebrenica cases, one might question whether the exclusive criminal jurisdiction of the TCC would be suitable to apply to the cases at hand, and whether it would be preferable for international criminal courts to have jurisdiction over the conduct under review. The role of international criminal law in punishing misconduct by peacekeepers has been explored in relation to the alleged involvement of peacekeepers in acts of sexual violence.<sup>20</sup> Regarding the failure to act in PKOs however, the discussion in international law has not yet moved beyond discussing the role of the state. This might be because individual criminal liability for a failure to act is much debated to begin with. Another reason may be that an active role for international courts in the adjudication of peacekeepers could make states more reluctant to provide troops to PKOs.<sup>21</sup>

It follows that the Dutch and Belgian cases sparked a debate in international law scholarship that addressed the limits of state responsibility and the limits of peacekeeping,<sup>22</sup> but failed to address the question of the legal position of military commanders. Considering their disputed role in the

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<sup>20</sup> Deen-Racsmay (n 17); Melanie O'Brien, 'Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-Based Crimes' (2011) 11 *International Criminal Law Review* 803; Noelle Quenivet, 'The Role of the International Criminal Court in the Prosecution of Peacekeepers for Sexual Offences' in Roberta Arnold (ed), *Law enforcement within the framework of peace support operations* (Brill 2008).

<sup>21</sup> The argumentation is generally that criminal jurisdiction is exclusively assigned to the TCC to not discourage states even further from contributing troops to PKOs, see Felicity Lewis, 'Human Rights Abuses In U.N. Peacekeeping: Providing Redress And Punishment While Continuing Peacekeeping Missions For Humanitarian Progress' (2014) 23 *Southern California Interdisciplinary Law Journal* 595, 599.

<sup>22</sup> See i.e. Tom Dannenbaum, 'Killings At Srebrenica, Effective Control, And The Power To Prevent Unlawful Conduct' (2012) 61 *International & Comparative Law Quarterly* 713; 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 *Harvard International Law Journal* 113; Andre Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 *Journal of International Criminal Justice* 1143; Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence and Concurrent Responsibility' (2015) 36 *Michigan Journal of International Law* 129; Berenice Boutin, 'Responsibility Of The Netherlands For The Acts Of Dutchbat In Nuhanović And Mustafić: The Continuous Quest For A Tangible Meaning For "Effective Control" In The Context Of Peacekeeping' (2012) 25 *Leiden Journal of International Law* 521; Otto Spijkers, 'Bystander Obligations at the Domestic and International Level Compared' (2014) 6 *Goettingen Journal of International Law* 47; Amir Čengić, 'The Netherlands v. Nuhanović & The Netherlands v. Mustafić-Mujić et al (Sup. Ct. Neth.), Introductory Note' (2014) 53 *International Legal Materials* 512; Peter Rowe, 'United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline: A Response to Dannenbaum' (2010) 51 *Harvard International Law Journal Online* 69; August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2014) 10 *International Organizations Law Review* 572; Nico Schrijver, 'Beyond Srebrenica and Haiti' (2014) 10 *International Organizations Law Review* 588; Siobhan Wills, 'Continuing Impunity of Peacekeepers: The Need for a Convention' [2013] *Journal of International Humanitarian Legal Studies* 47.

course of events, it appears justified to look beyond the confines of state responsibility and to focus on the individual obligations and potential responsibility of peacekeeping commanders, particularly in relation to civilian protection. Over the last decade, the protection of civilians has become a priority in UN peacekeeping operations.<sup>23</sup> Good examples of operations with protection-focused mandates are the United Nations Assistance Mission in Afghanistan (UNAMA), the United Nations Mission in South Sudan (UNMISS)<sup>24</sup> and the United Nations Organisation Mission in the DR Congo (MONUSCO).<sup>25</sup> This increased focus on civilian protection also reinforces the need for a clear understanding of the extent to which peacekeeping can offer that protection. More important, the extent to which the commanders are tasked with protecting civilians must be determined.

If such obligations or tasks are identified, the question arises how the UN, TCCs and the international community deal with failures to fulfil these obligations or tasks. That the excessive use of force could cause liability and that the law is less clear on whether inaction may result in individual liability, results in peacekeeping troops averting the risk of accountability by choosing inaction over action.<sup>26</sup> It is therefore of importance to look into the available accountability mechanisms and see what options are available to sanction a potential failure to act or contribution to the commission of a serious crime. That also requires us to look into the classification of the commanders' conduct and whether it would fall under the jurisdiction of a domestic or international court.

If it is a matter of international law, the options may be limited. The criminal responsibility of military commanders in armed conflict has been implemented by means of the command

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<sup>23</sup> Haidi Willmot and Scott Sheeran, 'The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' [2013] *International Review of the Red Cross* 517.

<sup>24</sup> UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996; UNSC Res 2155 (27 May 2014) UN Doc S/RES/2155. The Secretary-General advised in 2014 that the mission should be extended, but with a stronger focus on, *inter alia*, the protection of civilians and humanitarian assistance.

<sup>25</sup> UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147. These cases were highlighted as missions with protection-focused mandates by the UN on their Protection of Civilians website available at <<http://www.un.org/en/peacekeeping/issues/civilian.shtml>> accessed 25 April 2017.

<sup>26</sup> UNGA, 'Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations, Report of the Office of Internal Oversight Services' (7 March 2014) UN Doc A/68/787 (hereafter referred to as 'OIOS report') para 50.

responsibility doctrine.<sup>27</sup> However, the context in which the doctrine has been used has always been one of armed conflict; the commander usually belongs to one of the warring parties. How can this apply if the commander belongs to an impartial third party? And how does the doctrine apply if the duty held by the commander is not based on his or her control over subordinates but on a relationship of protection? Scholars have looked at command responsibility in detail and have discussed the duties placed upon a superior to act to prevent and punish crimes (that are about to be) committed by their subordinates.<sup>28</sup> However, these works failed to explore the possibility of a relationship of care between a military commander and civilians in PKOs. The developments in the Netherlands and Belgium imply that it is worth exploring this option at least under domestic law, and arguably also under international law. The assessment of a peacekeeping commander's responsibility for failing to act under domestic or international law may require a critical and more elaborate review of rules under domestic and international law. This should not be limited to a relationship between the commander and the principal perpetrator, but may be extended to an assessment of the relationship between the commander and the civilian population that the commander's troops came to protect.

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<sup>27</sup> See article 28 of UNGA 'Rome Statute of the International Criminal Court' (last amended 2010) (17 July 1998) UN Doc A/CONF.183/9 (hereafter: Rome Statute); article 7(3) of UNSC 'Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (last amended 17 May 2002) (25 May 1993) UN Doc S/25704 and adopted by the UNSC by UN Doc S/RES/827 (hereafter referred to as ICTY Statute); article 6(3) of UNSC 'Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States between January 1, 1994 and December 31, 1994' (8 November 1994) UN Doc S/RES/955 (hereafter referred to as ICTR Statute); article 6(3) of UNSC 'Statute of the Special Court for Sierra Leone' (14 August 2000) UN Doc S/Res/1315.

<sup>28</sup> E.g. Guénaél Mettraux, *The Law Of Command Responsibility* (OUP 2009); Ilias Bantekas, *Principles Of Direct And Superior Responsibility In International Humanitarian Law* (Juris Pub : Manchester University Press 2002); Héctor Olásolo, *The Criminal Responsibility Of Senior Political And Military Leaders As Principals To International Crimes* (Hart 2009); Roberta Arnold, 'Command Responsibility: A Case Study Of Alleged Violations Of The Laws Of War At Khiam Detention Centre' (2002) 7 *Journal of Conflict and Security Law* 191; Chantal Meloni, *Command Responsibility In International Criminal Law* (TMC Asser Press 2010); Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *Journal of International Criminal Justice* 619; Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, And A Simple Solution' (2012) 13 *Melbourne Journal of International Law* 1; Kai Ambos, 'Superior Responsibility' in Antonio Cassese (ed), *The Rome Statute of the International Criminal Court. A Commentary* (OUP 2002); Kai Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "most Responsible"' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009).

This legal assessment of a failure to act on part of the commander depends to a great extent on the definition of the commander's duty to act and its demarcation. One might question whether only legal duties give rise to legal responsibility, or whether having the capacity to act may result in liability as well. Considering the serious implications that failing to act had in Srebrenica and Rwanda, this needs to be addressed.<sup>29</sup> The rationale underlying criminalisation of inaction depends on whether the inaction is considered active or passive perpetration and whether inaction may amount to criminal activity at all. Luc Walley, who represented the plaintiffs in *Mukeshimana*, compared the active crime of rape with the inaction of the Belgian commanders and declared: 'If one consciously decides to surrender three thousand people to a group of murderers, I consider that at least as horrible as [the active crime of] rape. A soldier bears responsibility for the civilian population'.<sup>30</sup> This responsibility is arguably part of the commander's professional responsibility and may have its foundations in domestic or international law, as a doctor may owe a duty to do everything within his or her capabilities to save a patient on the operating table. Is that duty any different for a peacekeeping commander in relation to civilians under his or her care?<sup>31</sup>

This research aims to answer the question of whether peacekeeping commanders could be held accountable for a failure to act against serious crimes committed against the civilian population they came to protect. Throughout the thesis it will become clear that this also requires assessing whether peacekeeping commanders have an obligation to act against such serious crimes being committed under domestic and international law. These assessments will be made using the cases of the Dutch and Belgian peacekeeping commanders as examples, but also by placing the analysis into the context of contemporary PKOs.

If peacekeepers are allegedly involved in the commission of crimes on the territory of the host state, the host state normally has criminal jurisdiction over that crime based on the principle of

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<sup>29</sup> Ilias Bantekas, 'On Stretching the Boundaries of Responsible Command' (2009) 7 *Journal of International Criminal Justice* 1197, 1197–1208.

<sup>30</sup> Radio Netherlands Worldwide, 'Srebrenica and Rwanda Massacre Lawyers Compare Trials' available at <<https://www.rnw.org/archive/srebrenica-and-rwanda-massacre-lawyers-compare-trials>> accessed 25 April 2017.

<sup>31</sup> A similar comparison with the medical profession was made in Ted Van Baarda and Fred Van Iersel, 'The Uneasy Relationship between Conscience and Military Law: The Brahimi Report's Unresolved Dilemma' (2002) 9 *International Peacekeeping* 25, fn 56.

territorial jurisdiction.<sup>32</sup> However, it has been accepted for centuries that the army is the ‘agent of the sovereign and functions under the permissions and limitations that the sovereign placed on it’.<sup>33</sup> This thought is reflected in international agreements that prevent the host state from exercising that jurisdiction and instead, determine that the TCC has full criminal jurisdiction over its peacekeepers. The immunity of military personnel from criminal jurisdiction by the host state in PKOs is regulated by the Status of Forces Agreement (SOFA) signed between the host state and the UN.<sup>34</sup> Paragraph 47(b) of the Model SOFA assigns jurisdiction over crimes committed on host state territory to the TCC: ‘military members of the military component of the United Nations peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [the host country/territory]’.<sup>35</sup> The rationale behind criminal jurisdiction for the TCC is to ensure a fair legal process where the local laws in the host state may be undemocratic or the law enforcement system may be dysfunctional due to a situation of armed conflict.<sup>36</sup>

In assessing how the failure to act of peacekeeping commanders could be sanctioned, this thesis compares domestic and international criminal law approaches to inaction. While domestic law is more advanced in criminalising failures to act, the ad hoc tribunals have been influential in developing such responsibility on the international level. The thesis demonstrates the transformative effect that the jurisprudence of these courts has had on developing these complex forms of liability in international criminal law. Since the developments mainly took place in recent times, the jurisprudence of post-Second World War trials will only provide context to the issues discussed, but will not be considered in detail in the main parts of chapters 4 and 7. The jurisprudence of the ICC has not had a real effect on the discussion on omission and bystander liability yet, but has been important in the development of the command responsibility doctrine.<sup>37</sup>

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<sup>32</sup> Wilson and Singer Hurvitz (n 16) 3.

<sup>33</sup> Eric Talbot Jensen, ‘Exercising Passive Personality Jurisdiction Over Combatants: A Theory in Need of a Political Solution’ (2008) 42 *The International Lawyer* 1107, 1124. Article 4 of the Geneva Conventions III also included a reference to ‘those on the battlefield who the sovereign invested as his agents’.

<sup>34</sup> UNGA ‘Model Status-of-Forces Agreement to Peace-keeping Operations’ (9 October 1990) UN Doc A/45/594; Bruce Oswald, Helen Durham and Adrian Bates, *Documents On The Law Of Un Peace Operations* (OUP 2011) 34.

<sup>35</sup> Model Status-of-Forces Agreement (n 34) para 47b.

<sup>36</sup> Melanie O’Brien, ‘Protectors On Trial? Prosecuting Peacekeepers For War Crimes And Crimes Against Humanity In The International Criminal Court’ (2012) 40 *International Journal of Law Crime and Justice* 223, 225.

<sup>37</sup> In particular, the *Bemba Gombo* case has been of importance, see *Prosecutor v Bemba Gombo (Trial Judgment)*

The eligibility of the existing doctrines will be assessed based on the three general principles of criminal law: the principles of culpability, legality and fair labelling.<sup>38</sup> Although the last principle is also known as ‘fairness’, the concept of ‘fair labelling’ has been recognised as such<sup>39</sup> and seems of specific relevance in explaining some of the complexity experienced in criminalising inactive behaviour.

The individual culpability principle requires that people are only held responsible for their own personal conduct.<sup>40</sup> Or as the ICTY Appeals Chamber held in its *Tadić* judgment: ‘nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)’.<sup>41</sup> As will become clear throughout the thesis, an important issue with criminalising inaction is that often someone will be incriminated based on another person’s conduct. Only if the liability is assigned based on a failure to act and not because of the criminal result that followed such a failure to act, the defendant would be held responsible for his or her failure to act alone.

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ICC-01/05-01/08 (21 March 2016).

<sup>38</sup> Leena Grover, ‘A Call To Arms: Fundamental Dilemmas Confronting The Interpretation Of Crimes In The Rome Statute Of The International Criminal Court’ (2010) 21 *European Journal of International Law* 543, 550.

<sup>39</sup> The most important works in this regard are: Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925, 928, 931, 938; Robinson, ‘How Command Responsibility Got So Complicated’ (n 28) 35 ff; Elies Van Sliedregt, ‘Perpetration and Participation in Article 25(3)’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 503, 510–511; Fannie Lafontaine, ‘Parties to Offences under the Canadian Crimes against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity’ (2009) 50 *Les Cahiers de Droit* 967, 1010; Elies Van Sliedregt, *Individual Criminal Responsibility In International Law* (OUP 2012); Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 105 *Law Quarterly review* 424; Grover (n 38); Jens David Ohlin, Elies van Sliedregt and Thomas Weigend, ‘Assessing the Control-Theory’ (2013) 26 *Leiden Journal of International Law* 725; Glanville Williams, ‘Convictions and Fair Labelling’ (1983) 42 *The Cambridge Law Journal* 85; Victor Tadros, ‘Recklessness and the Duty to Take Care’, *Criminal law theory: doctrines and the general part* (2002) 237; James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *The Modern Law Review* 217; David L Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity’ (2007) 43 *Stanford Journal of International Law* 221; Douglas Guilfoyle, ‘Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law’ (2011) 64 *Current Legal Problems* 255; Jens David Ohlin, ‘Joint Intentions to Commit International Crimes’ 11 *Chicago Journal of International Law* 693; Gerard Werle and Boris Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’ in Elies Van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (OUP 2014); Beatrice Krebs, ‘Justification and Excuse in Article 31(1) of the Rome Statute’ (2013) 2 *Cambridge Journal of International and Comparative Law* 382; James G Stewart, ‘The End of “Modes of Liability” for International Crimes’ (2012) 25 *Leiden Journal of International Law* 1, 17–18; Victor Tadros, ‘Criminal Responsibility’ (OUP 2007).

<sup>40</sup> Robinson, ‘The Identity Crisis’ (n 39) 926.

<sup>41</sup> *Prosecutor v Tadić (Appeal Judgment)* IT-94-1-A (27 February 2001) para 186.

The second principle is that of legality, which is also described as *nulla poena nullum crimen sine lege* or more simply as a combination of the principles of non-retroactivity, the prohibition of analogy, the principle of certainty and the prohibition of uncodified legal provisions.<sup>42</sup> The crime should be clear prior to the act taking place, for people to know of the rule existing.<sup>43</sup> The rule can be found in article 15 of the International Covenant on Civil and Political Rights (ICCPR) and article 22 (and article 23) of the Rome Statute (RS) and serves to protect the individual by recognising the individual's weakness in the legal system.<sup>44</sup> It ensures that the criminality of conduct is foreseeable.

In the light of the cases under review, the third principle, fair labelling, is arguably most important for the peacekeeping commander. Fair labelling refers to the idea that the stigma attached to the defendant should be proportionate to the actual wrongfulness.<sup>45</sup> Together the three principles provide a benchmark for judiciary to assess whether criminal liability would be appropriate. The following section sets out the structure of the thesis in more detail.

## 1.2 Structure

Chapter 2 describes the course of events in Srebrenica and Kigali that supported the legal proceedings to which reference is made above. Then the legal steps taken in Dutch and Belgian domestic courts will be discussed in more detail. Before legal accountability arises, the state must fulfil its duty to investigate under article 2 of the European Convention on Human Rights (ECHR). An attempt to hold the Dutch commanders accountable for their positive contribution to the crimes committed by the Bosnian Serb Army in Srebrenica was unsuccessful. Criminal responsibility for a failure to protect could thus be more suitable. Chapters 3 and 4 therefore look

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<sup>42</sup> Claus Krefß, 'Nulla Poena Nullum Crimen Sine Lege' (2010) VII Max Planck Encyclopedia of Public International Law 889, para 1.

<sup>43</sup> Robinson, 'The Identity Crisis' (n 39) 927.

<sup>44</sup> Camilla Lind, 'Article 22 Nullum Crimen sine lege (section 255)', *Commentary on Case Matrix Network* available at <<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>> accessed 25 April 2017.

<sup>45</sup> Tadros, 'Recklessness and the Duty to Take Care' (n 39) 238; Krebs (n 39) 398–399; Stewart (n 39) 17; Robinson, 'The Identity Crisis' (n 39) 962; Van Sliedregt, 'Perpetration and Participation in Article 25(3)' (n 39) 503, 510–511.

into the option of establishing liability for a criminal omission, which requires a legal duty to act. The factual and legal findings of the Dutch and Belgian cases discussed in chapter 2 will be applied in assessing whether the conduct of the commanders would reach certain thresholds set for individual criminal responsibility by omission under domestic and international law. Both the literature, the law and jurisprudence on omissions is considered and attention will be given to the different views represented by each of these sources. On the domestic level a further comparison will be made between common and civil law. These findings will then be compared with the stance taken towards this matter in international criminal law in chapter 4.

Both domestic and international law could be relevant; domestic law because a peacekeeping commander is always bound by its domestic law and may be adjudicated by its domestic court, and international law is valuable as a guideline to interpreting international law in domestic courts. For example, the RS is of relevance since the signatories to the RS, eg the Netherlands and Belgium, have implemented the Statute in their domestic legal systems. As discussed above, the general reluctance to prosecute military officials in the domestic realm is another reason to consider the limits and value of international law in this regard. Chapter 4 will also assess whether international criminal courts have jurisdiction over the conduct under review, and to what extent international law could be of significance in adjudicating the commanders' conduct in domestic courts. The comparative analysis also provides insights into the modality of criminal liability attached to the accused: does the liability solely refer to failing to fulfil a legal duty or does the liability extend to the consequences of that failure, making the non-actor an accomplice to the commission of the crime?

Chapter 5 builds on the domestic case law in the Netherlands and Belgium in assessing the extent to which the commanders may have had a duty to protect, as required for a criminal omission to arise. It also analyses international human rights law (IHRL) and international humanitarian law (IHL) and the interpretation thereof to see to what extent it applies to peacekeeping commanders and what norms within these paradigms may contribute to an obligation to act. Protection is defined differently in IHL and IHRL, and in the context of peacekeeping. This troubles the argument made by some scholars who argue that protective norms stemming from these legal paradigms apply in PKOs, but should be interpreted in a contextual way. Negative obligations of

protection are then explained as positive obligations depending on the context in which they are being applied. This chapter will argue that there may be an expectation of protection, but that there is no legal duty to do so. The expectation extends to the idea that commanders should do everything within their means to protect the civilian population. This may include monitoring the security situation, reporting and undertaking steps to request further support for the civilians under their care. This could be defined as a moral duty, which could be included in the mandate on the one hand, but could also be derived from their profession as a trained and higher ranked soldier. The expectation is furthermore strengthened by the TCC's extraterritorial obligation to guarantee the non-derogable human rights to the civilian population in the area under their control. Although it is difficult to define an appropriate type of responsibility for failing to fulfil a moral duty, bystander responsibility as discussed in chapter 6 and 7 may be suitable for this purpose.

A bystander witnesses a crime *without* having a specific duty to act. While omission liability requires a specific legal duty to act and the attendant failure to fulfil that duty, bystander responsibility criminalises inaction based on the encouraging or approving effect of someone's inactive presence at the scene of the crime. The presence of the defendant with a certain authority (eg a commander) near or at the scene of the crime may have an encouraging effect on the perpetrators of a crime. Similarly, the presence of an individual with a certain authority can be interpreted as tacit approval of the crimes taking place. In international law this may be framed as aiding and abetting through encouragement or tacit approval. In some domestic laws this is referred to as 'presence at the scene of the crime' or 'not distancing oneself from a crime'. I will argue here that despite the focus on the positive effect of the defendant's presence, the underlying rationale might be that the defendant's authority raised an expectation to act, which I will refer to as a general duty or moral obligation.

The degree of liability<sup>46</sup> assigned to the defendants for both omission and bystander liability is

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<sup>46</sup> This is a term borrowed from the German notion of *Verantwortlichkeitsgrad* and is in English interchangeably referred to as degree of criminality, degree of liability and degree of responsibility. The term was, *inter alia*, used in Werle and Burghardt (n 39); Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953; Joachim Vogel, 'How to Determine Individual Criminal Responsibility In Systemic Contexts: Twelve Models' [2002] *Cahiers de Défense Sociale* 151; Jane Wright, 'Local

high. Also, the liability extends to the criminal result instead of creating responsibility for the actual failure to act. If we then consider the general principles of criminal law to assess whether it would be just to apply these modes of liability to the Dutch and Belgian commanders, it seems unlikely that the commanders could be held responsible using these forms of liability. Using the principles of culpability, legality and fair labelling indicates that the outcomes would not be foreseeable because, in part, the requirements applied in the judgments under review differ from the elements required by law. Also, the label attached to peacekeeping commanders would seem disproportionate to their actual role in the commission of the crimes. In addition, the peacekeepers would not be held responsible for their own conduct (a failure to act), but for the crime committed by the principal(s).

Chapter 8 offers an outlook on liability for inaction for peacekeeping commanders from a normative perspective. It lists alternative options to the criminal liability discussed. The development of a separate doctrine for peacekeeping commanders within international criminal law is one alternative discussed here, but this chapter also explores the use of tort liability in the domestic realm as a reasonable alternative to criminal liability. In particular, if a legal obligation to act would apply to the peacekeeping commander (eg through the domestic law of the TCC), a type of civil responsibility could arise that is similar to failing to meet a due diligence obligation by states. Some of these alternatives may however contribute to the further fragmentation of international law; a development not always considered desirable. Therefore, this thesis also looks into the option of developing a separate legal paradigm applicable to PKOs. This separate paradigm could then include a clearer definition of what peacekeeping commanders are legally required to do, without harming the interpretation of current law.

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Authorities, the Duty of Care and the European Convention on Human Rights' (1998) 18 Oxford Journal of Legal Studies 13; Chile Eboe-Osuji, "Complicity in Genocide" versus "Aiding and Abetting Genocide": Construing the Difference in the ICTR and ICTY Statutes' (2005) 3 Journal of International Criminal Justice 56; Rain Livolja, 'Service Jurisdiction Under International Law' (2010) 11 Melbourne Journal of International Law 309; Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) 290; Brian Lawson, 'Individual Complicity in Collective Wrongdoing' (2013) 16 Ethical Theory and Moral Practice 227, 240; Stewart (n 39) 46. See also *Prosecutor v Vasiljević (Appeal Judgment)* IT-98-32-A (25 February 2004) para 102; *Tadić (Appeal Judgment)* (n 41) para 192; *Prosecutor v Blaškić (Trial Judgment)* IT-95-14-T (3 March 2000) para 788 ff; *Prosecutor v Djordjević (Appeal judgment)* IT-05-87/1-A (27 January 2014) para 792.

## Chapter 2: Peacekeeping Failures and their Legal Aftermath

### 2.1 Introduction

To answer the main question of whether the peacekeeping commander can be held accountable for failing to act against serious crimes committed against civilians who he or she came to protect, let us first return to the cases that triggered the debate on this matter. This chapter focuses on the two cases that have touched on accountability for peacekeeping failures: the actions brought in relation to the withdrawal of the Belgian battalion from Kigali (April 1994) and the fall of the enclave in Srebrenica (July 1995). Then the domestic court cases in Belgium and the Netherlands regarding the liability of these TCCs will be considered. Before focusing on the role of the individual commanders within a PKO in more detail, section 2.4 sets out the command and control structure within such operations. In the fifth section, we will then turn to the Dutch criminal complaint procedure, *Mustafić & Nuhanović v Karremans, Franken & Oosterveen*, in which the individual criminal responsibility of the Dutch peacekeeping commanders has been assessed. Although it focused on a positive contribution to the commission of crimes and command responsibility under Dutch criminal law, this case demonstrates that establishing liability for such a positive contribution to crimes committed by others faces several obstacles. However, as we will then discuss, it is important that the TCC launches an effective investigation into potential complicity in the commission of criminal conduct, since the ECHR requires this of its signatories.

### 2.2 Case Studies

#### 2.2.1 Kigali<sup>47</sup>

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<sup>47</sup> The details of the civil wars in Rwanda and Bosnia Herzegovina have been discussed extensively in other works. Therefore, the specifics will not be discussed in further detail here. See eg Carole Rogel, *The Breakup of Yugoslavia and the War in Bosnia* (Greenwood Press 1998); Steven Burg, *The War in Bosnia-Herzegovina Ethnic Conflict and International Intervention* (ME Sharpe 1999); Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia University Press 1995); Thomas Odom, 'Journey into Darkness Genocide in Rwanda'; Dale Tatum, *Genocide at the Dawn of the Twenty-First Century: Rwanda, Bosnia, Kosovo, and Darfur* (Palgrave Macmillan 2010).

Following the signing of the Arusha Peace Agreement on 4 August 1993, the United Nations Assistance Mission to Rwanda (UNAMIR) was developed to oversee the implementation of the agreement. The first phase of UNAMIR included the creation of a 'secure area' in the Rwandan capital of Kigali. The mandate, adopted on 5 October 1993 (UNSC Resolution 872)<sup>48</sup> called on the force to 'contribute to the security of the city of Kigali'.<sup>49</sup> It was the Belgian infantry battalion, Kibat, which took responsibility for the strategic positions in the city to fulfil this task.<sup>50</sup>

The Rwandan genocide was sparked to a large extent by the death of President Habyarimana, whose plane was shot down on 6 April 1994. The tensions were running high within hours after this attack, which led Prime Minister Agathe Uwilingiyimana to seek refuge on the UN Volunteers compound on 7 April 1994.<sup>51</sup> The next day, Prime Minister Uwilingiyimana was found dead and 10 Belgian peacekeepers were killed by Interahamwe militias.<sup>52</sup> Different hypotheses were raised afterwards on why the peacekeepers were killed. One option raised was that the peacekeepers were 'considered responsible' for the death of president Habyarimana.<sup>53</sup> Another option was that the peacekeepers witnessed the killing of Prime Minister Uwilingiyimana, but the Belgian Inquiry Committee considered this unlikely as they were not present when she was killed.<sup>54</sup> More likely, it was part of a political plan to force the withdrawal of the Belgian contingent, which would allow the militias greater freedom to act as they saw fit.<sup>55</sup> Depicting the Belgians as the ones who downed President Habyarimana's plane was part of that plan.<sup>56</sup> This sparked political executions of which the UN, despite guarding these politicians' houses, seemed unaware or to which a blind eye was turned.<sup>57</sup> Despite being present, UNAMIR soldiers did not even attempt to prevent the abduction and severe mistreatment of Judge

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<sup>48</sup> UNSC Res 872 (5 October 1993) UN Doc S/RES/872.

<sup>49</sup> Ibid para 3a.

<sup>50</sup> Astri Suhrke, 'Dilemmas of Protection: The Log of the Kigali Battalion' in Howard Adelman and Astri Suhrke (eds), *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (Transaction Publishers 2000) 256.

<sup>51</sup> UNSC 'Report of the Independent Inquiry into the Actions of the United Nations in the 1994 genocide in Rwanda' (16 October 1999) UN Doc S/1999/1257 (hereafter referred to as 'UN Independent Inquiry') 16.

<sup>52</sup> Ibid 17.

<sup>53</sup> Belgian Senate, Report following the Parliamentary Inquiry into the Events in Rwanda, 6 December 1997, (hereafter referred to as Belgian Inquiry) section 3.5.2.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> UN Independent Inquiry (n 51) 18; Belgian Inquiry (n 53) section 3.6.3.

Kavaruganda and his family. To provide some form of protection to politicians likely to be targeted in further attacks, the UN soldiers took them to the École Technique Officielle (ETO), a secondary school, at the outskirts of Kigali.<sup>58</sup> About 2000 Rwandan civilians sought protection in the school between 7 and 11 April 1994, while members of the Rwandan militia stood outside.<sup>59</sup> Captain Luc Lemaire was the commander of the Belgian battalion residing in the ETO.<sup>60</sup> In response to the threat of the militia, Colonel Luc Marchal (sector commander in Kigali and commander of the Belgian battalion)<sup>61</sup> instructed Lemaire to evacuate ‘only the white people’ from the school.<sup>62</sup> Despite requests by some refugees to be evacuated with the French and Belgian ‘expatriates’, these requests were denied.<sup>63</sup> Meanwhile, the Belgian contingent was preparing its own withdrawal from the school.<sup>64</sup>

When the Belgian contingent withdrew from the school on 11 April, its forces left men, women and children in the hands of the Rwandan soldiers and Interahamwe militia members standing outside.<sup>65</sup> The refugees tried to get on the UN jeeps as they left, warning the peacekeepers that they were leaving them in the hands of their murderers. Mrs Mukeshimana, the wife of the former minister of Foreign Affairs, informed the Belgian battalion that her husband and others would be killed with machetes.<sup>66</sup> Despite knowing this, the Belgians refused to evacuate her husband.<sup>67</sup> The French battalion that arrived at the ETO at a later stage agreed to bring the former minister to the French Ambassador.<sup>68</sup> The Belgian military commander however did not allow them to do so.<sup>69</sup> The refugees, including Mr Mukeshimana, were tortured, raped and massacred after the troops had left.<sup>70</sup> Inquiries held by the UN and the French and Belgian governments attempted to assign responsibility for the decision to withdraw the troops. Captain Lemaire declared in the Belgian inquiry that Lieutenant-Colonel Joseph Dewez, commander of Kibat II,

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<sup>58</sup> UN Independent Inquiry (n 51) 18-19.

<sup>59</sup> Belgian Inquiry (n 53) section 3.8.5.

<sup>60</sup> Ibid.

<sup>61</sup> Romeo Dallaire, *Shake Hands With The Devil: The Failure of Humanity in Rwanda* (Random House 2003) 547.

<sup>62</sup> Belgian Inquiry (n 53) section 3.8.5.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

authorised him to abandon the refugees with the approval of Colonel Marchal.<sup>71</sup>

The UN considered that the withdrawal endangered the situation of the civilians even further:

During the early days of the genocide, thousands of civilians congregated in places where UN troops were stationed, i.a., the Amahoro Stadium and the Ecole Technique at Kicukiro. And when UNAMIR later came to withdraw from areas under its protection, civilians were placed at risk. Tragically, there is evidence that in certain instances, the trust placed in UNAMIR by civilians left them in a situation of greater risk when the UN troops withdrew than they would have been otherwise.<sup>72</sup>

The UN report furthermore clarified that, when the UNAMIR contingent at ETO left, there ‘could not have been any doubt as to the risk of massacre which awaited the civilians who had taken refuge with them’.<sup>73</sup> Additionally, the UN inquiry confirmed that

the manner in which the troops left, including attempts to pretend to the refugees that they were not in fact leaving, was disgraceful. If such a momentous decision as that to evacuate the ETO school was taken without orders from the Force Commander, that shows grave problems of command and control within UNAMIR.<sup>74</sup>

The report suggested that the decision to withdraw was taken by the Belgian commanders within UNAMIR.<sup>75</sup> The Belgian parliamentary investigation, finalised in 1997, indicated that the division of command positions was anything but well organised. The Canadian Force Commander, Lieutenant-General Roméo Dallaire, had decided relatively late that Kibat would have a separate sector commander, Luc Marchal. Marchal was added to the chain of command after the staff had been prepared for their mission.<sup>76</sup> The circumstances in which Marchal had to operate were difficult, due to the lack of proper organisation.

The objective of UNAMIR was defined as ‘contributing to the security and protection of displaced persons, refugees and civilians in danger in Rwanda, by means, including the

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<sup>71</sup> Ibid.

<sup>72</sup> UN Independent Inquiry (n 51) 45.

<sup>73</sup> Ibid 46.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid 45.

<sup>76</sup> Belgian Inquiry (n 53) para 3.2.3.8.

establishment and maintenance, where possible, of safe humanitarian areas'.<sup>77</sup> The withdrawal of the Belgian troops left the impression that the Belgians had prioritised their own security at the expense of the lives of the refugees who stayed at the ETO.

However, the UN was also critical of its own duty. In its report the committee held that

[f]aced in Rwanda with the risk of genocide, and later the systematic implementation of a genocide, the United Nations had a duty to act which transcended the basic principles of peacekeeping. In effect, there can be no neutrality in the face of genocide, no impartiality in the face of an effort to exterminate part of a population.<sup>78</sup>

In doing so, the UN highlights a main difficulty in carrying out PKOs in such complex circumstances: the practice of PKOs has undermined the traditional principles of peacekeeping. These principles are host state consent, impartiality of the troops and the non-use of force.<sup>79</sup>

### 2.2.2 Srebrenica

On 18 April 1993, the UN Security Council passed Resolution 819 which established the safe area in and around the East Bosnian town of Srebrenica.<sup>80</sup> The Dutch battalion, Dutchbat I, took positions in the area from 1 March 1994, with their main task being the defence of the enclave against external attacks. When Dutchbat III took over on 18 January 1995<sup>81</sup> the Bosnian Serb Army (BSA) had increased its power over the area substantially. As a result, Dutchbat was restrained in its abilities to carry out its defensive task. Two infantry companies of about 300 men were divided over 8 observation posts. In contrast, the Serb army consisted of 1000-2000 well-equipped troops and the Bosnian army had 3000-4000 ill-equipped men and women at its disposal.<sup>82</sup>

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<sup>77</sup> Ibid. On 17 May 1994, the UN Security Council imposed an arms embargo on Rwanda by means of UNSC Resolution 918. It also expanded UNAMIR's mandate to enable it to contribute to the security and protection of refugees and civilians at risk, through means including the establishment and maintenance of secure humanitarian areas, and the provision of security for relief operations to the degree possible. See UNSC Res 918 (17 May 1994) UN Doc S/RES/918, paras A3 and A4.

<sup>78</sup> UN Independent Inquiry (n 51) 50.

<sup>79</sup> <<http://www.un.org/en/peacekeeping/operations/principles.shtml>> accessed 14 June 2017.

<sup>80</sup> UNSC Res 819 (18 April 1993) UN Doc S/RES/819.

<sup>81</sup> UNGA 'Report of the Secretary-General pursuant to General Assembly resolution 53/35: "The Fall of Srebrenica"' (15 November 1999) UN Doc A/54/549 (hereafter referred to as Srebrenica UN Report), 53.

<sup>82</sup> Ibid.

In the days preceding the fall of the enclave, some 25000 refugees moved towards the UN compound in Potočari, near Srebrenica, as the situation in the town of Srebrenica deteriorated. Only 5000 could access the compound. The other 20000 had to remain outside the compound with no real protection in place.<sup>83</sup> Although there was no specific instruction to do so, the gates of the compound were closed. The decision to close the gates ensured at least that ‘the situation was clear’ as Major Franken, deputy commander of Dutchbat III, stated in his witness hearing.<sup>84</sup> He added that ‘the compound was most suitable to gather people considering their mission to prevent human suffering. The compound could be easily supervised’.<sup>85</sup>

The attack leading to the fall of the enclave started on 6 July and lasted for a week. The BSA targeted the Dutchbat compound, with some of the observation posts being under severe attack.<sup>86</sup> The military observers in the sector ‘North-East’ reported that Dutchbat personnel were being targeted by BSA soldiers. Although the BSA formed a serious threat to both Dutchbat and the Bosnian Muslims, Lieutenant Colonel Karremans refused to return the weapons to the Bosnian Muslims taken from them as part of the mission’s mandate ‘to disarm the warring parties’.<sup>87</sup> Although the BSA did not aim for the invasion of the entire enclave, this became its objective as it became clear to its soldiers that the Dutch offered little resistance to the attacks.<sup>88</sup> 30 UNPROFOR peacekeepers were taken hostage on 9 July, when the BSA took over the enclave.<sup>89</sup>

By this time, air support had been granted: the North Atlantic Treaty Organisation (NATO) agreed to carry out precision attacks on 11 July. Due to miscommunications however, these attacks never took place.<sup>90</sup> In June 2015, the publication of several documents that had remained secret since 1995, caused further upheaval regarding the question who cancelled the air support and on what grounds this decision was based.<sup>91</sup> Regardless of the exact course of events,

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<sup>83</sup> Preliminary Witness Hearing Franken, The Hague District Court, 9 June 2005, 2 and 7.

<sup>84</sup> Ibid 2.

<sup>85</sup> Ibid.

<sup>86</sup> Srebrenica UN Report (n 81) 57 ff.

<sup>87</sup> Ibid 63.

<sup>88</sup> Ibid 61.

<sup>89</sup> Ibid 64.

<sup>90</sup> Ibid 69.

<sup>91</sup> Documentary ‘Waarom Srebrenica moest vallen’ (translated: ‘Why Srebrenica had to fall’), NPO, 29 June 2015,

Karremans reported to Dutch and UN authorities that he was in a difficult position. He wrote in his report to the authorities in Zagreb, Sarajevo, Tuzla and The Hague that ‘there are now more than 15000 people within one square kilometre, including the battalion, in an extreme[ly] vulnerable position: the sitting duck position, not able to defend these people at all’.<sup>92</sup> He further observed:

I am responsible for these people [yet] I am not able to: defend these people; defend my own battalion; find suitable representatives among the civilians because the official authorities are for certain reasons not available; find representatives among the military authorities because they are trying to fight for a corridor to the Tuzla area, and will not show up anyway because of purely personal reasons; manage to force ARBiH [Army of the Republic of Bosnia and Herzegovina] troops to hand over their weapons ... In my opinion there is one way out: negotiations today at the highest level: United Nations Secretary-General, highest national authorities and both Bosnian Serb and Bosnian Government.<sup>93</sup>

In the difficult circumstances that had arisen, Karremans requested the preparation of an evacuation plan. This was finalised on 12 July. The plan included the evacuation of small groups of people in buses provided by the international community.<sup>94</sup> When the plan was carried out, the BSA only allowed women and elderly men to enter the buses. The BSA soldiers stressed that the able-bodied men were taken away to be questioned and would be treated in compliance with the Geneva Conventions.<sup>95</sup> Dutchbat could not monitor this, since they could not escort each bus individually.<sup>96</sup> While evacuating the compound, Dutchbat noticed that men and women were being separated, that men were being physically abused and that the men’s passports were burned before they entered the buses. Meanwhile, gunshots were audible, since the hills reverberated with the sound of the continuous killings taking place.<sup>97</sup> Additionally, Dutchbat soldiers noticed the next day that groups of men were kept separate from others on a football pitch. Bodies of men who appeared to have been executed were found by Dutch soldiers near the compound.<sup>98</sup> The

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available online at <<http://www.npodoc.nl/documentaires/series/2doc/2015/juni/waarom--srebrenica-moest-vallen.html>> accessed 25 April 2017.

<sup>92</sup> Srebrenica UN Report (n 81) 72.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 73.

<sup>95</sup> Ibid 74.

<sup>96</sup> Netherlands Institute for War Documentation (n IWD), *Srebrenica a ‘safe’area* (Uitgeverij Boom 2002) 2801, 2821.

<sup>97</sup> Srebrenica UN Report (n 81) 76-77.

<sup>98</sup> Ibid 76, 78.

UN's chief political officer in Bosnia, Philip Corwin, already reckoned that the situation would not end well for the Muslim population, as he wrote in his diary on 12 July:

Not a single one of us believes that the Moslem population of Srebrenica will be safe. The pattern is all too familiar, and it is a pattern used by Croats and Moslems as well. The draft-age men will be separated from their families, then tortured, imprisoned, executed. Women will be raped. Mass graves will be hurriedly dug to hide the evidence.<sup>99</sup>

That same day, the remaining refugees in the compound hall were sent away from the Dutch base.<sup>100</sup> Dutchbat's local personnel could stay and were to be evacuated with Dutchbat. A list was drawn up with the names of the Dutch soldiers and 29 other individuals working for them at the time.<sup>101</sup> Rizo Mustafić, working as an electrician, was on this list.<sup>102</sup> None of the BSA soldiers had raised any objections to Karremans' instruction to Major Franken to evacuate the local employees with the Dutchbat soldiers.<sup>103</sup> Despite his name being on the list, Mustafić was told by personnel officer Adjutant Berend Oosterveen to leave the compound, although Mustafić declared that he would stay.<sup>104</sup> Franken stated in his later witness accounts that he told Oosterveen after this incident that this was an 'immense stupidity'.<sup>105</sup> Mustafić was indeed forced to leave the compound. His remains were found in 2010.

The situation of Hasan Nuhanović, working as interpreter, was different. He was told that he would be evacuated with the Dutch soldiers.<sup>106</sup> His family residing at the compound however was not granted the same level of protection. Nuhanović very well knew of the fate of the men who were 'evacuated' and taken to the hills of Potočari. After sharing his concerns with the Dutchbat staff, Franken decided that no exception could be made for Nuhanović's family members. Major De Haan, UN military observer, later stated that he and the other officials believed this was the only chance for Nuhanović and his family to leave the compound.<sup>107</sup> To save Nuhanović and his

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<sup>99</sup> Philip Corwin, *Dubious Mandate: A Memoir of the UN in Bosnia, Summer 1995* (Duke University Press 1999) 212.

<sup>100</sup> Srebrenica UN Report (n 81) 78.

<sup>101</sup> Preliminary Witness Hearing Franken (n 83) 8.

<sup>102</sup> NIWD (n 96) 2760.

<sup>103</sup> Preliminary Witness Hearing Franken (n 83) 7 and 11.

<sup>104</sup> Preliminary Witness Hearing Oosterveen, The Hague District Court, 12 May 2005, 8.

<sup>105</sup> Preliminary Witness Hearing Franken (n 83), 8.

<sup>106</sup> Preliminary Witness Hearing De Haan, The Hague District Court, 12 May 2005, 9-10.

<sup>107</sup> *Ibid* 10.

family, De Haan made serious efforts to put the names of the Nuhanović family on the list of personnel that could be evacuated with Dutchbat.<sup>108</sup> Franken however, noticed that De Haan lied about Nuhanović' brother being a new employee, and crossed out his name off the list.<sup>109</sup> Franken allowed Nuhanović's father to stay at the compound with his son Hasan. This would mean leaving his youngest son, Nuhanović's younger brother, to go onto the buses alone.<sup>110</sup> His father refused to let him get on the bus alone, and he accompanied his son on the bus leading to an almost certain death. Franken acknowledged later that he sent these people off the Dutch base in the awareness that they would be killed.<sup>111</sup> It is this awareness and the observations made during the evacuation that indicate that the incompetence of the commanders may have been worthy of blame. The next section describes in more detail which legal steps were taken after the events in Kigali and Srebrenica and assesses the main conclusions drawn by the courts regarding the conduct of the battalions and their commanders.

## 2.3 Legal Steps taken in Domestic Courts

### 2.3.1 Belgium: Prosecutor v Marchal and Mukeshimana-Ngulinzira and others v Belgium and others

Belgium's involvement in the UNAMIR peacekeeping operation resulted in two court cases in Belgium. The first, *Prosecutor v Marchal*,<sup>112</sup> considered the criminal and civil responsibility of Sector Commander Colonel Marchal for the death of the 10 Belgian paratroopers. The second case, *Mukeshimana*<sup>113</sup> dealt with the civil liability of both the state and the Belgian military commanders for the decision to withdraw the troops from the ETO and the consequences this decision arguably had.

In the first case, Marchal was charged with the commission of involuntary homicide in relation to

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<sup>108</sup> Ibid 9-10.

<sup>109</sup> NIWD (n 96) 2755-2756.

<sup>110</sup> Zegveld, Aangifte Strafbare Feiten begaan in Srebrenica in juli 1995 (Complaint Criminal Facts committed in Srebrenica in July 1995) (letter to the prosecutor), 5 July 2010, 6.

<sup>111</sup> NIWD (n 96) 2756. See also the interview held with major Franken, NIWD, 21 May 2001.

<sup>112</sup> *Prosecutor v Marchal*, Military Court, 4 July 1996.

<sup>113</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11).

the 10 Belgian paratroopers who were killed by the Interahamwe militias on 7 April 1994.<sup>114</sup> The Court concluded that Marchal did not act negligently in failing to prevent their deaths. In its discussion of the law, the military court held that ‘the lack of foresight does not have to be the *immediate cause* of involuntary manslaughter. Causation by negligence, lack of foresight or precaution suffices’.<sup>115</sup> The Court held that a low threshold for the *mens rea* would be sufficient. Although the military auditor had argued that Marchal *could have foreseen* the situation considering the ongoing hate campaign against the Belgian peacekeepers, the Court argued that a lack of precaution could not be demonstrated. The final assessment of Marchal’s liability was based on a test of reasonableness, whereby the Court assessed whether another commander in the exact same circumstances would have acted in the same way.<sup>116</sup> Only when ‘the personal abilities of the defendant for responsibility exceed those of a normally prudent and reasonable person’, would an exception be made and the defendant’s responsibility be determined without applying the reasonableness test.<sup>117</sup>

The military judge held that foreseeability and awareness could not be considered, since events taking place after the tortious act should not be taken into account.<sup>118</sup> Foreseeability and awareness are mentioned as examples that cannot fulfil the element of ‘knowledge’.<sup>119</sup> However, such an approach seems contrary to the accepted belief that foreseeability and awareness are important in establishing criminal responsibility, particularly if the defendant is in a superior position.<sup>120</sup> The higher expectations raised by the superior position were clarified when the Court

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<sup>114</sup> *Marchal* (n 112). See text to n 52 for information regarding the context in which these killings took place.

<sup>115</sup> *Ibid* para 3.

<sup>116</sup> *Ibid* para 8.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Marchal* (n 112) para 10.

<sup>119</sup> *Ibid*.

<sup>120</sup> José Doria, ‘The Relationship between Complicity Modes of Liability and Specific Intent Crimes in the Law and Practice of the ICTY’ in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Brill - Nijhoff 2009) 148 ff; Lafontaine (n 22) 989 ff; James G Stewart, ‘Complicity’ in Markus Dubber and Tatjana Hoernle (eds), *Oxford Criminal Law Handbook* (OUP 2014) 554 ff, in particular 556-558. See regarding the use of these elements in the context of command responsibility: Alejandro Kiss, ‘Command Responsibility under Article 28 of the Rome Statute’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 643 ff. Regarding the use of foreseeability in certain forms of Joint Criminal Enterprise in the practice of the ad hoc tribunals, see Darryl Robinson, ‘The Two Liberalisms of International Criminal Law’ in Carsten Stahn and Larissa Van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser 2010) 124–127; Antonio Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’ (2005) 5 *Journal of International Criminal Justice* 109; *Prosecutor v Blaškić (Appeal Judgment)* IT-95-14-A (29 July 2004) para 33; *Tadić (Appeal Judgment)* (n 41) para 228; *Vasiljević*

noted the need ‘to take into account that the defendant is a person with public authority, both on the national and international level’.<sup>121</sup> This authority however, would depend on the commander’s position in the chain of command. A relationship of subordination between different levels of command would limit that authority to a certain extent, particularly on the ‘geopolitical and strategic level’.<sup>122</sup> If the complaint would, for instance, be related to exercising a specific task assigned to the battalion or applicable to the area in which that battalion is based, the battalion commander would have a great deal of responsibility for carrying out that task diligently. The battalion commander exercises command on the tactical level.<sup>123</sup> Although Marchal was a sector commander, he was still a part of the tactical level of command as he was also placed under the Force Commander.<sup>124</sup> The argument that a specific unit *itself* is responsible for the tasks assigned to them was confirmed by the judge. The Court held that the primary control is, in the first place, in hands of the given unit and that, only in the second place, would that control lie with the superior who gave orders to that unit.<sup>125</sup> The Court concluded:

Even, as far as this additional control is concerned, the sector commander is in no way to blame, since the information in the file shows that, on several occasions, the accused himself has supervised the execution of his orders by the subordinate units (cf for instance to such vital point as was the airport and the orders for appropriate ammunition, in particular to defend this target).<sup>126</sup>

By giving orders and supervising the execution of those orders, Marchal had fulfilled his part of the task. After the orders have been given by the higher levels of command, it is up to the battalion level commander to decide how these orders should be exercised and it will be his or her task to instruct his underlings to do so. The judge also held that the only culpable conduct on part of Marchal was his failure to draw up an emergency plan; however, the judge found that the causal nexus between the absence of such a plan and the death of the paratroopers could not be

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(*Appeal Judgment*) (n 46) para 101; Kai Ambos, ‘Remarks on the General Part of International Criminal Law’ (2006) 4 *Journal of International Criminal Justice* 660, 672–673.

<sup>121</sup> *Marchal* (n 112) para 14.

<sup>122</sup> *Ibid.*

<sup>123</sup> Patrick C Cammaert and Ben Klappe, ‘Authority, Command and Control in United Nations-Led Peace Operations’ in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 161–162.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Marchal* (n 112) para 23.

<sup>126</sup> *Ibid* para B2(d) of the Conclusions regarding the grievances.

established.<sup>127</sup> As such, Marchal was not to blame for their deaths. The Court found it would have required too much time to prepare any form of effective intervention.<sup>128</sup> As a result, the Court acquitted Marchal. For our purposes, the main point of interest to be taken from this case is that the responsibility for certain tasks remains with the specific unit, which implies that accountability in these circumstances is more likely to be imposed on the level of battalion command than on the higher level of force command.

In the second case, *Mukeshimana*, the survivors and relatives of victims of the mass killing that took place in the ETO filed a civil complaint against the Belgian state and the commanders, Luc Marchal, Joseph Dewez and Luc Lemaire. The plaintiffs argued there was a causal link between the decision to withdraw the Belgian battalion and the killings that took place after the Belgians left.<sup>129</sup> The Brussels District Court's interim decision indicated that the complaint might be justified, since both the state and the officials knew of the atrocities going on in the wider area outside the school before their withdrawal. It stated that

[t]he commanders could not have been ignorant of the war crimes committed on a large scale in Rwanda before the evacuation of the ETO, and of the fact that such crimes would be perpetrated against the ETO refugees once the protection by the Belgian soldiers came to an end. The commanders could have had no illusion as to the fate that awaited the refugees after the departure of the Belgian blue helmets.<sup>130</sup>

The District Court further confirmed the causal connection between leaving the people unprotected and the crimes that took place after the withdrawal.<sup>131</sup> The defence counsel argued that the Belgian troops were only following orders, which should relieve them from guilt, and that the troops were under the command and control of the UN rather than the Belgian state.<sup>132</sup> These defences were rejected.<sup>133</sup> An argument made by the defence that alternative solutions were sought to protect the civilians before the troops were withdrawn was not found to lessen the

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<sup>127</sup> Ibid para B2(c) of the Conclusions regarding the grievances.

<sup>128</sup> Ibid para B3(i) of the Conclusions regarding the grievances.

<sup>129</sup> The conclusions regarding the causality between the two are discussed in *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) para 51.

<sup>130</sup> Ibid para 46.

<sup>131</sup> Ibid para 51.

<sup>132</sup> Ibid para 47.

<sup>133</sup> Ibid.

culpability associated with the withdrawal either.<sup>134</sup> An important factor was that the passive presence of the battalions was considered sufficient to keep the militias from attacking the refugees. The withdrawal was particularly culpable considering that the refugees had the status of protected persons under the Geneva Conventions.<sup>135</sup>

The Court also held that the military officials acted on behalf of the state, which meant that their conduct could result in state responsibility.<sup>136</sup> The decision to withdraw was taken outside the UN chain of command, since the Belgian commanders consulted only their national military superiors and state representatives. Therefore, they were acting under *de facto* Belgian command and control.<sup>137</sup> Two separate reproaches were addressed to the state on the one hand and the military officials on the other: the former was said to have failed to intervene to prevent the commission of genocide; the latter were said to have failed to act ‘in the face of war crimes taking place’.<sup>138</sup>

Regarding the specific failure of the commanders to act while knowing that war crimes were about to be committed, the Court referred to command responsibility as included in article 136septies (5) of the Belgian Penal Code (BPC).<sup>139</sup> The outcome of the Court’s analysis is particularly relevant to this thesis. The Court rejected the defence counsel’s argument that command responsibility only referred to the relationship between the military official and his or her subordinates, leaving the option of command responsibility for conduct committed by third parties like the Interahamwe militias open. It held that this limitation is not included in article 136septies (5) of the BPC.<sup>140</sup> This demonstrates that the Belgian law has its own definition of the notion of superior or command responsibility. Applying such a domestic definition of the crime to conduct engaged in at the international level may lead to confusion, given that another definition exists in international law. While ‘superior responsibility’ was referred to on the domestic level, it

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid paras 34, 46. See text to *n* 751.

<sup>136</sup> Ibid A2.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid paras 40-42.

<sup>139</sup> Article 136(5) septies of the BPC reads as follows: the failure to use the opportunity to act because of those who have the knowledge of orders, given with the intent to commit such a crime or of facts that constitute the beginning of such a crime, although they could have prevented or halted the completion of these crimes.

<sup>140</sup> ‘A Guide to State Practice Concerning International Humanitarian Law’, *Yearbook of International Humanitarian Law*, vol 1 (2009) 414.

would not have been an option under international criminal law. The perpetrators are not subordinates of the commanders, and that relationship will not fulfil the subordination requirement in article 28 of the Rome Statute. It is thus important to compare the approaches taken in domestic and international criminal law: the outcome of a trial at the domestic level may differ from one at the international level depending on the definitions and interpretations used by the courts. With the conduct of the Belgian and Dutch commanders taking place in the context of international crimes being committed, but with exclusive criminal jurisdiction being assigned to the TCC, both domestic and international law may be relevant.

By establishing that, on other occasions, protection from UN troops prevented civilians from being killed, the Court observed that there was no need to step outside the limitations imposed upon the battalion by the Rules of Engagement (ROE): the passive presence of the troops was a sufficient measure to protect the civilians.<sup>141</sup> That, according to the Court, was sufficient to conclude that there was a causal connection between that protection being removed and the later death of the refugees.<sup>142</sup> That refugees were also killed outside the compound did not break that chain of causality.<sup>143</sup>

The most interesting aspects were, however, not discussed in this judgment: the blameworthiness of the commanders and the exact compensation to be paid to the victims. This will be addressed in the still pending follow-up judgment. The Court clarified that it deems the commanders culpable for their decision to withdraw. That the perpetrators were not the commanders' subordinates, did not affect the Court's finding of culpability.

### 2.3.2 The Netherlands: *Mothers of Srebrenica* and *Nuhanović/Mustafić*

The legal aftermath of the Srebrenica genocide is difficult to capture. Different courts have not only discussed different aspects of the cases, but the outcomes have also demonstrated that there has been a considerable development in how the facts are interpreted. The question of attribution

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<sup>141</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) para 51.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

will be left aside as it concerns state responsibility; instead our focus will be on the conduct of the Dutch battalion and the role of the commanders in the events. This will allow us to look into whether the judgments leave scope to consider the role of the military commander as a responsible actor in later chapters.

First, it is relevant to map the different cases and the complaints raised by the plaintiffs. There are two concurrent yet separate procedures that have petitioned for the attribution of state responsibility based on tort law. In both *Nuhanović/Mustafić v the Netherlands*<sup>144</sup> and *Mothers of Srebrenica v the Netherlands*<sup>145</sup> the plaintiffs asked for a form of civil responsibility to be ascribed to the state for its alleged role in the death of their relatives. There is however a difference in the scope of their complaints and in the way these judgments must be interpreted. The *Nuhanović/Mustafić* case looked at responsibility for the deaths of three specific men, while the plaintiffs in *Mothers of Srebrenica* hoped to establish liability for the death of a group of 300 men who remained at the compound and who were forced to leave the compound after the enclave had fallen.

The civil legal aftermath started with the Nuhanović/Mustafić families who sought legal redress, claiming the state and the military commanders had failed to prevent the deaths of their family members, despite being able to do so. In 2008, the District Court in The Hague ruled that the Dutch state could not be held accountable for Dutchbat's conduct since it was related to the UN mandate and it was the UN's responsibility that needed to be assessed.<sup>146</sup> As such, the Court declined jurisdiction. In July 2014, The Hague District Court confirmed that actions outside of the powers given to Dutchbat by the mandate could be classified as *ultra vires* conduct, and were

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<sup>144</sup> The Hague District Court 10 September 2008 (*Nuhanović/Mustafić v the Netherlands 2008*), ECLI:NL:RBSGR:2008:BF0187; ECLI:NL:RBSGR:2008:BF01; The Hague Court of Appeal 5 July 2011 (*Nuhanović/Mustafić v the Netherlands 2011*), ECLI:NL:GHSGR:2011:BR5386; ECLI:NL:GHSGR:2011:BR53; The Hague Court of Appeal 26 June 2012 (*Nuhanović/Mustafić v the Netherlands 2012*), ECLI:NL:GHSGR:2012:BW9014; ECLI:NL:GHSGR:2012:BW90; Dutch Supreme Court 6 September 2013 (*The Netherlands v Nuhanović/Mustafić 2013*), ECLI:NL:HR:2013:BZ9228; ECLI:NL:HR:2013:BZ9225.

<sup>145</sup> The Hague District Court 10 July 2008 (*Mothers of Srebrenica v the Netherlands and United Nations 2008*), ECLI:NL:RBSGR:2008:BD6795; The Hague Court of Appeal 30 March 2010 (*Mothers of Srebrenica v the Netherlands and United Nations 2010*), ECLI:NL:GHSGR:2010:BL8979; Dutch Supreme Court 13 April 2012 (*Mothers of Srebrenica v the Netherlands and United Nations 2012*), ECLI:NL:HR:2012:BW1999; The Hague District Court 16 July 2014 (*Mothers of Srebrenica v the Netherlands 2014*) (n 7); *Mothers of Srebrenica v the Netherlands 2017* (n 9).

<sup>146</sup> *Mothers of Srebrenica v the Netherlands and United Nations 2008* (n 145).

attributable to the TCC. Wrongful conduct taking place within the limits of the mandate or contrary to the mandate, however, fell outside the scope of the TCC's powers<sup>147</sup> and fell within the remit of the UN.<sup>148</sup> Given that the UN was immune from prosecution, legal redress for any wrongful conduct attributable to it was impossible. This is a further reason why assessing the means to sanction peacekeepers at an individual level is important. Without remedies to sanction individuals, peacekeeping conduct may fall within this grey area of law in which establishing liability on part of any of the actors involved is complicated due to the constraints posed by organizational or individual immunity. This limits the victims' relatives in their right to claim compensation for injuries or to seek redress for injustice.

The *Nuhanović/Mustafić* case reached an important point in 2013, when the Dutch Supreme Court confirmed that the state was responsible for not preventing the deaths of the three men. In doing so, the Court confirmed that it was 'the duty of peacekeepers to protect individuals within their control when the peacekeepers are aware of the risk that crimes may be committed against those individuals'.<sup>149</sup> This was based on the rationale that Dutchbat was informed about the commission of serious crimes near the compound, and nevertheless agreed to evacuate the men from the compound. Given the authority that Dutchbat had over the compound, they could keep those seeking refuge on the compound and could have continued to offer them protection.<sup>150</sup>

As mentioned, the complaints in the *Mothers of Srebrenica* cases concerned a wider group of people than the indictment in the *Nuhanović/Mustafić* judgments. The foundation *Mothers of Srebrenica* represents the relatives of approximately 300 men who were killed after being expelled from the Dutch compound.

After the decision of the Dutch Supreme Court in *Mothers of Srebrenica v the Netherlands and United Nations* that it could not rule on the responsibility of the UN due to that organisation's immunity, the *Mothers of Srebrenica* started new proceedings against the Netherlands.<sup>151</sup> This

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<sup>147</sup> *Mothers of Srebrenica v the Netherlands* 2014 (n 7) paras 4.56-4.60.

<sup>148</sup> *Ibid* para 4.69.

<sup>149</sup> Čengić (n 22) 513.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Mothers of Srebrenica v the Netherlands and United Nations* 2012 (n 145).

resulted in the much debated judgment handed down on 16 July 2014.<sup>152</sup> A decision by the appellate court of The Hague was given on 27 June 2017. I will consider both judgments in the discussion that follows. In the 2014 judgment, The Hague District Court ruled that the Dutch state is responsible for the deportation of 300 men who resided at the UN compound in Potočari.<sup>153</sup> The Court remarkably broadened the liability of the Dutch state compared to the previous judgments. The 2014 judgment implied that Dutchbat acted wrongfully, not only because the Dutch *should have known* that the men were in danger, but also because Dutchbat, and thus the state, had full control over the compound.<sup>154</sup> The latter conclusion was confirmed by the appellate Court of The Hague in its 2017 judgment.<sup>155</sup> Both the District Court and the Appellate Court appeared to have considered the decision of whether or not to protect the refugees on the compound to be in Dutch hands, although the Court of Appeal confirmed that the state did not influence this decision, since this fell under the responsibility of the Dutch commanders.<sup>156</sup> However, the Hague Court of Appeal remained undecided on the question of whether the Dutch should have known that the men were at risk of genocide.<sup>157</sup>

The Hague District Court furthermore found a causal nexus between the wrongful conduct attributable to the state and the killings that took place. The Court reasoned that these 300 men would most likely not have been killed had Dutchbat allowed the men to stay on the compound.<sup>158</sup> Therefore, the District Court found that the deportation facilitated the killings. On this count, the Hague Court of Appeal disagreed again with the position taken by the District Court. The Appellate Court argued that it cannot be determined with sufficient certainty what would have happened to the refugees if they had been allowed to stay on the compound on 13 July.<sup>159</sup> Instead, it estimated that the chances of survival, had the refugees been allowed to stay on the compound, was 30%, which is the proportion of damages the State is therefore required to pay to the victims' relatives.<sup>160</sup> The Appellate Court however did reinstate the District Court's

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<sup>152</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7).

<sup>153</sup> The Dutch state appealed this decision in October 2014.

<sup>154</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.322.

<sup>155</sup> *Mothers of Srebrenica v the Netherlands 2017* (n 9) paras 24.2-24.3.

<sup>156</sup> *Ibid* para 27.2.

<sup>157</sup> *Ibid* para 51.2.

<sup>158</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.182.

<sup>159</sup> *Mothers of Srebrenica v the Netherlands 2017* (n 9) para 66.2.

<sup>160</sup> *Ibid* paras 68, 69.1.

observation that Dutchbat, by assisting the evacuation and the separation of men and women, facilitated the killings.<sup>161</sup> Remarkably, the Appellate Court deemed the causal nexus between the facilitation and the killings unworthy of reparations, but did want to make this statement by means of redress to the victims' relatives.<sup>162</sup>

In a similar vein, the District Court did not state that either Dutchbat or the Netherlands was responsible for the deaths of the 300 men, but it also found that helping the BSA soldiers deport these men amounted to culpable conduct.<sup>163</sup> It deemed Dutchbat's engagement in the deportation specifically wrongful.<sup>164</sup> The Court considered Dutchbat's involvement in the deportation against the background that Gobilliard instructed the forces 'to take all reasonable measures to protect refugees and civilians in your care'. This led the District Court to conclude that Dutchbat would not have violated instructions of the Dutch government or the UN, ordering them to assist the evacuation, if they had kept the able-bodied men on the compound due to the risk that these men would be killed.<sup>165</sup> Assisting the deportation of the Bosnian Muslims clearly breached the instruction given by Gobilliard which came from a higher level of command. It made the decision to expel the able-bodied men unreasonable.<sup>166</sup> The cooperation with the BSA should have been ended in the afternoon of 13 July 1995, when there were clear signs that 'the men were at serious risk of being killed as part of a genocide'.<sup>167</sup> The Appellate Court followed the District Court on this matter, but referred to the risk that the men would be subjected to torture, inhumane or degrading treatment or would be executed if Dutchbat had ended the cooperation with the Bosnian Serb Army.<sup>168</sup>

It is significant to note that the District Court confirmed the existence of an obligation on part of the Netherlands to protect human rights on the compound after the fall of the enclave in the 2014 *Mothers of Srebrenica* judgment.<sup>169</sup> The District Court acknowledged that the Dutch had the

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<sup>161</sup> Ibid para 70.

<sup>162</sup> Ibid para 73.2.

<sup>163</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.331.

<sup>164</sup> Ibid para 4.313 ff.

<sup>165</sup> Ibid para 4.328.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> *Mothers of Srebrenica v the Netherlands 2017* (n 9) para 51.5.

<sup>169</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.329.

geographical notion of effective control over the Dutch compound (also referred to in the judgment as the ‘mini safe area’).<sup>170</sup> This was based on the Dutch state’s active involvement in the command and control structure after the BSA took over,<sup>171</sup> which meant that the Netherlands had jurisdiction over the compound within the meaning of the ECHR and the ICCPR.<sup>172</sup> This is supported by the District Court’s reasoning that the compound was a fenced area over which Dutchbat had authority and more important, that this authority was respected by the BSA.<sup>173</sup> The Appellate Court on the other hand did not go as far as recognising the existence of a positive human rights obligation on part of the Dutch state, and failed to discuss this in its judgment. The Court of Appeal however did confirm that Dutchbat facilitated actions that violated articles 2 and 3 of the ECHR, which resulted in the conclusion that Dutchbat acted wrongfully.<sup>174</sup> As such, the Court referred to the negative obligation to refrain from violating the convention. Although both the District Court and the Appellate Court thus found that Dutchbat acted wrongfully, the Appellate Court was unable to confirm the District Court’s conclusion that a causal connection exists between that conduct and the killings that followed. This conclusion may appear relevant in discussing the potential criminal liability of the peacekeeping commanders throughout the remainder of the thesis. Before I turn to the exploration of individual responsibility, I will first set out the command and control structure in PKOs.

## 2.4 Command and Control within PKOs

### 2.4.1 Chain of command

The chain of command and control within a PKO consists of three different levels. These levels of command and control (also referred to as C2) from bottom to top are tactical, operational and strategic command and control. First, the tactical level of command and control is in the hands of the TCC. That state will appoint a national commander, the battalion commander, who is responsible for the movements of his or her contingent and will decide on the actions taken by

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<sup>170</sup> Ibid paras 4.160-4.161.

<sup>171</sup> Ibid paras 4.44 - 4.66.

<sup>172</sup> Ibid para 4.161.

<sup>173</sup> Ibid para 4.160.

<sup>174</sup> *Mothers of Srebrenica v the Netherlands* 2017 (n 9) para 65.

them.<sup>175</sup> In doing so, he or she must ensure that the contingent members carry out the specific tasks assigned to them by the higher levels of command.<sup>176</sup> Also part of the tactical level of command is the ‘joint handling of local crisis situations, including evacuations of UN civilians when necessitated by the security situation’.<sup>177</sup> A tactical level commander will report to the operational commander, while the TCC may take steps if the tactical commander cannot fulfil his or her tasks properly. The main responsibility of the batallion commander is to ensure compliance with UN standards, local laws and regulations.<sup>178</sup>

Second, the operational level is represented by the (civilian) Head of Mission and (military) Force Commander (FC). These actors have the power to issue directives that regulate the conduct of the peacekeeping troops.<sup>179</sup> In addition, it is up to them to decide how and where units are employed and they have the authority to reassign forces if necessary.<sup>180</sup> Operational control is considered part of operational command and refers to the authority possessed by the FC over the activities of subordinate commanders. Compared to combat operations, the authority of FCs in PKOs is limited since they will not have disciplinary tasks vis-à-vis subordinate troops. The fact that different national battalions operate under the FC’s authority limits the FC’s authority, which makes assigning disciplinary powers to the FC legally difficult as discipline is then subject to national laws applicable to the national battalions.<sup>181</sup> Another factor that complicates the application of international law to national contingents and their commanders is that there is no formal relationship in place between the UN and the TCC.<sup>182</sup>

Third, the strategic level is the highest level of command within PKOs. The actors operating on

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<sup>175</sup> Terry D. Gill, ‘Legal Aspects of the Transfer of Authority in UN Peace Operations’ in I. F. Dekker and E. Hey (eds), *Netherlands Yearbook of International Law 2011*, vol 42 (T. M. C. Asser Press 2012) 49.

<sup>176</sup> United Nations Department of Peacekeeping Operations & Department of Field Support, ‘Authority, Command and Control in United Nations Peacekeeping Operations’, February 2008, para 39.

<sup>177</sup> *Ibid* para 40.

<sup>178</sup> Article 7 ter, Chapter 9 of UNGA, ‘Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)’ (29 January 2009) UN Doc A/C.5/63/18 (hereafter referred to as ‘MOU’).

<sup>179</sup> UN GAOR, ‘Report of the Group of Legal Experts on Making the Standards Contained in the Secretary-General’s Bulletin Binding on Contingent Members and Standardizing the Norms of Conduct so that They Are Applicable To All Categories of Peacekeeping Personnel’ (18 December 2006) UN Doc A/61/645.

<sup>180</sup> Gill (n 175) 46.

<sup>181</sup> Burke (n 16) 77.

<sup>182</sup> *Ibid* 97.

this level are the Security Council, the Secretary-General and the UN Secretariat who carry overall oversight over the mission and provide the mission with instructions regarding the political objective and tasks of the mission.<sup>183</sup>

In the cases under review, protecting civilians was a relevant task assigned to the battalions as it is in many contemporary PKOs. Civilian protection can be a tactical task or a strategic goal of the mission.<sup>184</sup> The UN Security Council Resolution regarding the UNMISS operation in South Sudan for example contained civilian protection as a 'strategic goal'.<sup>185</sup> The concept of civilian protection in PKOs was envisaged in a peaceful context where the host state had consented to peacekeepers being present in its territory. That consent is based on the assumption that PKOs only employ peaceful means to achieve their goals, but this may have changed due to the development of robust forms of peacekeeping.<sup>186</sup> Sewall refers to the concept of civilian protection as something that is an 'affirmative military task' in a UN PKO.<sup>187</sup> Civilian protection is therefore coordinated on the tactical level. That is distinct from interpreting the protection of civilians as a military objective which is aimed at ending atrocities committed against civilians.<sup>188</sup> In this sense, protecting civilians is different in peacekeeping than in conventional warfare. Protecting civilians in regular warfare would impose a negative obligation on combatants to not harm civilians, whereas in PKOs the protection of civilians is framed as a positive obligation: the peacekeepers are supposed to take measures to protect the civilians from harm by third parties.<sup>189</sup> This will be assessed in further detail in chapter 5, where the same distinction will be made between protection under IHL, IHRL and in PKOs.

The notion of civilian protection as a task carried out on the tactical level of the PKO is in line

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<sup>183</sup> UN Department of Peacekeeping Operations / Department of Field Support, Police Command in United Nations Peacekeeping Operations and Special Political Missions (January 2016) 9.

<sup>184</sup> Sarah Sewall, 'Civilian Protection' in Mary Kaldor and Iavor Rangelov (eds), *The Handbook Of Global Security Policy* (Wiley Blackwell 2014) 213, 219, 222.

<sup>185</sup> Ralph Mamiya, 'Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan', *ASIL Insights*, vol 18, no 26, 9 September 2014 <<https://www.asil.org/insights/volume/18/issue/26/legal-challenges-un-peacekeepers-protecting-civilians-south-sudan>> accessed 11 April 2017.

<sup>186</sup> Sewall (n 184).

<sup>187</sup> *Ibid* 212.

<sup>188</sup> *Ibid*.

<sup>189</sup> Damian Lilly, 'The Changing Nature of the Protection of Civilians in International Peace Operations' (2012) 19 *International Peacekeeping* 628, 630; Robert Weiner and Fionnuala Ní Aoláin, 'Beyond the Laws of War: Peacekeeping in Search of a Legal Framework' (1996) 27 *Columbia Human Rights Law Review* 293.

with the idea that decision-making regarding responses to imminent threats can only be taken on the ground. Breaky and Dekker therefore refer to protection as a ‘decentralised activity’.<sup>190</sup> Calculating risks and evaluating the specific circumstances at a specific time cannot be done as well in an office in New York or the capital of the host state as in the local area where the threat occurs. Therefore, considerable weight is placed on the battalion commander in the decision-making process. Both the Force Commander and the Head of Mission, acting on behalf of the Secretariat, have no power to regulate the conduct of battalion members directly.<sup>191</sup> Therefore, the directives issued by the higher chains of command bind the battalion members if the battalion commander has translated the directives in orders. After all, the UN has no enforcement powers over battalion members, this is exclusively assigned to the battalion commander.<sup>192</sup> If however, protecting civilians is an objective, this would fall within the responsibility of the operational level commander.<sup>193</sup>

In sum, different levels of command fulfil the tasks and objectives of PKOs. It is unlikely that a failure to protect civilians is ascribed to one level of command only. Yet, the command and control arrangements within PKOs leave the question open to what extent these commanders can be held accountable for not fulfilling their tasks. The Memorandum of Understanding refers to accountability in a few respects, as discussed below. A difficulty in the overall assessment of the commanders' responsibilities and accountability however is that contingents, and thus battalion commanders, fulfil 'a dual legal position and act in a dual role: in an international capacity as part of the institutional structure of the international organisation conducting the operation, and in a national capacity as an organ of their sending State'.<sup>194</sup>

#### 2.4.2 Memorandum of Understanding

The Memorandum of Understanding (MOU) is an agreement between the TCC and the UN in

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<sup>190</sup> Hugh Breaky and Sidney Dekker, ‘Weak Links in the Chain of Authority: The Challenges of Intervention Decisions to Protect Civilians’ (2014) 21 *International Peacekeeping* 307, 313.

<sup>191</sup> Deen-Racsmany (n 17) fn 13.

<sup>192</sup> *Ibid.*

<sup>193</sup> Stuart Gordon, ‘The Protection of Civilians: An Evolving Paradigm?’ (2013) 2 *Stability: International Journal of Security & Development* 40.

<sup>194</sup> Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’ (2008) 8 *Human Rights Law Review* 151, 161.

which the TCC agrees to take on certain responsibilities in order to fulfil the mission-specific mandate.<sup>195</sup> An example is the guarantee to familiarise the national contingent members with the rules of conduct and to provide proper pre-deployment training to the troops.<sup>196</sup> The MOU binds its parties, which includes the members of the national contingents.<sup>197</sup> The Memorandum also sets out the procedure for both the UN and the TCC on how misconduct should be dealt with by the contingent members.<sup>198</sup> Misconduct in a PKO is defined as follows:

any act or omission that is a violation of United Nations standards of conduct, mission-specific rules and regulations or the obligations towards national and local laws and regulations in accordance with the status-of-forces agreement where the impact is outside the national contingent.<sup>199</sup>

Serious misconduct is defined in article 30 of the MOU as ‘misconduct including criminal acts, that results in, or is likely to result in, serious loss, damage or injury to an individual or to a mission’.

Over the years, the TCCs have committed themselves to take on the responsibility to exercise their criminal jurisdiction over their contingent members if they are suspected of such serious misconduct. Yet, the MOU still lacks an *obligation* for TCCs to present those cases of alleged criminal behaviour to its authorities to make sure that these are subject to prosecution when the DPKO has confirmed that this would be appropriate.<sup>200</sup> This also means that there is no mechanism in place that obligates the TCC to report to the UNSG why the domestic authorities decided to prosecute or why it deemed prosecution unnecessary.<sup>201</sup> Such a mechanism could provide an effective measure against the strong reluctance to prosecute peacekeepers within the TCC’s domestic system. At the European level, such a measure exists in the form of the obligation to investigate serious instances of misconduct involving death under article 2 of the ECHR, as will be discussed in section 2.5.2.

The operational aspects of the mission are dealt with in the Operational Planning (OPLAN) and

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<sup>195</sup> MOU (n 178).

<sup>196</sup> Ibid, article 7bis para 2.

<sup>197</sup> Deen-Racsmany (n 17) 335.

<sup>198</sup> Article 7 quarter, MOU (n 178) .

<sup>199</sup> Ibid, art. 28.

<sup>200</sup> Deen-Racsmany (n 17) 340.

<sup>201</sup> Ibid.

the Rules of Engagement (ROE).<sup>202</sup> The Department for Peacekeeping Operations (DPKO) sets up these documents, and falls under the responsibility of the Under-Secretary General.<sup>203</sup> These documents translate the mandate into specific instructions for the peacekeeping troops. How both the mandate and the ROE influence the obligations of peacekeeping commanders will be discussed in chapter 5. Now we have explored how the different levels of command operate in a PKO, the discussion in the remainder of this chapter will focus on whether there appears to be scope for assessing *individual* responsibility of peacekeeping commanders for a failure to act under international and domestic law. I will do this by first addressing the general view on individuals as fully-recognised actors in international law. In the second part, the focus lies on the Arnhem Court of Appeal's judgment in *Mustafić & Nuhanović v Karremans, Franken & Oosterveen* to illustrate the difficulties encountered in establishing criminal liability for the peacekeeping commanders' alleged positive contribution to the serious crimes committed.

## 2.5 Looking Beyond the State as Actor Bearing Responsibility for Human Rights Protection

As set out in the chapter thus far, both the Belgian and Dutch state were held accountable for their disputed roles in the course of events in Kigali and Srebrenica. In the case of the Netherlands, the responsibility is based on wrongful conduct by the Dutch battalion, whereas the Belgian state responsibility is linked to a causal connection between the deaths of the Rwandan refugees and the Belgian withdrawal of passive protection. Having discussed the command and control relationships in the previous section, it is evident that many actors are involved in a PKO's decision-making procedure and that accountability could arise at different levels within the chain of command. As Willmot and others concluded regarding accountability for failing to protect civilians:

Individuals, States, and international and regional organizations can all be held accountable for breaches of both positive and negative international obligations relating to the protection of civilians. This is as a matter of State or international organization responsibility or international criminal responsibility, as well as national legal and UN administrative responses (...) There are circumstances in which Force Commanders (and possibly Heads of Mission) can be held

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<sup>202</sup> Terry D Gill, 'Characterization and Legal Basis for Peace Operations', *The Handbook of the International Law of Military Operations* (OUP 2010) 141.

<sup>203</sup> *Ibid.*

responsible for failing to use force to protect civilians, and contingents for not following orders to use force.<sup>204</sup>

Although command and control was in the hands of the state in both Kigali and Srebrenica,<sup>205</sup> the contingent commanders were the main national military representatives present in the area and thus capable of taking immediate decisions regarding the protection of civilians. That the use of force was not considered necessary to offer protection to the civilians under their care supports the idea that the commanders could at least have continued to offer them protection. However, as the cases discussed in this chapter illustrate, the battalion commanders acted on behalf of their states.<sup>206</sup> In *Blaškić*, the ICTY Appeals Chamber clarified the matter of individual accountability for state agents being part of an international peacekeeping force:

The situation differs for a State official (e.g., a general) who acts as a member of an international peace-keeping or peace-enforcement force such as UNPROFOR, IFOR or SFOR. Even if he witnesses the commission or the planning of a crime in a mon[itoring] capacity, while performing his official functions, he should be treated by the International Tribunal qua an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force responsible for maintaining or enforcing peace and not qua a member of the military structure of his own country. His mandate stems from the same source as that of the International Tribunal, i.e., a resolution of the Security Council[.]<sup>207</sup>

To what extent this would change where the TCC has command and control over the situation and not the UN, is unclear. We can however conclude that the TCC's command and control would not affect the position of the commander whose presence in the mission area would still rely on an authorisation by the UN Security Council.

It is ground-breaking that the Dutch cases on Srebrenica were the first (considering that the Belgian case only led to an interim decision so far) cases in which responsibility for a failure to protect in peacekeeping was assigned to a TCC. Addressing legal responsibility to a state where a

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<sup>204</sup> Haidi Willmot and others (eds), *Protection of Civilians* (OUP 2016) 434-435.

<sup>205</sup> See above n 137 and n 171.

<sup>206</sup> Amabelle Asuncion, 'Pulling The Stops On Genocide: The State Or The Individual?' (2009) 20 *European Journal of International Law* 1195, 1218. Note that the domestic cases discussed above have pointed out that when peacekeeping troops act within the powers or limits of the mandate, their acts are in principle attributable to the UN. Only when acts are contrary to the mandate or outside the scope of the mandate, the state could be held responsible, in the court's view.

<sup>207</sup> *Prosecutor v Blaškić (Appeals Chamber) Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 IT-95-14-A* (29 October 1997) para 50.

third party was the main culprit is a serious matter. This has been a turning point in international law. A thorough legal assessment of the conduct of the individuals who made the decisions in those difficult circumstances is therefore necessary. After all, the state's responsibility implies that 'there must be individuals who are also liable'.<sup>208</sup> Although the International Court of Justice (ICJ) in principle seems to believe that state responsibility and individual responsibility are independent from each other, its reliance on the jurisprudence of the ICTY in the Bosnia genocide case shows that state responsibility builds on a finding of individual responsibility.<sup>209</sup> We have seen in the discussion of the cases in chapter 2, and the language used by the courts, that the states' responsibility was based on conduct performed by the national battalions and their commanders. The difficulty lies with the fact that a state will always be held responsible for its own failure to act and that the conduct of the actors giving rise to that responsibility might be left unaccounted for. In sum, state and individual responsibility are connected, but the responsibility that follows leaves space for an assessment of the individual actors' conduct that lies at the basis of a state's responsibility.

Contemporary peacekeeping mandates contain a stronger focus on civilian protection which, coupled with the more integrated approach<sup>210</sup> taken in recent PKOs, expands the powers held by the peacekeepers in the mission area. It then becomes likely that obligations of protection arise in these operations. It is thus necessary to determine who the addressees of these potential obligations to protect are and what their limitations are. The role of non-state actors, including individuals, in international law has changed over the last decades, which requires us to reassess our perception of their obligations under international law and IHRL in particular.<sup>211</sup> Admittedly, most individuals continue to act under the auspices of a state and the responsibility for protecting

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<sup>208</sup> Asuncion (n 206) 1218.

<sup>209</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

<sup>210</sup> The integrated approach refers to 'the establishment of a UN mission where all UN actors, including humanitarian agencies, the military, civil and political affairs, electoral officers and human rights officials, work together with the SRSG as the overall head of the mission', see Albert Fiawosime, 'An Integrated Approach to Peace Support Operations Overview of UN and International Humanitarian Agencies in Liberia' in Festus Aboagye and MS Alhaj iBah (eds), *The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia* (Institute for Security Studies 2005) 181.

<sup>211</sup> Manfred Nowak and Karolina Miriam Januszewski, 'Non-State Actors and Human Rights' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-state actors in international law* (Hart Publishing 2015) 113 ff.

fundamental human rights continues to be predominantly a state matter.<sup>212</sup>

However, scholars like Meron and Rawksi have argued that we must move away from the state-based perspective on international law.<sup>213</sup> Rawksi argues that in the internationalised sphere in which multinational organisations and non-state agents are predominantly represented, we should shift our focus towards an ‘individual rights’ discourse.<sup>214</sup> In a similar vein, protecting the individual who acted in an official capacity from criminal responsibility has by now become obsolete and is no longer in line with the development that international law has undergone. We accept that not only states, but also individuals bear responsibility for mass atrocities; a development that gained traction in the aftermath of the Second World War. With the establishment of international criminal courts to enforce international law against individuals besides states, we must be more open to the option that where state responsibility has been established, also the individual actors involved may bear responsibility.

The role of the individual in international law can be explored by challenging the classical view. Is it not the case that the perception of the responsibility for such human rights obligations falling to states alone is based on the *capacity* of an actor to guarantee these rights? That could explain why international law focuses on the state as the guarantor of such rights, presuming that states are the most capable actors to do so in all circumstances. There may however be non-state actors equally capable to intervene. This could be an international organisation or an NGO, but also the military officials acting under the auspices of the UN in a multinational operation. This would require the area in which the operation takes place to fall within the effective control of the commander’s state of nationality.<sup>215</sup>

As pointed out above, the Belgian interim case pertained not only to the responsibility of the TCC, but also to the direct failure of the Belgian commanders to act in the face of atrocities being committed. Thus, establishing state responsibility does not exclude the option that also the

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<sup>212</sup> Ibid.

<sup>213</sup> Theodore Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 239, 247 ff especially 250-251; Frederick Rawksi, ‘To Waive Or Not To Waive: Immunity And Accountability In U.N. Peacekeeping Operations’ 18 *Connecticut Journal of International Law* 103, 125–126.

<sup>214</sup> Rawksi (n 213) 125–126.

<sup>215</sup> Text to n 169 - 172. See also section 5.4 (Ch. 5).

individuals acting on behalf of the state are held responsible.<sup>216</sup> For that reason, the relatives of Mustafić and Nuhanović filed a criminal complaint against three Dutchbat officials in 2010 for their alleged active participation in the commission of war crimes and genocide.<sup>217</sup>

#### 2.5.1 Mustafić & Nuhanović v Karremans, Franken & Oosterveen

The criminal complaint was based on article 2 of the Implementation Act of the Genocide Convention and article 9 of the Dutch War Crimes Act.<sup>218</sup> The former criminalises those who intentionally allow the commission of genocidal acts (as defined in article 1 of the same act) by a subordinate. Article 9 of the Dutch War Crimes Act criminalises those who intentionally allow the commission of war crimes by a subordinate. The plaintiffs argued that the Dutchbat officials acted wrongfully in forcing Mustafić and Nuhanović's father and younger brother to leave the compound while knowing this would have fatal consequences for them. As mentioned in the introduction, the Committee of experts that was asked to advise the Dutch Public Prosecutor on this matter was of the opinion that prosecution of the Dutchbat officials was appropriate.<sup>219</sup> The Prosecutor appeared to dismiss this opinion and held such a case to be inadmissible.<sup>220</sup> The plaintiffs appealed this decision, but this was dismissed by the Arnhem-Leeuwarden Court of Appeal.<sup>221</sup>

The main conclusion of the Court of Appeal was that the officials could not rely on the immunity of the state, because the SOFA does not affect the criminal jurisdiction of the TCC.<sup>222</sup> Regarding the extent to which a potential prosecution would be possible, the Court held that the Netherlands is obligated under public international law to prosecute the most serious crimes. Therefore, the Court could not apply a narrow interpretation to the requirement that prosecution should be in the 'interest of justice' as mentioned in article 53 of the Rome Statute.<sup>223</sup> The Court decided that it

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<sup>216</sup> Asuncion (n 206) 1218 ff.

<sup>217</sup> Zegveld (n 110).

<sup>218</sup> Ibid.

<sup>219</sup> See above n 12 (Ch. 1).

<sup>220</sup> Public Prosecutor's Office (Openbaar Ministerie) 'Geen strafrechtelijk Onderzoek Srebrenica', 7 March 2013 (press release).

<sup>221</sup> *Mustafić & Nuhanović v Karremans, Franken & Oosterveen* (n 13).

<sup>222</sup> Ibid paras 4.1-4.3.

<sup>223</sup> Ibid para 5.

should assess the content of the case to decide whether prosecution was possible, since there was no formal objection to prosecution. The Court continued by arguing that the available information did not show that the defendants knew of the crimes being committed elsewhere. It furthermore held that most executions took place after these specific men were expelled from the Dutch base.<sup>224</sup> In its decision regarding complicity in genocide, the Court argued that it would apply the same standards the ICTY used. This means that the defendants would have to have known of the genocidal acts being committed, which they did not.<sup>225</sup> The Court therefore rejected this part of the complaint. For complicity in the commission of war crimes and/or murder, the Dutch threshold of *dolus eventualis* would however suffice.<sup>226</sup>

In assessing the knowledge of the defendants regarding the commission of war crimes and/or murder, the Court held that although the facts were sufficient for the civil courts to conclude that Dutchbat should not have expelled these men from their compound, they could not show ‘criminal knowledge’.<sup>227</sup> The defendants knew of the killings taking place and were aware of the able-bodied men being ‘evacuated’ separately from the elderly men, women and children.<sup>228</sup> The Court appeared to follow the defendants in their argument that the actual death of the men was not foreseeable, because detention seemed more likely as that was not an unusual practice for the BSA.<sup>229</sup> It furthermore held that the killings taking place in Potočari, near Srebrenica, were considered ‘opportunistic killings’ and not necessarily murder or killings on a large scale.<sup>230</sup>

Regarding the question of whether Karremans intentionally allowed Franken to commit a crime (article 9 of the Dutch War Crimes Act) the Court clarified that ‘intentionally allowing’ also includes ‘failing to act where he/she had the ability to do so’.<sup>231</sup> Karremans could have overruled Franken’s decision.<sup>232</sup> It is not clear why the Court then held that, despite this conclusion, it was not likely that a judge would conclude that Franken would be found guilty. As such, there would

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<sup>224</sup> Ibid para 9.3.

<sup>225</sup> Ibid para 11.2.

<sup>226</sup> Ibid para 11.2.

<sup>227</sup> Ibid para 12.4.

<sup>228</sup> Ibid para 12.5.

<sup>229</sup> Ibid para 13.3.

<sup>230</sup> Ibid para 13.4.

<sup>231</sup> Ibid para 13.6.2.

<sup>232</sup> Ibid.

not be a subordinate that committed a crime, and Karremans would not be guilty under article 9 of the Dutch War Crimes Act.<sup>233</sup> This appears to be speculative to a great extent.

Regarding the death of Nuhanović's father, Ibro, the Court concluded that although The Hague District Court found that his death resulted from unlawful conduct of the Dutch state, this was not a sufficient ground for criminal responsibility on part of the commanders involved.<sup>234</sup> The situation of Mustafić was different, since he was told to leave the compound, although he had the right to stay on the compound because he worked for Dutchbat. The Court confirmed that Oosterveen made a 'stupid mistake' with 'horrendous consequences', which could at most result in a conviction for negligent manslaughter, if it was not for the fact that the conduct was already statute-barred at the time.<sup>235</sup>

The criminal complaint regarding the alleged positive contribution of Karremans *cum suis* to genocide or war crimes was unsuccessful in the domestic legal order. As a follow-up to this judgment, the plaintiffs asked the European Court of Human Rights to assess whether the Netherlands has fulfilled its duty to carry out an effective and adequate investigation into the matter under article 2 of the ECHR. The following section will first discuss the duty to investigate in general, after which *Mustafić-Mujić and others v the Netherlands* and *Jaloud v the Netherlands* will be discussed.

### 2.5.2 Article 2 of the European Convention on Human Rights: the Duty to Investigate

If there is any doubt regarding the willingness or ability of the domestic authorities to investigate a case in which death occurred, article 2 of the ECHR provides plaintiffs with the opportunity to request an objective assessment of the efforts made by the state. This is of particular importance in PKOs since domestic authorities may not always be willing or able to investigate conduct committed by their officials.

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<sup>233</sup> Ibid.

<sup>234</sup> Ibid para 14.4.

<sup>235</sup> Ibid para 15.3.

Article 2 of the ECHR refers to the right to life and the duty of the state to investigate death. Although this duty may also apply to the human rights included in article 3 and 5 of the Convention, this section will focus on the duty to investigate violations of the right to life. The duty to investigate has developed through case law; *McCann v United Kingdom*<sup>236</sup> was an important starting point in that development. Here, three members of the Irish Republican Army were killed despite being unarmed. There was suspicion that these members were about to commit an attack in Gibraltar by means of a car bomb. The military was requested to arrest the suspects.<sup>237</sup> While following the suspects to arrest them, a situation occurred in which the soldiers felt that the suspects would detonate the bomb by using a button.<sup>238</sup> In response to this being an immediate threat, the soldiers killed the suspects.<sup>239</sup> The complaints filed by the relatives of the deceased were referred to the ECtHR by the European Commission of Human Rights with the request ‘to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 2 (art. 2) of the Convention’.<sup>240</sup> Although the Court concluded that the UK had carried out an effective investigation into the deaths of the three suspects,<sup>241</sup> it established the general obligation to carry out such an investigation by concluding that

a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art 2) read in conjunction with the State’s general duty under Article 1 (art.2+1) of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in the [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as result of the use of force by, inter alios, agents of the State.<sup>242</sup>

For this obligation to arise, it is not relevant whether a substantial obligation under the convention was breached.<sup>243</sup> That the circumstances suggest that a substantial obligation may

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<sup>236</sup> *McCann and Others v the United Kingdom* App No 18984/91 (ECtHR, 27 September 1995) para 13.

<sup>237</sup> *Ibid* paras 54-58.

<sup>238</sup> *Ibid* paras 59-63, 77-81.

<sup>239</sup> *Ibid*.

<sup>240</sup> *Ibid* para 1.

<sup>241</sup> *Ibid* paras 162-163.

<sup>242</sup> *Ibid* para 161.

<sup>243</sup> Robert Weekes, ‘Focus on ECHR, Article 2’ (2005) 10 *Judicial Review* 19, 23.

have been breached is sufficient.<sup>244</sup> In addition, as concluded by the Court in *Cyprus v. Turkey*, 'the above-mentioned procedural obligation also arises upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening'.<sup>245</sup> A state must fulfil several requirements to fulfil its duty to investigate.<sup>246</sup> These requirements are that the investigation is carried out independently<sup>247</sup> and promptly;<sup>248</sup> that the family of the deceased can participate effectively in the investigation;<sup>249</sup> that there is sufficient 'public scrutiny';<sup>250</sup> that the investigation must identify which officials were involved in the operations, and must clarify the circumstances in which the events evolved, and should provide insight into whether force was used and if so, whether this was justified.<sup>251</sup> It is of outmost importance that the state involved takes disciplinary steps against the officials responsible, if appropriate, and that responsibility for any serious offences are punished adequately.<sup>252</sup> The Court stated in *McKerr v the United Kingdom* that 'a crucial aspect of the investigation into a killing by State agents is that it is capable of leading to the prosecution and punishment of those responsible'.<sup>253</sup>

Yet, the duty to investigate is 'not confined to cases where it has been established that the death was a result of the actions of an agent of the state', as was confirmed in *Ergi v Turkey*.<sup>254</sup> Here, the Court also stated that

neither the prevalence of armed clashes and the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces.<sup>255</sup>

A broader interpretation of the scope of the duty was also found in *Bazorkina v. Russia*, among other judgments. The Court held that

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<sup>244</sup> Ibid.

<sup>245</sup> *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001) para 132.

<sup>246</sup> See also *Mustafić-Mujić and others v the Netherlands* (n 12) para 100.

<sup>247</sup> Adam Straw, 'The Legal Basis of the Duty to Investigate (2): The Duties to Investigate Within the European Convention on Human Rights' (1998) para 38.

<sup>248</sup> Ibid para 41.

<sup>249</sup> Ibid para 39.

<sup>250</sup> Ibid para 40. See also *Kelly and Others v United Kingdom* App No 30054/96 (ECtHR, 4 August 2001) para 136.

<sup>251</sup> Ibid para 42-43.

<sup>252</sup> Ibid para 46.

<sup>253</sup> *McKerr v the United Kingdom* App No 28883/95 (ECtHR, 4 May 2001) para 131.

<sup>254</sup> *Ergi v Turkey* App No 66/1997/850/1057 (ECtHR, 28 July 1998) para 82.

<sup>255</sup> Ibid.

the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.<sup>256</sup>

Other judgments expressed that accountability should be secured.<sup>257</sup> In cases of serious violations of human rights, the punishment for such violation should be sought in criminal law, although situations of negligence and omission may be exceptions to this rule.<sup>258</sup> This is of particular interest to the peacekeeping cases under review, as our focus will turn to such negative forms of liability in the following chapters.

The Court also introduced a new threshold for the duty to be triggered as it held that ‘the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death’.<sup>259</sup> This also means that the investigation does not depend on a formal complaint filed by the relatives of the victims.<sup>260</sup>

As mentioned at the outset of this section, the duty to investigate is of particular relevance in relation to peacekeeping. The Netherlands was involved in two ECtHR cases in which the Netherlands was accused of not having fulfilled its duty to investigate sufficiently in the context of peace support operations. In *Jaloud v the Netherlands*, the Netherlands was held accountable for inadequately investigating the death of an Iraqi civilian during the UN mandated peacekeeping operation Stabilisation Force in Iraq (SFIR).<sup>261</sup> The Court recognised that the mission was carried out in difficult circumstances, but nevertheless concluded that important documents were not provided to the relevant judicial authorities (and to the applicants) and that insufficient precaution was taken to prevent that witnesses could align their statements prior to being questioned.<sup>262</sup> Also, the autopsy carried out was considered inappropriate considering that an agent of the state may be held criminally responsible following the death of the victim. The

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<sup>256</sup> *Bazorkina v Russia* App No 69481/01 (ECtHR, 27 July 2006) para 117; *Anguelova v Bulgaria* App No 38361/97 (ECtHR, 13 June 2002) para 139; *İlhan v. Turkey* App No 22277/93 (ECtHR, 27 June 2000) para 63.

<sup>257</sup> *Mahmut Kaya v. Turkey* App No 22535/93 (ECtHR, 28 March 2000) paras 85-87; *Paul and Audrey Edwards v the United Kingdom* App No 46477/99 (ECtHR, 14 March 2002) para 69.

<sup>258</sup> Jean-François Akandji-Kombe, ‘Positive Obligations under the European Convention on Human Rights’ [2007] Human Rights handbooks, 35.

<sup>259</sup> *Ergi v Turkey* (n 254) para 82.

<sup>260</sup> Akandji-Kombe (n 258) 33.

<sup>261</sup> *Jaloud v the Netherlands* App No 47708/08 (ECtHR, 20 November 2014) paras 226-228.

<sup>262</sup> *Ibid* para 226.

autopsy was carried out by an Iraqi physician and the report on his findings was written in Arabic and not translated.<sup>263</sup> Also, there were no representatives of the Dutch military present during the autopsy.<sup>264</sup> Another point of critique concerned the fact that substantial material evidence got lost, namely bullets fragments.<sup>265</sup> Most relevant however was the ECtHR's conclusion that there was no reason to conclude that 'the Netherlands troops were placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State'.<sup>266</sup> That the Netherlands handed over operational control to a British commander did not change the fact that Jaloud 'was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer'.<sup>267</sup>

The second case, *Mustafić-Mujić and others v the Netherlands*, deals with the question of whether the Netherlands has adequately investigated the role of Karremans *cum suis* in relation to the death of Mustafić, Ibro and Muhamed Nuhanović.<sup>268</sup> The Court restated in this case that the applicants did not want to imply that Karremans *cum suis* intentionally contributed to their death, but that their claim related to the idea 'that the defendants were aware of the fate that awaited the three men outside the compound at Potočari but nonetheless made them leave'.<sup>269</sup> In addition, the Court held that '[a]rticle 2 does not entail the right to have third parties prosecuted – or convicted – for a criminal offence; the Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic authorities submitted the case to the careful scrutiny required by Article 2 of the Convention'.<sup>270</sup> This judgment's relevance therefore pertains to the critique that TCCs are often unwilling to prosecute their military officials. A judgment by an independent court like the ECtHR sheds light on whether the authorities have indeed made sufficient efforts in considering the option of prosecuting the Dutch military officers.

In assessing the Netherlands' efforts to investigate the matter, the Court referred first to the large

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<sup>263</sup> Ibid para 169.

<sup>264</sup> Ibid paras 107 (f), 180, 213.

<sup>265</sup> Ibid paras 217-220.

<sup>266</sup> Ibid para 151.

<sup>267</sup> Ibid para 152.

<sup>268</sup> *Mustafić-Mujić and others v the Netherlands* (n 12).

<sup>269</sup> Ibid para 116.

<sup>270</sup> Ibid para 117.

amount of information that had become available over the years regarding the course of events.<sup>271</sup> Due to the multiple investigations carried out concerning the treatment of Mustafić & Nuhanović's father and brother and the involvement of Karremans, Franken and Oosterveen, it was impossible for the Court 'to find that the investigations were ineffective or inadequate'.<sup>272</sup> Another reasoning put forward by the Court was that 'the respondent State's procedural obligation under Article 2 can be discharged through its contribution to the work of the ICTY, given that the ICTY has primacy over national courts and can take over national investigations and proceedings at any stage in the interest of international justice'.<sup>273</sup> The most important consideration for the Court appeared to be the conclusion of the Court of Appeal regarding the actual scope for liability for Karremans *cum suis* in relation to the nature and scale of the crimes committed and the moment in which the crimes took place:

Turning to the facts, the Court observes that the Court of Appeal found it established – referring to the judgment of the Trial Chamber of the ICTY in the Krstić case – that there were a limited number of “opportunistic killings” in Potočari, but that “murder on a large scale” took place elsewhere, and more importantly, commenced only after Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović had left the compound(.)<sup>274</sup>

Ultimately, the Court found that 'it cannot be said that the domestic authorities have failed to discharge the procedural obligation under Article 2 of the Convention to conduct an effective investigation ... which was capable of leading to the establishment of the facts, ... and of identifying and – if appropriate – punishing those responsible'.<sup>275</sup>

With this conclusion by the ECtHR, all options to hold Karremans *cum suis* criminally responsible for their positive contribution to the crimes committed by the BSA have been exhausted. It appears plausible to conclude that criminal responsibility is not a viable option here, because criminal liability in this context suggests that the commanders intentionally contributed to the commission of serious crimes; despite the explicit statement made by the plaintiffs that this

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<sup>271</sup> Ibid para 103.

<sup>272</sup> Ibid para 106.

<sup>273</sup> Ibid para 109.

<sup>274</sup> Ibid para 126.

<sup>275</sup> Ibid para 131, citing *Armani da Silva v. the United Kingdom* App No 5878/08 (ECtHR, 30 March 2016) para 286.

was not the case in their opinion. That was different for the interim judgment on the individual responsibility of the Belgian commanders, because it concerned tort liability (based on criminal law though) and it explicitly addressed the failure to act. The outcome did not suggest that the commanders actively contributed to the crimes committed. Noteworthy is also that the strategy chosen in *Mukeshimana*<sup>276</sup> has succeeded. It bears consideration whether a failure to protect or intervene could be framed as negative conduct under criminal law, either directly resulting in criminal liability or as a basis for tort liability. This appears relevant if one considers the criticism voiced regarding the passive stance taken by UN peacekeepers towards the serious abuse of civilians in South Sudan.<sup>277</sup>

## 2.6 Conclusion

The main objective in this chapter was to summarise the facts of the cases that are central to the thesis and to draw the reader's attention to the idea that individuals, like peacekeeping commanders in different command positions, may bear responsibility for their troops' conduct besides the state's responsibility. Where the domestic cases discussed in this chapter considered a positive contribution to criminal conduct where it concerned the Dutch commanders, the Belgian interim case dealt with tort liability for their failure to act against the crimes committed. The Brussels District Court based its conclusion on the Belgian Penal Code however. As the persons in charge, the commanders played a key role in the decisions taken regarding the Belgian withdrawal in Kigali and the decision to expel certain men from the Dutch compound in Srebrenica. Although the state is deemed responsible for these decisions, aspects like the foreseeability and awareness of the consequences of the commanders' conduct are factors which can also be ascribed to the individual commanders in charge. These factors may indicate that responsibility could also be incurred by peacekeeping commanders as individual actors.

In the cases concerning Srebrenica, clear reference was made to a certain duty of care, the limits and precise meaning of which are unclear. Also, the Hague District Court referred to human

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<sup>276</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11).

<sup>277</sup> UNSC 'Independent Special Investigation into the violence which occurred in Juba in 2016 and UNMISS response' (1 November 2016) UN Doc S/2016/924.

rights obligations that the troops and their TCC were supposed to uphold. In *Mukeshimana*, reference was made to the status of the civilian population as protected persons, which also implies that the Court recognised a certain obligation to protect based on article 4 of GC IV. Another important conclusion drawn in the *Mukeshimana* was the causal connection established between the troops' withdrawal and the deaths of the refugees. The recognition that passive presence could have protected the people placed under their care indicates that there may have been an expectation to act. In the most recent *Mothers of Srebrenica* judgment, the causal connection established earlier by the Hague District Court was partly offset based on the reasoning that the likelihood of the respective group of Bosniak men surviving, had the Dutch troops acted differently, was estimated at 30 per cent. The outcome of the criminal complaint procedure initiated by the relatives of Mustafić and Nuhanović showed that liability for a positive contribution to genocide and war crimes may be difficult to establish. Framing the contribution of the commanders as a negative contribution to the crimes committed however may be a realistic alternative. A similar approach was taken in the complaint filed in *Mukeshimana*, albeit it a tort claim, which was successful in the interim judgment handed down by the Brussels District Court. Chapter 3 will explore how criminal liability for a failure to act may arise when such a failure is defined as an omission. This could be relevant for both direct criminal liability and for tort liability based on criminal law.

## Chapter 3: Omission Liability in Domestic Law

### 3.1 Introduction

Since the judgments in the Dutch and Belgian cases discussed in chapter 2, the notion of positive obligations in the context of peacekeeping has become a more prominent topic of research in international law. So far, this has mainly focused on obligations of the TCC and the responsibility that can be incurred by that state when it fails to meet such obligations. However, I have argued in chapter 2 that state responsibility implies action or inaction by an individual actor, which may justify the additional exploration of *individual* responsibility. This is based on the reasoning that state responsibility does not exclude individual liability. Since criminal liability for a positive contribution to the committed crimes failed in *Mustafić & Nuhanović v Karremans, Franken & Oosterveen*, and the ECtHR confirmed that the Netherlands effectively investigated the matter,<sup>278</sup> this chapter will assess whether responsibility for a criminal omission is more likely to succeed. This could result in a direct form of criminal liability or may serve as a basis for tort liability.

The main question this chapter aims to answer is first, how the elements required for omission liability have been interpreted by the domestic legal systems, both in the criminal law and jurisprudence. Second, this chapter aims to establish the rationale underlying these forms of criminal responsibility to understand whether failing to act is considered culpable or the contribution to the principal crime committed. This helps to develop an understanding of how the commanders' conduct would be perceived in the light of the legal systems under review. This sheds light on the liability that could be incurred by the commanders. Identifying potential gaps or similarities among the different domestic systems furthermore indicates whether there would be a difference in the liability established in one domestic system or the other.

The conclusions drawn here allow us to assess whether it is likely that this type of liability would, hypothetically speaking, be incurred by the Dutch and Belgian peacekeeping commanders. In judging whether the use of omission liability would be appropriate, the general principles of criminal law, which form an important yardstick for both domestic and international criminal law to assess whether someone can be held criminally responsible, will be applied.

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<sup>278</sup> *Mustafić-Mujić and others v the Netherlands* (n 12).

As mentioned in the introduction to the thesis, this chapter will analyse the law on omissions by means of a comparative study between common and civil law. Throughout the chapter, the effect of the conclusions drawn in the cases of the Dutch and Belgian commanders will be considered as well as the implications for current or future PKOs in which this liability may be more likely to occur. To place the Dutch and Belgian cases in the context of this chapter, we will refer back to the judgments handed down by the domestic courts regarding the state responsibility of Belgium and the Netherlands in which the battalions' conduct was also discussed. Important elements such as the *actus reus* and *mens rea* can be outlined using these conclusions. In section 3.6 some of the practical limitations of the domestic adjudication of peacekeeping conduct will be discussed. The issues encountered could justify an assessment of the peacekeeping commanders' liability on the international level.

### 3.2 Omission Liability: A Definition

In theory, omissions are considered criminal because the defendant failed to do something that he was legally obligated to do: the defendant had a duty to act that he failed to fulfil. I introduce the basic aspects of omission liability in this section.

Let us first consider the classification of different types of omissions. An omission can be pure, direct or indirect. A *pure omission* is the failure to fulfil a general duty to rescue a stranger in peril – though it is only found in certain domestic systems.<sup>279</sup> It requires no relationship with the victim, but refers to a situation in which one would come to the aid of a stranger who is in great peril.<sup>280</sup> More relevant for this research, however, are direct and indirect omissions. In the case of a direct omission the duty to act and its failure are defined in a legal provision as being criminal,

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<sup>279</sup> Jacobo Dopico Gómez-Aller, 'Criminal Omissions: A European Perspective' (2008) 11 *New Criminal Law Review* 419, 421; William Wilson, 'Murder By Omission: Some Observations on a Mismatch Between The General and Special Parts' (2010) 13 *New Criminal Law Review: An International and Interdisciplinary Journal* 1, 22; Heiner Mommsen, 'Time to Move on: The Case for Liability for Negligent Omissions' (2005) 37 *Bracton Law Journal* 60, 60; Melody I Stewart, 'How Making the Failure to Assist Illegal Fails Criminal Omission Liability' (1998) 25 *American Journal of Criminal Law* 385, 387.

<sup>280</sup> *Ibid.*

and therefore there is no doubt regarding its criminality.<sup>281</sup> For example, a provision may impose a duty on care-takers to take sufficient care of someone placed under their care and will also state that not doing so may result in liability for the care-takers. If the failure to act is included in a legal provision, this is a *conduct* offence and thus a direct form of omission liability.<sup>282</sup> The *actus reus* required to establish liability is the failure to act, no specific result is required to constitute the criminal offence. It is often held that the mental state of the defendant is not important in cases of direct omission, as long as the defendant failed to fulfil an obligation as stated in the provision.<sup>283</sup> Other potential legal bases for a duty to act may be a contract,<sup>284</sup> a duty that follows the voluntary assumption of care,<sup>285</sup> statute-based duties,<sup>286</sup> a duty based on relationship,<sup>287</sup> a duty based on the fact that the defendant created a risk himself,<sup>288</sup> a duty because the defendant had control over the source of danger,<sup>289</sup> and so forth. Not all of these duties will be clearly defined in legal provisions. If they are not, we refer to the omissions as *indirect* omissions. An omission is then based on the interpretation of a provision that describes the active commission of a crime, which in cases of indirect omission may be fulfilled by passive behaviour.<sup>290</sup> For example, the commission of murder is criminal and will usually result from an act, but not doing something might also result in death and can therefore be defined as murder. This is then a *result* offence, or

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<sup>281</sup> Markus Dubber, *An Introduction to the Model Penal Code* (OUPOUP 2015) 30–31; Markus Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (OUP 2014) 219.

<sup>282</sup> Andrew Simester and Warren Brookbanks, *Principles of Criminal Law* (Thomson Reuters 2012) 52–53.

<sup>283</sup> Jerome Hall, *General Principles of Criminal Law* (2nd edn, The Lawbook Exchange 1960) 199.

<sup>284</sup> Tracey Elliott and David Ormerod, ‘Acts and Omissions - A Distinction without a Defence?’ (2008) 39 *Cambrian Law Review* 40, 55; M Stewart (n 279) 396; Larry Alexander, ‘Criminal Liability for Omissions: An Inventory of the Issues’ in Stephen Shute and Andrew Simester (eds), *Criminal law theory: doctrines of the general part* (OUP 2002) 122; Johannes Andenæs, ‘Comment by Prof. Johannes Andenæs Comparing Study Draft of Proposed New Federal Code to European Penal Codes’ (1971) 3 Working Papers of the National Commission on Reform Federal Criminal Laws 1451, 1453; George Fletcher, ‘Criminal Omissions: Some Perspectives’ (1976) 24 *American Journal of Comparative Law* 703, 704; Brandon W Chamberlin, ‘Am I My Brother’s Keeper?: Reforming Criminal Hazing Laws Based on Assumption of Care’ (2014) 63 *Emory Law Journal* 925, 965; Paul H Robinson, ‘Criminal Liability for Omissions: A Brief Summary and Critique of the Law in United States’ (1985) 29 *New York Law School Law Review* 101, 115.

<sup>285</sup> Elliott and Ormerod (n 284) 55; M Stewart (n 279) 396; Alexander (n 284) 122; Fletcher ‘Criminal Omissions: Some Perspectives’ (n 284) 704; Chamberlin (n 284) 966; Robinson (n 284) 116.

<sup>286</sup> M Stewart (n 279) 395; Andenæs (n 284) 1453; Robinson (n 284) 115.

<sup>287</sup> M Stewart (n 279) 395; Alexander (n 284) 122; Fletcher ‘Criminal Omissions: Some Perspectives’ (n 284) 704; Chamberlin (n 284) 965; Robinson (n 284) 112.

<sup>288</sup> M Stewart (n 279) 396; Alexander (n 284) 122; Andenæs (n 284) 1453; Fletcher ‘Criminal Omissions: Some Perspectives’ (n 284) 704; Chamberlin (n 284) 966; Robinson (n 284) 116.

<sup>289</sup> Alexander (n 284) 122; see text to n 306.

<sup>290</sup> Dubber (n 281) 31; Hall (n 283) 198–201; Dubber and Hörnle (n 281) 219.

‘commission by omission’.<sup>291</sup> It does not matter whether the result is brought about by passive or active conduct, the result constitutes criminal liability. Some *conduct* offences cannot be committed by omission, because they require specific conduct. To illustrate: death can be *caused* by both active and passive behaviour,<sup>292</sup> whereas rape or assault cannot be ‘caused’ by inaction since it requires specific, active conduct.<sup>293</sup>

### 3.3 General Perspectives in Common and Civil Law Compared

The general treatment of omissions and liability for omissions is different in both common and civil law systems. For example, the common law approach to criminal liability is relatively strict. The common law rejects liability for omissions because it is not in line with the principles of autonomy and liberalism so highly valued by common law countries.<sup>294</sup> Over time and through practice, common law countries have come to accept liability for omissions, but maintain a narrow approach compared to civil law countries.<sup>295</sup> Common law does not recognise pure

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<sup>291</sup> Hall (n 283) 199; Dubber and Hörnle (n 281) 213; Jesús-María Silva Sánchez, ‘Criminal Omissions: Some Relevant Distinctions’ (2008) 11 *New Criminal Law Review: An International and Interdisciplinary Journal* 452, 452 ff; Lars C Berster, “‘Duty to Act’ and ‘Commission by Omission’ in International Criminal Law’ (2010) 10 *International Criminal Law Review* 619, 620 ff; Michael Duttwiler, ‘Liability for Omission in International Criminal Law’ (2006) 6 *International Criminal Law Review* 1, 1 ff; Gómez-Aller (n 279) 420 ff; Frits Kalshoven, *Reflections on the Law of War* (Martinus Nijhoff Publishers 2007) 87; Kai Ambos, *Teatrise on International Criminal Law. Volume II: The Crimes and Sentencing* (OUP 2014) 37.

<sup>292</sup> Whether the specific offence can be committed by omission depends on whether logical reasoning enables the commission of the offence by omission and on a textual interpretation of the offence, eg chapter 17 of the German Criminal Code (GCC) regarding the crimes against persons includes omissions in the scope of the chapter by implicitly referring to ‘causing’ certain results. For instance, infliction of bodily harm *causing* death and *causing* bodily harm by negligence. This construction was used in articles 223, 224, 226, 227 and 229 of the GCC. Section 13 of the GCC includes commission by omission.

<sup>293</sup> Eg paragraph 1 of the Sexual Offences act defines rape as follows: ‘(1) A person (A) commits an offence if (a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b)B does not consent to the penetration, and (c)A does not reasonably believe that B consents’. Because this is a description of *active* conduct, this offence can therefore not be committed by omission.

<sup>294</sup> Arthur Leavens, ‘A Causation Approach to Criminal Omissions’ (1988) 76 *California Law Review* 547, 577 in specific fn 100.

<sup>295</sup> See among others Peter M Agulnick and Heidi V Rivkin, ‘Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law’ (1998) 8 *Touro International Law Review* 93, 96 ff; Fletcher, ‘Criminal Omissions: Some Perspectives’ (n 284); Girish S Kashyap, ‘Looking Abroad to Protect Mothers at Home: A Look at Complicity by Omission Domestically and Abroad’ (2004) 22 *Boston University International Law Journal* 425; Samuel Freeman, ‘Criminal Liability and the Duty to Aid the Distressed’ (1994) 142 *University of Pennsylvania Law Review* 1455; Sally Kift, ‘Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law - Part I’ (1997) 1 *Macarthur Law Review* 212; Sally Kift, ‘Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law - Part II’ (1997) 1 *Macarthur Law Review* 258; Miriam Gur-arye, ‘A Failure to Prevent Crime- Should It Be Criminal?’ (2001) 20 *Criminal Justice Ethics* 3; Julia Tolmie, ‘The “Duty to Protect” in New Zealand Criminal Law: Making It up as We Go Along?’ [2010] *New Zealand Law Review* 725;

omissions, discussed above, except for a few American states.<sup>296</sup> Common law only recognises direct and indirect omissions in which the defendant failed to fulfil his or her *specific duty to act*.<sup>297</sup> Civil law countries in contrast, have mostly codified a general duty to rescue under which anyone may have the obligation to rescue someone in immediate peril, irrespective of his or her relationship with the victim.<sup>298</sup>

In both systems criminal liability requires a physical component and a mental component. These are referred to as *actus reus* and *mens rea* respectively in common law; however, these specific terms are not used in most civil law systems. As we will see, these elements must be fulfilled to establish direct individual liability for the commission of a crime, whereas the elements of complicity or ‘aiding and abetting’ need to be fulfilled to establish responsibility for being an accomplice to the commission of a crime. Usually, co-perpetration is an additional option to complicity, which means that the co-defendants fulfilled the elements of the main crime together.<sup>299</sup>

The next sections explore the elements necessary to constitute liability for an omission in both common law and civil law: the *actus reus*, the *mens rea* and the causation required. The sections discuss each element separately and will assess how the interpretation of these elements influences the degree of responsibility assigned to the defendant.

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Nicholas J McBride, ‘Duties of Care - Do They Really Exist?’ (2004) 24 Oxford Journal of Legal Studies 417; Nicholas J McBride, ‘Negligence Liability For Omissions – Some Fundamental Distinctions’ (2006) 2 Cambridge Student Law Review 10; Ashworth, ‘The Scope of Criminal Liability for Omissions’ (n 39); Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (OUP 2013); Andrew Ashworth, ‘Public Duties And Criminal Omissions: Some Unresolved Questions’ (2011) 1 Journal of Commonwealth Criminal Law 1.

<sup>296</sup> Eg Vermont and Minnesota, see Kift, ‘Part II’ (n 295) 212, 232; Agulnick and Rivkin (n 295) 95 ff; P Robinson, (n 284) fn 17.

<sup>297</sup> David A Hyman, ‘Rescue Without Law : An Empirical Perspective On The Duty To Rescue’ (2005) Illinois Law and Economics Working Papers Series Working Paper No. LE05-018, 1.

<sup>298</sup> Andrew Ashworth and Eva Steiner, ‘Criminal Omissions And Public Duties: The French Experience’ (1990) 10 Legal Studies 153, 153.

<sup>299</sup> It is not relevant whether all co-perpetrators fulfilled all elements or that different individual elements of the crime were fulfilled by co-perpetrators which then together fulfils all the elements required. A close and conscious cooperation is the most important overall requirement in Dutch and German law, see section 25 (2) of the GCC and below n 785.

### 3.4 Elements Required for Omission Liability

#### 3.4.1 Actus Reus: Failure to Act despite a Duty to Act

In both common and civil law, the *actus reus* required for a direct omission consists of a failure to act despite having a duty to act.<sup>300</sup> As introduced above, this will be part of a legal provision and is therefore rather straightforward. With indirect omissions, the *actus reus* still requires the defendant to have had a duty to act that he or she failed to fulfil.<sup>301</sup> Rather than focusing on the conduct described in the provision, the focus will be on whether the result is brought about by the defendant: this can be done by either active or inactive conduct. This is what civil law refers to as the formal legal duty doctrine.<sup>302</sup> Unlike in the cases of direct omissions, that duty to act will not be referred to explicitly in a legal provision. Since these duties must be inferred from the circumstances, this section addresses the two bases for a duty to act that are most often recognised in the jurisprudence. First, an omission may create a situation in which the risk of violence or harm is substantial.<sup>303</sup> The person creating this situation is expected to prevent the

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<sup>300</sup> Section 215(2) and 215(3) of the Canadian Criminal Code (CCC) criminalise a failure to provide necessities of life to persons to whom a legal duty of care is owed. The duties to which this applies are included in section 215(1) of the CCC. See Simester and Brookbanks (n 282) 181. This was also confirmed in *R v Brough* CA507/96, 27 February 1997.

<sup>301</sup> The UK Law Commission confirmed that this is a recognised form of committing a crime in clause 19(1) of the 1993 proposed Criminal Act, in Law Commission, 'Legislating the Criminal Code: Offences against the Person and General Principles (LC218)' (1993) 101. See also Johannes Andenæs, *The General Part of the Criminal Law of Norway* (FB Rothman; Sweet & Maxwell 1965) 132; Andenæs, 'Comment by Prof. Johannes Andenæs' (n 284) 1454 regarding German law accepting this view. The general recognition of omissions as a ground for criminal responsibility is mentioned in section 13 of the GCC. It follows from sections 8 and 9 of the GCC that an omission is seen as 'equivalent to an act'.

<sup>302</sup> Claus Roxin, *Täterschaft Und Tatherrschaft* (W de Gruyter 1963) 459. France and Norway take a slightly different approach by focusing on the legal provision to assess whether the specific offence allows commission by omission, eg Court of Appeals Poitiers, 20 May 1901 (D. 1902- II 81) also referred to as *Séquestrée de Poitiers*. The Poitiers Court of Appeal argued in this case that the defendant could not be held responsible for allowing his parents to keep his mentally handicapped sister in terrible conditions in a room without air or light, because he did not commit 'acts of violence' as article 309 of the FPC requires for a conviction for 'violence or assault'. There is no indication in this provision that the offence could be committed by omission, which relieves the defendant from guilt. See also Kashyap (n 295) 441–442, 466.

<sup>303</sup> This is also referred to in German as *Ingerenz*, and was considered in the German landmark case BGH 12.02.2009 - 4 StR 488/08. The defendant was allegedly involved in torture inflicted upon his cellmate by other cellmates. As he participated actively in torturing the cellmate in an earlier situation, the Court argued that he had a duty to act (*überwachung*) based on previous acts that created the situation the victim was in (*Ingerenz*). See also BGH 06.07.1990 - 2 StR 549/89 (*Lederspray*) and BGH 22.09.1992 - 5 StR 379/92 in German jurisprudence. Another example can be found in Dutch jurisprudence: Dutch Supreme Court, 12 December 2000 (*Honden Peter*), ECLI:NL:HR:2000:AA8966. In *Honden Peter*, participation by omission was also based on *Ingerenz*: the defendant contributed to the creation of the circumstances due to the previous involvement in abusing his flatmate. The victim

likely result and liability arises where he or she fails to do so.<sup>304</sup> Second, law, contract or the fulfilment of a certain profession may ascribe protective or oversight duties to someone which are subsequently violated.<sup>305</sup> This requires the existence of a relationship. This can be a relationship with the victim (relationship of care) or with the main perpetrator (relationship of control).<sup>306</sup> We refer to this relationship as having a *Garantenstellung*: a guarantor needs to guarantee that a certain result does not occur.<sup>307</sup> Technically, the *Garantenstellung* consists of a duty of *care* and only combined with knowledge of possible harm would a duty to *act* (*Garantenpflicht*) arise.<sup>308</sup> If then, the guarantor fails to act despite having that duty, the guarantor may be held responsible as a perpetrator.<sup>309</sup> This approach, focused on prevention of the result, implies that not preventing the result connects the defendant to the crime committed by the main perpetrator and does not create liability for the separate failure to act. We will discuss whether the Dutch and Belgian peacekeeping commanders hypothetically had such a duty to act under domestic law.

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had been consistently abused by his house mates, which escalated one night; the victim stayed in the bathroom for hours while crying for help and being unable to move due to his injuries. The defendant was at home, but turned up the volume of the radio and ignored the victim's situation. When Honden Peter (the principal perpetrator) came home later that evening, he kicked the victim multiple times and left him to die. The Court held that 'the defendant omitted to do what can be expected from every 'sane person' in these circumstances, which is calling for help. Instead, the defendant left the victim in a deplorable state as an act of abhorrent indifference. As such, the defendant created the environment in which the victim was driven slowly into death. The conduct of the defendant demonstrates an attitude that lacks any form of respect for the person and the life of the victim', see paragraph 3.3 of the judgment, but also RC Fransen, *Strafbaar Nalaten. De Praktische En Jurisprudentiële Grenzen Van Het Oneigenlijke Omissiedelict* (Celsus juridische uitgeverij 2008) 82.

<sup>304</sup> See the Norwegian Supreme Court cases Rt. 1989 s. 505; Rt. 1955 s. 328; Rt. 1978 s. 147; Rt. 1992 s. 810; Rt. 2002, s. 1717 and Rt. 2006 s. 480. The focus on the result justifies the idea that an omission is 'equivalent to an act', which is also how sections 8 and 9 of the GCC define an omission. Under German law an omission is furthermore defined as 'should have acted' (*hätte handeln müssen*).

<sup>305</sup> See the Norwegian Supreme Court cases Rt. 1913 s. 261; Rt. 1932 s. 395; Rt. 1952 s. 738 and Rt. 1955 s. 261.

<sup>306</sup> In German this is referred to as the *Funktionslehre*. Michael Bohlander, *Principles Of German Criminal Law* (Hart Pub 2009) 41; Lars Christian Berster, *Die Völkerstrafrechtliche Unterlassungsverantwortlichkeit* (Utz 2008) 166 ff; Lars C Berster, 'General Introduction: Article III' in Christian Tams, Lars Berster and Björn Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide* (Hart Publishing 2014) 105-106; Berster, "'Duty to Act" and "Commission by Omission"' (n 291); Dubber and Hörnle (n 281) 220; Urs Kindhäuser, *Strafrecht Allgemeiner Teil* (n omos Verlagsgesellschaft 2013) 313, 318-319; Roxin (n 302) 259 ff. In general, the Funktionslehre distinguishes a duty to protect (*Beschützergaranten*) from a duty of supervision (*Überwachergaranten*) or as Berster names it between custodial control (*Obhutsherrschaft*) and security control (*Überwachungsherrschaft*). Similar duties of protection and control can be derived from material principles of liability, according to the *Materielle Rechtspflichtenlehre* (see Kindhäuser 318 ff), eg principles of trust, protection, control etc. But in order to provide the reader with a clear oversight, I will here narrow the overall approaches to one distinction made between relationships of care and control.

<sup>307</sup> Eg section 13 (1) of the GCC that reads 'whosoever fails to avert a result which is an element of a criminal provision shall only be liable under this law if he is responsible under law to ensure that the result does not occur'.

<sup>308</sup> BGH 29.05.1961 - GSSt 1/61, para 13.

<sup>309</sup> Kindhäuser (n 306) 303.

### *a Pure omission*

Only civil law would allow the commanders' failure to act to incur liability even absent a responsibility, i.e. a pure omission. This is based on the thought that anyone is required to rescue someone in peril or has an obligation to prevent crime in general.<sup>310</sup> There is no specific *actus reus*, because having the ability to act will trigger the duty to do something.<sup>311</sup> One could argue that having the ability to act is then part of the *actus reus*. Since a failure to fulfil such a general duty would not criminalise the result that follows from the failure, but only renders failing to act itself blameworthy, this is therefore considered a *conduct* crime.<sup>312</sup> This would, *in arguendo*, impose a lower degree of liability on the Dutch and Belgian commanders than the alternative option of defining their failure to act as participation in the commission of war crimes arguably would. However, pure omissions are mostly used where the victim is in peril due to circumstances often not the result of criminal conduct.

### *b Creation of a dangerous situation*

The second category referred to here, where an obligation to act follows from the creation of a dangerous situation, renders the defendant culpable for inaction even if he or she is not involved in violence that harms the victim. One could argue that the commanders' decisions to withdraw (Belgians) or allowing the BSA access to the civilians on the compound (Dutch) put the victims in a helpless and vulnerable position,<sup>313</sup> which enabled the subsequent killing of these people.

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<sup>310</sup> See Agulnick and Rivkin (n 295) 108; article 63 (1) of the French Penal Code (FPC) includes a duty to prevent a criminal offence, whereas article 63(2) requires each person within French territory to rescue a person in peril if this does not jeopardise the rescuer. See also Article 223-6 of the FPC that punishes the failure to aid someone in desperate need of help. Section 330c of the GCC contains a duty to assist in cases of persons in danger. A more general duty of care, most similar to a pure omission if breached, is incorporated into section 323c of the GCC in which omitting to effect an easy rescue (*unterlassene Hilfeleistung*) is considered a criminal offence. A similar provision can be found in article 450 of the Dutch Criminal Code (DCC). Art. 422ter of the Belgian Penal Code (BPC) criminalises a failure to provide an easy rescue, while pure omissions have been recognised in article 422bis of the BPC. Section 387 of the Norwegian Penal Code (n PC) contains the duty to aid a person in apparent and immediate danger of death.

<sup>311</sup> Ashworth and Steiner (n 298) 158. See also the discussion of ability to act as a factor of interpretation in omission liability below in section 3.4.2.

<sup>312</sup> Ibid; Josef Hofstetter and Wolfgang Van Marschall, 'Amendment of the Belgian Code Penal: The Duty to Rescue Persons in Serious Danger' (1962) 11 American Journal of Comparative Law of Comparative Law 66, fn 15.

<sup>313</sup> Helplessness may exist in situations of detention (involuntary limitation of freedom), old age, injury or disease.

Without the ability to defend themselves after forcibly handing over their weapons to Dutchbat (Srebrenica), the lives of the Muslim population depended heavily on a third party like Dutchbat for protection, just like they depended on the humanitarian aid provided by the peacekeeping troops. The situation in Kigali however is arguably a better example of a duty that could arise out of the risk of harm that was the immediate result of the Belgian decision to withdraw. The Brussels District Court confirmed that it was considerably less likely that the civilians in the school would have been killed, if the peacekeeping troops had not left the ETO.<sup>314</sup> If the Belgian commanders were aware of the reasonable risk that the refugees in the ETO would be killed after they had left, their decision to leave created the danger to some extent, which may have created the obligation to stay. The factor of reasonableness, as discussed in more detail in section 3.4.2 below, is important in establishing whether such an obligation existed.

*c The profession, law, or contract as legal basis for a duty to act*

In the third category, both direct and indirect omissions may rely on a relationship based on the profession, the law or contract.

The first option within this category refers to the Dutch and Belgian commanders having failed to fulfil a duty assigned to them by means of their profession.<sup>315</sup> A failure to fulfil that duty could then result in liability for an indirect omission. It is likely that a relationship of control or care that stems from his or her profession as military commander is then the legal basis for this duty of care.<sup>316</sup> The first option, a relationship of control, implies that the commanders should have been able to control the perpetrators. The case law discussed in chapter 2 gives no reason to argue this was the case. After all, the peacekeeping commanders were not part of the same military chain of command as the main perpetrators of the crimes.

The second option within this category lets us consider domestic law and the possibility that a contract may be the legal basis for an obligation to act. Both in the common and civil law systems

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See also Berster, “Duty to Act” and “Commission by Omission” (n 291) 636–637.

<sup>314</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) H14, para 51.

<sup>315</sup> See also the remarks in n 306 regarding the material duty theory as recognised in German law.

<sup>316</sup> See n 306.

under review the law contains numerous provisions referring to relationships and concomitant duties. A few examples in common law are article 215 of the Canadian Criminal Code (CCC) that contains the duty to provide necessities of life and article 217 of the same Code that refers to a failure to act despite a commitment made, particularly if that failure endangers life. Legal provisions may refer directly to a duty of care or duty to help people in a helpless position. References to relationships of vulnerability have been made in sections 151-154 of the New Zealand Criminal Act of 1961 (NZCA) and the 2011 Crimes Amendment Bill<sup>317</sup> which is also part of New Zealand criminal law. In addition, section 221 of the German Criminal Code (GCC) contains a duty of care owed to people in a helpless position or people under the defendant's care. Abandoning a person in a helpless situation although giving him shelter or being obligated to care for him are examples of situations that might incur direct omission liability by the defendant. If this results in a threat to health or life, this may serve as an aggravating circumstance. For example, section 242 of the Norwegian Penal Code (NPC) criminalises abandoning someone under your care and leaving him or her in a helpless position. In a similar vein, article 255 of the Dutch Criminal Code punishes those who leave someone in a helpless position who depends on their care. Whether or not the peacekeeping commanders could be convicted for breaching such a duty will depend on the interpretation of the relationship between the peacekeeping commanders and the civilian population. Chapter 5 will discuss the protective duties of the commander towards the civilian population in the mission area in more detail.

Particularly relevant to military commanders is section 324 of the NPC, which refers to the misdemeanour of wilfully failing to perform or otherwise violating an official duty by public officials. Although one could argue that the peacekeeping commanders did not failed their duty *wilfully*, the simple violation of their official duty may be sufficient here. The Belgian case *Mukeshimana* referred to article 136(5) of the BPC which contains failing to use an ability to act because of knowledge they had of the commission of crimes they could have prevented or stopped.<sup>318</sup> This article refers to serious international crimes in particular. Note that the knowledge requirement is lower than the usually required intent for criminal responsibility, which makes it more similar to civil liability. In addition, article 255ff of the Dutch Criminal Code

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<sup>317</sup> 2011 Crimes Amendment Bill No 2, 79.

<sup>318</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) para 34.

establishes criminal liability for someone with a ‘special responsibility’ who leaves someone behind needing urgent assistance.<sup>319</sup> Although the Dutch commanders are initially blamed for actively contributing to the crimes committed, one could argue that they refused people access to the compound, knowing these people would be at risk of falling in the hands of the BSA. It could be argued that peacekeeping commanders have a ‘special responsibility’ towards the civilians in the mission area. Whether or not the Dutchbat commanders could be convicted based on article 255ff of the DCC, however, would depend on a Court’s assessment of the case. Again, it would depend on how the relationship between the commanders and the civilians is defined. Section 3.4.2 will also discuss how the relationship should be weighted against having the ability to act, a factor that is also relevant for individuals with a ‘special responsibility’ and thus capacity.

A third option is that the relationship (of care) between the commanders and the civilians was based on a contract.<sup>320</sup> By analogy, one can take the example of the relationship between a physician and his patient, as also referred to in the introduction to the thesis.<sup>321</sup> The doctor does not need a contract with each individual victim to be required to intervene:<sup>322</sup> the responsibilities towards the patient are part of his profession and may be part of a professional oath that each doctor takes. That contract creates a relationship of care between the professional and the patient that is arguably not very different from the relationship between a peacekeeping commander and the civilian population that his or her battalion is expected to protect. Whether such an obligation to act within PKOs exists based on law or contract depends not only on the domestic law, but also on the legal status of the mission-specific documents, eg the UNSC resolution (the mandate) and the ROE. These documents and the legal implications thereof for peacekeeping commanders will be discussed in chapter 5.

### 3.4.2 The Interpretation of the Actus Reus: Reasonableness & Ability to Act

The scope of the duty to act depends greatly on the defendant's ability to act and the reasonableness of the inaction. This section will therefore discuss these two circumstantial factors

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<sup>319</sup> Baarda and Van Iersel (n 31) 41.

<sup>320</sup> This will in part overlap with the notion of a duty or relationship that is derived from the profession.

<sup>321</sup> See chapter 1, but also P Robinson (n 284) 115.

<sup>322</sup> M Stewart (n 279) 396.

that appeared to be most relevant in constituting liability for omissions in both civil and common law.<sup>323</sup>

In common law countries there is a visible tendency to focus on an objective interpretation of whether someone failed in his or her duty to act.<sup>324</sup> The standard used is often referred to as ‘reasonableness’.<sup>325</sup> In New Zealand the law was amended in 2011 to codify this tendency that has developed in the case law.<sup>326</sup> The amendments also widened the scope of the relationship required by not specifying the content of the required relationship, but instead referring to a ‘failure to protect [a] child or vulnerable adult’.<sup>327</sup> This would appear to imply that the specific relationship becomes less important: instead, the provision refers to ‘a child’ or ‘a vulnerable adult’ with whom the defendant ‘has frequent contact’.<sup>328</sup> Then, it continues by requiring that the defendant ‘failed to take reasonable steps to prevent the victim from that risk’.<sup>329</sup> In addition, the defendant should be either a member of the same household or ‘a person who is a staff member of any hospital, institution, or residence where the victim resides’.<sup>330</sup> This means that New Zealand criminal law has lessened its focus on the *Garantenstellung*, by making the required relationship between the defendant and the victim more flexible, but strengthened its focus on reasonableness and to some extent the ability to act. This allows for a broader interpretation of omission liability. A similar viewpoint was held in *Honden Peter* in which the Dutch Court argued that the defendant ‘did not do what every “sane” person would have done in these circumstances’.<sup>331</sup> A focus on both the duty and considerations of reasonableness and ability to act was demonstrated in *Lederspray*. The German Federal Court held in this case that those with a certain duty to act

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<sup>323</sup> Kindhäuser (n 306) 329. In the German discussion of these factors, one will also see that ‘erforderlichkeit’ is considered. This refers to the extent to which intervention could have decreased the level of harm done to the victim, eg 25.09.1957 – 4 StR 354/57 (*Radfahrer*). Ashworth even refers to a certain level of ‘moral wrongness’ that contains the principles of urgency, priority of life, principle of opportunity and capacity, see Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013) 79. See also Bohlander (n 306) 16–17, 55–56. See also Chapter 12 of the British Armed Forces Act (AFA) para 37.

<sup>324</sup> See also *Paterson v Lees* (1999) ScotHC 14.

<sup>325</sup> Ashworth, *Positive Obligations in Criminal Law* (n 323) 77–78.

<sup>326</sup> See the revised articles 151, 152 and new article 195A of the NZCA. Whereas articles 151 and 152 previously referred to the duty to provide necessaries, it now includes the duty to ‘take reasonable steps to protect (...) from injury’.

<sup>327</sup> Article 195A of the NZCA.

<sup>328</sup> Article 195A(1) of the NZCA.

<sup>329</sup> Article 195A(1)(b) of the NZCA.

<sup>330</sup> Article 195A(2)(b) of the NZCA.

<sup>331</sup> See n 303.

should do that which is within their capabilities and can be considered reasonable.<sup>332</sup>

The different interpretations may stretch a duty to act from only being imposed on individuals with a specific duty to act to those who may not have such an obligation, but were simply passing by and able to do something. It is important to keep these two separate concepts of omission liability in mind: on the one hand, there is a situation in which someone has a duty to act because of a certain relationship, the *Garantenstellung*.<sup>333</sup> On the other hand, someone's duty to act may *depend* on the factors of reasonableness and capacity to act to some extent.<sup>334</sup> Pure omissions are a good example thereof. In practice however, these two concepts may easily be confused.

The weight that should be assigned to the duty on the one hand and reasonableness and capacity to act on the other complicates the definition and demarcation of liability for omissions. Logically speaking, not having the ability to act would take away the obligation to do so.<sup>335</sup> When someone has a specific duty to protect and/or a specific capacity to do so, the relevance of reasonableness in assessing the criminality of that failure to act must be determined in a different way. To illustrate, if a random passer-by can save a drowning child, but only by putting his own life at risk, not acting seems reasonable. However, if it concerns an armed police officer who does not intervene when a burglar shoots an innocent man, this changes the evaluation of reasonableness. In the latter context, not acting somehow will appear unreasonable to many. This depends not just on the capacity to act, being armed for instance, but also on the specific quality of the police officer. Even if he or she risks being shot in an attempt to stop the burglar, this could be inherent to his job. The same rationale may apply to the military commanders in Kigali and Srebrenica. Note that the Belgian military court considered reasonableness as a factor in its *Marchal*

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<sup>332</sup> *Lederspray* (n 303) paras 1c, 1e, 1bb; BGH 6.11.2002- 5 StR 281/01, para 8 of the guiding principles preceding the judgment and paras 1d, 7 and D of the judgment itself. The judgment confirmed that the uselessness of acting (and thus unreasonableness) takes away the duty to act. See also BGH 16.07.1993 - 2 StR 294/93 where this is described as weighing the risk to harm for the defendant against the likelihood of preventing the result when intervening, as mentioned in the principles and paragraph 9b, see furthermore paragraph 6 of this judgment.

<sup>333</sup> Text to n 307.

<sup>334</sup> Roxin (n 302) 464; Kindhäuser (n 306) 329; Carl Bottek, *Unterlassungen Und Ihre Folgen: Handlungs- Und Kausalitätstheoretische Überlegungen* (Mohr Siebeck 2014) 146. In a slightly different context the ability to act was also discussed in JBJ Van der Leij and HK Elzinga, *Plegen En Deelnemen* (Kluwer 2007) 23.

<sup>335</sup> Maik Barthel, *Die ( Un- ) Zumutbarkeit Des Erfolgsabwendenden Tuns* (Tenea 2004) 238.

judgment, as mentioned in chapter 2.<sup>336</sup>

Some have argued that acting would have been unreasonable due to the risk this would have posed to the peacekeeping commanders themselves. While this may be a legitimate objection for civilians when not acting in cases of pure omissions, this does not appear persuasive where the defendant has a special quality. In both the Srebrenica and Rwanda cases, this argument of defence was raised. Some of the Dutch troops had been taken hostage and were at risk of losing their lives.<sup>337</sup> The Belgian battalion had lost ten of its members.<sup>338</sup> It was therefore understandable that both sides refrained from acting against the aggressors. In certain situations, however, these risks may be part of the job and therefore reasonable. Each profession has its own norms which determine the extent to which the defendant can be expected to face individual danger. The risks that the commanders would have faced if they had opposed the aggressors more strongly in both Kigali and Srebrenica would arguably have been acceptable considering the norms that apply to the military commander's profession. As section 26 of the Norwegian Military Penal Code also states: 'fear of personal danger cannot be pleaded to justify the omission of an official duty'.

Another difficulty in relation to these risk assessments is that it is impossible to attach a certain value to the lives of one group of people to justify the death of others. Human life cannot be graded in numbers.<sup>339</sup> This applies to the thought of saving the lives of the Dutch and Belgian troops, but also to the reasoning brought forward by Deputy Commander Franken in the Srebrenica hearings, that Dutchbat sacrificed the able-bodied men to save women and children.<sup>340</sup> Although this may seem morally just, it is not an acceptable legal basis to argue that the commander's (in)action was reasonable. Reasonableness and capacity should be read in the context of the relationship or duty that is key to the case.

The exact circumstances in which a duty to act arises are after all difficult to define. The Ontario

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<sup>336</sup> Text to n 116 and 117 (Ch. 2).

<sup>337</sup> See above n 89 (Ch. 2).

<sup>338</sup> See above n 52 (Ch. 2).

<sup>339</sup> Andenæs, *The General Part of the Criminal Law of Norway* (n 301) 169.

<sup>340</sup> NIWD (n 96) 2743–2744.

Court of Appeal defined the standard for establishing a duty to act in *Browne*.<sup>341</sup>

The threshold definition must be sufficiently high to justify such serious penal consequences. The mere expression of words indicating a willingness to do an act cannot trigger the legal duty. There must be something in the nature of a commitment, generally, though not necessarily, upon which reliance can reasonably be said to have been placed.<sup>342</sup>

Tolmie however argued that reasonableness should be the main threshold and that it is of greater importance than the *exact nature* of the relationship.<sup>343</sup> She refers here to the difference between a security guard's duties and that of a parent towards his or her child and observes:

Certainly it is true that the nature of the relationship that parents and security guards have with the person they are protecting will be very different - the parent/ child relationship has emotional and moral dimensions that will not be present in a paid security relationship, and parents obviously have holistic responsibilities towards their children that go far beyond simply protection from other people's violence. But the difference in the nature of the relationships should not colour a consideration of the actual function which is in issue when discussing a duty to protect. The duty, quite simply, is to do what you can reasonably do to protect your charge from foreseeable physical assaults from other people, and that will also be part of the services provided by paid security, even though the nature of the relationship giving rise to the obligation and the source of the threat (family members as opposed to strangers) is likely to be different.<sup>344</sup>

Tolmie rightly argues that using the reasonable ability to act is arguably more important than the specific relationship between the defendant and the victim. This is however an uncontroversial point of view as a legal obligation is often assigned based on a specific quality of the defendant, for example having the authority to act, special training that raises an expectation of protection, etc. On the other hand, it may affect the interpretation of the provisions discussed in the previous section that often referred to a relationship of care. If the peacekeeping commanders had the ability to act, in combination with their specific quality as a military commander, one could question the need to establish such a relationship. To fulfil the *actus reus* requirement of a potential duty to act, it should be established that the commanders did not *reasonably* do everything they could have done in the circumstances to protect the civilians 'under their care'.<sup>345</sup>

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<sup>341</sup> R v Browne (1997) 33 O.R. (3d) 775 (C.A.).

<sup>342</sup> Ibid 779-780.

<sup>343</sup> This is in contrast to the position taken by Roxin who argued that, in cases where the defendant has a *garantenstellung*, the ability to act is arguably not that relevant, see Roxin (n 302) 464-465.

<sup>344</sup> Tolmie (n 295) 754.

<sup>345</sup> See Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility'

There may have been an ability to act, by passive presence at the very least, which would have fulfilled the *actus reus* requirement, because they were reasonably capable of doing something. They withdrew and surrendered instead. The latest judgment in *Mothers of Srebrenica* also stressed that the Dutch commanders could have continued to provide protection, which implies that the District Court found the decisions taken by the commanders unreasonable.<sup>346</sup> In contrast, the Court of Appeal reasoned that it cannot be determined with sufficient certainty whether the refugees would have survived, had they been allowed to stay on the compound, and even assessed the possibility of them surviving at no more than 30 per cent.<sup>347</sup> Whether or not failing to act could result in criminal liability depends on whether the commanders had a duty to act, which will be discussed separately in chapter 5. It also depends on the mental element required for omission liability under domestic law, which is discussed in the next section.

### 3.4.3 Mens rea

As Roxin argued in his much cited *Taeterschaft und Tatherrschaft*, where differentiation between objective behaviour in different cases of omission is difficult, the mental element is crucial to determine criminal liability.<sup>348</sup> The mental element required for omission liability is similar if one compares the civil law countries under review. Within the common law system however, one can find substantial differences. Principal liability for the commission of a crime usually requires intent.<sup>349</sup> Participation in the commission of crimes requires double intent in both systems.<sup>350</sup> This applies to both complicity and co-perpetration. This means that the participant should have intended the participation itself and should have intended the commission of the crime. Each

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(2001) 27 Monash University Law Review 197; Tolmie (n 295) 730–731. See also art. 15(2)(b) of the proposed Crime (Encouraging or Assisting) Act 2006 and *Paterson v Lees* (n 324).

<sup>346</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.330–4.331.

<sup>347</sup> *Mothers of Srebrenica v the Netherlands 2017* (n 9) para 67.1.

<sup>348</sup> Roxin (n 302) 458.

<sup>349</sup> Helmut Satzger, ‘German Criminal Law and the Rome Statute - A Critical Analysis of the New German Code of Crimes against International Law’ (2002) 2 International Criminal Law Review 261, 269; MM Dolman, *Overmacht in Het Stelsel van Strafvuitsluitingsgronden* (Wolf Legal Publishers (WLP) 2006) 36; Jan Vanheule, *Strafbare Deelneming* (Intersentia 2010) 761, fn 2762.

<sup>350</sup> Kai Ambos and Stephanie Bock, ‘Germany’ in Michael Bohlander and Alan Reed (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 334; Hein D Wolswijk, ‘The Netherlands’ in Michael Bohlander and Alan Reed (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 372; Deborah Bayley, ‘Six Degrees of Separation: Canadian Accessory Liability in Afghan War Crimes’ (2011) 20 Dalhousie Journal of Legal Studies 61, 87.

system under review will have its own adaptations to this requirement, but this is the general viewpoint on the required mental element for participation. In most interpretations of ‘intent’ however, knowledge will suffice. A different threshold may apply for omissions though.

The provisions and jurisprudence show that both recklessness and negligence are often used to establish omission liability. Although the two are often considered similar, it is important to keep in mind that recklessness refers to subjective foresight,<sup>351</sup> meaning that the defendant actually was aware of the risk but consciously disregarded it, whereas negligence refers to objective foreseeability.<sup>352</sup> This means it is unnecessary for the defendant to have foreseen the risk; it is sufficient that he could or even should have foreseen the risk that the result might occur. Negligence is an objective standard because it considers what another person in the same position and circumstances would have done. Negligence is often used for individuals who fulfil a certain role or are part of a certain profession where an objective comparison with individuals in the same position is possible. The rationale is that the position or profession raises the expectation of the defendant to foresee the result of his or her inaction,<sup>353</sup> which lowers the threshold for the required *mens rea*. This results in using an objective standard rather than a subjective one.

#### 3.4.3.1 Recklessness

In the criminal laws and jurisprudence of several civil and common law countries recklessness serves as a minimum threshold for the mental element required for omission liability. The Canadian Criminal Code for example accepts recklessness as the mental standard for omission liability<sup>354</sup> for both domestic and serious international crimes.<sup>355</sup> The New Zealand law also requires knowledge ‘that the victim is *at risk* of death, grievous bodily harm, or sexual assault (...)’<sup>356</sup> in one of the most relevant provisions codifying the failure to protect a child or vulnerable adult.

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<sup>351</sup> Lafontaine (n 39) 1003–1004.

<sup>352</sup> Tracy Raffles, ‘The Guilty Bystander: Leet V. State’ (1992) XXII Stetson Law Review 323, 333–334.

<sup>353</sup> In Germany, the result should be foreseeable, but note that in England, any form of foreseeable harm may lead to liability, Bohlander (n 306) 32.

<sup>354</sup> Art 217 of the CCC.

<sup>355</sup> *Mugesera v Canada* [2005] 2 S.C.R. 100, para 173.

<sup>356</sup> Article 195A of the NZCA (emphasis added).

The case law in New Zealand *prior* to this amendment from 2011 was not uniform regarding the *mens rea* for omissions, but was nevertheless an important reason to change the law. In *Kuka* the Court used a recklessness standard by arguing that the defendant knew of the threat her daughter was facing,<sup>357</sup> which was similar to the standard used in *Witika* in which it was held that knowledge of the risk that violence may occur would fulfil the *mens rea* requirement.<sup>358</sup> However, in *Lunt* the Court declared that a duty to act is triggered if the defendant ‘ought to know’ what was ongoing or *foreseeable* to happen.<sup>359</sup> Where the latter judgment accepted a negligence standard, the first two cases used a recklessness standard. The English Manual on Service Law deviates from the standard set in the general criminal law by accepting foreseeability of the consequences as sufficient to fulfil the required ‘intent’:

The meaning of ‘intention’ is not restricted to consequences which are wanted or desired, but includes consequences which an accused might not want to follow but which he knows are virtually certain to occur. (...) Where the accused may not have desired the consequence but may have foreseen it as a by-product of his action, whether intent is proved will require consideration both of the probability, however high, of the consequence occurring as a result of the accused’s action, and in some cases this may be a very significant factor together with all the other evidence, in order to determine whether the accused intended to bring about the consequence.<sup>360</sup>

The standard of *dolus eventualis* used in most civil law countries is similar to recklessness.<sup>361</sup> It allows the use of a relatively objective standard to fulfil the intent requirement. In *Honden Peter*, for example, the Dutch Supreme Court applied *dolus eventualis* which led the Court to argue that the defendant ‘willingly and knowingly took the risk that the victim would die as a result of his

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<sup>357</sup> Ibid.

<sup>358</sup> *R v Witika* [1993] 2 NZLR 424.

<sup>359</sup> Tolmie (n 295) 730.

<sup>360</sup> Chapter 8, part 3, para 33 of the British AFA. In addition, para 36 of Chapter 8 of the AFA states that in order to prove that a person was reckless he must have had some foresight that by acting, *or failing to act in a given manner* there was a risk that the offence would be committed. He must then have gone on, *unreasonably*, to take that risk and commit the offence. Any reason why the accused did not in fact appreciate the risk is relevant, except for voluntary intoxication through drink or drugs. However, an accused’s assertion that he did not think of a certain risk will not be accepted when all the circumstances and probabilities and evidence of what he did and said at the time, show that he did or must have done so. (emphasis added)

<sup>361</sup> Andenæs, *The General Part of the Criminal Law of Norway* (n 301) 212–213; Annette Nørby Møller-sørensen, ‘On the Definition of Criminal Liability as an Accessory in Danish Law - With Particular Reference to Cases of Violence and Robbery Resulting in Homicide’ (2009) 54 *Scandinavian studies in law* 109, 113; Wolswijk (n 350) 361; Ambos and Bock (n 350) 232, 234; BGH 12.02.1952, 1 StR 59/50 para 13.

inaction'.<sup>362</sup> Not acting against the crimes being committed equalled intentionally allowing it to happen, argued the Court.<sup>363</sup> The defendant was held responsible for aiding the crime of manslaughter by omission. It should be noted that the double intent requirement is often not referred to in these cases, but is more or less embedded in the notions of recklessness and *dolus eventualis*. It contains both the awareness of the risk and acceptance of the risk that the criminal result may occur. This may explain why double intent as such is rarely discussed in cases dealing with omissions.

Although the Dutch case of *RB Zutphen 6 April 2004*<sup>364</sup> is not a perfect example of an omission, since the mother was more actively involved in the mistreatment of her son than in the other examples referred to, the mental element used was also *dolus eventualis*. The Court held that the nature and frequency of the violent acts committed by her partner towards her son should have made her 'reflect on the situation'.<sup>365</sup> It must have been clear to her that death would be a possible consequence of her partner's acts. Therefore, she 'willingly and knowingly' took the considerable risk that her child might die because of her partner's violent behaviour.<sup>366</sup> She was convicted for co-perpetrating attempted assault and attempted manslaughter.

As demonstrated in chapter 2, the Dutch and Belgian courts were of the opinion that the battalions (and presumably their commanders) could not have been ignorant of the fact that systemic killings were taking place near the compound and school respectively.<sup>367</sup> In both situations, the courts established some level of subjective knowledge, which could fulfil a *recklessness* or *dolus eventualis* standard. In the *Mustafić & Nuhanović v Karremans, Franken & Oosterveen* complaint procedure, the Arnhem Court of Appeal touched upon the notion of different concepts of knowledge in civil and criminal law. The Court concluded that the defendants did not have the required knowledge under criminal law, despite having it under civil law.<sup>368</sup> As Ryngaert and Thompson later argued in a case commentary, this is peculiar since the commanders cannot have

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<sup>362</sup> *Honden Peter* (n 303) para 3.6.

<sup>363</sup> *Ibid.*

<sup>364</sup> *Zutphen District Court 6 April 2004*, ECLI:NL:RBZUT:2004:AO7084.

<sup>365</sup> *Ibid.* ((n o paragraph numbers available).

<sup>366</sup> *Ibid.* (n o paragraph numbers available).

<sup>367</sup> Text to n 130 (Ch. 2).

<sup>368</sup> Text to n 227 (Ch. 2).

knowledge under civil law, but have no knowledge under criminal law.<sup>369</sup> It is true however that civil law applies a lower threshold for the required intent, not necessarily requiring a subjective form of knowledge. This could explain why the Court argued as such. Perhaps civil law focuses more on causation to establish who is responsible for the damage caused, whereas criminal law requires evidence of individual guilt. This means that if criminal intent would be difficult to demonstrate, tort liability would be a good alternative if causation between the defendants' inaction and the result has been demonstrated.<sup>370</sup> Within criminal law, negligence is another form of *mens rea* used to establish omission liability. This type of intent is more objective and is as such also used in establishing tort liability.

#### 3.4.3.2 Negligence

Where tort negligence can be defined as 'creating an unreasonable risk of physical harm to another, a risk that the actor could and should have prevented by taking a precaution',<sup>371</sup> criminal negligence differs from this concept in that it refers to 'the actor's unreasonable inadvertence or unreasonable mistake'.<sup>372</sup> Or as Simons specifies this, '[a]n actor might be unreasonably ignorant or inadvertent in failing to form any belief about a relevant matter, when he should have formed a belief [,o]r the actor might form a definite belief, but that belief might be unreasonably mistaken'.<sup>373</sup> Where tort law considers the reasonableness of the actor's conduct, given the risks created by that conduct prior to the harm actually occurring, criminal law looks at the reasonableness of the actor's belief considering the information available to him or her when taking the decision.<sup>374</sup>

Using negligence to establish omission liability is likely in the cases of the peacekeeping

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<sup>369</sup> Cedric Ryngaert and Benjamin Thompson, 'Srebrenica: Military Chamber of Arnhem Court upholds prosecutor's decision not to investigate the role of Dutch commanders', blog post Utrecht Centre for Accountability and Liability Law, 27 May 2015 <<http://blog.ucall.nl/index.php/2015/05/srebrenica-military-chamber-of-arnhem-court-upholds-prosecutors-decision-not-to-investigate-the-role-of-dutch-commanders/>> accessed 25 April 2017.

<sup>370</sup> HJJ Leenen, 'Het Schuldbegrip in Civiel Recht, Tucht recht En Strafrecht' (1986) 130 *Nederlands Tijdschrift voor Geneeskunde* 840, 840–41.

<sup>371</sup> Kenneth W Simons, 'Dimensions of Negligence in Criminal and Tort Law' (2002) 3 *Theoretical Inquiries in Law* 283, 286.

<sup>372</sup> *Ibid* 288.

<sup>373</sup> *Ibid*.

<sup>374</sup> *Ibid* 294.

commanders where they have a duty of care regarding the civilian population.<sup>375</sup> Some criminal provisions will specifically include negligence as the standard for the mental element.<sup>376</sup> This is officially required for negligence to be applied.<sup>377</sup> How criminal negligence should be defined is often subject to debate. In Canadian criminal law it is defined as ‘who in doing anything or omitting to do anything that it is his duty to do so, shows *wanton or reckless disregard* for the lives or safety of other persons’.<sup>378</sup> The British Armed Forces Act explains that negligence will most often occur in cases of non-criminal offences because they are related to the military’s ‘professional responsibilities, where certain basic (or reasonable) standards of performance can be expected’.<sup>379</sup> A reasonable person in this context means someone with the ‘same skills, professional training, knowledge and experience. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable person would exercise in the same situation’.<sup>380</sup> The rationale behind the use of negligence for specific roles and professions is that, in those roles or professions, someone had the training or education to deal with such situations. Examples are a lighthouse officer, railway officer, a pharmacist, medical doctors, police men<sup>381</sup> and military officials. The exercise of these professions is often ‘monopolised’; in other words, only a limited number of people can do the job. Working in these professions may therefore create an obligation to go beyond what other people outside that job should do, simply because other people cannot respond to the need in question.

Although no one is required to do the impossible, sometimes, the defendant could or should have known that not acting would put someone at risk of harm. This corresponds with the discussion in section 3.4.2 on reasonableness and the ability to act. Applying negligence is complex, partly

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<sup>375</sup> Andenæs, *The General Part of the Criminal Law of Norway* (n 301) 196; Duttwiler (n 291) 38; Bohlander (n 306) 54–55.

<sup>376</sup> Paragraph 40 of the NPC determines that only *intentionally* committed acts are subject to this code, *unless* the provision also criminalises negligent conduct, eg ‘a misdemeanour consisting of a failure to act shall be punishable also when it is committed by negligence unless the contrary is expressly provided or unambiguously implied’.

<sup>377</sup> George Fletcher, ‘The Theory of Criminal Negligence: A Comparative Analysis’ (1971) 119 *University of Pennsylvania Law Review* 401, 402.

<sup>378</sup> Section 191 of the CCC. (emphasis added)

<sup>379</sup> Chapter 12 of the British AFA, para 37. The AFA refers to negligence in relation to non-criminal offences, but it is indicative of the fact that the profession creates a higher standard in law.

<sup>380</sup> *Ibid.*

<sup>381</sup> Andenæs, *The General Part of the Criminal Law of Norway* (n 301) 140.

because of its use as both a subjective and objective element to the commission of crimes.<sup>382</sup> Where the defendant had a specific duty of care, negligence may be part of the objective element rather than being part of the *mens rea*.<sup>383</sup> Surely, it is difficult to argue that the defendant had an actual mental state if one was not aware of criminal conduct being committed.<sup>384</sup> This type of negligence is expected to result in a lower degree of liability, arguably for the failure to fulfil a duty as a separate offence, but not linked to the criminal result.

However, some provisions indicate that the expectation of action that is inherent to using a negligence standard, links the defendant to the resulting crime. This was explicitly stated in the German Soldiers Act,<sup>385</sup> for example, which determines that soldiers who commit an offence by omission based on *negligence*, are to be held liable for the *result* of their omission. A likely explanation for this would be that negligence is equated with intent, based on the reasoning that a soldier was *expected to know* what was about to happen and should therefore have intervened.<sup>386</sup> Willingly taking the risk that the result may occur (while the defendant at least should have been aware of this) is then seen as culpable conduct that makes the defendant liable for the *result* and not just for failing to fulfil a certain duty.

Several criminal law provisions also offer scope to convict the commanders based on their potential negligence regarding the death that resulted from the withdrawal of protection to the civilians under their care.<sup>387</sup> Section 239 of the Norwegian Penal Code (NPC) is one provision which criminalises 'any person who negligently causes the death of another person'. The maximum punishment referred to in this section is three years, and six years if aggravating circumstances occur. This implies a lower sentence than one may expect for causing death.

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<sup>382</sup> Bohlander (n 306) 60.

<sup>383</sup> Ibid.

<sup>384</sup> Fletcher, 'The Theory of Criminal Negligence' (n 377) 408.

<sup>385</sup> German soldiers can violate duties by either intent or negligence, as included in section 24 of the Soldiers Act.

<sup>386</sup> Note how this is similar to *Paterson v Lees* (n 324) under common law where the acceptance of the unlawful conduct was equated with intent. The basis in both situations is a certain form of authority over the conduct giving rise to the ability to act.

<sup>387</sup> Bohlander (n 306) 59. Article 229 of the GCC refers specifically to causing bodily harm by negligence (*fahrlässige Körperverletzung*). Since there is no clear reference to the *degree* of negligence required in the GCC, simple negligence may be sufficient. Section 3 of the German Military Criminal Code (GMCC) refers to a situation in which a military official 'by his act at least negligently causes a serious danger for the security of Germany (...) [or] negligently causes the death or serious bodily harm of another person' as a *besonders schwerer Fall*. Section 239 of the NPC criminalises negligently causing another person's death.

Another provision in the NPC states that if the defendant ‘*could have foreseen* the possibility of such a consequence or failed to prevent the foreseeable consequence to the best of its ability’,<sup>388</sup> an increased sentence may be imposed. Thus, in certain circumstances there might be a duty to foresee; failing to do so and the subsequent failure to act are considered worthy of higher sanctions.

When comparing the use of negligence and recklessness in practice, it is clear that in the majority of the jurisprudence reviewed a negligence standard has been applied as the mental element for an omission. The expectation of a lower degree of liability or a lower punishment is however not visible. *Kuka*<sup>389</sup> is a good example of a case in which the Court held that the duty to protect is triggered as soon as the parent ‘ought to have known’ that violence would occur.<sup>390</sup> *Lunt* confirmed that simple negligence may establish criminal liability for a failure to act.<sup>391</sup> In the Canadian case *Popen* the Court confirmed that aiding by omission based on relationships of care requires *purpose*, but could not establish the defendant’s purpose to aid murder. Instead, the Court argued that ‘the defendant may be independently guilty of manslaughter if he knew, *recklessly disregarded*, or was *negligent* to the fact that his wife was abusing their child’.<sup>392</sup> Thus, in cases where only knowledge, recklessness or negligence can be demonstrated as opposed to the required purpose, the Canadian Court may establish principal liability for a lesser offence. In the Dutch *Savanna* case, there was no proof that the mental element was fulfilled according to an objective standard: the guardian *could not have foreseen* the maltreatment by the girl’s mother and partner and the consequences thereof.<sup>393</sup>

In these cases, using a relatively objective standard like negligence or a low subjective standard as recklessness may facilitate a conviction. It lowers the threshold for liability, also in cases where it does not concern the criminalisation of a separate failure to act, but where omission leads to a criminal result.

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<sup>388</sup> Section 43 of the NPC.

<sup>389</sup> *R v Kuka* [2009] NZCA 572.

<sup>390</sup> *Ibid.*

<sup>391</sup> *R v Lunt* [2004] 1 NZLR 498.

<sup>392</sup> Kashyap (n 295) 439. In the German case BGH 09.05.1990, 3 StR 112/90 para 7 it was also held that multiple mental elements could apply in the case of omissions, such as intent, recklessness and negligence. The Court established negligence in this specific case however.

<sup>393</sup> The Hague District Court 16 November 2007 (*Savanna*), ECLI:NL:RBSGR:2007:BB8016, paras 39, 44.

Applying these observations to the Dutch and Belgian case studies results in the following conclusion: because the Dutch and Belgian courts confirmed the foreseeability of the crimes that were about to take place,<sup>394</sup> the Dutch and Belgian commanders would fulfil the required *mens rea*. In the case of the Belgians one could even speak of a situation in which the commanders turned a blind eye to the danger faced by the refugees.<sup>395</sup> The conclusions drawn so far in this chapter shed a different light on the decision in *Mustafić & Nuhanović v Karremans, Franken & Oosterveen*,<sup>396</sup> especially if one takes the state responsibility cases into account. The Hague Court of Appeal was of the opinion that the knowledge or awareness of the Dutchbat officials regarding the possible consequences of sending the men away was limited.<sup>397</sup> The Court concluded that the commanders did not possess the required knowledge when they sent the men from the compound.<sup>398</sup> As touched upon in section 2.5.1 (Ch. 2) this conclusion is not in line with previous judgments in the *Mothers of Srebrenica* and *Nuhanović/Mustafić* cases. The witness statements and observations made demonstrated that there was a certain level of awareness among the Dutchbat officials of what was ongoing outside the compound and of the likelihood that the men who were sent away would face the same fate.<sup>399</sup> The fact that Franken explained to Ibro Nuhanović that they had to sacrifice the men to save women and children demonstrates this,<sup>400</sup> as well as his remark in the NIOD investigation that he sent these men off the compound into an almost certain death.<sup>401</sup> The Hague District Court's conclusion in this regard was clear:

at the end of the afternoon of July 13th 1995 Dutchbat given what they *knew* then and *had observed* as reproduced above *must have been aware* of a serious risk of genocide of the men separated and carried off from Potočari by the Bosnian Serbs as referred to in the deliberation cited in paragraph 4.178 of the [ICJ]: the Bosnian Serbs systematically selected men who were then

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<sup>394</sup> Text to n 130 (Ch. 2).

<sup>395</sup> *Ibid.*

<sup>396</sup> *Mustafić & Nuhanović v Karremans, Franken & Oosterveen* (n 13).

<sup>397</sup> *Ibid* para 13.4.

<sup>398</sup> *Ibid* para 15.3.

<sup>399</sup> *Ibid* para 12.5: Franken and Oosterveen knew that the men were evacuated separately. See *Mothers of Srebrenica v the Netherlands 2014* (n 7) paras 4.252, 4.254; *Mothers of Srebrenica v the Netherlands 2017* (n 9) para 51.6. Oosterveen declared that they heard shots indicating that executions were taking place. The observations in this paragraph would make reasonably clear that the men would be killed. In *Prosecutor v Krstić (Trial Judgment)* IT-98-33-T (2 August 2001) para 160, the Trial Chamber held that the removal and burning of ID's 'could only be an ominous signal of atrocities to come'.

<sup>400</sup> *Nuhanović/Mustafić v the Netherlands 2011* (n 144) para 6.7; NIWD (n 96) 2743–2744.

<sup>401</sup> Text to n 111 (Ch. 2).

badly treated and stripped of their identity papers – so that they could no longer be identified – and then carried off separately to an unknown destination.<sup>402</sup>

This was different in the days preceding the 13th of July and may therefore not have applied to the situation of Mustafić and Nuhanović, since they were sent of the basis on the 12th of July. However, the Hague District Court's conclusion here indicates that the Dutch were negligent regarding the potential consequences of sending people of the base from the end of the afternoon on the 13th of July onwards, which was confirmed in the Appeal Judgment.<sup>403</sup> The District Court further held that '[i]n all reasonableness, Dutchbat could have been required to reassess the situation and all interests concerned prior to the evacuation of the refugees from the compound and that it should have decided to let the male refugees stay at the compound'.<sup>404</sup> The commanders' awareness of the imminent risk of the killings could have fulfilled the criminal law interpretation of negligence, and if applicable, a duty to act. This is in line with domestic practice as discussed above.

#### 3.4.4 Causation

So far it appeared that the thresholds used for the mental element are relatively low and that there are different ways to establish a duty to act that would fulfil the *actus reus* of omission liability. The causation requirement is important to determine whether the peacekeeping commander's potential liability would be linked to the failure to act or to the criminal result. Judging from the limited jurisprudence discussed above, it appears that causation is interpreted in a similar manner whether a court is dealing with cases of commission or omission, based on the rationale that the result, eg death or serious injury, is the same.<sup>405</sup> In *Kuka*, the mother was held responsible as a principal offender for manslaughter,<sup>406</sup> based on the argument that her failure to protect caused the result.<sup>407</sup> Causation for homicide and manslaughter is tested in the same way: the judges will

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<sup>402</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) paras 4.255, 4.324 (emphasis added). The Court refers to the observations by the ICJ in *Bosnia and Herzegovina v Serbia and Montenegro* (n 209) paras 430-431.

<sup>403</sup> *Mothers of Srebrenica v the Netherlands 2017* (n 9) para 51.6.

<sup>404</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.326.

<sup>405</sup> Eg BGH 6.11.2002, 5 StR 281/01 (n 332) para 5a.

<sup>406</sup> *Kuka* (n 389); Tolmie (n 295) 736.

<sup>407</sup> Julia Tolmie, 'New Zealand', Michael Bohlander and Alan Reed (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 382; Tolmie, 'The "Duty to Protect" in New Zealand Criminal Law' (n

assess whether the act or omission 'is a "substantial and operative" contribution to the acceleration of death which took place'.<sup>408</sup> This was also the view taken by the New Zealand Law Commission regarding omissions in cases of domestic violence when it argued that 'in comparison with illegal violence, an omission would be equally culpable (...) in the sense that the risk to the child is the same'.<sup>409</sup>

The search for causation is plausible when it concerns commission by omission, focusing on the result, but is more questionable when it concerns failing to act. Only in establishing tort liability, causation between the omitted act and the result could be established without implying that the defendant is also responsible for the result. In the Dutch *Savanna* case, the culpable failure to act on its own could not establish liability.<sup>410</sup> Since the Court applied a negligence standard, one would expect the case to focus on the failure to act as a separate issue rather than coupling it to the criminal result. It therefore applied negligence as a subjective element rather than as an extension of the *actus reus*. In cases of direct omissions, in which someone is under a duty to act but fails to do so and fulfils the required mental element, it is not necessary to establish a connection with the result. The Court's conclusion that the defendant should be acquitted because a causal link between the guardian's failure to protect and the death of the 3-year-old Savanna could not be established was therefore an incorrect conclusion.<sup>411</sup> The causal connection to the result is only required if it concerns commission by omission and thus an indirect form of omission. Since the guardian had a duty of care regarding Savanna this was a direct omission.

The *Savanna* case is an example of how direct and indirect omissions are sometimes combined leading to an incorrect judgment.<sup>412</sup> The confusion mainly results from widening the scope of the subjective element as well as focusing on whether the omitted act *could have prevented the result*, despite claiming in theory that such a causal effect is not required for a failure to act or a direct

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295) 736.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid 734. See also Simester and Brookbanks (n 282) 182-183.

<sup>410</sup> Text to n 393.

<sup>411</sup> *Savanna* (n 393) para 44.

<sup>412</sup> Andenæs, *The General Part of the Criminal Law of Norway* (n 301) 140; Christian Becker, 'Herrschaft Durch Nichtstun? Zur Beteiligung Durch Unterlassen' [2009] *Zugleich Anmerkung zum BGH Urt. v. 12.02.2009 - 4 StR 488/08 (HRRS 2009 Nr. 351)* available at <<http://www.hrr-strafrecht.de/hrr/archiv/09-06/index.php?sz=6>> accessed 25 April 2017.

omission.<sup>413</sup> In other words, a counter-factual form of causation is applied. Where this may lead to a conviction for the result, it might also relieve the defendant from guilt. In the German *Radfahrerfall*<sup>414</sup> case a lorry driver did not keep sufficient distance from a drunken cyclist, who was hit by the lorry and died. The Court held that even had the lorry driver kept enough distance, the drunken cyclist could have gotten under the truck. Therefore, a causal connection between the driver's violation of law and the death of the cyclist was not existent.<sup>415</sup>

Whether the defendant's omission actually contributed to the result is subjected to a strict test in New Zealand and America: the omitted act should have prevented the result with certainty.<sup>416</sup> It is not sufficient to conclude that intervening *could* have made a difference.<sup>417</sup> This is a high standard and yet, omissions fulfil this requirement more easily than might be assumed - especially if we recognise that multiple causes could lead to one result.<sup>418</sup> The inaction of the defendant need not be the main cause for the result to occur. For example, the BSA in Srebrenica and the Interahamwe in Kigali committed the actual crimes and were the main cause that led to the killings, but that does not rule out the passive attitude of the Dutch and Belgian commanders as an additional cause that may incur liability. However, Canada has accepted a lower standard by requiring that the omission should have been a *significant contributing cause* to the result.<sup>419</sup> Therefore, one might be inclined to conclude that Canada is less focused on the causal contribution of the defendant's act or omission to the result than we have seen above in the New Zealand and American approach.<sup>420</sup> However, the causal contribution is relevant in establishing criminal conduct and it appears that the distinction between direct and indirect omissions is not always made, although this is a highly relevant question for the actual meaning of a judgment on omissions. If the inaction is linked to the result, it implies that the defendant is held responsible

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<sup>413</sup> Arthur Kaufmann, *Schuld Und Strafe Studien Zur Strafrechtsdogmatik* (C Heymann 1966) 82. See also Kindhäuser regarding the degree of certainty that the result could have been prevented: Kindhäuser (n 306) 310; Roxin (n 302) 463.

<sup>414</sup> *Radfahrer* (n 323).

<sup>415</sup> Bohlander (n 306) 51.

<sup>416</sup> Simester and Brookbanks (n 282) 61. As the Supreme Court of Michigan held in *People v Beardsley*: the omission to perform the duty must be the immediate and direct cause of death'. *People v Beardsley*, 150 Mich. 206, 113 N.W. 1128, 1129.

<sup>417</sup> Simester and Brookbanks (n 282) 79–80.

<sup>418</sup> *Kuka* (n 389): the Court argued that multiple causes are not uncommon, see para 18.

<sup>419</sup> Lafontaine (n 39) 987.

<sup>420</sup> *Ibid.*

for the criminal result and not for his or her failure to act. The degree of liability between the two options may differ greatly, depending on which specific crime it concerns.

### 3.5 Degree of Liability

In common law, the starting point for the attribution of guilt differs from civil law. Since the defendant will be held responsible for the result, the causal connection is arguably more important to establish. The result will be key to the criminal liability of the defendant, regardless of whether he or she is a principal or a participant. This means that differentiation only takes place by means of the sentence and the crime. A court may convict a defendant as a principal for a lesser offence, because participation in the commission of a more severe crime could not be established, eg principal liability for manslaughter where a conviction for aiding the crime of murder fails, as will be explained in more detail below. This approach to criminal liability can be explained by the common law tendency to focus on the causal connection with the criminal result.

In the light of this approach, a failure to act can lead to liability as a principal based on the reasoning that a failure to act causes the result just as much as active conduct, if the intervention could have prevented the result.<sup>421</sup> This leads to a scenario as seen in both the *Kuka* and the *Peters* cases: convictions for either manslaughter or murder, which, arguably, impose an unfair label on the parent who failed to act.<sup>422</sup> Although the mother in *Kuka* was held responsible for failing to protect and a failure to provide medical care, the conviction and punishment (9 years imprisonment) themselves stigmatised the parent as an active wrongdoer, or even a serious criminal, despite her being described as an otherwise loving and caring mother. If these parents or caretakers would have been held responsible for not fulfilling their duty of care, as a direct omission, the degree of responsibility would have been lower. However, the courts' reasoning

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<sup>421</sup> Note that in Belgium responsibility is likely to focus on the failure to act itself and not the result, since it does not recognise commission by omission. See Hofstetter and Van Marschall (n 312) 70.

<sup>422</sup> Tolmie, 'The "Duty to Protect" in New Zealand Criminal Law' (n 295) 757. Similar to these cases where parents and family members have a duty of care are the following cases: in *R v Gibbins and Proctor* (1918) 13 Cr. App. R. 134 the accused was responsible for her boyfriend's daughter. She was convicted for murder after failing to feed her, which led her to die of starvation. Similarly, in *R v Instan* (1893) 1 QB 450, the defendant took on responsibility for her elderly aunt. After letting her aunt starve to death, R. was considered liable for manslaughter. Although the duty is based on a relationship of care, the criminality assigned to their conduct is not related to the failure to act but is framed as responsibility for the criminal result, murder and manslaughter respectively.

implies that they are being held responsible for the main crimes committed and not for the more suitable failure to fulfil a duty of care. After all, it seems unreasonable to frame the person who failed to act as a principal perpetrator.<sup>423</sup> This would not be in line with the principle of fair labelling, as introduced in the introductory remarks to this part of the thesis. It would also mean that the defendant is held liable for conduct he or she did not commit him- or herself, which is in contrast to the principle of culpability as discussed in the introduction.

Because of this practice, the final judgment often contains a mixture of the elements necessary for a criminal omission as a separate offence (legal duty and failure to act + negligence) and the mode of liability, eg participation (substantial effect on/contribution to the commission of the crime and knowledge or awareness with *dolus eventualis* as minimum threshold and double intent). This will negatively affect the outcome, since a failure to act is then linked to the criminal result.

The problems encountered could be avoided if a separate approach to liability for a failure to fulfil duties is used. In German law for example, the *Pflichtsinhalttheorie* as an objective approach is sometimes used to establish liability based on failure to fulfil duties.<sup>424</sup> A simple rule differentiates between perpetration and participation: someone who fails a duty to *protect* is considered a *perpetrator* of the crime, whereas a failure to exercise *security control* may only result in participation.<sup>425</sup> The underlying rationale is that the latter refers to cases in which the defendant will have been a third party to the offence.<sup>426</sup> It is therefore more a secondary form of liability than a primary one. This also reflects more accurately the role that the defendant played in the commission of the crime, which is in line with the principle of culpability and fair labelling. However, in the case law reviewed here, although not restricted to Germany, this secondary role often results in liability for co-perpetration. If, however, the control theory is used, there is little scope for differentiation, as in the German case *BGH 4 StR 488/08*.<sup>427</sup> The judiciary therefore find a middle way between the control theory and the *Pflichtsinhalttheorie*. Both the mindset (*innere*

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<sup>423</sup> Hofstetter and Van Marschall (n 312) fn 8.

<sup>424</sup> Matthias Krüger, 'Beteiligung Durch Unterlassen an Fremden Straftaten' (2011) 1 Zeitschrift für Internationale Strafrechtsdogmatik 1, 5–6.

<sup>425</sup> Ibid 6.

<sup>426</sup> Ibid.

<sup>427</sup> BGH 12.02.2009 - 4 StR 488/08 (n 303).

*Haltung*) and the control over the commission of the crime are then considered.<sup>428</sup>

The confusion that some domestic courts have demonstrated regarding the qualification of inactive conduct and the elements required to establish liability for omissions leads to a difficult conclusion regarding the elements and the degree of liability that is assigned to the defendants. In the cases under review, the *actus reus* of participation was often not considered. Instead, the focus was placed on the failure to act and the knowledge (foreseeability or awareness) required, where it was also held that negligence suffices. One can see that omission and commission are often treated equally and that both direct and indirect omissions may result in criminal liability for the result, even though direct omissions are normally not connected to the result. This means there is little scope in the assessment of a failure to act to consider it a separate offence.

If we apply the law hypothetically to the cases of the Dutch and Belgian commanders, it would be problematic to argue that they would be responsible if we aim to respect the general principles of criminal law. However, we have not considered whether the Dutch and Belgian commanders had an obligation to act yet. If one of the national law provisions would be applicable to the Dutch and Belgian commanders, or if chapter 5 would point out that an obligation to act exists under international law (which may be enforceable under domestic law if based on customary international law), the liability that follows would impose an unfair stigma on the commanders and would hold them responsible for conduct they did not commit. If the rationale behind criminalisation is that the defendant is held accountable for his or her own conduct, the judgments should reflect this. Also, where the jurisprudence has diverged from written law, it may not be foreseeable for the commanders that not acting could be considered a crime in certain situations.

This chapter illustrates how context is important in ensuring that failing to fulfil an obligation does not result in an unfair judgment on the Dutch and Belgian commanders' criminal liability. The elements used to assess omission liability are after all relatively objective and provided that a duty to act exists, a factual, non-contextual assessment of their liability (disregarding the principles of criminal law) could result in the conclusion that they are responsible for crimes

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<sup>428</sup> Becker (n 412); Ambos and Bock (n 350) 324.

committed by a third party. Context is also provided by factors such as reasonableness and ability to act, just like the general principles of criminal law provide an additional check to assess whether the outcome of a legal judgment would be fair considering the facts under review.

### 3.6 Practical Limitations to Domestic Adjudication of Peacekeeping Conduct

Besides the difficulties in establishing a fair degree of liability, the domestic criminal prosecution of peacekeeping conduct is constrained by several practical issues in the domestic sphere. These practical limitations complicate the fair and effective adjudication of crimes committed during PKOs. As many incidents of sexual abuse in PKOs have demonstrated so far, TCCs are often unwilling to investigate conduct performed by their own peacekeepers and will therefore not initiate investigations easily.<sup>429</sup> This may contribute to selective prosecutions when it concerns politically sensitive cases.<sup>430</sup> In addition, TCCs may not have jurisdiction over crimes or other conduct committed outside their national territory.<sup>431</sup> Or, if the TCC uses military courts to adjudicate military conduct, their jurisdiction may be limited to conduct committed during an armed conflict and therefore exclude conduct committed in times of peace.<sup>432</sup> An additional problem encountered in practice is that the investigations often take place somewhere far removed from the place where the crimes occurred. It is then difficult to find the proof and evidence in due time.<sup>433</sup> A benefit of domestic adjudication for the TCC is that it keeps the willingness of states to contribute to future missions high, as states keep the power to adjudicate their agents in their own

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<sup>429</sup> M O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold' (2012) 10 *Journal of International Criminal Justice* 525, 526; O'Brien, 'Protectors On Trial?' (n 36) 224; Wills, 'Continuing Impunity' (n 22) 48. See also UNGA/SC 'Report of the High-level Independent Panel on Peace Operations on Uniting Our Strengths for Peace: Politics, Partnership and People' (17 June 2015) UN Doc A/70/95-S/2015/446, para 281.

<sup>430</sup> Linda E Carter, 'The Future of the International Criminal Court: Complementarity as A Strength or A Weakness?' (2013) 12 *Washington University Global Studies Law Review* 451, 459.

<sup>431</sup> William Howard Taft IV, 'Preventing and Reporting Violations of International Humanitarian Law' in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 286.

<sup>432</sup> *Ibid.*

<sup>433</sup> With regard to sexual crimes, the special Group of Legal Experts has recommended jurisdiction for the host state considering the ability they have to gather evidence. The UN would then assist the host state in exercising this jurisdiction. It was also argued that this would give a greater sense of justice and accountability to the local population, see UNGA 'Report of the group of legal experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations' (16 August 2006) UN Doc A/60/980, paras 27, 44. See also Jimena M Conde, 'Allocating Individual Criminal Responsibility to Peacekeepers for International Crimes and Other Wrongful Acts Committed during Peace Operations' (2012) 17 *Tilburg Law Review* 104, 109.

hands.<sup>434</sup> This is important in keeping the morale of TCCs up, since PKOs depend on the voluntary contributions of UN member states.<sup>435</sup>

A complicated aspect is that different national laws apply in multinational PKOs, which results in the fulfilment of the nearly impossible task of FCs, battalion commanders and legal advisors to keep a close eye on how certain conduct in PKOs may affect a peacekeeper according to his or her national laws. This is particularly difficult if it concerns crimes that may be qualified as international crimes. If one considers that the greatest contributors to PKOs nowadays are countries that have not necessarily ratified the Rome Statute (RS), for example Bangladesh, Pakistan and India,<sup>436</sup> it is clear that finding a uniform approach may be difficult. Four out of ten countries currently contributing to peacekeeping missions have not ratified the RS at all.<sup>437</sup> Therefore, their domestic law may not be in line with the internationally applicable standards, to which the RS is an important guideline. Also, many of these countries are still in the process of developing an effective judicial system, which does not warrant legal remedies after misconduct in PKOs.<sup>438</sup> This problem is more pressing if these states have domesticated international crimes, eg frame a war crime as murder in a domestic court.<sup>439</sup> The criminal complaint filed against the Dutch commanders showed a combined use of international and domestic crimes, eg complicity to the commission of war crimes and complicity to the commission of murder.<sup>440</sup>

Besides the differences in defining specific crimes, TCCs will also apply their own general part of criminal law. This means they will apply their own standards regarding the modes of liability, rather than the general part of international criminal law statutes.<sup>441</sup> This may be beneficial if certain countries may have standards that go further than international law in criminalising contributions to the commission of international crimes. With the majority of TCCs lagging

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<sup>434</sup> Lewis (n 21) 599.

<sup>435</sup> Ibid.

<sup>436</sup> Ibid 613.

<sup>437</sup> Ibid 614.

<sup>438</sup> Peter F Chapman, 'Ensuring Respect: United Nations Compliance with International Humanitarian Law' (2009) 17 Human Rights Brief 2, 5.

<sup>439</sup> Thomas Wayde Pittman and Matthew Heaphy, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 Leiden Journal of International Law 165, 177–178.

<sup>440</sup> *Mustafić & Nuhanović v Karremans, Franken & Oosterveen* (n 13) para 11.2.

<sup>441</sup> Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2009) 29.

behind in adopting the international norms regarding individual criminal responsibility for international crimes, this may however be a negative aspect.

Another difficulty in applying domestic law to try conduct that may be considered an international crime is that the ‘nature of the conduct’ is in those cases more likely to be international than domestic, as Kleffner points out.<sup>442</sup> Considering international legal practice on the matter would then do justice to the serious and international nature of that conduct.<sup>443</sup> Not acting while knowing what was about to happen, the commanders may have neglected the fundamental principles of humanity that international criminal law aims to respect. That makes international law relevant in this context,<sup>444</sup> albeit it for consultation.

In addition, if a failure to act arises in a PKO, it might not just harm criminal law principles or norms, but it may also affect the UN’s main objectives and principles.<sup>445</sup> It might even affect mission specific objectives as mentioned in the mandate. This is derived from Oswald’s argumentation that a model criminal law framework for peace operations is necessary, because the effects that peacekeeping conduct may have are inherently different from conduct normally under scrutiny of a domestic criminal court.<sup>446</sup> While recognising the exclusive criminal jurisdiction assigned to the TCC, I consider the interpretation and practice of criminal law at the international level highly relevant. Despite the limitations that domestic law poses, we must focus on domestic criminal law as the primary area of law that applies, while recognising that international law may provide us with a universally accepted approach to liability and the definition of crimes.<sup>447</sup>

International law may be important to help us find uniformity in the approach to the adjudication

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<sup>442</sup> Ibid 44; GL Coolen and GF Walgemoed, *Militair Strafrecht* (Kluwer 2008) 161. The same rationale applies in most domestic military criminal law systems: the nature of the act/omission decides whether military law or ordinary criminal law applies.

<sup>443</sup> Ibid.

<sup>444</sup> Geert-Jan Knoops, *The Prosecution And Defense Of Peacekeepers Under International Criminal Law* (Transnational Publishers 2004) 23.

<sup>445</sup> Bruce M Oswald, ‘Model Codes for Criminal Justice and Peace Operations: Some Legal Issues’ (2004) 9 *Journal of Conflict and Security Law* 253, 267.

<sup>446</sup> Ibid.

<sup>447</sup> Kleffner (n 441) 31.

of serious criminal conduct committed in an international context. If domestic courts have implemented international law in their domestic codes, this is the direct way to apply the international standard. But where domestic courts cannot apply international law directly, international courts may exercise jurisdiction. Where IHL applied and where crimes were committed within the geographical and temporal scope of jurisdiction of the ad hoc tribunals, these tribunals may even exercise their primary right of jurisdiction.<sup>448</sup> Generally, it has been argued that if domestic adjudication is problematic, the adjudication of such conduct by international courts or tribunals should at least be considered.<sup>449</sup>

### 3.7 Comparative Perspective and Concluding Remarks

This chapter aimed to discuss both common and civil law approaches to omission liability and wanted to highlight the main differences and similarities between the two systems. The outcome however is straightforward: the approaches in both systems are similar to a great extent. Although common law is generally stricter and prefers a narrow interpretation of omission liability, which excludes pure omissions, the comparison demonstrated that direct and indirect omissions in both common and civil law are treated in a similar fashion. Both systems recognise the same legal bases for duties of care: creation of danger or risk, the law, contract and the possibility to derive this from the fulfilment of a certain profession. Equally, both systems use factors such as reasonableness and the ability to act to assess whether a duty to act was triggered. The supporting evidence was however primarily found in the jurisprudence and literature discussing the common law system.

Regarding the required *mens rea*, a negligence standard is mostly used in both systems, even though several common law cases applied recklessness as a threshold and civil law systems occasionally applied the *dolus eventualis* threshold for the required knowledge. Although often claimed that omission liability requires no causal relationship between failing to act and the result,

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<sup>448</sup> Article 9 of the ICTY Statute; Article 8 of the ICTR Statute.

<sup>449</sup> O'Brien, 'Protectors On Trial?' (n 36) 238–239; O'Brien, 'Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-Based Crimes' (n 20) 807–808; Marten Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' (1999) 10 European Journal of International Law 124, 124–125; O'Brien, 'Prosecutorial Discretion' (n 429) 525; Conde (n 433) 112; Quenivet (n 20) 426. For opposing views see e.g. Alexandra R Harrington, 'Victims of Peace: Current Abuse Allegations against UN Peacekeepers and the Role of Law in Preventing Them in the Future' (2005) 12 ILSA Journal of International & Comparative Law 125; Lewis (n 21) 611 ff.

the jurisprudence shows that such a causal connection was sought in most cases discussed. There was no substantial difference between civil and common law countries. A problematic aspect regarding this type of liability and its potential application to the cases of the Dutch and Belgian commanders is the high degree of liability incurred by the defendants. This is partly based on the unitary approach to liability applied in the common law system, but is also the immediate result of the fact that causation is established and that lower standards have been used in establishing this type of liability, while often linking the liability to the crime committed by the principal perpetrator.

Considering the general principles of criminal law, the liability incurred by the commanders would be disproportionate to the crime committed, because they would not be held responsible for their own personal conduct. In addition, it would stigmatise the commanders as contributors to the commission of serious crimes. Whereas a certain level of responsibility for a failure to act with such dramatic consequences seems appropriate, omission liability will be difficult to establish under domestic law. We furthermore discussed that this is not the only limitation to domestic prosecution of the conduct under review, since there are several practical obstacles to effective criminal prosecution of peacekeeping conduct by the TCC. It is thus relevant to consider omission liability under international criminal law to see how the RS has been interpreted in international law in this context and how the jurisprudence of the ad hoc courts may have contributed to the development of liability for omissions in the international legal sphere.

## Chapter 4: Scope for Omission Liability under International Law?

### 4.1 Introduction

This chapter takes us from liability for omissions in the domestic legal realm to omission liability at the international level. In view of the jurisdictional provisions in a PKO's SOFA, the application of a TCC's criminal law is most suitable in considering what type of liability should be incurred by peacekeeping commanders if they fail to fulfil such an obligation. We considered domestic criminal law in chapter 3. Since the domestic prosecution of peacekeepers in their TCCs comes with practical difficulties and omission liability is difficult to establish for the Dutch and Belgian commanders, this chapter will look into omission liability under international criminal law. International law has a complementary role in domestic courts because of the example set by the RS. The international context in which peacekeeping takes place and the relevance of international provisions of IHL and IHRL for the fulfilment of PKOs furthermore supports the idea that international criminal law should be considered in the cases under review.

Although criminal omissions as such are contested in international criminal law, the ICTR and ICTY have produced a limited amount of case law on omissions. Yet, the RS and the ICTY and ICTR Statutes lack an explicit provision that criminalises such a failure to act. The statutes only recognise the concept of command responsibility, which is an important example of liability for omissions in international criminal law as it establishes individual criminal responsibility for a state agent. After assessing whether the international courts have jurisdiction over the conduct under review and whether that conduct should be classified as a domestic or international crime, the third section discusses command responsibility. Thereafter, I will give an overview of the general position on omission liability in international law. Then, an analysis of the elements required for omission liability shall take place.

### 4.2 Jurisdiction of the International Courts and/or Tribunals

The current jurisdictional arrangements for criminal conduct in PKOs do not exclude the possibility that conduct is also subject to the jurisdiction of an international criminal tribunal or

the ICC where IHL applied directly to peacekeeping commanders. It is however questionable whether conduct committed by peacekeepers or peacekeeping commanders can fulfil the requirements that make these mechanisms suitable for the most serious international crimes. To reach that threshold, several requirements must be fulfilled.

Let us first consider the jurisdiction of the ad hoc tribunals, the ICTY and the ICTR, in relation to the conduct of the Belgian and Dutch commanders. The ad hoc tribunals have primacy over national courts (art 9 (2) of the ICTY Statute) concerning violations of international humanitarian law. It is possible to consider responsibility for both a domestic and international court however, if the crime for which the person is tried by a national court was characterised as an ordinary crime (art 10 (2) (a) of ICTY Statute) or if the 'national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted' (art 10 (2) (b) of the ICTY Statute).

The jurisdiction of the ad hoc tribunals is based on three grounds: jurisdiction *ratione loci*, jurisdiction *ratione temporis* and jurisdiction *ratione materiae*.<sup>450</sup> Put differently, the jurisdiction is triggered when the alleged crimes were committed in Rwanda or Yugoslavia respectively, after a certain date (for Yugoslavia this is 1 January 1991,<sup>451</sup> whereas the ICTR's jurisdiction is limited to the year 1994)<sup>452</sup> and if the subject matter triggers the Court's jurisdiction. This is the case if it concerns grave breaches of the 1949 Geneva conventions,<sup>453</sup> violations of the laws and customs of war,<sup>454</sup> genocide<sup>455</sup> and/or crimes against humanity.<sup>456</sup> One can observe that the alleged failures to protect were 'committed' within the required territory and within the time frame to which the tribunals' jurisdiction extends, but it is unclear whether that failure to protect could fall within a category of crimes over which the ad hoc tribunals have jurisdiction. We will look into that aspect below. We will first turn to the main requirements that trigger the jurisdiction of the ICC.

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<sup>450</sup> Article 8 of the ICTY Statute; Maja Eriksson, *Reproductive Freedom : In the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff Publishers 2000) 358–359.

<sup>451</sup> Article 1 of the ICTY Statute;

<sup>452</sup> Article 7 of the ICTR Statute.

<sup>453</sup> Article 2 of the ICTY Statute.

<sup>454</sup> Article 3 of the ICTY Statute.

<sup>455</sup> Article 4 of the ICTY Statute.

<sup>456</sup> Article 5 of the ICTY Statute.

The jurisdiction of the ICC depends on two main foundations: 1) the time of the commission of the crimes, which should be after the entry into force of the Rome Statute (1 July 2002) as determined in article 11 of the RS and 2) the state of which the defendant is a national or the state on whose territory the conduct occurred should be a party to the RS.<sup>457</sup> It is clear from the first requirement that jurisdiction for the failures to protect by the Belgian and Dutch commanders, which took place in 1994 and 1995, would not trigger the jurisdiction *ratione temporis* of the ICC. Conduct that took place in PKOs of more recent date could however be subjected to the jurisdiction of the ICC if the national courts appear unwilling or unable to exercise jurisdiction.<sup>458</sup> The second requirement, that the TCC to which the defendant belongs or the state on whose territory the conduct was committed should be a member of the ICC, has automatically not been met in the cases of Kigali and Srebrenica. The ICC and its statute were not in force until 1 July 2002, therefore both Bosnia and Herzegovina and Rwanda as the host states and Belgium and the Netherlands as the TCCs could not have been a party to the RS. As addressed above, this does not exclude the possibility that the ICC may have jurisdiction over matters that arise in contemporary or future PKOs, if these requirements have been met.

For contemporary or future PKOs this would mean that two additional criteria must be fulfilled. These additional criteria are first, the threshold of gravity<sup>459</sup> and second, the principle of complementarity that requires asking whether the domestic court is unwilling or unable to try the defendant.<sup>460</sup> If so, the ICC may obtain jurisdiction if a country refers a case to the ICC itself,<sup>461</sup> or if the UN Security Council does so.<sup>462</sup> Alternatively, the prosecutor has the discretionary power to pick cases himself.<sup>463</sup> The complementarity principle underlines that the ICC may exercise jurisdiction if the national courts with this right are unwilling or unable to do so,<sup>464</sup> something that

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<sup>457</sup> Article 12 of the RS.

<sup>458</sup> Chapman (n 438) 7.

<sup>459</sup> Article 53(1)(c) of the RS contains an obligation on part of the Prosecutor to consider the gravity of a specific situation or case brought to his attention. In addition, article 17(1)(d) of the RS requires a case to be of sufficient gravity to trigger the Court's powers of jurisdiction.

<sup>460</sup> Article 17 of the RS.

<sup>461</sup> Art 13(a) and 14 of the RS.

<sup>462</sup> Art 13(b) of the RS. Note that there cannot be an overlapping domestic investigation or domestic proceeding.

<sup>463</sup> Art 13(c) and 15 (1) of the RS.

<sup>464</sup> Art 17 of the RS.

is not an unlikely scenario in the context of peacekeeping. Since the conduct of the Dutch and Belgian commanders did not meet the requirements for jurisdiction to be assigned to the ICC, we will not discuss the jurisdiction of the ICC in further detail.

#### 4.2.1 Qualification of Conduct: A Domestic or International Crime?

With criminal jurisdiction being exclusively assigned to the TCC, and the ad hoc tribunals having primary jurisdiction over international crimes committed in the territory of the former Yugoslavia and Rwanda, the exercise of jurisdiction will greatly depend on the classification of the commanders' conduct. We thus need to assess whether the conduct of the Dutch and Belgian commanders can be classified as an international crime or whether it is more suitably framed as a domestic crime.

Bantekas confirmed that the 'principle difference between domestic crime and international crime is context'.<sup>465</sup> This means that where the local authorities have control over crime committed in a domestic society, international crimes occur in 'situations of lawlessness and breakdown of authority'.<sup>466</sup> The ICTY Appeals Chamber held in its *Kunarac* judgment regarding the difference between war crimes and domestic crimes that

[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.<sup>467</sup>

This reasoning can be applied to peacekeepers as well: it has been argued that the context of armed conflict in which they have been deployed creates the connection required to commit an international crime.<sup>468</sup> It is possible to argue that the general context in which the Dutch and Belgian commanders' conduct took place was a context of armed conflict. But is that sufficient to

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<sup>465</sup> Ilias Bantekas and Emmanouela Mylonaki, *Criminological Approaches to International Criminal Law* (CUP 2014) 5.

<sup>466</sup> *Ibid.*

<sup>467</sup> *Prosecutor v Kunarac and others (Appeal Judgment)* IT-96-23-A (12 June 2002) para 58.

<sup>468</sup> O'Brien, 'Protectors On Trial?' (n 36) 229.

qualify their conduct as an international crime? For the three core crimes recognised in international criminal law, and thus in the statutes of the international courts, certain contextual requirements indicate whether a crime could be defined as such. Each requirement will be discussed in this section for the crimes of genocide, crime against humanity and war crimes.

#### 4.2.2 Genocide

When we consider genocide briefly, it is mainly relevant to discuss whether the Dutch and Belgian commanders could have fulfilled the requirements set for genocide. Genocide as defined in article II of the 1948 Convention on the Prevention and Punishment of Genocide<sup>469</sup> requires a specific mental element, namely the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. In addition, article II requires a physical element, which consists of several options.<sup>470</sup> In assessing these options, while taking the conduct of the Dutch and Belgian commanders in consideration, some of these possibilities can be excluded. For example, the commanders did not ‘kill members of the group’<sup>471</sup> or ‘deliberately inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part’.<sup>472</sup> Neither did the commanders ‘impose measures intended to prevent births within the group’<sup>473</sup> nor ‘forcibly transfer children of the group to another group’.<sup>474</sup> More debatable is the act of genocide described as ‘causing serious bodily or mental harm to members of the group’,<sup>475</sup> because it allows for a broader interpretation than the other acts listed. The language used does not restrict the interpretation of this option to active conduct, since ‘causing’ may also imply a more passive way of bringing about harm. In particular, when we consider the listed forms in which genocide can be committed, this does not necessarily limit its options to direct responsibility for genocide. Article III of the Convention for example also refers to conspiracy, incitement, attempt and complicity as additional ways of committing the crime of genocide.

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<sup>469</sup> Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) article 3.

<sup>470</sup> See article II (a) – (e) of the Genocide Convention.

<sup>471</sup> Article II (a) of the Genocide Convention.

<sup>472</sup> Article II (c) of the Genocide Convention.

<sup>473</sup> Article II (d) of the Genocide Convention.

<sup>474</sup> Article II (e) of the Genocide Convention.

<sup>475</sup> Article II (b) of the Genocide Convention.

The question is then to what extent these options would require the commanders to have fulfilled the specific intent requirement referred to above. It has for example been argued that the *specific intent* requirement may not apply to *complicity* to genocide, since article III (e) of the Convention contains no reference to the specific *mens rea* requirement.<sup>476</sup> In particular, the difference between ‘complicity in genocide’ as included in article 4(3)(e) of the ICTY Statute, and thus in the special part of the statute, and aiding and abetting genocide in article 7(1) of the ICTY Statute, which is the general part of the statute, is cause for confusion. This refers to the difference between complicity as part of the crime of genocide and complicity as part of aiding and abetting and thus as a modality of criminal liability. Some interpret the notion of complicity in genocide as a separate crime, which sets it apart from aiding and abetting the crime of genocide as a mode of liability.<sup>477</sup> Those who follow that line of reasoning accept that complicity to commit genocide as a crime requires knowledge (and thus awareness), whereas aiding and abetting as a mode of liability would require specific intent.<sup>478</sup> This is arguably because the accomplice would be the mastermind behind the genocide and not the actual perpetrator.<sup>479</sup> A substantial body of case law confirmed that the meaning of aiding and abetting under article 7(1) of the ICTY Statute should

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<sup>476</sup> Berster, ‘Article III’ (n 306) paras 43, 60. See also *Bosnia and Herzegovina v Serbia and Montenegro* (n 209) para 421. The ICJ confirmed that complicity requires awareness of the specific intent of the principal. See also *Prosecutor v Furundžija (Trial Judgment)* IT-95-17/1-T (10 December 1998) para 243, where the Trial Chamber holds that ‘it is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal’s criminal will and purpose, provided that his own conduct was with knowledge’.

<sup>477</sup> Flavia Zorzi Giustiniani, ‘The Responsibility of Accomplices in the Case-Law of the Ad Hoc Tribunals’ (2009) 20 *Criminal Law Forum* 417, 436–437.

<sup>478</sup> John W. Gold, ‘A Comparative Analysis of the Mens Rea Requirement for Complicity as Applied in the International Tribunals and the Common-Law Jurisdictions of the United States, England & Australia: Memorandum for the Office of the Prosecutor’, Case Western Reserve University School of Law: International War Crimes Project, Spring 2003, <<http://law.case.edu/Academics/AcademicCenters/Cox/WarCrimesResearchPortal/memoranda/JGold.pdf>> accessed 25 April 2017; Daniel M Greenfield, ‘The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters’ (2008) 98 *Journal of Criminal Law & Criminology* 921, 925-926; Nina HB Jørgensen, ‘Complicity in Genocide and the Duality of Responsibility’ in B Swart, A Zahar and G Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 248; Eboe-Osuji (n 46) 58. Cases concluding that there is a difference between complicity and aiding and abetting genocide and that aiding and abetting would require specific intent are *Prosecutor v Akayesu (Trial Judgment)* ICTR-96-4-T (2 September 1998) para 547; *Prosecutor v Ntakirutimana (Trial Judgment)* ICTR-96-10-T (21 February 2003) para 787 (iii). Judgments that considered aiding and abetting part of complicity and have argued that knowledge is sufficient are i.e. *Prosecutor v Musema (Appeal Judgment)* ICTR-96-13 –A (16 November 2001) para 272; *Prosecutor v Musema (Trial Judgment)* ICTR-96-13-T ( 27 January 2000) para 394; *Prosecutor v Krstić (Appeal Judgment)* IT-98-33-A (19 April 2004) paras 140-141; *Prosecutor v Semanza (Trial Judgment)* ICTR-97-20-T (15 May 2003) para 338; *Prosecutor v Ntakirutimana (Appeal Judgment)* ICTR-96-10-A (13 December 2004 ) paras 499-501.

<sup>479</sup> William Schabas, *Genocide in International Law : The Crime of Crimes* (CUP 2000) 286.

be read into article 4(3)(e) of the Statute, so knowledge of the (specific) intent of the perpetrator will constitute aiding and abetting the crime of genocide.<sup>480</sup> Although the Dutch and Belgian commanders seemed aware of the reasonable likelihood that the civilians in the area under their protection could be the subject of serious crimes, it seems unrealistic to argue that they were aware or knew of the specific genocidal intent of the BSA and Interahamwe rebels respectively. As such, it appears unlikely that the Dutch and Belgian commanders aided and abetted genocide.

#### 4.2.3 Crime(s) against Humanity

Crimes against humanity are subject to two relatively stringent requirements particularly difficult to fulfil for peacekeepers.<sup>481</sup> The chances that inaction will amount to a crime against humanity are limited, because it requires the conduct to be part of a widespread or systemic attack.<sup>482</sup> It is not realistic that peacekeeping commanders, or peacekeepers generally, would willingly join the perpetrating forces to set up such an attack together. Another requirement for crimes against humanity is knowledge of the conduct being part of the attack.<sup>483</sup> Even if there is awareness that people may be killed, the Dutch and Belgian commanders should have been aware that this was part of an attack of such scale. The only aspect that may form a risk for peacekeeping commanders is the way the fulfilment of these requirements is demonstrated. Whether or not these requirements are met is usually based on contextual circumstances such as presence at the scene of the crime, the position in the chain of command, etc. For the commanders of the Dutch and Belgian troops to have been part of such an attack, this would require them to be part of the chain of command that conspired the attack. If awareness however is sufficient, one may argue that a peacekeeping commander could be aware of an imminent attack because of the intelligence he or she received or the contact he had with the party that orchestrated the attack. The latter

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<sup>480</sup> This approach was taken in *Prosecutor v Stakić (Trial Judgment)* IT-97-24-T (31 July 2003 ) para 531; *Krstić (Appeal Judgment)* (n 478) para 139-140; *Ntakirutimana (Appeal Judgment)* (n 478) para 364; *Prosecutor v Blagojević & Jokić (Appeal Judgment)* IT-02-60-A (9 May 2007) para 127; *Prosecutor v Kalimanzira (Appeal Judgment)* ICTR-05-88-A (20 October 2010) para 86; *Prosecutor v Bagaragaza (Trial Judgment)* ICTR-05-86-T (17 November 2009) para 22.

<sup>481</sup> O'Brien, 'Protectors On Trial?' (n 36) 228.

<sup>482</sup> *Ibid.*

<sup>483</sup> Article 7(1) of the RS; *Akayesu (Trial Judgment)* (n 478) para 577; *Prosecutor v Mpambara (Trial Judgment)* ICTR-01-65-T (11 September 2006) para 11; *Prosecutor v Simić (Trial Judgment)* IT-95-9-T (17 October 2003) para 46.

consideration is much debated in the context of Srebrenica, since it appeared in hindsight that certain countries were aware of the imminence of the attack on the enclave.<sup>484</sup> However, this would still not enable us to argue that the commanders in Srebrenica or Kigali were part of the attack itself and helped in planning and setting up the attack.

#### 4.2.4 War Crimes

For crimes to be defined as war crimes in contrast to domestic crimes, they must have taken place in the context of an armed conflict. This is more commonly referred to as the required ‘nexus with armed conflict’.<sup>485</sup> The status of the situations in both Srebrenica and Rwanda has been discussed extensively in the case law of the ICTY and ICTR. The ICTY Trial Chamber concluded in *Prosecutor v Krstić* that ‘it is not disputed that a state of armed conflict existed between BiH and its armed forces, on the one hand, and the Republika Srpska and its armed forces, on the other. There is no doubt that the criminal acts set out in the indictment occurred not only within the frame of, but in close relation to, that conflict’.<sup>486</sup> Regarding the situation in Rwanda, the ICTR Trial Chamber observed in *Akayesu* that

the FAR was and the RPF were "two armies" engaged in hostilities, that the RPF had soldiers systematically deployed under a command structure headed by Paul Kagame, and that FAR and RPF forces occupied different sides of a clearly demarcated demilitarised zone. Based on the evidence presented, the Chamber finds beyond a reasonable doubt that armed conflict existed in Rwanda during the events alleged in the indictment, and that the RPF was an organised armed group, under responsible command, which exercised control over territory in Rwanda and was able to carry out sustained and concerted military operations.<sup>487</sup>

In *Ntagerura and others*, the ICTR Trial Chamber confirmed that ‘[b]etween 1st January 1994 and 17th July 1994, in Rwanda, there was an armed conflict not of an international character’.<sup>488</sup>

It follows that the PKOs in both Srebrenica and Kigali were deployed in the context of an armed conflict. To what extent does that allow us to argue that the Dutch and Belgian commanders’

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<sup>484</sup> Documentary ‘Waarom Srebrenica moest vallen’ (n 97).

<sup>485</sup> O’Brien, ‘Protectors On Trial?’ (n 36) 229.

<sup>486</sup> *Krstić (Trial Judgment)* (n 399) para 481.

<sup>487</sup> *Akayesu (Trial Judgment)* (n 478) para 174, 601-610.

<sup>488</sup> *Prosecutor v Ntagerura and others (Trial Judgment)* ICTR-99-46-T (25 February 2004) para 767.

conduct had a nexus with armed conflict? Several international decisions have indicated that a lenient approach has been taken towards this requirement. In the ICTY's *Tadić* case the ICTY Appeals Chamber held that it is 'sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.<sup>489</sup> In its *Kunarac and others* judgment, the ICTY Trial Chamber clarified that

the criterion of a nexus with the armed conflict under Article 3 of the Statute does not require that the offences be directly committed whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.<sup>490</sup>

If the conduct took place in an area controlled by a party to the armed conflict, it could be qualified as establishing a nexus with the armed conflict. In both Srebrenica and Kigali, the peacekeeping troops were in control up to a certain point, but they were not considered a party to the armed conflict. This does however not necessarily mean that the peacekeeping troops were not sufficiently connected to the conflict.

In relation to peacekeeping, some have argued that the nexus with the armed conflict is constituted in a different way. The context may be an indicator that the nexus is there. For example, one may assume that the deployment of peacekeepers is an immediate result of the existence of an armed conflict.<sup>491</sup> The SCSL Trial Chamber 'observe[d] that peacekeepers are by definition deployed in areas of actual or recent armed conflict, often in precarious situations before the warring factions have disarmed and while tensions remain high'.<sup>492</sup> You can therefore not ignore the connection between the context of an armed conflict and the peacekeepers operating in that environment. Wills even stated that 'peacekeepers could be held accountable

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<sup>489</sup> *Prosecutor v Tadić (Appeal Decision)* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1 (2 October 1995) para 70.

<sup>490</sup> *Prosecutor v Kunarac and others (Trial Judgment)* IT-96-23-T (22 February 2001) para 568.

<sup>491</sup> Wills, 'Continuing Impunity' (n 22) 62–63. See text to n 467.

<sup>492</sup> *Prosecutor v Sesay, Kallon and Gbao (Trial Judgment)* SCSL-04-15-T (2 March 2009) para 1889.

under IHL for conduct amounting to a war crime regardless of whether the peacekeeping force is party to the conflict in the formal sense'.<sup>493</sup> She based this on the following reasoning:

[T]he peacekeepers' relationship with the local population, and their power over individuals within it, is not the result of an incidental consequence of the chaos of war but of purposeful deployment by the Security Council in response to the conflict. (...) The existence of the armed conflict would "have played a substantial part" in the peacekeeper's ability to commit the crime, his decision to commit it and the manner in which it was committed, in a way that is different in nature to that of a civilian merely exploiting the break-down of order.<sup>494</sup>

The status of peacekeeping commanders under IHL is thus not important per se to decide whether conduct can be classified as a war crime.<sup>495</sup> The context will determine whether the conduct can be classified as a war crime. Since we have established above that an armed conflict was ongoing in both Srebrenica and Kigali at the time of the conduct committed, this would be sufficient to state that the conduct fulfilled the requirement of having a nexus with the armed conflict.

A second requirement for conduct to be classified as a war crime is knowledge or awareness of the existence of an armed conflict. This requirement does not need extensive discussion as it seems plausible that both in Kigali and Srebrenica, the commanders were aware of the armed conflict taking place in the area where they were deployed.

So far it seems plausible to argue that there is at least no convincing reason to assume that the commanders' conduct cannot be defined as a war crime, at least if the context of armed conflict in which PKOs operate would allow it. The main objection against defining it as a war crime could be the scope of application of the domestic provisions regarding international crimes under Dutch and Belgian law. The Dutch have, at least for war crimes as mentioned in article 5 of the Dutch International Crimes Act, incorporated the requirement of a nexus with armed conflict.<sup>496</sup> The

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<sup>493</sup> Wills, 'Continuing Impunity' (n 22) 63.

<sup>494</sup> Ibid. See also O'Brien, 'Protectors On Trial?' (n 36) 233.

<sup>495</sup> Knut Dörmann and Eve La Haye, 'The Context of War Crimes' in Roy S Lee (ed), *The international Criminal Court* (Transnational Publishers 2001) 119; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003) 391–393; Andreas Zimmerman, 'Preliminary Remarks on para. 2 (c)e(f) and para. 3: War Crimes Committed in an Armed Conflict Not of an International Character' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck 2008) 488.

<sup>496</sup> HR 11 November 1997, De zaak Knesevic, *LJN ZD0857* (case analysis) in: *Militair Rechtelijk Tijdschrift*, with

Belgians have also included this requirement in article 136quater of the Belgian Penal Code. It should be noted however that the Dutch have universal jurisdiction over international crimes.<sup>497</sup> This may leave room for the argument that the Netherlands need not be involved in the conflict itself to have jurisdiction over such crimes. In contrast, Belgium has withdrawn its universal jurisdiction in 2003 and limited it to jurisdiction according to the principles of passive and active nationality.<sup>498</sup> As such, the domestic interpretation of war crimes may be limited compared to the international interpretation discussed above.

It follows from the above that the remainder of this thesis primarily needs to focus on the idea that the Dutch and Belgian commanders may have contributed to war crimes. Alternatively, their conduct may be classified as a separate failure to act. The qualification of their conduct as domestic or international criminal conduct depends greatly on the context in which it took place. The context of an armed conflict allows us to argue that it can be framed as an international crime. Yet, the involvement of Dutch and Belgian authorities and the command and control exercised by the Dutch and Belgian state at the time of the alleged crimes also does not rule out the possibility that it can be framed as a domestic crime, like murder or manslaughter for example. At least, it seems appropriate to continue our assessment of the possibility of liability for the commanders keeping in mind that the ad hoc tribunals would have primary jurisdiction over crimes committed in the territories of Bosnia and Herzegovina and Rwanda, but that TCCs have exclusive criminal jurisdiction over their peacekeepers. It is difficult to determine which rule takes precedence since the context of peacekeeping may change the primacy of the ICTY. Both options should be kept in mind. Jurisdiction also depends on whether the conduct is classified as a violation of IHL or IHRL, which requires us to assess whether the overarching concept of protection in PKOs is based on IHL or IHRL-based norms of protection, or both. In cases where IHRL is the dominant framework establishing that obligation, adjudication by an international criminal court may not

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case note by H. van der Wilt, February 1998, No. 2, 211; CPM Cleiren and JF Nijboer, *Strafrecht: Tekst & Commentaar: De Tekst Van Het Wetboek Van Strafrecht En Enkele Aanverwante Wetten Voorzien Van Commentaar* (Kluwer 2008) 695. See also Rotterdam District Court 5 June 2003, *ECLI:NL:RBROT:2003:AF9546*.

<sup>497</sup> Dutch Supreme Court 30 June 2009 (*Van Anraat*), *ECLI:NL:HR:2009:BG4822*, par. 3.3 en 4; Coolen and Walgemoed (n 442) 122. See also the minutes of the Dutch Parliament's discussion on the matter in Kamerstukken II 2001–02, 28 337, no.3, p.3.

<sup>498</sup> Wet van 23 april 2003 tot wijziging van de wet van 16 juni 1993 betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht; Cedric Ryngaert, 'Universele Jurisdictie' in Jan Wouters and Bart Pattyn (eds), *Misdaden tegen de mensheid: de internationale strijd tegen straffeloosheid* (Acco 2006) 147–149.

appear suitable. While IHL may be relevant for the contextual interpretation of a potential human rights violation, it would arguably stretch too far to ignore the TCC's right to sanction violations of IHRL committed by its own nationals. As we have discussed in chapter 3 however, the hurdles that prevent effective adjudication of peacekeepers in the domestic system, allow us to consider the possibility of jurisdiction for the ad hoc tribunals. In addition, international criminal law may provide valuable insights into the adjudication of military commanders in general. The command responsibility doctrine is an example of a recognised mechanism to prosecute a state agent for a failure to act under criminal law.

### 4.3 Command Responsibility

Command responsibility is a doctrine in international criminal law developed to create a separate responsibility for a superior who is at the same time an agent of the state. In this thesis we will mainly consider the responsibility for military commanders under this doctrine as opposed to superiors in general, which is then referred to as command responsibility. While the doctrine particularly focuses on a failure to fulfil a commander's duty to prevent or punish conduct performed by his or her subordinates, it was also used in relation to protective duties. Originally, the command responsibility doctrine was derived from the 'purpose of the laws of war, namely to protect civilians' as Robinson wrote.<sup>499</sup> The *Yamashita* judgment, one of the first judgments in which command responsibility was elaborated, referred to this purpose and the commander's role in serving that purpose explicitly:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.<sup>500</sup>

The doctrine has developed since then and its distinctive elements, as set out in article 28 of the RS and article 7(3) of the ICTY Statute, clearly set it apart from the modes of liability in article 25 of the RS and article 7(1) of the ICTY Statute. Yet, the characterisation of the doctrine is still

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<sup>499</sup> Robinson, 'The Identity Crisis' (n 39) 937.

<sup>500</sup> In *Re Yamashita*, 327 US 1 (1946) (US SC) 15, also accessed through LRTWC (1948) Vol IV (hereafter: *Yamashita*).

much debated. Some scholars strongly argue that command responsibility is a separate offence,<sup>501</sup> while others define it as a mode of liability.<sup>502</sup> An elaboration on this debate can be found in chapter 8.

Command responsibility is the only codified form of omission liability in international criminal law, but can in some ways be considered a middle way between an omission and bystander liability. The latter is an alternative to omission liability and will be discussed in chapters 6 and 7. To give a general idea of the difference between omission and bystander liability: where omission liability requires a duty to act, bystander liability is more focused on elements of authority and control and on the effect the bystander had on the principal perpetrator's mental state. Although command responsibility contains a clear failure to fulfil a certain duty, it also relies on the authority or the control of the commander vis-à-vis the perpetrators. Having said that, command responsibility is based on the profession of the military commander and therefore contains elements of both forms of liability. This is furthermore supported by the fact that article 28 of the RS, in contrast to article 7(3) of the ICTY Statute, seems to connect the commander's failure to fulfil his/her duty to the criminal result.

Despite the different nuances, international courts often use command responsibility in conjunction with either omission liability or bystander responsibility. Liability for aiding and abetting by omission or encouragement (the latter of which I refer to here as bystander liability) both fall under article 7(1) of the ICTY Statute and article 25(3) of the RS. The courts have however created a clear separation between command responsibility and aiding and abetting as a mode of liability, requiring the use of only the more appropriate of the two provisions and treating

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<sup>501</sup> Ambos, 'Superior Responsibility' (n 28) 850–851; Meloni, 'Command Responsibility' (n 28) 637; Robinson, 'How Command Responsibility Got So Complicated' (n 28) 37 ff, Robinson suggests the interpretation of command responsibility as a concept *sui generis*, neither similar to an offence nor to a mode of liability. Judge Shahabuddeen argued that he considers command responsibility to be a separate offence, *Dissenting Opinion of Judge Shahabuddeen to the Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility in Prosecutor v Hadzihasanovic and Kubura (Appeal Decision)* IT-01-47-AR72 (16 July 2003) para 32.

<sup>502</sup> Amy J Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30 Michigan Journal of International Law 251, 276; Boris Burghardt, 'Die Vorgesetztenverantwortlichkeit Nach Völkerstrafrecht Und Deutschem Recht (§ 4 Vstgb)' (2010) 11 Zeitschrift für Internationale Strafrechtsdogmatik 695; *Prosecutor v Hadžihasanović and Kubura (Appeal Judgment)* IT-01-47-A (22 April 2008) para 39, referring to *Prosecutor v Halilović (Trial Judgment)* IT-01-48-T (16 November 2005) para 78. The Appeals Chamber classified it as a mode of liability *sui generis*.

the less suitable as an aggravating circumstance.<sup>503</sup>

This passage from *Kayishema and Ruzindana* further demonstrates how both command responsibility and bystander liability have gained recognition in international criminal law, while liability for omissions may still be somewhat unestablished within the confines of the courts' jurisprudence:

This jurisprudence extends naturally to give rise to responsibility when the accused failed to act in breach of a clear duty to act. The question of responsibility arising from a duty to act, and any corresponding failure to execute such a duty is a question that is inextricably linked with the issue of command responsibility. This is because under Article 6(3) a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime. However, individual responsibility pursuant to Article 6(1) is based, in this instance, not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.<sup>504</sup>

While command responsibility is codified in the provisions referred to above and bystander liability is included in article 6(1) of the ICTR Statute as a contribution to the crime,<sup>505</sup> omissions neither belong to command responsibility nor to the articles dealing with individual criminal responsibility.<sup>506</sup> Command responsibility and bystander responsibility share the element of authority as a common denominator; omission liability and command responsibility share the duty requirement. Yet, omission liability has not been codified and cannot fulfil the requirements of these two codified forms to a satisfactory extent.<sup>507</sup> To gain a better understanding of liability for omissions in international criminal law, we will first turn to the discussion of omission liability.

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<sup>503</sup> *Akayesu (Trial Judgment)* (n 478) section 6.2; *Prosecutor v Aleksovski (Appeal Judgment)* IT-95-14/1-A (24 March 2000) para 183; *Prosecutor v Delalić et al (Trial Judgment)* IT-96-21-T (16 November 1998) para 1221-1223; *Prosecutor v Delalić and others (Appeal Judgment)* IT-96-21-A (20 February 2001) para 745; *Blaškić (Appeal Judgment)* (n 120) para 664; *Krstić (Trial Judgment)* (n 399) para 705; *Blaškić (Trial Judgment)* (n 46) para 337; *Prosecutor v Naletilić and Martinović (Trial Judgment)* IT-98-34-T (31 March 2003) paras 79, 81.

<sup>504</sup> *Prosecutor v Kayishema and Ruzindana (Trial Judgment)* ICTR-95-1-T (21 May 1999) para 202. (emphasis added)

<sup>505</sup> *Prosecutor v Brđanin (Trial Judgment)* IT-99-36-T (1 September 2004) para 271; *Prosecutor v Brđanin (Appeal Judgment)* IT-99-36-A (3 April 2007) para 273. In the Appeal Judgment the Chamber clarified that '[i]n such cases the combination of a position of authority and physical presence on the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement'. See for an extensive discussion of this distinction paras 271-286. The contribution to the crime was also referred to in *Prosecutor v Perišić (Trial Judgment)* IT-04-81-T (6 September 2011) para 136.

<sup>506</sup> Article 6(1) of the ICTR Statute, article 7(1) of the ICTY Statute and article 25 of the RS.

<sup>507</sup> The *Ndahimana* appeal judgment confirmed that 'Ndahimana's contribution to the 16 April killings in the form of providing moral support by tacit approval is not to be characterised as an omission', see *Ndahimana v Prosecutor (Appeal Judgment)* ICTR-01-68-A (16 December 2013) fn 526.

#### 4.4 Omissions: Point of Departure in International Criminal Law

Liability for omissions is far less established on the international level than on the domestic level, partly because of the far-reaching repercussions that such a recognition may have in the light of the character of international crimes. There are few countries willing to commit to an indirect assumption of positive duties, particularly not in the Rome Statute which applies to all member states. Just like in domestic law, direct omissions and indirect omissions may nevertheless occur on the international level. Command responsibility is the only example in the statutes, and will here be defined as a form of direct omission.<sup>508</sup>

That international crimes may be committed by omission (indirect omission) under international law is the general opinion held in the literature on this topic. Mantovani argued that the intention to punish duty-related omissions was already confirmed by the Nuremberg tribunal and the Draft Code of Offences against the Peace and Security of Mankind.<sup>509</sup> Berster posits that commission by omission could be legitimate in international criminal law as a general rule of international law.<sup>510</sup> Gerhard Werle shares this opinion and argues that ‘liability for omission can be qualified as a general principle of law, as comparative analysis shows that with the exception of French law, almost all legal cultures establish such liability’ and that ‘article 25 should [thus] be interpreted in such a way that it covers omissions, not only where they are explicitly criminalized in the Statute, but also where the omission equates to the active causation of the criminal result’.<sup>511</sup> Van Sliedregt agrees and holds that ‘commission or participation by omission can be regarded as part of customary international law and the general principles derived from national laws’.<sup>512</sup> To support her argument, Van Sliedregt refers to article 21(1)(b) and (c) of the RS which respectively

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<sup>508</sup> See section 8.4.1 (Ch. 8).

<sup>509</sup> Ferrando Mantovani, ‘The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer’ (2003) 1 *Journal of International Criminal Justice* 26, 32. Mantovani argued that the ‘responsibility for commission by way of omission’ is based on the idea that ‘every individual is obligated to conform to the rules of international law, and can thus be held responsible for having neglected to do so’.

<sup>510</sup> Berster, ‘Article III’ (n 306) 84.

<sup>511</sup> Werle (n 46) 966.

<sup>512</sup> Van Sliedregt, *Individual Criminal Responsibility In International Law* (n 39) 94. An opposing view was held by Boas in Gideon Boas, ‘Omission Liability at the International Criminal Tribunals—A Case for Reform’ in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2011) 207. The lack of clarity on the mental element required for omissions as a separate offence could be problematic.

define the applicable sources of law as ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’ and

general principles of law derived by the court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

We have concluded in chapter 3 that omissions, both direct and indirect, have been recognised in the domestic laws under review. As such, domestic jurisprudence arguably laid the foundation for omission liability as a general principle of international law. The RS and the jurisprudence of the ad hoc tribunals provide domestic courts with important guidelines regarding the interpretation of such forms of liability and the definition of the core crimes.

In assessing, hypothetically, what type of liability could be incurred by the Dutch and Belgian commanders under the international statutes, aiding and abetting by omission seems the most suitable form of omission liability to be applied. Aiding and abetting is included as a mode of liability in article 25(3) of the RS, article 7(1) of the ICTY Statute and article 6(1) of the ICTR Statute. Article 25(3)(c) of the RS does not contain an *actus reus* requirement for aiding and abetting, and only refers to assistance ‘with the purpose of facilitating the commission of such a crime (...) including providing the means for its commission’. The case law indicates however that the requirement for the *actus reus* of aiding and abetting under the RS is a substantial contribution. In *Mbarushimana* for example, Pre-Trial Chamber I of the ICC confirmed this and based its conclusion on the jurisprudence of the ad hoc tribunals.<sup>513</sup>

Article 7 (1) of the ICTY Statute contains no *actus reus* of aiding and abetting but states that ‘a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute,

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<sup>513</sup> *Concurring Opinion of Judge Christine Van den Wyngaert to the Judgment pursuant to Article 74 of the Statute in the case of The Prosecutor v Mathieu Ngudjolo Chui (Trial Judgment) ICC-01/04-02/12 (18 December 2012 )* para 44; *Prosecutor v Callixte Mbarushimana (Pre-Trial Chamber I) Decision on the confirmation of charges ICC-01/04-01/10 (16 December 2011) para 279.*

shall be individually responsible for the crime'. The definition of the *actus reus* can be found in the jurisprudence of the tribunals. The ICTY Trial Chamber held in its *Tadić* judgment that it is required for aiding and abetting that 'the conduct of the accused contributed to the commission of the illegal act'.<sup>514</sup> The ICTY Appeals Chamber developed a definition in *Tadić, Aleksovski* and *Vasiljević* that has at least one consistent basis: aiding and abetting requires proof of 'acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible'.<sup>515</sup> The ICTY Appeals Chamber however added an additional requirement in *Tadić* and *Vasiljević* by requiring that the assistance is given with specific direction.<sup>516</sup> Specific direction is still a debatable aspect of aiding and abetting and because of its importance for peacekeeping operations, this aspect will be discussed separately in section 4.5.3.

The *mens rea* requirement for aiding and abetting under the RS can be found in article 30 of the Statute which reads:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

Intent is defined as meaning 'to cause that consequence' or 'awareness that it will occur in the ordinary course of events'. Article 30 then states that '[k]nowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. This definition of the *mens rea* implies that *dolus directus* of the first and second degree suffices, but that *dolus eventualis* is not sufficient under article 30 of the RS to constitute liability.<sup>517</sup>

The ICTY Statute contains no definition of the *mens rea* for aiding and abetting, neither do the Rules of Procedure and Evidence.<sup>518</sup> The case law of the ad hoc tribunals however indicates there are requirements that need to be fulfilled to establish the mental element of aiding and abetting a

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<sup>514</sup> *Prosecutor v Tadić (Trial Judgment)* IT-94-1-T (7 May 1997) para 674.

<sup>515</sup> *Aleksovski (Appeal Judgment)* (n 503) para 162; *Tadić (Appeal Judgment)* (n 41) para 229.

<sup>516</sup> *Vasiljević (Appeal Judgment)* (n 46) para 102; *Tadić (Appeal Judgment)* (n 41) para 229.

<sup>517</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 476.

<sup>518</sup> William Schabas, 'Mens Rea and The International Criminal Tribunal for the Former Yugoslavia' (2003) 37 *New England Law Review* 1015, 1017.

crime. In *Blaškić*, the ICTY Trial Chamber held that ‘in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct’.<sup>519</sup> The ICTY Appeals Chamber disagreed with this viewpoint in *Vasiljević* in which it held that ‘knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator’s crime suffices for the *mens rea* requirement of this mode of participation’.<sup>520</sup> In *Tadić*, the ICTY Appeals Chamber concluded that ‘in the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal’.<sup>521</sup> The position taken by the ICTY Trial Chamber in *Orić* caused further confusion as it referred to a double intent requirement, similar to the one used in domestic law.<sup>522</sup>

In conclusion, we accept that the *actus reus* of aiding and abetting requires the defendant to have contributed substantially to the commission of the crime and that he or she acted ‘with the knowledge that such act would lend practical assistance, encouragement, or moral support to the commission of a crime or underlying offence’.<sup>523</sup> For the *mens rea* it is now accepted that the defendant was aware of the essential elements of the crime or underlying offence for which he or she is charged with responsibility, including the mental state of the physical perpetrator or intermediary perpetrator.<sup>524</sup> Differing requirements may be imposed on aiding and abetting offences that require a specific intent. In *Simić* for example, the ICTY Appeals chamber referred to aiding and abetting the crime of persecution.<sup>525</sup> In those cases, it was held, the defendant ‘must

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<sup>519</sup> *Blaškić (Trial Judgment)* (n 46) para 286.

<sup>520</sup> *Vasiljević (Appeal Judgment)* (n 46) para 102.

<sup>521</sup> *Tadić (Appeal Judgment)* (n 41) para 229.

<sup>522</sup> *Prosecutor v Orić (Trial Judgment)* IT-03-68-T (30 June 2006) para 288 in which it held that ‘the aider and abettor must have “double intent”, namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator’. See also *Prosecutor v Krnojelac (Trial Judgment)* IT-97-25-T (15 March 2002) para 90; *Prosecutor v Vasiljević (Trial Judgment)* IT-98-32-T (29 November 2002) para. 71; *Simić (Trial Judgment)* (n 483) para 163; *Naletilić and Martinović (Trial Judgment)* (n 503) para 63; *Brđanin (Trial Judgment)* (n 505) para 273; *Prosecutor v Blagojević and Jokić (Trial Judgment)* IT-02-60-T (17 January 2005) para 727; *Furundžija (Trial Judgment)* (n 476) para 245; *Prosecutor v Strugar (Trial Judgment)* IT-01-42-T (31 January 2005) para 350.

<sup>523</sup> *Vasiljević (Appeal Judgment)* (n 46) para 102; *Prosecutor v Milutinović and others (Trial Judgment)* - vol 1 IT-05-87-T (26 February 2009) para 93.

<sup>524</sup> *Prosecutor v Milutinović and others (Trial Judgment)* - vol 1 (n 523) para 93; *Aleksovski (Appeal Judgment)* (n 503) para 162; *Prosecutor v Simić and others (Appeal Judgment)* IT-95-9-A (28 November 2006) para 86.

<sup>525</sup> *Simić and others (Appeal Judgment)* (n 525) para 86.

thus be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime'.<sup>526</sup>

Article 25 (3) of the RS and article 7(1) of the ICTY Statute refer to aiding and abetting a crime generally and do not exclude aiding and abetting by omission.<sup>527</sup> There is, however, no specific reference to omission liability in article 25 of the RS<sup>528</sup> or article 7(1) of the ICTY Statute. An important indicator of whether omission liability may be recognised indirectly by the ICC or the ad hoc tribunals is the interpretation of the modes of liability in their jurisprudence and the limitations applied to the specific offences. As Berster, Werle and Van Sliedregt also argued,<sup>529</sup> the general principles of international law may give an impression of whether omission liability could apply.<sup>530</sup>

As I have mentioned in the introduction to the thesis, the ICC lacks jurisprudence explicitly dealing with liability for omissions. Most conclusions about the scope of the Rome Statute and the jurisdiction of the Court in this regard are therefore based on a textual interpretation of the Rome

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<sup>526</sup> Ibid.

<sup>527</sup> The interpretation of 'commission' and thus participation is shaped by the ICTY's jurisprudence. In the *Tadić* appeal judgment, the Chamber defined committing as 'a) the physical perpetration of a crime by the defendant himself, or the culpable omission of an act that was mandated by a rule of criminal law or b) participation in the realisation of a common design or purpose (or participation in a JCE)', see *Tadić (Appeal Judgment)* (n 41) para 181. In its *Kvočka and others* trial judgment, the Chamber held that committing should be seen as the 'perpetrator participates physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others'. See *Prosecutor v Kvočka and others (Trial Judgment)* IT-98-30/1-T (2 November 2001) para 251. In the view of the courts, participation can thus refer to either active or inactive conduct.

<sup>528</sup> Olásolo (n 28) 84. The final draft version of the Rome Statute, however, did include an article that dealt with omission liability. This article was not included in the Statute itself, but it is interesting to see how the Preparatory Committee phrased the inclusion of omission in the '*actus reus*': 'a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without reasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where: b) in the circumstances, the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].[]' See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court (14 April 1998) UN Doc A/CONF.183/2, draft article 28 at 33. The draft article aimed to criminalise both the direct (article 2a) and indirect (article 2b) forms of omissions. See also Robert Cryer, *Prosecuting International Crimes Selectivity and the International Criminal Law Regime* (CUP 2005) 263.

<sup>529</sup> See p. 113 ff.

<sup>530</sup> Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009) 6.

Statute. Berster has written extensively about liability for omissions under the RS. He is of the opinion that, for the ICC to have jurisdiction over crimes committed by omission, the duty to act should be included in the description of the specific offences in article 6-8 of the RS.<sup>531</sup> This follows from the legality principle in article 22(2) of the RS that prescribes that the ‘definition of a crime shall be strictly construed and shall not be extended by analogy’.<sup>532</sup> Article 22(1) of the RS further confirms this as it states that ‘[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court’. This complicates the criminalisation of omissions under the RS, as long as they are not explicitly included in the text. There have been commentators who have disputed such a strict textual interpretation of the Statute. Broomhall for example argued that the term ‘conduct’ used in article 22(1) of the RS may refer to both acts and omissions.<sup>533</sup> This is however only the case if the conduct meets the requirements set for the specific crime or the mode of liability. Since the RS contains no separate crime of omission, it is not likely that an omission will be tried under the RS. If indirect omissions occur, the specific crimes must be result crimes and the result must then be brought about by the required failure to act while having a duty to act.

Although we focus on the modes of liability mostly in relation to omission liability, the special part of the Statutes (article 6-8 of the RS and articles 2-5 in the ICTY Statute) provide an important implication of whether crimes can be committed by omission. The ad hoc tribunals however have so far mainly focused on the general part of the Statute to assess whether liability for omissions could arise. They remarkably refrained from analysing the special part of the Statute to see whether there was scope for omission liability in the definition of the crimes.<sup>534</sup>

Yet, the interpretation of the specific part of the statutes of the ICC and the ad hoc tribunals is crucial to determine whether crimes can be committed by omission. I already observed in section 4.2 that it is not likely that the Dutch and Belgian peacekeeping commanders committed or contributed to the commission of genocide or crimes against humanity because the high threshold

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<sup>531</sup> Berster, “‘Duty to Act’ and ‘Commission by Omission’” (n 291) 641.

<sup>532</sup> Article 22(2) of the RS refers to the *nullem crimen sine lege* principle.

<sup>533</sup> Bruce Broomhall, ‘Article 22 – Nullum Crimen Sine Lege’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (CH Beck 2008) 722–723.

<sup>534</sup> Duttwiler (n 291) 46–47.

imposed for these crimes is not likely to be reached by the conduct of the commanders. We will therefore not consider whether these crimes can be committed by omission. It suffices to refer to the ICTR's trial judgment in the *Kambanda case*<sup>535</sup> which confirmed that *all the acts of genocide* can be committed by omission. The judgment referred to 'acts or omissions' resulting in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and also complicity to genocide.<sup>536</sup> In relation to crimes against humanity, article 5 of the ICTY Statute does not necessarily exclude the option that crimes against humanity may be committed by omission. In contrast to the ICTY Statute however, the Rome Statute limits crimes against humanity to 'any of the following acts'. This could be interpreted as excluding anything *other than* acts, therefore omissions.

This is different where it concerns the category of war crimes. Article 2(c) of the ICTY Statute regarding the 'grave breaches of the Geneva Conventions' defines this category of crime as 'wilfully causing great suffering or serious injury to body or health'. This requires no positive action and could be fulfilled by inaction. Surely, 'to cause' does not restrict the result to follow from acts, but leaves scope for great suffering or injury to be established by omission. In contrast, language such as 'killing', 'treatment', etc. refer more clearly to active conduct.<sup>537</sup> Article 8 of the RS regarding war crimes leaves less scope for liability by omissions. Like crimes against humanity, the RS limits the scope of the provision to 'acts'. Article 3 of the ICTY Statute also contains a list referring to active ways of violating the laws or customs of war, such as 'employment of poisonous weapons', 'wanton destruction', 'attacks or bombardments', etc. An immediate conclusion could be that despite small differences between the two statutes, the RS has adopted a narrower approach to how the core crimes can be committed, which may leave less

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<sup>535</sup> *Prosecutor v Kambanda (Trial Judgment)* ICTR 97-23-T (4 September 1998) para 40.

<sup>536</sup> Ibid. See also Raneisha Blair, International War Crimes Project Rwanda Genocide, 'Prosecution Memorandum For The Office Of The Prosecutor Issue #2: Can An Omission Fulfill The Actus Reus Requirement For Complicity In Genocide, And To What Degree Does Article 6(3) Of The ICTR Statute Impute Criminal Liability For The Crime To A Superior Officer?' (Case Western Reserve University School Of Law 2003)

<sup>537</sup> However, in the first session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, the parties explained that the word 'killed' is similar to the term 'caused death'. This is a good example of an indication that inaction may fulfil the *actus reus* of the crime. 'Killed', in contrast, would indicate that an action is required to establish the result. The use of terminology in the provisions can make a clear difference in whether the 'conduct' or the 'result' establishes the criminality -or the 'unlawfulness' as referred to in the draft provision on omissions- of a certain offence, see First session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, 3-10 September 2002, 125; Byron (n 530) 28.

scope for these crimes to be committed by omission.

## 4.5 The Elements of Omission Liability in International Law

Although the interpretation of the Statutes has been discussed in the scholarship on international law and there may be space to argue that omissions can be read in the statutes, it is still too vague to draw conclusions. We will therefore move towards an assessment of the jurisprudence of the international courts, which in practice means that we will consider the jurisprudence of the ad hoc tribunals. The ICTY's *Prosecutor v Mrkšić* case is the most noteworthy in this respect, but other cases like *Prosecutor v Ntagerura and others* and *Prosecutor v Rutaganira* also shed light on the scope of omission liability and the duty requirement in specific.<sup>538</sup> In discussing these cases I will assess how omission liability is established under international law: which elements are required and how would this potentially affect the individual responsibility of the Dutch and Belgian peacekeeping commanders?

### 4.5.1 Actus Reus: Duty to Act

The *actus reus* for omission liability in international law deviates little from the one for domestic law. A duty to act and a subsequent failure to act are required.<sup>539</sup> For *participation by omission* to be established, the additional requirements are that the defendant should have had the ability to act, that he or she failed to act intending to bring about the consequences, or was aware of or consented to those consequences occurring and that his or her failure to act resulted in the

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<sup>538</sup> In addition, the following cases were important in the development of omission liability (and 'commission by omission' in specific): *Delalić and others (Trial Judgment)* (n 503); *Blaškić (Trial Judgment)* (n 46); *Prosecutor v Kordić & Čerkez (Trial Judgment)* IT-95-14/2-T (26 February 2001).

<sup>539</sup> The Appeals Chamber of the ICTY has previously found that 'the omission to act where there is a legal duty to act can lead to individual criminal responsibility under Article 7(1) of the Statute'. Moreover, the Appeals Chamber has consistently found that, in the circumstances of a given case, the *actus reus* of aiding and abetting may be perpetrated through an omission, as mentioned in *Nahimana and others v Prosecutor (Appeal Judgment)* ICTR-99-52-A (28 November 2007) para 482; *Prosecutor v Mrkšić (Trial Judgment)* IT-95-13/1-T (27 September 2007) paras 553-554; *Blaškić (Appeal Judgment)* (n 120) para 47; *Prosecutor v Taylor (Trial Judgment)* SCSL-03-01-T (18 May 2012) para 482; *Furundžija (Trial Judgment)* (n 476) para 235, 249; *Ntagerura and others (Trial Judgment)* (n 488); *Prosecutor v Rutaganira (Trial Judgment)* ICTR-95-1C (14 May 2005) para 65.

commission of the crime.<sup>540</sup> An additional, yet debatable requirement is the specific direction requirement I referenced to above. In *Orić* it was held that ‘his omission must be *directed* to assist, encourage or lend moral support to the perpetration of a crime’.<sup>541</sup> Whether or not this requirement is part of aiding and abetting by omission will be discussed in section 4.5.3. Another requirement not set in stone is that the duty to act held by the defendant should have been ‘mandated by a rule of criminal law’.<sup>542</sup> This would implicate that duties based on IHL and IHRL cannot support a *legal* obligation to act under international criminal law. Dutwiler observed that ‘domestic and international law interact’ and that

in (...) the international law of armed conflict, the obligations of individuals have always been defined on two levels: On the domestic level, certain functions are attributed (e.g. who is to be a member of the armed forces), which are filled with duties on the international level (defining what the obligations of combatants are).<sup>543</sup>

In Berster’s opinion however,

deriving criminal responsibility for omissions through reliance on duties extraneous to criminal law seems inconsistent insofar as the commission of an offence through action presupposes a duty of international criminal law, while committing the same crime by omission could be based on duties far remote from the sphere of international criminal law.<sup>544</sup>

The jurisprudence of the ad hoc tribunals demonstrates that the duty to act can be founded on sources outside international criminal law. In *Galić*<sup>545</sup> the ICTY Appeals Chamber referred to the requirement that the duty must be a ‘legal duty’, thus not necessarily based on criminal law. A

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<sup>540</sup> *Prosecutor v Mrkšić (Appeal Judgment)* IT-95-13/1-A (5 May 2009) para 49 reads: ‘[t]he *actus reus* of aiding and abetting by omission will thus be fulfilled when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime. The Appeals Chamber recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty. This was also held in *Prosecutor v Orić (Appeal Judgment)* IT-03-68-A (3 July 2008 ) para 43; *Prosecutor v Milutinović and others (Trial Judgment) - vol 1 (n 523)* para 92.

<sup>541</sup> *Orić (Appeal Judgment)* (n 540) para 43.

<sup>542</sup> *Ntagerura and others (Trial Judgment)* (n 488) para 659; *Mrkšić (Trial Judgment)* (n 539); *Mpambara (Trial Judgment)* (n 483); *Milutinović and others (Trial Judgment) - vol 1 (n 523)* fn 112; *Tadić (Appeal Judgment)* (n 41) para 188; Berster, “‘Duty to Act’ and “‘Commission by Omission’” (n 291) 623 ff.

<sup>543</sup> Dutwiler (n 291) 56; Spijkers (n 22) 54–55.

<sup>544</sup> Berster, ‘Article III’ (n 306) 104.

<sup>545</sup> *Prosecutor v Galić (Appeal Judgment)* IT-98-29-A (30 November 2006) para 175; *Orić (Appeal Judgment)* (n 540) para 43; *Milutinović and others (Trial Judgment) - vol 1 (n 523)* para 103. *Prosecutor v Ntagerura and others (Appeal Judgment)* ICTR-99-46-A (7 July 2006) para 334 referred to a legal duty to act, rather than one mandated by criminal law.

similar wide scope was referred to in *Orić*: ‘[s]uch a duty can, in particular, arise out of responsibility for the safety of the person concerned, derived from humanitarian law or based on a position of authority, or can result from antecedent conduct by which the person concerned has been exposed to a danger’.<sup>546</sup> In *Ntagerura and others*, the Prefect of the local council and defendant, Bagambiki, was assumed to have the duty to ‘ensure the protection and safety of the civilian population within his prefecture’.<sup>547</sup> Allegedly, ‘[he failed or refused] on several occasions (...) to assist those whose lives were in danger and who requested his help’.<sup>548</sup> The duty to which reference was made had its foundation in Rwandan administrative law<sup>549</sup> that obligates a Prefect to ‘ensure the tranquillity, public order, and security of people and property’.<sup>550</sup> Based on that duty, Bagambiki was expected to act because of his position as a political superior. It even allowed him to request the intervention of armed forces.<sup>551</sup> Where the Trial Chamber concluded that criminal responsibility under article 6(1) of the ICTR Statute would not apply, because it was not a duty mandated by criminal law,<sup>552</sup> the Appeals Chamber was not sure whether a *general* or a *criminal law* provision established the duty to act.<sup>553</sup> That question was left unanswered as the Appeals Chamber reasoned that even if criminal responsibility under article 6 (1) of the ICTR Statute had applied, the Prosecution failed to show which possibilities were open to Bagambiki to fulfil his duties under Rwandan law.<sup>554</sup>

In his separate and dissenting opinion to the *Ntagerura and others* trial judgment, Judge Pavel Dolenc held that a specific indication of the legal basis for a duty to *act must be defined* to constitute commission by omission.<sup>555</sup> Judge Dolenc further stated that the principle of precision

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<sup>546</sup> *Orić (Trial Judgment)* (n 522) para 304. In *Blaškić (Appeal Judgment)* (n 120) para 668 the Appeals Chamber held the following: ‘The Appellant was under a duty, imposed upon him by the laws or customs of war, to care for the protected persons put in danger, and to intervene and alleviate that danger. He did not. The consequential breach of his duty, leaving the protected persons exposed to danger of which he was aware, constituted an intentional omission on the part of the Appellant’.

<sup>547</sup> *Ntagerura and others (Trial Judgment)* (n 488) para 658.

<sup>548</sup> *Ibid*. The indictment in this case included a charge for criminal responsibility under article 6 (1) of the ICTR Statute for an omission despite a duty to act.

<sup>549</sup> The Rwandan Law on the Organisation and Function of the Prefecture.

<sup>550</sup> *Ntagerura and others (Trial Judgment)* (n 488) para 660.

<sup>551</sup> *Ibid*; Article 11 of the Rwandan Law on the Organisation and Function of the Prefecture.

<sup>552</sup> *Ibid* paras 61, 660, 678.

<sup>553</sup> *Ntagerura and others (Appeal Judgment)* (n 545) para 334.

<sup>554</sup> *Ibid* para 335.

<sup>555</sup> See Separate and Dissenting Opinion Judge Dolenc to *Ntagerura and others (Trial Judgment)* (n 488) para 22. This means that the following elements should be clearly defined: (i) sufficient particulars of the underlying crime

should be applied in a strict sense, considering the serious nature of the crimes.<sup>556</sup> This is in line with the ICTY Trial Chamber's remark in *Delalić and others* that 'great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote'.<sup>557</sup> In *Mrkšić*,<sup>558</sup> the Chamber recognised a duty of care similar to the one in the German tradition on omissions. The ICTY assessed the responsibility of Šljivančanin who, as head of the security guards and major in the Yugoslav National Army (JNA), was responsible for the well-being of prisoners held captive in Vukovar. When Šljivančanin handed them over to the Croatian Defence Council (HVO), this resulted in the prisoners being killed. He failed to take measures to prevent the commission of crimes against the POWs under his protection, which amounted to a breach of the legal duty that comes with his profession as head of security. This may incur criminal responsibility pursuant to Article 7(1) of the Statute.<sup>559</sup> However, the ICTY Trial Chamber argued that Šljivančanin could only be responsible for the crimes he *witnessed* and the crimes that *continued that same day*.<sup>560</sup> Regarding the origin of the duty, the Appeals Chamber referred to the *Blaškić* judgment when it stated that the duty to act can be based on the laws and customs of war and that its failure may give rise to individual criminal responsibility.<sup>561</sup>

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so that it may be identified without any ambiguity; (ii) particulars of the subordinate perpetrator(s); (iii) the legal or factual basis for establishing a superior-subordinate relationship between the accused and the principal perpetrators; (iv) a description of the necessary and reasonable measures, within the accused's authority, duty, and disposal which the accused failed to take; (v) a statement that the accused had knowledge, or sufficient information to conclude, that his subordinates were about to commit a crime; and (vi) an allegation that these measures, if applied, may have prevented the subordinate from committing the crime.

<sup>556</sup> Ibid para 23.

<sup>557</sup> *Delalić and others (Trial Judgment)* (n 503) para 377.

<sup>558</sup> *Mrkšić (Trial Judgment)* (n 539); *Mrkšić (Appeal Judgment)* (n 540). *Mrkšić* is the first case that explicitly confirmed that a commander or higher ranked military officer can be held responsible for crimes committed by others than his subordinates. Mrkšić and Šljivančanin were convicted for their 'involvement' in the mistreatment and execution of nearly 300 Croat and other non-Serb forces who were taken from Vukovar hospital to a prison camp in Ovčara where the crimes eventually took place. Mrkšić had several brigades under his command as a colonel in the Yugoslav National Army (JNA), whereas Šljivančanin was head of the security guards and held the rank of major in the JNA chain of command. Mrkšić ordered the evacuation of the hospital in Vukovar and made Šljivančanin responsible for the security of the POWs during their transport to Sremska Mitrovica with the aim of exchanging them for Serbian Prisoners of War (POWs). On the day of the transport itself however, Mrkšić changed his mind and gave orders to bring the Croatian POWs to Ovčara, to hand them over to the Vukovar Territorial Defence group who would eventually commit the crimes. In the days preceding this decision, Mrkšić was informed about this group's activities elsewhere that also included mistreatment and execution of non-Serb POWs. Šljivančanin was in no way involved in this decision-making process. The question raised in this judgment was to what extent the defendants, Mrkšić and Šljivančanin, aided and abetted the killing of the POWs in Ovčara.

<sup>559</sup> *Mrkšić (Trial Judgment)* (n 539) para 669.

<sup>560</sup> Ibid para 672.

<sup>561</sup> *Mrkšić (Appeal Judgment)* (n 540) para 151.

The ICTR clarified the scope of the duty in *Prosecutor v Rutaganira*,<sup>562</sup> by looking at Rutaganira's authority as a *conseiller communal* and drawing a remarkably heavy duty from this authority. The main conclusion was that Rutaganira had the authority to gather people and discuss the ongoing atrocities, which he failed to do.<sup>563</sup> As a 'prominent member of the local community', he could be said to have the moral power to influence the population's actions.<sup>564</sup> The ICTR Trial Chamber furthermore held that

international law also places upon a person vested with public authority a duty to act in order to protect human life. Indeed, the State to which it falls to carry out international obligations, can only act through all its representatives, be they in the upper reaches or at lower levels of Government. The State itself can fulfil its international obligations and not incur any responsibility not only because of its representatives' respect for human rights but also by reason of actions taken, in the performance of their duties, to prevent any violation of the said rights.<sup>565</sup>

The Chamber furthermore stated that 'as any person, all public authorities have a duty not only to comply with the basic rights of the human person, but also to ensure that these are complied with, which implies a duty to act in order to prevent any violation of such rights'.<sup>566</sup> The Chamber seemed to be of the opinion that people with public authority have a duty to prevent violations of basic human rights.<sup>567</sup> This was strengthened by its statement that

[i]ndeed, violence to physical well-being suffered by thousands of people during the said events affects the very fundamental interests of Humanity as a whole, and the protection of such interests cannot be counterbalanced by the mere personal risk that may have been faced by any person in a position of authority who failed to act in order to assist people whose lives were in danger.<sup>568</sup>

Rutaganira's authority placed him in a unique position, which resulted in a duty to assist people in danger. The Chamber also implied that he had a duty to report the crimes committed in his local area to the authorities. It also stated that Rutaganira had a duty to prevent people in his community

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<sup>562</sup> *Rutaganira (Trial Judgment)* (n 539) para 15. Vincent Rutaganira faced a charge of complicity (by omission) to the crime of extermination (crime against humanity) under Article 3(b) of the ICTR Statute.

<sup>563</sup> *Ibid* para 73.

<sup>564</sup> *Ibid* para 75-77.

<sup>565</sup> *Ibid* para 78.

<sup>566</sup> *Ibid* para 79.

<sup>567</sup> *Ibid*.

<sup>568</sup> *Ibid* para 81.

from participating in the attacks, and a duty to assist victims of these attacks.<sup>569</sup> There is no other judgment in the international criminal courts that would stretch the duty of a superior to protect the civilian population this far. Although it may concern a duty towards his ‘own People’, this is not specified as such by the Chamber. It refers to a general duty of ‘a person in a position of authority’ to ‘assist people whose lives were in danger’. Given the public authority held by the Dutch and Belgian commanders as public officials and state agents, a similar obligation could be imposed on them if their TCC has the required jurisdiction over the territory under IHRL. This will be discussed in more detail in chapter 5.

This judgment indicates that duties under international criminal law may have their foundation outside international criminal law, and could be based on human rights law, without specifying the specific norm on which the duty would be based. Consequently, it will be of interest to assess in chapter 5 whether the same applies for peacekeeping commanders, considering that in both Srebrenica and Kigali, IHRL provided the peacekeepers with the minimum norms they were ought to respect.

If we compare the discussion in international law with the assessment of duties under domestic law, the discussion focuses more on the source of the legal duty. Other than in the domestic sphere, the international courts have thus far not analysed the interpretation and demarcation of the duty to act to the extent as this occurred in the domestic laws under review. To assess whether liability based on an omission creates liability for failing to act or for the contribution to the result, the additional requirements for aiding and abetting need to be addressed in the context of omissions.

#### 4.5.2 Actus Reus of Aiding and Abetting: the Contribution Required

To assess how aiding and abetting by omission is limited and interpreted, we must look into the requirements for aiding and abetting and how these have been applied to omissions. Where the causal connection between failing to act and the criminal result is an important aspect for liability

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<sup>569</sup> Ibid para 82-83.

for omissions under domestic law, international criminal law focuses on the effect of certain conduct on the commission of the crime.

The ICTR Trial Chamber broke the required connection between failing to act and the commission of the crime down in two criteria in its *Rutaganira* judgment: 1) there must be a temporary or geographical connection and; 2) the aiding and abetting of the crime should have had a *substantial and decisive effect* on the principal perpetrator of the crime.<sup>570</sup> This is also referred to as a ‘substantial contribution’ or ‘substantial assistance’ to the commission of the crime.<sup>571</sup> In *Popović and others*, the ICTY Trial Chamber looked into this aspect of aiding and abetting in relation to omissions and concluded that

whether an omission constitutes “substantial assistance” to the perpetration of a crime requires a fact based enquiry. The fact that the accused provided a more limited assistance to the commission of a crime than others does not preclude the accused’s assistance from having had a substantial effect on the perpetration of the crime. With regard to the standard of proof, the Prosecution must show (i) that the omission had a substantial effect on the crime in the sense that the crime would have been substantially less likely had the accused acted; and (ii) that the accused knew that the commission of the crime was probable and that his inaction assisted it.<sup>572</sup>

This was an attempt to define the notion of substantial assistance and indicate how it should be demonstrated. However, the exact threshold for the impact of the assistance or contribution has not been crystallised sufficiently. In *Tadić*, the ICTY Trial Chamber only referred to ‘participation in that the conduct of the accused contributed to the commission of the illegal act’,<sup>573</sup> which did not contain a reference to the scope of the contribution. The now more accepted threshold of substantial contribution is still difficult to define.<sup>574</sup> In the opinion of the ICTR, *Rutaganira*’s contribution was both substantial and decisive, and there was a temporal and geographical connection between *Rutaganira* and the crimes committed.<sup>575</sup> His conduct thus established the *actus reus* for aiding and abetting extermination by omission, since the duty to act was already established, as discussed in the previous section. The required connection between failing to act

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<sup>570</sup> *Ntagerura and others (Trial Judgment)* (n 488) paras 84-88. The requirement of a substantial and decisive effect is accepted by both ad hoc tribunals.

<sup>571</sup> *Orić (Trial Judgment)* (n 522) para 681 referred to a substantial contribution.

<sup>572</sup> *Prosecutor v Popović and others (Trial Judgment)* IT-05-88-T (10 June 2010) para 1019.

<sup>573</sup> *Tadić (Trial Judgment)* (n 514) para 674.

<sup>574</sup> Larry May, ‘Complicity and the Rwandan Genocide’ (2010) 16 *Res Publica* 135, 137.

<sup>575</sup> *Rutaganira (Trial Judgment)* (n 539) paras 85-87.

and the result indicates, as also highlighted in the discussion of the domestic case law, that the aider and abettor is held directly responsible for the result. This is an important factor in trying to understand what the defendants in cases of omission liability are held accountable for.

It is not undisputed that an omission can form ‘substantial assistance’ to the commission of a crime.<sup>576</sup> Berster for example held that aiding and abetting by omission cannot be realised, because substantial assistance requires a ‘physically effective momentum, an operative influence upon the course of events which would be missing in the case of a failure to act, which in fact is a nonentity in physical terms’.<sup>577</sup> One can see that Berster focuses on the element of control, which allows him to argue that if the defendant had the required control, the defendant would be a co-perpetrator rather than an accomplice.<sup>578</sup> Focusing on control as an element for liability may be suitable to establish liability as a principal, but lacks the refinement to differentiate between different types of secondary liability. As a result, an analysis based on the premise that a certain level of control is required to speak of aiding and abetting may neglect conduct that may assist in the commission of a crime, but that does not necessary qualify as ‘a physically effective momentum’. Inaction may as well contribute to the commission of crimes,<sup>579</sup> as the ICTY Trial Chamber in *Popović and others* indicated.

The *Mrkšić* and *Popović and others* cases underline that the substantial contribution is also part of aiding and abetting by omission. Even though Šljivančanin claimed that he could not have fulfilled this requirement because he was not even present at the crime scene and other JNA officers who were present had more influence on the commission of the crime than he had, the ICTY Appeals Chamber disagreed. In its response, the Appeals Chamber held that ‘the fact that the accused provided more limited assistance to the commission of a crime than others does not preclude the accused’s assistance from having had a substantial effect on the perpetration of the crime’.<sup>580</sup> If the Dutch and Belgian commanders would be tried, they would be judged according to their own respective roles in the events and they would not be able to seek the defence of

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<sup>576</sup> *Mrkšić (Appeal Judgment)* (n 540) para 146.

<sup>577</sup> Berster, ‘Article III’ (n 306) 97.

<sup>578</sup> *Ibid.*

<sup>579</sup> Miles Jackson, *Complicity in International Law* (OUP 2015) 108.

<sup>580</sup> *Mrkšić (Appeal Judgment)* (n 540) para 200. See also *Blagojević & Jokić (Appeal Judgment)* (n 480) para 134.

superiors or people outside the chain of command being more involved. In *Marchal*,<sup>581</sup> the Court also looked at the unit's own responsibility, but focused on the level of control –primary or secondary- held regarding the conduct under review.

Having the ability to act but not doing so is relevant in fulfilling the substantial contribution requirement, just like the ability to act was relevant for the *actus reus* on the domestic level. Larry May also stated that having the ability to act is more important in establishing aiding and abetting by omission than the actual relationship is.<sup>582</sup> This is a similar argument to the one Tolmie made, as I have discussed earlier in chapter 3.<sup>583</sup> May links the ability to act to knowledge about the risk that failing to act contributes substantially to the commission of a crime. The knowledge of that risk would make neglecting the ability to act culpable if the defendant had a duty to act. That creates a connection between the failure to act and the criminal consequence.

In an objective assessment of the contribution made, one can assess whether the result would have occurred 'but for' the omission. This need not be an absolute causal connection. For example, the ICTY Appeals Chamber argued in *Mrkšić* that the killings would have been 'substantially less likely' if Šljivančanin had secured the return of the military police to the hangar in Ovčara where the prisoners were held.<sup>584</sup> Therefore, the Appeals Chamber found that 'Šljivančanin's failure to act pursuant to his duty under the laws and customs of war substantially contributed to the murder of the prisoners of war'.<sup>585</sup> It was clear from the circumstances that Šljivančanin had the ability to act.<sup>586</sup> Further, the Appeals Chamber disagreed with the Trial Chamber that Šljivančanin's duty to protect the prisoners ended as soon as Mrkšić ordered the withdrawal of the military police. His failure to act pursuant to that duty contributed substantially to the killings.<sup>587</sup>

Šljivančanin's conviction for his failure to prevent crimes was remarkable not only because the

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<sup>581</sup> Text to n 125 (Ch. 2).

<sup>582</sup> Larry May, *Genocide: A Normative Account* (CUP 2010) 166.

<sup>583</sup> Text to n 344 (Ch. 3).

<sup>584</sup> *Mrkšić (Appeal Judgment)* (n 540) para 100.

<sup>585</sup> *Ibid* para 100.

<sup>586</sup> *Ibid* para 154.

<sup>587</sup> *Ibid* para 102.

Court convicted him for his failure to protect people placed under his protection, but also because it demonstrated that this failure contributed substantially to the killings. As such, the Court applied the same questionable reasoning as seen in several domestic cases; it established a failure to act on the one hand, but connected it to the criminal result. It is then a combination of a direct and an indirect omission. This case is also distinct from the *Ntagerura* and *Rutaganira* cases, because these cases both contained aspects that resembled superior responsibility. Yet, Šljivančanin's authority was also an important factor in the *Mrkšić* judgment. The Appeals Chamber blamed Šljivančanin for failing to do what was expected of him in his position.<sup>588</sup> The consequent responsibility for aiding and abetting the crimes of torture and cruel treatment by omission may be an explicit failure of duty, but that does not relieve him from being a party to the main offence. The substantial contribution requirement links the aider and abettor to the criminal result. Šljivančanin would probably not have been convicted however had the Appeals Chamber recognised the specific direction requirement as being essential for the *actus reus* of aiding and abetting. In contrast to what the Appeals Chamber held in *Tadić*<sup>589</sup> and *Orić*,<sup>590</sup> this additional requirement was rejected in the *Mrkšić* appeal judgment.<sup>591</sup>

#### 4.5.3 Specific direction

This specific direction requirement triggered an extensive debate in the courts and academia pursuant to the controversial judgments in *Prosecutor v Perišić*.<sup>592</sup> This requirement would apply if the defendant is allegedly part of a criminal organisation that carries out so-called 'mixed activities'. These activities are considered 'mixed' because they can be both lawful and unlawful.

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<sup>588</sup> Ibid para 674. Since the cruel treatment and torture both followed from the same physical acts, and Šljivančanin fulfilled the additional requirement for torture, he was only convicted for aiding and abetting the crime of torture.

<sup>589</sup> *Tadić (Appeal Judgment)* (n 41) para 229.

<sup>590</sup> Text to n 571.

<sup>591</sup> *Mrkšić (Appeal Judgment)* (n 540) para 159.

<sup>592</sup> *Perišić (Trial Judgment)* (n 505); *Prosecutor v Perišić (Appeal Judgment)* IT-04-81-A (28 February 2013). The specific direction requirement has been mentioned in a number of cases in recent years and was rejected in much debated judgments among which *Taylor (Trial Judgment)* (n 539) para 484. In *Prosecutor v Taylor (Appeal judgment)* SCSL-03-01-A (26 September 2013) para 354 however, the Chamber held that neither specific direction nor a causal 'but for' connection was required. This was also confirmed in *Prosecutor v Lukić & Lukić (Appeal judgment)* IT-98-32/1-A (4 December 2012) para 424; *Prosecutor v Sainović (Appeal judgment)* IT-05-87-A (23 January 2014) paras 1649-1650. In *Prosecutor v Stanisić and Simatimović (Trial Judgment)* IT-03-69-T (30 May 2013) para 2360, the Chamber applied the requirement but did not assign specific direction to the assistance. Judge Picard dissented and acknowledged how in his opinion the defendant specifically directed the crimes, see also para 2405.

This begs the question of whether someone's 'neutral assistance' which is then used or seen as a contribution to unlawful activities, may constitute criminal liability for aiding and abetting those crimes. General Momčilo Perišić was a high ranked commander in the Yugoslav army (VJ) who transferred operational control over his troops partly to General Mladić<sup>593</sup> and was, among others, closely involved in the genocide that took place in Srebrenica. Perišić allegedly assisted other armies, namely the Army of Republika Srpska (VRS) and the Army of the Serbian Krajina (VSK).<sup>594</sup> Whereas the ICTY Trial Chamber followed the *Mrkšić* appeal judgment in disregarding the specific direction requirement and sentenced Perišić to 27 years of imprisonment, the ICTY Appeals Chamber followed the approach adopted in *Tadić* and required specific direction.<sup>595</sup> Perišić was acquitted as the assistance was considered too remote from the crimes committed and Perišić was not present during the commission of the crimes.<sup>596</sup>

The cases dealing with specific direction are in some respects similar to the situation of the Dutch commanders in Srebrenica. First, the distance between the main perpetrators and the defendant, eg Perišić, was considerable. This includes the geographical distance between the defendant and the crimes,<sup>597</sup> but there was also no official relationship between the two armies in terms of a command structure. These similar circumstances must be considered if one wants to argue that the Dutch commanders facilitated the commission of war crimes. In the view of the Dutch commanders, the BSA was evacuating their compound to bring people to safety. The consideration to be made by the Dutch commanders is then whether their assistance was likely to contribute to the commission of crimes. Mr Harmon argued in *Perišić* that Perišić 'knew that the assistance was going to assist the VRS and that it was likely that that assistance would be used in the commission of crimes'.<sup>598</sup> For understandable reasons, it is debatable whether such conclusions should be drawn without requiring that the assistance had the *purpose* of assisting the crimes. This was illustrated by Judge Moloto who used an analogy to show that this appeared undesirable to him:

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<sup>593</sup> *Prosecutor v Perišić* amended indictment, 26 September 2005, IT-04-81-R, para 5.

<sup>594</sup> Christopher Jenks, 'Prosecutor v Perišić' (2013) 52 *International Legal Materials* 622, 622.

<sup>595</sup> *Perišić (Appeal Judgment)* (n 592) para 36.

<sup>596</sup> *Ibid* paras 39, 42, 73.

<sup>597</sup> *Stanisić and Simatimović (Trial Judgment)* (n 592) para 1264.

<sup>598</sup> As cited in Manuel Ventura's guest post on 'Spreading the Jam', 11 March 2013 <<http://dovjacobs.com/2013/03/>> accessed 25 April 2017.

A war began in Afghanistan in 2001 and it is generally known that there are allegations of crime[s] having been committed at least since 2002 to date. Does that make the commanders of the various NATO armies that are jointly participating in that war guilty of the crimes that are alleged to have been committed, and are still being committed, like detentions in Guantanamo, in Bagram, in Kabul and all these places?<sup>599</sup>

This is a valid point as it demonstrates that objective factors alone are arguably not sufficient to come to a conviction for contributing to the commission of a crime. Although specific direction is considered part of the *actus reus*, it seems more indicative of the defendant's mental state regarding the assistance provided and can thus be considered a subjective factor.<sup>600</sup>

However, specific direction is a high threshold for aiding and abetting that would equate aiding and abetting with perpetration, which means that the alleviated degree of criminality that is inherent to aiding and abetting is disregarded.<sup>601</sup> Requiring a clear intent or purpose, which specific direction arguably represents, means after all that the defendant was consciously involved in the commission of a crime. The instances of aiding and abetting where awareness or other cognitive forms of the mental element are now deemed sufficient will then result in an acquittal if the defendant did not direct his or her assistance to the commission of the crime. Using such a high threshold for the *actus reus* of aiding and abetting is also in contrast to the low threshold used for the *mens rea*. In *Bemba*, the Pre-Trial Chamber of the ICC confirmed that 'awareness' regarding the 'almost inevitable outcome' of the assistance is sufficient for aiding and abetting.<sup>602</sup> Adding specific direction to the requirements for aiding and abetting means that such awareness probably does not suffice and sheds a different light on the mental element required for aiding and abetting.

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<sup>599</sup> Manuel Ventura, 'Farewell "Specific Direction": Aiding and Abetting War Crimes and Crimes against Humanity in Perisic, Taylor, Sainovic et al., and US Alien Tort Statute Jurisprudence' in Stuart Casey-Maslen (ed), *The War Report: Armed Conflict in 2013* (OUP 2014) 514.

<sup>600</sup> This was also argued in Marko Milanovic, 'The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perišić', EJIL Talk, 11 March 2013 < <http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/>> accessed 25 April 2017.

<sup>601</sup> See Dissenting Opinion Judge Liu to the Perišić Appeal Judgment (n 592). Consider also the different *mens rea* standards used for co-perpetration/JCE (intent) and aiding and abetting (knowledge) as confirmed in *Vasiljević (Trial Judgment)* (n 522) para 73 indicating the difference in the degree of criminality.

<sup>602</sup> *Prosecutor v Bemba Gombo (Pre-Trial Judgment)* ICC-01/05-01/08 (15 June 2009) para 359. The Chamber confirmed that *dolus directus* in the second degree does not require the defendant to have the will to actually commit the crime, but awareness that the elements will be the 'almost inevitable outcome of his acts or omissions': 'the suspect is aware that the consequence will occur in the ordinary course of events'.

When placing the discussion regarding the specific direction requirement in the context of liability for omissions, there appears to be a broad scope for holding an aider and abettor responsible for the result if a specific direction requirement is not used. This results in using a strict form of liability that will qualify a defendant as a party to the offence (also referred to as the unitary perpetrator model),<sup>603</sup> which leads to a high degree of criminal responsibility. As the *Mrkšić* judgments and the *Perišić* trial judgment indicate, the bar for holding someone responsible for someone else's conduct is then relatively low. This could result in a problematic conviction if one considers the culpability principle, that aims to ensure that individuals are held accountable for their own conduct. Applying the specific direction requirement increases the threshold for aiding and abetting significantly, which means that also more culpable assistance could lead to impunity. If this is a threshold used in situations where the 'main perpetrators' are involved in both lawful and unlawful activities, the standard applied should reflect that factor of uncertainty. After all, the assistance may have contributed to lawful acts. Specific direction would relieve the Dutch and Belgian commanders from guilt, as they did not fail to protect the civilians with the intention that this would lead to their death. Also for contemporary and future PKOs it appears unlikely that peacekeeping commanders would have such a specific will or intent to aid and abet the commission of a crime.

#### 4.5.4 Mens Rea

The *mens rea* required for aiding and abetting by omission is similar to that in domestic law and that of aiding and abetting by positive conduct in international law. In *Prosecutor v Mrkšić*, the ICTY Appeals Chamber confirmed that the *mens rea* consists of two elements. First, it is required that 'the aider and abettor [knows] that his omission assists in the commission of the crime of the principal perpetrator' and second, the defendant 'must be aware of the essential elements of the crime which was ultimately committed by the principal'.<sup>604</sup> In *Prosecutor v Simić* however, the defendant did not have to be aware of the *specific* crime about to be committed, but he or she had to be 'aware that *one of a number of crimes* will probably be committed, and one of those crimes

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<sup>603</sup> Giustiniani (n 477) 419.

<sup>604</sup> *Mrkšić (Appeal Judgment)* (n 540) para 49, as confirmed in *Perišić (Trial Judgment)* (n 505) para 134.

is in fact committed’ to conclude that ‘[the defendant] has intended to facilitate the commission of that crime, and is guilty as an aider and abetter’.<sup>605</sup> In *Rutaganira*, the ICTR Trial Chamber limited the mental requirement to awareness of his duties and his moral authority towards the civilians.<sup>606</sup> That awareness of his position vis-à-vis the population and the fact that he knew of his failure to act led the Court to conclude that he was aware that his failure to act would further the commission of the crime.<sup>607</sup> This is in line with the requirements set out in *Ntagerura and others*.<sup>608</sup> This conclusion follows from the authoritative position held and the realisation that the defendant failed to do something that was expected of him in that position.

As mentioned above, in *Mrkšić* the ICTY Appeals Chamber found the *mens rea* for aiding and abetting in ‘awareness of the circumstances’ and the *realisation* that a failure to act would ‘assist in the murder of the prisoners’.<sup>609</sup> Šljivančanin argued in his defense that the *mens rea* requires a *conscious decision not to act* that reaches a threshold similar to consent. The ICTY Appeals Chamber however rejected the requirement that an aider and abettor should have had ‘the *intention* to provide assistance, or as a minimum, *accepted* that such assistance would be a possible and foreseeable consequence of his conduct’ in its *Vasiljević* judgment.<sup>610</sup> Judge Vaz held in her dissenting opinion that Šljivančanin did not have the required *mens rea* to be convicted for aiding and abetting murder by omission, since it should have been established without reasonable doubt<sup>611</sup> that ‘Šljivančanin *knew* that (i) killings of the prisoners of war were *likely* to take place at Ovčara and that (ii) his failure to take action in this regard *would assist* the commission of the murders’.<sup>612</sup> Strictly speaking, this is not awareness she referred to, but foreseeability of the commission of crimes. In her opinion, it was not evident that Šljivančanin was *aware of the likeliness* that the killings would occur.<sup>613</sup> She based this opinion on the fact that it was difficult to ‘foresee that the killings would occur as long as the prisoners of war remained

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<sup>605</sup> *Simić and others (Appeal Judgment)* (n 525) para 86; *Mrkšić (Appeal Judgment)* (n 540) para 49 (emphasis added).

<sup>606</sup> *Rutaganira (Trial Judgment)* (n 539) para 97.

<sup>607</sup> *Ibid* paras 95-99.

<sup>608</sup> *Ntagerura and others (Trial Judgment)* (n 488) para 659.

<sup>609</sup> *Mrkšić (Appeal Judgment)* (n 540) para 63.

<sup>610</sup> *Vasiljević (Appeal Judgment)* (n 46) para 102.

<sup>611</sup> Dissenting Opinion of Judge Vaz to the *Mrkšić* Appeal Judgment (n 540) paras 2, 4.

<sup>612</sup> *Ibid* para 2. (emphasis added)

<sup>613</sup> *Ibid* para 4.

under the authority of the JNA'.<sup>614</sup>

The few judgments discussed indicate that the standard for the *mens rea* for aiding and abetting by omission is at least lower than intent or knowledge, and may be similar to recklessness, combined with the awareness of failing to fulfil a duty to act, arguably even realising that such a failure would contribute to the commission of a crime. The level of probability that the failure would contribute to the result is not specified, and differs between the judgments discussed. Since it is not an absolute form of awareness, it may be considered recklessness, which was also the standard used on the domestic level. It was however not as frequently used as negligence.

On the international level, using recklessness (or a similar standard) as a subjective form of *mens rea* may be more appropriate than negligence given the fact that international criminal law deals with the commission of serious international crimes by omission. Considering this standard in the light of the Dutch and Belgian commanders, one can conclude –as argued with regard to recklessness in the domestic sphere- that they were arguably aware of the likelihood that serious crimes would take place, which could make them worthy of blame had a legal obligation applied to the Dutch and Belgian commanders. On the domestic level, even awareness would suffice to demonstrate aiding and abetting the commission of a crime.

More difficult to establish is whether the commanders were aware that they failed to fulfil a duty, if they had one, and that their failure to act would contribute to the commission of crimes. In both Kigali and Srebrenica, the commanders were aware that something terrible was about to happen. In Srebrenica, the fact that Franken admitted that they sacrificed the men to save the women could indicate that they were aware that their decision to allow the BSA to evacuate the compound would result in a massacre. They did not want the killings to take place, but they were aware that they would happen in the ordinary course of events. It is difficult to argue that the commanders consciously disregarded the serious consequences their passive conduct or withdrawal had. It can be argued that they did not see the opportunity to act differently in the chaotic and difficult circumstances. However, the more complex and integrated the responsibilities in contemporary

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<sup>614</sup> Ibid para 2.

PKOs become, the more difficult it will be to argue that military personnel were not properly prepared to protect basic human rights if necessary.

#### 4.6 Degree of Liability

The degree of liability will be derived from the type of involvement in the commission of the crime, eg as a principal or participant, and is based on the conclusions regarding the connection between the peacekeeping commander's failure to act and the criminal result. Although judiciary at the ICTY have argued that the terminology regarding principal or participant is 'non-normative' and would therefore not indicate the level of responsibility assigned,<sup>615</sup> the sentence imposed does not always determine the degree of liability alone. It seems commonly accepted that aiding and abetting represents a lesser degree of liability than, for example, Joint Criminal Enterprise, as Van Sliedregt also points out.<sup>616</sup> The degree of participation may not be the only relevant factor, as it is part of a number of rules,<sup>617</sup> but it is an important factor.

The conclusion that aiders and abettors are punished for the main crime and therefore as principals is particularly problematic in relation to omissions, because the legal duty combined with a low threshold for the *mens rea* could easily establish this type of liability. Solutions have been sought in domestic systems, like lower sentences for complicity in the Dutch and German system,<sup>618</sup> but in relation to serious international crimes differentiation on the sentencing level has not been established yet. Van Sliedregt refers to the 'principal–accomplice distinction in Nuremberg case law' that was 'nuanced', which made clear that regardless of the level of involvement, defendants received similar sentences. Van Sliedregt refers to *Katanga* as an example of how these norms are

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<sup>615</sup> Van Sliedregt, 'Perpetration and Participation in Article 25(3)' (n 39) 504.

<sup>616</sup> Ibid.

<sup>617</sup> Ibid, referring to Rule 145(1)(c) of the Rules of Procedure and Evidence to the Rome Statute, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A.

<sup>618</sup> Héctor Olásolo, 'Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 341; Jens David Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 519.

still being used.<sup>619</sup>

With regard to the responsibility for omissions, we can conclude that in the cases under review, the substantial contribution requirement connects the commander to the criminal result. Whereas the specific direction requirement could prevent that, it is sensible to consider the requirement undesirable because it would equate aiding and abetting with co-perpetration, as it would increase the defendant's involvement in the commission of the crimes. Discussing the specific direction requirement as if it is part of the *actus reus* of aiding and abetting should not distract judiciary from the fact that aiding and abetting with specific direction should be interpreted as sharing the intent of the principal. Using either low or high thresholds is undesirable in the light of the general principles of criminal law. The low thresholds used for omission liability in international law indicate that the Dutch and Belgian commanders could, in theory, be held responsible, had the general principles of criminal law not made such a conclusion unjustified. Holding them criminally responsible for the result would be in contrast with the culpability principle. Also, the ability to impose equal sentences on both perpetrators and assistants to the commission of the crime makes that the principle of fair labelling would be compromised. Only if the liability that follows would establish liability for failing to act as a separate offence, the conclusion would be different. In chapter 8 command responsibility will be discussed as an important example of establishing a separate type of liability for a military commander. The option of establishing a similar type of responsibility for peacekeeping commanders will be considered there. However, to create liability for a failure to act, whether as part of command responsibility or omission liability, a duty to act is required. Whether the Dutch and Belgian peacekeeping commanders had such a duty under international law, will be discussed in chapter 5.

#### 4.7 Comparative Perspective and Concluding Remarks

If one compares the conclusions on the domestic level with those on the international level, it is visible that international courts are still at the outset of defining their approach to this type of

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<sup>619</sup> Van Sliedregt, 'Perpetration and Participation in Article 25(3)' (n 39) 512 citing *Prosecutor v Katanga* (Trial Judgment) Situation in the Democratic Republic of the Congo, ICC-01/04-01/07-3436 (7 March 2014) para 1386.

liability. This was clear in relation to the duty to act and the lack of analysis applied on the international level. Rather than defining the exact triggers for a duty to act, the courts were more occupied with the sources from which these duties could be drawn. Negligence was not considered in the cases discussed in international criminal law, while this is the standard most commonly used on the domestic level. This underlines the difference between omission liability and command responsibility since the latter applies negligence as the *mens rea* standard.

However, the overall liability assigned to a defendant for a failure to act has the same shortcomings as at the national level. Although recklessness is more subjective than negligence, and is therefore more suitable in the context of criminal responsibility for serious international crimes, it is still a low threshold compared to intent or knowledge. Furthermore, the application of a counter-factual approach to causation on the domestic level demonstrates that the omitted act should have made a difference to the result, which links the omission once more to the actual crime. At the international level, we saw a similar tendency but then in the form of a substantial contribution requirement to the criminal result. Using such low standards may facilitate the conviction of peacekeeping commanders. Just like in domestic criminal law however, the general principles of criminal law would complicate such a conviction to a great extent. Attaching the peacekeeping commanders' responsibility to the criminal result would make them responsible for conduct committed by others. It would also attach an unfair stigma to the commander as an actor involved in the commission of war crimes.

A special mention should be made of the specific direction requirement that will be of particular importance in defining the standards for aiding and abetting by omission. The discussion on this supposed element of aiding and abetting is still ongoing. The recent appeal judgment in *Stanisić and Simatimović*, which rejected the use of specific direction,<sup>620</sup> further complicates our interpretation of aiding and abetting by omission. Where applying specific direction for aiding and abetting may result in impunity in a number of aiding and abetting cases, particularly if these cases concern liability for an omission, the current interpretation imposes a high degree of liability for aiding and abetting by omission. This is also undesirable. In both scenarios, imposing liability

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<sup>620</sup> *Prosecutor v Stanisić and Simatimović (Appeal Judgment)* IT-03-69-A (9 December 2015) paras 104-107.

for aiding and abetting by omission requires a critical assessment of whether the general principles of criminal law allow the liability to be incurred by the defendant. Where the criminality of inaction is not sufficiently foreseeable or where the defendant is held liable for conduct he or she did not commit, the responsibility should not be imposed. However, this is a factor inherent to omission liability. There is a thin line between being held responsible for one's personal conduct and that of someone else if a failure to intervene or act is at the core of this type of liability. Whether one can speak of a separate failure to act will depend on whether such an obligation to act applied to the Dutch and Belgian peacekeeping commanders.

Another cause for concern is the label attached to the defendant. If a conviction would label a peacekeeping commander as a contributor to the commission of war crimes, such liability should not be imposed, because it would not be a 'fair label' considering that someone failed to fulfil an obligation of protection. The next chapter will look into whether such a legal obligation to act or protect exists under international law, which could influence our conclusion on what form of accountability for peacekeeping commanders seems fit in both domestic and international law.

## Chapter 5: A Legal Obligation to Act for the Peacekeeping Commander?

### 5.1 Introduction

We have discussed how command responsibility is a means to assign responsibility to a state agent like the peacekeeping commander for a failure to fulfil a certain duty. Similarly, liability for omissions as discussed in chapters 3 and 4 requires a duty to act. This chapter therefore analyses the extent to which peacekeeping commanders are obligated to act under the legal paradigms applicable to PKOs.

This assessment is difficult to make because it is debatable whether positive obligations can be placed upon individuals under legal paradigms like IHL and IHRL. It is equally unclear whether the mandate directly binds the peacekeeping commanders. Also, it is difficult to establish which paradigms apply in the often complex circumstances in which PKOs take place; more often than not the peacekeepers are deployed in a context of armed conflict, while not being a party to the conflict themselves. Another issue in defining which obligations are imposed on whom is that national contingents deployed in PKOs 'occupy a dual legal position'.<sup>621</sup> On the one hand they are part of a multinational force under UN control, and on the other hand they continue to be agents of their state. This means they must comply with both the rules and laws applicable to the UN as the organisation of which the PKO is a subsidiary organ, yet they are also bound by their national laws and the treaties to which their TCC is a signatory.<sup>622</sup>

The first section discusses the mandate and the ROE applicable to PKOs and the extent to which these instructions create an obligation to act for peacekeeping commanders. The second section looks into the relationship between IHL and IHRL, which is relevant for PKOs that often take place on the borderline between peace and armed conflict. Third, we will assess whether IHRL offers a potential legal basis for an obligation to act for peacekeeping commanders, and the fourth section will make this assessment for IHL. In discussing IHL and IHRL, I will address the

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<sup>621</sup> Siobhan Wills, 'International Responsibility for Ensuring the Protection of Civilians' in Haidi Willmot and others (eds), *Protection of Civilians* (OUP 2016) 249.

<sup>622</sup> *Ibid.*

difference between protection as a concept in IHL, IHRL and PKOs. The need to distinguish between different notions of protection is an important reason to argue against the contextual interpretation of the law. It arguably paves the way for developing a separate paradigm for peacekeeping, which will be addressed in chapter 8.

## 5.2 Peacekeeping Mandates and Rules of Engagement

### 5.2.1 The Mandate and ROE as Legal Basis for Individual Obligations?

Whether the UNSC resolution, also referred to as the mandate, and the ROE impose any obligations on peacekeeping commanders is difficult to answer. The mandate serves as an authorisation for the presence of peacekeeping troops in the territory of the host state while also stating the aims and objectives of the mission. Evans refers to both the mandate and ROE as 'the legally binding instructions for particular missions, describing at different levels of generality not only what their basic tasks are but when, where, and to what extent their members may use force'.<sup>623</sup> However, this is limited to 'general' instructions of which the legal status is unclear. There has been discussion on the binding force of resolutions issued under chapters VI and VII of the UN charter;<sup>624</sup> in particular the binding nature of Chapter VI resolutions has been widely discussed.<sup>625</sup> Some have argued that the language used in the mandate indicates whether or not the resolution is intended to bind its addressees.<sup>626</sup> The International Court of Justice argued in the *Namibia* case<sup>627</sup> (1971) that all UNSC resolutions are binding and that 'the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made

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<sup>623</sup> Gareth Evans, 'Protection of Civilians in Peace Operations, or the "operationalisation" of the Responsibility to Protect' in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 222.

<sup>624</sup> Bohlander (n 306) 14; *Al-Jedda v United Kingdom* App No 27021/08 (ECtHR, 7 July 2011) para 35; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004) 38 ff; Andre de Hoogh, *Obligations Erga Omnes and International Crimes* (Martinus Nijhoff 1996) 371.

<sup>625</sup> Elvira R Gadelshina, 'On the Role of UN Security Council Resolutions in International Commercial Arbitration' (30 January 2013, 2013) <<http://kluwerarbitrationblog.com/2013/01/30/on-the-role-of-un-security-council-resolutions-in-international-commercial-arbitration/?print=print>> accessed 21 April 2017; de Wet (n 624) 37-38; John Dugard, *The South West Africa/Namibia Dispute; Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (University of California Press 1973) 511.

<sup>626</sup> Security Council Report, 'Special Research Report No. 1: Security Council Action Under Chapter VII: Myths and Realities' (2008) 1.

<sup>627</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory opinion of 21 June 1971, para 113.

as to its binding effect'.<sup>628</sup> Since the language used is often ambiguous, a conclusion to its binding effect is not straightforward. Interestingly, a UNSC research report concluded that the 'actual tasks in the mandate and the political circumstances surrounding the resolution's implementation (which will be reflected in the concept of operations) are likely to have a larger impact than whether Chapter VII is mentioned in the relevant resolution'.<sup>629</sup>

In considering a potential obligation to act under the mandate, a distinction should be made between an obligation to use force and an obligation to do what is within the capabilities of the peacekeepers. Generally, peacekeeping troops are authorised to use force where others 'commit or threaten to commit physical violence against civilians or against other persons under the protection of the peacekeeping operation or if there is reasonable belief, as demonstrated by intent and capacity, that they are preparing to commit such physical violence against civilians'.<sup>630</sup> Khalil interprets the authorisation under Chapter VII of the UN Charter as an obligation 'to use force, up to and including deadly force, where and when necessary and appropriate to pre-empt, prevent, deter, and/or respond to targeted or systematic attacks on civilians within the limits of their capabilities and areas of deployment'.<sup>631</sup>

However, for peacekeeping commanders it is often unclear to what extent they are supposed to use the authority to use force to protect civilians if the host state appears unwilling or unable to do so.<sup>632</sup> Khalil's argument that peacekeepers are obliged to use force under a chapter VII mandate does not find support in the 2014 and 2017 *Mothers of Srebrenica v the Netherlands* judgments and the *Al-Jedda* case, which concluded that the mandate authorises the use of force, but does not create an obligation to do so.<sup>633</sup> Wills argues that if the protection of civilians is

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<sup>628</sup> Ibid para 114.

<sup>629</sup> Security Council Report (n 626) 33-34.

<sup>630</sup> Mona Khalil, 'Legal Aspects of the Use of Force by United Nations Peacekeepers for the Protection of Civilians' in Haidi Willmot and others (eds), *Protection of Civilians* (OUP 2016) 211.

<sup>631</sup> Ibid 222.

<sup>632</sup> OIOS report (n 26) 14.

<sup>633</sup> *Al-Jedda v United Kingdom* (n 624) para 105. The District Court held that 'the effect of mandates drafted in this way is to authorise rather than oblige action on the part of the mission'. In *Mothers of Srebrenica v the Netherlands 2014* (n 7) the District Court held that '[w]hilst UNPROFOR's mandate is indeed regarded as a decision by an international law organisation it only has a powers-creating character and does not call to life any obligations Claimants can enforce at a court of law for UNPROFOR i.e. Dutchbat', para 4.149. The Court of Appeal confirmed this in *Mothers of Srebrenica v the Netherlands 2017* (n 9) para 35.2.

included in the mandate as if it were an obligation, this is a positive legal obligation since this 'cannot be achieved simply by refraining from action'.<sup>634</sup> She furthermore argues that '[w]ith positive legal obligations come procedural obligations, and with procedural obligations come the obligation to carry out the procedures unless there is a good reason why this is not possible'.<sup>635</sup> The obligation should then be read as a minimum duty to monitor the security situation and ensure that risks of likely attacks are assessed and that the senior levels of command are notified of these risks.<sup>636</sup> However, this does not require the use of force per se, but may also consist of duties to report and investigate threats to the civilian population.<sup>637</sup> In this context, a distinction should be made between the duty to report and the duty to report 'immediately', as Wills points out.<sup>638</sup> The latter words were used in the mandate of UNMISS,<sup>639</sup> and seem more than a request to do so. It implies an obligation to act upon it. Not interpreting a duty to report as an obligation would, as Wills puts it, 'reduce the mission's protective actions to the level of ad hoc (essentially dependent on the best efforts of the individual commander and her/his advisors at the time)'.<sup>640</sup> She then concludes that 'ad hoc responses are not sufficient to meet a positive obligation to protect in situations where civilians are known to be at risk'.<sup>641</sup> In her view, the protection strategy in the UN DPKO Civilian Affairs Handbook<sup>642</sup> read in conjunction with the civilian protection mandate creates an implied obligation to actually carry out the protection plan. Risks of serious harm that were not foreseeable at the time of drafting the plan could limit that obligation however.<sup>643</sup>

Where Wills focused on the language used in the mandate and other mission-specific documents, Khalil looked at the historical development of the civilian protection mandate and

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<sup>634</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 225.

<sup>635</sup> Ibid.

<sup>636</sup> Ibid.

<sup>637</sup> Ibid 232.

<sup>638</sup> Ibid.

<sup>639</sup> UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996, para 3(b)(iii). The troops were required to 'monito[r], investigat[e], verif[y] and repor[t] regularly on human rights and potential threats against the civilian population as well as actual and potential violations of international humanitarian and human rights law (...) and immediately repor[t] gross violations of human rights to the UN Security Council'.

<sup>640</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 250.

<sup>641</sup> Ibid.

<sup>642</sup> UN DPKO and Department of Field Support, UN Civil Affairs Handbook (2012) 53-54, which states that PKOs mandated to protect civilians 'are required to conduct a detailed analysis of risks facing civilians in the area of operations and to devise a comprehensive POC strategy'.

<sup>643</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 226.

the overall UN legal framework.<sup>644</sup> The main difference between the two views is that Wills ultimately admits that legal obligations are more likely to be based on IHL, IHRL and the law of international organisations, and less so on the mandate considering the view that the mandate is not necessarily a binding source of law.<sup>645</sup> In particular, the way in which individual peacekeepers would be bound by the mandate is unclear.<sup>646</sup> Wills additionally recognises that policy documents, eg the Brahimi report, may support a general obligation to act in PKOs.<sup>647</sup> Although it indicates that the UN and the international community at large have shown a stronger commitment to protecting civilians and the will to incorporate this in PKOs, it lacks the legal impact required to create such an obligation. Khalil's focus on civilian protection as a historically developed objective of peacekeeping is understandable. Without clarity regarding the mandate's binding force and without mandates explicitly setting out the role of individual peacekeepers in the mission however, it remains questionable whether mandates are of particular relevance in analysing the peacekeeping commander's obligation to act. For now, it appears that a careful analysis of the language used indicates what the mandate's intended effect is.

### 5.2.2 Mission-specific mandates and ROEs: UNAMIR and UNPROFOR

In the previous section, we have considered that analysing the language used in the mandate is the most straightforward way to assess the mandate's meaning for the peacekeeping troops and their commanders. This part of the chapter will look into the language and objective(s) of the UNAMIR and UNPROFOR mandates and the ROE to see how they affected the mission in practice, answering the question of whether there was an implication that the peacekeeping commanders were under an obligation to act.

It is evident from the language used in UNAMIR's mandate that it did not create an explicit obligation to protect a certain area or a particular part of the population. In addition to being responsible for the security in the city of Kigali, the resolution states that 'UNAMIR shall have

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<sup>644</sup> Ibid 229 ff; Khalil (n 630) 207-208 ff.

<sup>645</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 231-232.

<sup>646</sup> Ibid.

<sup>647</sup> Ibid 233.

the following mandate’, expecting the troops to ‘monitor observance of the cease-fire agreement’, ‘to monitor the process of repatriation of Rwandese refugees and resettlement of displaced persons to verify that it is carried out in a safe and orderly manner’ and ‘to assist in the coordination of humanitarian assistance activities in conjunction with relief operations’.<sup>648</sup> Nothing in the language used indicates that UNMIR *has to* fulfil these tasks, it simply states that the troops are mandated to do so.

Although UNSC resolution 743, issued at 21 February 1992, defined UNPROFOR as an operation based on consent, there was ‘increasing pressure for the force to operate in a non-consensual environment in particular for humanitarian convoys and protection of civilians’.<sup>649</sup> Ultimately, the UNSC adopted Resolution 836 on 4 June 1993, which extended UNPROFOR’s mandate ‘to deter attacks against the safe areas, to monitor the cease-fire [and], to promote the withdrawal of the military or paramilitary units other than those of the Government of Bosnia and Herzegovina and to occupy some key points on the ground[.]’<sup>650</sup> In that light, the UN authorised UNPROFOR

to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.<sup>651</sup>

Dutchbat was mandated to protect the people within the safe area, or at least received the authorisation to use force to protect the safe areas. Allowing them to do so seems superfluous if it comes without the expectation that the troops use such an authorisation if necessary. In comparison, UNAMIR’s mandate was less specific and contained no specific reference to the protection of civilians. The instruction given to UNPROFOR to protect the safe areas can be read as an implicit authorisation to use force to protect those within that safe area. Yet, an authorisation is not forceful enough to constitute a legal obligation.

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<sup>648</sup> UNSC Res 872 (n 48) paras 3(b), 3(f) and 3(g).

<sup>649</sup> Security Council Report (n 626) 28.

<sup>650</sup> UNSC Res 836 (4 June 1993) UN Doc S/RES/836, para 5.

<sup>651</sup> *Ibid* para 9.

The ROE are part of the operationalisation of the mandate and directly address the peacekeeping commanders. These rules indicate to what extent and in what circumstances the peacekeepers may use force. They do not create obligations to use force; rather they indicate what the troops are allowed to do in this respect and when.<sup>652</sup> The ROE also specify when 'force may not be used by armed UN military personnel'.<sup>653</sup> As such, ROE are legally binding<sup>654</sup> and their legal purpose can be defined as '[providing] restraints on a commander's actions, consistent with both domestic and international laws, and may, under certain circumstances, impose greater restrictions than those required by the law'.<sup>655</sup> It is the duty of military commanders to ensure that their subordinates are well familiar with the ROE.<sup>656</sup>

In contrast to UNAMIR's mandate, the ROE developed by Dallaire for UNAMIR<sup>657</sup> implied that they had far-going options to protect the population from violence. Based on these ROE, UNAMIR was allowed to 'use all available means to halt' the commission of mass atrocities:

Ethnically motivated criminal acts may also be perpetrated during this mandate and will morally and legally require that UNAMIR use all means available to terminate the same. Examples: execution, attacks against displaced people or refugees, ethnic riots, attacks against demobilised soldiers, etc. When this happens, UNAMIR military personnel shall follow this directive's ROE's, in support of UNCIVPOL and the local authorities, or in their absence, UNAMIR shall take the necessary action to prevent any crime against humanity.<sup>658</sup>

However, the UN refused several requests by Dallaire to act upon these ROE, which implied that the UN considered the 'standard ROE' applicable to the mission and not the ROE drafted by Daillaire. This even though UN headquarters did not object to a renewed proposal to include action against crimes against humanity in these ROE.<sup>659</sup> Since the Belgian inquiry refers to

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<sup>652</sup>Peace Operations Training Institute, Core PreDeployment Training Materials, 'Establishment and Operationalization of Security Council Mandates in Peacekeeping Operation part 1 (2014) 91-92.

<sup>653</sup> Ibid.

<sup>654</sup> Ibid.

<sup>655</sup> Chairman of the Joint Chiefs of Staff Instr. 3121.01b, Standing Rules of Engagement (SROE)/Standing Rules for the Use Of Force (SRUF) for US Forces (13 June 2005) 81.

<sup>656</sup> Ibid.

<sup>657</sup> These ROE were not officially approved by the UN Headquarters, see UN independent inquiry (n 51) 9. The Belgian inquiry however refers to them as being the ROE in place for UNAMIR at the time.

<sup>658</sup> Para 17 of the UNAMIR ROE, as cited in Belgian Inquiry (n 53) section 4.13; UN Independent Inquiry (n 51) 9. The Belgian Inquiry confirmed that this was to be interpreted as an instruction to act in the face of certain atrocities, eg crimes against humanity, see para 3.8.4.1.

<sup>659</sup> Security Council Report (n 626) 29.

Dallaire's ROE as the ones applicable, it is difficult to indicate which ROE actually applied.

The ROE for UNPROFOR allowed Dutchbat to 'defend themselves, other U.N. personnel, or persons and areas under their protection against direct attack, acting always under the order of the senior officer/soldier at the scene',<sup>660</sup> 'to resist attempts by forceful means to prevent the Force from discharging its duties'<sup>661</sup> and 'to resist deliberate military or paramilitary incursions into the United Nations Protected Areas (UNPAs) or Safe Areas'.<sup>662</sup> These ROE do not indicate what means Dutchbat was allowed to use, but the language used implies there is an expectation that Dutchbat would act against an attempt to take over the enclave and against any harm done to the people living within that area. So, where Dallaire's ROE for UNAMIR designated that it could use all 'available means', this was not stated in UNAMIR's mandate. For UNPROFOR however, the mandate contained such language, but the ability to act was not reflected in the ROE applicable to UNPROFOR. This could indicate that using all available means does not necessarily imply the use of force, but may also refer to other non-forceful measures that could be taken to limit the harm done to the civilians within the area under their control.

There is the obvious risk of reading obligations of protection into the mandate or the ROE based on the idea that the mandate prioritises civilian protection. Where this was not the case yet for UNPROFOR and UNAMIR, this could be likely in analysing contemporary peacekeeping mandates which often focus on civilian protection. One should be wary of imposing obligations on the commanders based on the mandate if there is no unitary opinion on whether or not these resolutions are legally binding. Also, if the mandate binds its addressees, it is unclear whether this includes the peacekeeping commanders. If the mandate includes a reference to civilian protection as a task however, the contingent commander may be responsible for carrying out that task diligently, as was also discussed in chapter 2.<sup>663</sup> Diligence refers to the expectation that someone is 'careful and using a lot of effort' in doing something.<sup>664</sup> Where the Force Commander is responsible for the mission's objectives, the battalion commander holds such responsibility for

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<sup>660</sup> Bruce D Berkowitz, 'Rules of Engagement for U.N. Peacekeeping Forces in Bosnia' (1994) 38 *Orbis* 635, para 5a of the ROE.

<sup>661</sup> *Ibid.*, para 5b of the ROE.

<sup>662</sup> *Ibid.*, para 5c of the ROE.

<sup>663</sup> See above p. 37 (Ch. 2).

<sup>664</sup> Cambridge dictionary <<http://dictionary.cambridge.org/dictionary/english/diligent>> accessed 9 June 2017.

the tasks that need to be carried out in the field.<sup>665</sup> Another observation is that the discussion regarding peacekeeping obligations should not focus on the use of force as the only means of protection, but should include other options that are more feasible to fulfil. This is in line with the conclusions drawn by the Dutch and Belgian courts that offering the refugees passive protection would have been sufficient to protect them.<sup>666</sup>

### 5.3 PKOs and the Relationship Between IHL and IHRL

In the previous section we have concluded that the mandate only creates an obligation to act upon the instructions given in the mandate if the language implicates this. This means that peacekeeping commanders may be expected to monitor the overall security situation and to take measures within their spheres of competence to protect the civilian population, depending on how the instructions are phrased. Considering the uncertainty surrounding the legal status of the mandate, it is worth looking into the applicable law to see whether it establishes a legal obligation to act for peacekeeping commanders.

With peacekeeping troops being impartial and PKOs being characterised by a limited use of force, the question is whether international law could form a legal basis for an obligation to act for peacekeeping commanders. In the example of the Dutch and Belgian peacekeeping commanders, IHL will apply in the general context, namely that of an armed conflict, but the peacekeepers are only subject to IHRL because they will usually not be a party to the conflict. However, the (now defunct) UN Commission on Human Rights stated that if IHRL is the prevailing regime, and if human rights may be violated, the parties to the conflict are called on to ‘apply fully the principles and rules of IHL’.<sup>667</sup> This suggests that both regimes apply to some

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<sup>665</sup> Text to n 198 (Ch. 2).

<sup>666</sup> Text to n 131, 135 and 150 (Ch. 2). The Brussels District Court even observed that ‘[i]t was undeniable that the refugees were not endangered as long as the Belgian blue helmets were at the ETO, and that they were massacred after the Belgian blue helmets’ departure’, see *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) para 51.

<sup>667</sup> UN Commission on Human Rights, ‘Question of Human Rights and Fundamental Freedoms in Afghanistan’ (11 March 1987) UN Doc E/CN.4/RES/1987/58, sections 2, 7, 9 and 10. See also UN Human Rights Council, ‘Report of the United Nations Fact-Finding Mission on the Gaza Conflict’ (25 September 2009) UN Doc A/HRC/12/48; Laurie R Blank, ‘The Application of IHL in the Goldstone Report: A Critical Commentary’ (2009) 12 Yearbook of International Humanitarian Law 347, 394–397 regarding the complicated dual application of IHL and IHRL.

extent. In practice, this may lead to difficult scenarios. Engdahl referred to the example of a robust PKO that usually exceeds the use of force commonly used in law enforcement situations.<sup>668</sup> With IHRL being the paradigm applicable in law enforcement situations and both IHRL and IHL in an armed conflict, it becomes difficult to draw the line between these two areas of law.

A situation may even develop in which the interpretation of a rule or norm from one paradigm must be interpreted in the context of the other. The ICTY Trial Chamber interpreted norms of IHRL in the context of IHL in its *Boškoski and Tarčulovski* judgment. It held that:

[t]he European Court of Human Rights has held in a number of cases that to use lethal force against a person whom it is possible to arrest would be ‘more than absolutely necessary’. However, when a situation reaches the level of armed conflict, the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law, where a different proportionality test applies.<sup>669</sup>

The interpretation of IHRL norms may thus depend on the context in which they apply. If there is an armed conflict ongoing, regardless of the involvement therein of the peacekeepers, these norms must be interpreted in the light of IHL. The ECtHR also applied this rationale in *Hassan v UK*<sup>670</sup> in which it considered:

As regards the interplay between the two regimes, there could be no single applicable rule. Any given situation was likely to require elements of both bodies of law [IHRL and IHL] working together, but the balance and interplay would vary. Accordingly, there might be situations, such as the detention of prisoners of war, in which the combination of criteria lead to the conclusion that international humanitarian law would carry more weight, and determination of human rights violations regarding issues such as grounds and review of detention would be based on the relevant rules of international humanitarian law. Even in such contexts, however, human rights law would not be under absolute subjection to international humanitarian law. For example, if there were allegations of ill treatment, human rights law would still assist in determining issues such as the specificities of the acts which constituted a violation. From the perspective of the human rights body, it would be advantageous to use human rights law as the first step to identify the issues that needed to be addressed, for example, periodicity of review of lawfulness of detention, access to information about reasons of detention, legal assistance before the review mechanism. The second step would be to undertake a contextual analysis using both international

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<sup>668</sup> Ola Engdahl, ‘The Status Of Peace Operation Personnel Under International Humanitarian Law’ (2010) 11 Yearbook of International Humanitarian Law 109,113.

<sup>669</sup> *Prosecutor v Boškoski & Tarčulovski (Trial Judgment)* IT-04-82-T (10 July 2008) para 178.

<sup>670</sup> *Hassan v United Kingdom* App No 29750/09 (ECtHR, 16 September 2014) paras 93-95.

humanitarian law and human rights law, in the light of the circumstances of the case at hand. On condition that the human rights body presented its analysis with sufficient coherence and clarity, the decisions generated would provide guidance to both States and armed forces ahead of future action. It went without saying that the approaches and the result had to be capable of being applied in practice in situations of armed conflict.<sup>671</sup>

Note that the ECtHR refers in specific to the guidance this also gives to armed forces. A contextual analysis and the considerations of the circumstances of the case are thus considered guiding in what law applies. The ICJ already used a similar approach in several cases, among which the *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons*, in which the ICJ argued:

The Court observes that the protection of the International Covenant for the Protection of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life, however, is not such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>672</sup>

What the ICJ does not indicate here is *how* norms of IHRL can be interpreted in the context of IHL. The reference to the *lex specialis* rule in the context of armed conflict implies that IHL becomes the determinant framework in such situations. The ICJ concluded in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that there are three possible solutions in dealing with the relationship between IHL and IHRL:

some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>673</sup>

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<sup>671</sup> Ibid para 95.

<sup>672</sup> *The Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996, para 25.

<sup>673</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep. 1996, para 106.

In addition, the Human Rights Committee considered IHL and IHRL as two complementary bodies of law rather than exclusive to each other:

the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.<sup>674</sup>

Although the two paradigms are complementary because of their mutual focus on protecting people in armed conflict (IHL and IHRL) and peace (IHRL), the reliance on context and circumstances to determine which norm prevails could result in the conflation of the two areas of law. Less attention is then paid to the purpose or nature of the law, and more to the context which then influences the interpretation of norms from these legal paradigms. An immediate result thereof may be that the relevant norms are developed outside their original paradigm, possibly affecting the future application of the norm, even in its original context.

The argument that both paradigms have taken a convergent direction has been made in particular with regard to the protection of civilians.<sup>675</sup> Wills argued that the *Case Concerning Armed Activities on the Territory of the Congo* of the ICJ may be exemplary of this convergence, because it concluded that Uganda had an obligation to protect based on human rights law, but also under the law of occupation in the form of article 43 of The Hague Regulations.<sup>676</sup> By arguing that the situation of occupation triggered Uganda's human rights obligations, it considered IHRL and IHL as intertwined. The International Commission of Inquiry on Darfur implied that IHL and IHRL protect the same values and that the difference is their application, since IHRL applies at all times and IHL only applies in times of war.<sup>677</sup> Meron shared this point

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<sup>674</sup> UN Human Rights Committee, 'General Comment 31' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 11.

<sup>675</sup> Meron, 'The Humanization of Humanitarian Law' (n 213); Jeremy Sarkin, 'The Historical Origins, Convergence And Interrelationship Of International Human Rights Law, International Humanitarian Law, International Criminal Law And Public International Law And Their Application Since The Nineteenth Century' (2007) 1 *Human rights & International Legal discourse* 125, 131 ff; Dan E Stigall and others, 'Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict' (2009) 30 *University of Pennsylvania journal of International Law* 1367, 1379. See also UN Human Rights Council, 'Report on the Gaza Conflict' (n 667) para 284.

<sup>676</sup> Siobhan Wills, 'The "Responsibility to Protect" by Peace Support Forces under International Human Rights Law' (2006) 13 *International Peacekeeping* 477, 484.

<sup>677</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to

of view and even argued against the separation of IHL and IHRL. He stated that ‘although these systems of protection continue to have different institutional ‘umbrellas’ (...), a strict separation between the two is artificial and hinders efforts to maximise the effective protection of human rights’.<sup>678</sup> Walter Kaelin, (former) UN special rapporteur on human rights, also spoke of norms that ‘reinforce each other’ and referred to them as a ‘unified complex of human rights norms under different institutional umbrella’s’.<sup>679</sup> IHRL is considered normative which means that in interpreting the law, we take into account the object and purpose of the relevant treaty, instead of using a limited interpretation.<sup>680</sup> IHL on the other hand is subject to a condition for it to apply, namely the existence of an armed conflict. It is furthermore not as unlimited in scope as IHRL is, but contains ‘purpose-built rules to protect life’ within certain limits in armed conflict.<sup>681</sup> Despite the similar focus on protection of life, the content of the law and the limits of its application are different. For example, protecting the right to life under IHRL and under IHL have different meanings. If one ought to use the principles of IHL, eg proportionality, to assess whether certain actions are proportionate, this would lead to different conclusions in each paradigm. The description of the relationship between IHL and IHRL by the International Law Commission as ‘two sets of rules related to each other as today’s reality and tomorrow’s promise’ captures that difference quite nicely.<sup>682</sup>

Where IHRL contains a normative, positive norm of protection of the right to life, IHL refers to protection as an effort to do as little harm as possible to those not actively engaged in the conflict. The main argument in favour of keeping this distinction in mind is the complicated assessment of how these norms should be enforced if we no longer distinguish between IHRL and IHL. A situation of peace is after all distinct from armed conflict. For that reason, international criminal law deals with violations of IHL by individuals whereas violations of IHRL are often sanctioned

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Security Council Resolution 1564 of 18 September 2004, para 143.

<sup>678</sup> Theodore Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius Publications 1987) 28.

<sup>679</sup> Walter Kälin, *Human Rights in Times of Occupation: The Case of Kuwait* (Law Books in Europe 1994) 26–27.

<sup>680</sup> UNGA ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (18 July 2006) UN Doc A/CN.4/L.702, para 130.

<sup>681</sup> Louise Doswald-Beck, ‘International humanitarian law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’, [1997] *International Review of the Red Cross* 35, 51.

<sup>682</sup> UNGA ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 680) para 104.

in human rights courts. If it concerns violations of IHRL by individuals, this can be brought before a domestic criminal court or a court of general jurisdiction. For that purpose, the distinction between IHL and IHRL norms of protection is relevant, even though peacekeeping, as a (partly) military activity that shows overlap with both paradigms, complicates that distinction. The next sections look into protective norms under IHRL and IHL respectively and will discuss how protection in PKOs relates to these notions of protection. Attention also goes out to the different impact these norms have on peacekeeping commanders on the one hand and military commanders in combat operations on the other hand.

#### 5.4 International Human Rights Law

This section discusses the human rights obligations of both the UN and the TCC, and assesses to what extent these obligations must be upheld by peacekeeping commanders. The extent to which a TCC has human rights obligations in an extra-territorial context depends on the level of effective control held by the TCC.<sup>683</sup> As Cerone highlighted, ‘the degree of positive obligations will be dependent upon the *type and degree* of control (or power or authority) exercised by the state’.<sup>684</sup> It has been accepted that peacekeeping troops must comply with the IHRL treaty obligations of their TCCs within the area of their military bases or compounds,<sup>685</sup> as the Hague District Court confirmed. In its *Mothers of Srebrenica* judgment the Court held

that through Dutchbat after the fall of Srebrenica the State had *effective control* as understood in the Al-Skeini judgment over the compound. The compound was a fenced-off area in which Dutchbat had the say and over which the UN after the fall of Srebrenica exercised almost no actual say any more. In addition we have established the fact that other than the *mini safe area* the Bosnian Serbs respected this area and left it untroubled after the fall of Srebrenica.<sup>686</sup>

This type of effective control creates a connection between the troops, present as agents of their

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<sup>683</sup> John Cerone, ‘Peace Operations and the Complementarity of Human Rights Law and International Humanitarian Law’ in Gian Luca Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations* (International Institute of Humanitarian Law 2008) 122–123. (emphasis added)

<sup>684</sup> Ibid.

<sup>685</sup> Hitoshi Nasu, ‘Operationalizing the Responsibility to Protect in the Context of Civilian Protection by UN Peacekeepers’ (2011) 18 *International Peacekeeping* 364, 368.

<sup>686</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.160. See also *Mothers of Srebrenica v the Netherlands 2017* (n 9) paras 32.2, 38.2–38.4 in which the Court of Appeal confirmed that the Dutch state had effective control in the sense of articles 1 and 2 of the ECHR within the mini safe area from 11 July 23:00 onwards.

TCCs, and the civilians that sought refuge on these compounds. In *Mukeshimana*, the Brussels District Court only referred to the effective control standard in the sense of article 6 of DARIO<sup>687</sup> and did not mention Belgium's human rights treaty obligations.

The Hague District Court even held that articles 2 and 3 of the ECHR and articles 6 and 7 of the International Convention on Civil and Political Rights (ICCPR) 'imply that the military force whose task it was to protect the refugees in the *safe area* was there to protect the right to life and the integrity of the human person inasmuch as that may reasonably [be] asked of it'.<sup>688</sup> These two non-derogable human rights norms are part of international customary law and are principles of international law<sup>689</sup> which bind the state,<sup>690</sup> state agents,<sup>691</sup> like Dutchbat, and other actors subject to international law.<sup>692</sup>

It is difficult to determine, however, to what extent the UN as an organisation is bound by human rights law, since it is not bound by the same human rights treaties that bind the TCCs. In addition, the conclusions of the Dutch and Belgian courts that the compound ("mini safe area")<sup>693</sup> and ETO respectively were under the effective control of the Dutch and Belgian state,<sup>694</sup> indicate that the UN no longer had command and control over the troops when the killings took place. It is therefore unlikely that the UN as an organisation was responsible for the protection of civilians. To see whether contemporary missions are bound by human rights obligations through the UN, we will first assess to what extent the UN has committed itself to positive obligations under international human rights law.

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<sup>687</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) A2.

<sup>688</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.176.

<sup>689</sup> Roland Otto, *Targeted Killings and International Law with Special Regard to Human Rights and International Humanitarian Law* (Springer 2012) 191; Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 180 ff.

<sup>690</sup> *The Netherlands v Nuhanović/Mustafić 2013* (n 144) para 3.15.2; *Nuhanović/Mustafić v the Netherlands 2011* (n 144) para 6.3.

<sup>691</sup> Berster, "Duty to Act" and "Commission by Omission" (n 291) 626.

<sup>692</sup> Noelle Quenivet, 'Human Rights Law and Peacekeeping Operations' in Marco Odello and R Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff Publishers 2011) 129.

<sup>693</sup> *Mothers of Srebrenica v the Netherlands 2014* (n 7) paras 4.159-4.160.

<sup>694</sup> Text to n 137 and n 154 (Ch. 2).

#### 5.4.1 The UN and IHRL

Articles 41 and 42 of DARIO, that also bind the UN as an organisation, assert that where the TCC has extraterritorial control over territory or persons, the TCC's positive obligations under the human rights treaties to which they are a party must be upheld.<sup>695</sup> Article 42 of the DARIO prescribes that '[s]tates and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41'.<sup>696</sup> Article 41 of DARIO refers to 'the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a *peremptory norm* of general international law'.<sup>697</sup> These obligations may apply to PKOs if the host state commits human rights violations or is incapable of providing human rights guarantees to its population.<sup>698</sup> However, taking over human rights functions from the host state may increase the risk of the host state withdrawing its consent for the operation. This means that the UN and a TCC must consider carefully whether to take over this responsibility from the host state.<sup>699</sup>

Article 14 of the DARIO reflects that the UN has an obligation not to violate peremptory norms. This article precludes the UN from *assisting* a state which violates peremptory norms, which makes it unlikely that the organisation itself could violate these norms directly.<sup>700</sup> For the organisation to be held responsible it must have provided assistance 'with knowledge of the circumstances of the internationally wrongful act'.<sup>701</sup> Wills is of the opinion that the protective legal obligations under IHRL and IHL and articles 14, 41 and 42 of the DARIO create something that is similar to an obligation.<sup>702</sup> This is based on the customary status of the DARIO, which is however not uncontested.<sup>703</sup>

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<sup>695</sup> UNGA 'Responsibility of International Organisations' (9 December 2011) UN Doc A/RES/66/100; Siobhan Wills, *Opinio Juris: Protection of Civilians Symposium: The Obligation to Protect Civilians*, 6 September 2016 <<http://opiniojuris.org/2016/09/06/protection-of-civilians-symposium/>> accessed 24 April 2017; Andrew Clapham, 'Protection of Civilians under International Human Rights Law' in Haidi Willmot and others (eds), *Protection of Civilians* (OUP 2016) 147.

<sup>696</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 241.

<sup>697</sup> *Ibid* (emphasis added).

<sup>698</sup> *Ibid* 228, 251-252.

<sup>699</sup> Clapham (n 695) 142.

<sup>700</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 227.

<sup>701</sup> Article 14 (a) of DARIO.

<sup>702</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 251.

<sup>703</sup> Marten Zwanenburg, *Opinio Juris: Protection of Civilians Symposium: Some Thoughts on Legal Obligations for*

The UN refers to positive obligations to protect civilians from serious violations of IHRL and IHL in its Human Rights Up Front Action Plan and its Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces (HRDDP).<sup>704</sup> The HRDPP states that if UN entities give support to non-UN forces, it must be in line with the UN's purposes and principles under the Charter and with 'its obligations under international law to respect, promote and encourage respect for international humanitarian law, human rights and refugee law'.<sup>705</sup> If the host state would commit grave human rights violations, the 'UN entity providing this support must intercede with the relevant authorities'.<sup>706</sup> This includes the 'commission of "war crimes" or of "crimes against humanity" (...) or "gross violations" of human rights, including summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence'.<sup>707</sup> Both the HR Up Front action plan and the HRDDP reflect that the UN is committed to actively contribute to the promotion of IHRL; the HRDPP even obligates the UN entity to interfere in the commission of serious international crimes by calling the responsible host state to account.

#### 5.4.2 The TCC, Peacekeeping Troops and IHRL

The Hague District Court seemed to confirm that IHRL applied in the context of Srebrenica and that the Dutch battalion needed to act in accordance with the non-derogable norms of IHRL based on the TCC's treaty obligations.<sup>708</sup> In *Osman*, the ECtHR held that 'in certain well-defined circumstances a positive obligation [rests] on the authorities to take preventive operational

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UN Peacekeeping Operations to Protect Civilians, 7 September 2016 <<http://opiniojuris.org/2016/09/07/protection-of-civilians-symposium-some-thoughts-on-legal-obligations-for-un-peacekeeping-operations-to-protect-civilians/>> accessed 24 April 2017.

<sup>704</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 252

<sup>705</sup> UNGA 'Annex to the Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces' (5 March 2013) UN Doc A/67/775-S/2013/110, principle 1.

<sup>706</sup> Ibid.

<sup>707</sup> Ibid principle 12 (a)(i).

<sup>708</sup> Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP, 2013) 660. See also General Comment 31 (n 674) para 8 which refers to a due diligence obligation for states and state parties to ensure compliance with article 2 of the ICCPR. Para 12 of General Comment 31 explicitly mentions deportation as prohibited conduct if there are 'substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'. This is arguably important in relation to Dutchbat's conduct.

measures to protect an individual whose life is at risk from the criminal acts of another individual'.<sup>709</sup> This positive obligation only extends to safeguarding the right to life and the prohibition of inhumane treatment. Although this is an obligation imposed on states, its immediate effect is that military troops (in particular in PKOs) will be placed in situations in which the expectation of action against criminal acts of others has been created. If the mission is established under a civilian protection mandate, this expectation rests on both the mandate and IHRL. Protection in the context of PKOs is defined as protection of “physical violence” and the threat thereof.<sup>710</sup> Although peacekeeping commanders may not be obliged to protect the peremptory norms of IHRL, the commanders may be responsible for civilian protection tasks as included in the mandate, depending on the textual interpretation of the UNSC resolution. This means that the expectation of what their TCC must do to fulfil its treaty obligations under IHRL and what the peacekeeping commanders might be required to do by the mandate may differ. With a different interpretation of ‘protection’ under both sources, the peacekeeping commanders are put under considerable pressure to fulfil different expectations of protection. The civilian population with whom the troops are in frequent contact will expect the troops to protect them however, which is demonstrated by civilians often seeking refuge on UN compounds.<sup>711</sup> Positioning troops in a conflict as human rights protectors increases the risk of the troops and civilians becoming more vulnerable to attacks by the warring parties. Although IHRL does not impose positive obligations of protection on the peacekeeping commanders directly, there is an expectation that the peacekeeping commanders will act. This follows partly from the idea that the state can only fulfil its human rights obligations through its state agents.

However, support for the position that responsibilities held by the state directly apply to individuals belonging to the state has grown and therefore should not be left out of the discussion. Sandoz, Swinarski and Zimmermann held that

[t]he commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations

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<sup>709</sup> *Osman v the United Kingdom* App No 23452/94 (ECtHR, 28 October 1998) para 115.

<sup>710</sup> Khalil (n 630) fn 23.

<sup>711</sup> Jenna Stern, ‘Establishing Safety and Security at Protection of Civilians Sites. Lessons From The United Nations Peacekeeping Mission In South Sudan’, Stimson Centre, Civilians in Conflict Policy brief no. 2, September 2015, 5.

are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State.<sup>712</sup>

If one extends this argument, one could argue that if the TCC has effective control over the area in which a PKO takes place, eg the compound, the human rights obligations of the TCC would also need to be upheld by the military commanders considered public officials. This would then be defined as indirect human rights obligations. Meron, who is considered a pioneer in advocating for individual human rights obligations, for example claimed that articles 5 and 20 of the ICCPR impose direct obligations on individuals.<sup>713</sup> Looking more closely at his position leads us to consider that this is not unrealistic, provided these obligations are included and thus ‘translated’ in criminal law. Meron referred to the International Convention on the Suppression and Punishment of Apartheid<sup>714</sup> and the Genocide Convention<sup>715</sup> as examples of ‘human rights instruments’<sup>716</sup> which were, at the time of writing, advanced ways of assigning international criminal responsibility based on human rights norms.

Nowadays, the criminalisation of human rights norms has become more common when we consider that the Rome Statute and the statutes of the ad hoc tribunals contain provisions that were initially human rights violations, such as genocide and crimes against humanity.<sup>717</sup> This indicates, to some extent, that over the years the expectation that individuals comply with human rights norms has increased, not only under domestic law, but also under international law.<sup>718</sup> Judge Buergenthal argued that the inclusion of individual responsibility under international

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<sup>712</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 4444.

<sup>713</sup> Meron, *Human Rights in Internal Strife* (n 678) 34–35. See also Nowak and Januszewski (n 211). In addition, Lopes and Quéniwet referred to the African Charter on Human and Peoples’ Rights as an international human rights treaty that most clearly imposes direct duties upon individuals, see Noëlle Quéniwet and Cátia Lopes, ‘Individuals as Subjects of International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noelle Quenivet (eds), *International humanitarian Law and International Human Rights: towards a new merger in international law* (Martinus Nijhoff Publishers 2008) 219.

<sup>714</sup> UN General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973) A/RES/3068(XXVIII).

<sup>715</sup> Genocide Convention (n 469).

<sup>716</sup> Meron, *Human Rights in Internal Strife* (n 678) 34–35.

<sup>717</sup> Meron, ‘The Humanization of Humanitarian Law’ (n 213) 253; Robinson, ‘The Identity Crisis’ (n 39) 928 ff; Sarkin (n 675) 131 ff.

<sup>718</sup> Ilias Bantekas, ‘Individual Responsibility and the Evolving Legal Status of the Physical Person in International Human Rights Law’, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 438–439; Quéniwet and Lopes (n 713) 199 ff.

criminal law reflects on the scope of obligations under IHRL:

These responses to new international realities [the establishment of international courts, among others], while still in a formative stage, suggest that the concept of international responsibility for massive violations of human rights is being expanded to include individuals and groups in addition to governments. If individuals are deemed to have ever greater rights under the international law of human rights, it makes sense to impose corresponding duties on them not to violate those rights and, if appropriate, to hold them internationally responsible for their violation.<sup>719</sup>

Judge Buergenthal recognises the idea of such duties still being ‘in a formative stage’. Also, the development referred to here has mainly concerned the negative obligation not to violate human rights law. However, the *Rutaganira* judgment discussed in section 4.5.1 illustrated how human rights law may become the basis for a positive obligation to act under international criminal law, albeit a rather general norm ‘to protect human life’.<sup>720</sup> The Court based Rutaganira’s failure to protect humanity not only on Rwandan law, but also on international law as the Trial Chamber argued that ‘international law also places upon a person vested with public authority a duty to act in order to protect human life’.<sup>721</sup> The Chamber apparently did not feel the need to specify which paradigm within international law forms the legal basis for such an obligation. Instead it arguably derived this from general norms of international law. Considering the serious implications criminal responsibility has, the Trial Chamber should have argued in more detail from which norms it derived this obligation.

Using human rights norms to establish criminal liability for a serious international crime expands the interpretation of such norms and consequently complicates the assessment of accountability under both national and international law. It is after all unclear whether a violation to meet a positive human rights obligation may always result in criminal liability or only if domestic law contains a duty to protect. Where IHRL is a normative and idealistic area of law, international criminal law is different in nature with its focus on justice and retribution. Cross-referencing to paradigms within international law could result in fragmentation of the law. Fragmentation

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<sup>719</sup> Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’ (1997) 19 *Human Rights Quarterly* 703, 719.

<sup>720</sup> Text to n 565 (Ch. 4).

<sup>721</sup> *Rutaganira (Trial Judgment)* (n 539) para 78.

means that the law can be diversified, expanded or that interpretations may conflict depending on the circumstances in which the law is being applied.<sup>722</sup> A similar risk exists when human rights norms, which are mainly negative obligations to protect, are used to interpret the protective task or obligations of peacekeeping troops. After all, protection is considered affirmative action under a peacekeeping mandate.

In conclusion, the UN has developed policy requiring political action by its entities if serious crimes are committed in a country where the UN is present. Diligence is also required in the assistance the UN provides to activities of other military forces. It is however not bound by IHRL and there is no positive obligation to prevent human rights violations by UN actors. Any positive obligation imposed on the TCC under IHRL has immediate bearing on the expectations placed on peacekeeping commanders as its representatives in the field. Their direct relationship with the civilian population means that peacekeeping commanders are approachable and can be asked to account for their actions or inactions. While the obligation is exclusively imposed on the TCC, we have seen how state agents as public officials could be considered to hold the same obligations, for example in *Rutaganira*. The extent to which the TCC's obligations are fulfilled relies on the diligence of the troops and their commanders, which will also be perceived as such by the local population. This places peacekeeping commanders at risk and makes them a vulnerable target if the troops become too involved in the conflict. An additional risk of recognising such positive obligations for state agents under IHRL is that these norms could be used in (international or domestic) criminal law to support liability for failing to fulfil a human rights obligation. This contributes to diversification and thus fragmentation of the law, since both human rights law and criminal law are special regimes within international law; cross-referencing between these paradigms is not without risk if the purpose of the norm is different from the environment in which it is being applied.

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<sup>722</sup> Rosanne Van Alebeek, 'The Judicial Dialogue between the ICJ and International Criminal Courts on the Question of Immunity' in Carsten Stahn and Larissa Van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 95.

## 5.5 International Humanitarian Law

Where it is generally assumed that IHRL applies in situations of both peace and armed conflict, and thus always applies in PKOs, the application of IHL to peacekeeping has been subject of debate.<sup>723</sup> It seems accepted that in order for IHL to apply during PKOs, not only should the context reach the threshold of an armed conflict,<sup>724</sup> the peacekeepers should also be engaged in the conflict as if they were combatants.<sup>725</sup> In those cases IHL would impose direct obligations on peacekeepers.<sup>726</sup> Later statements made by the UN, however, implied that the principles and spirit of IHL apply at all times, meaning that this should arguably be observed in times of peace as well.<sup>727</sup> Given that peacekeeping has become more forceful over the last years, IHL is however

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<sup>723</sup> Especially regarding the application of IHL to the traditional notion of peacekeeping, there have been critical voices. Shraga stated: (...) peacekeeping forces act on behalf of the international community at large, and thus cannot be considered as a “party” to the conflict, nor a “power” within the meaning of the Geneva Conventions. (...) The mere presence of UN peacekeeping forces in the theatre of war while performing a humanitarian or diplomatic mission, therefore, should not necessarily entail for them the applicability of international humanitarian law,’ see Daphna Shraga, ‘The Applicability of International Humanitarian Law to Peace Operations, from Rejection to Acceptance’ in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 91. Sassoli held that the UN is not a party to any of the treaties that make up IHL and thus the UN can only ‘respect the principles and spirit of IHL’ see Marco Sassoli, ‘International Humanitarian Law and Peace Operations, Scope of Application Ratione Materiae’ in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 101, 103. Wills referred to the argument that the principles and spirit of IHL apply in ‘all circumstances’ and to ‘all actors’ in an armed conflict, which includes civilians and thus peacekeepers not involved in armed conflict, Siobhan Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP 2009) 262. See also Marco Sassoli, ‘Ius Ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’ in Michael Schmitt and Jelena Pejić (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers 2007) 249. In 1999, the Secretary-General of the UN presented the Bulletin which is considered binding on individual peacekeepers, see UN Secretary-General (UNSG), Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law (6 August 1999) UN Doc ST/SGB/1999/13. It contains a detailed definition of whether and under what circumstances IHL applies in the context of UN peacekeeping, but has been criticised for being inconsistent and open to different interpretations, Wills, ‘Continuing Impunity’ (n 22) 58.

<sup>724</sup> O’Brien, ‘Protectors On Trial?’ (n 36) 232. It is however also possible to argue that IHL applies in PKOs ‘by policy’.

<sup>725</sup> Wills, *Protecting Civilians* (n 723) 248; Shraga (n 723) 94. This was also confirmed by the SG in the SG Bulletin 1999 (n 723) section 1.1. Regarding the position taken by the ICRC that conflicts with non-state actors would be considered a non-international armed conflict, see Wills, ‘Continuing Impunity of Peacekeepers: The Need for a Convention’ (n 22) 58.

<sup>726</sup> Wills, ‘Continuing Impunity’ (n 22) fn 45.

<sup>727</sup> Eg in para 28 of UNGA ‘Comprehensive review of the whole question of peacekeeping operations in all their aspects’ (23 May 1991) UN Doc A/46/185 it is written that UN PKOs ‘shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel’ after which the Geneva Conventions and the Additional Protocols are mentioned in particular. See also Model Status-of-Forces Agreement’ (n 34); Wills, ‘Continuing Impunity’ (n 22) 64; Gabriele Porretto and Sylvain Vité, ‘The Application of International Humanitarian Law and Human Rights Law to International Organisations’ (2006) University Centre

likely to apply in more situations than it did about ten years ago. For that reason, the critical notes regarding the application of IHL<sup>728</sup> should arguably be read in the context of the traditional notion of peacekeeping. Whether or not IHL applies, and thus whether an armed conflict takes place, is above all a matter of fact,<sup>729</sup> which means that the answer cannot be found in the peacekeeping mandate or the ROE. The mainstream opinion held however is that peacekeeping troops who engage in the conduct of hostilities become a party to an international armed conflict, with their TCC being a party to the conflict.<sup>730</sup> As a result, the TCC's troops are bound by the international conventions and treaties to which the TCC is a party.<sup>731</sup> This includes the Geneva Conventions and their additional protocols. Although the UN is not a party to the Geneva Conventions nor to other treaties of IHL, it is bound by the customary rules of IHL if its troops are actively engaged in the conflict.

It follows from these brief assumptions about the applicability of IHL to PKOs, that IHL arguably did not apply to the situations in Srebrenica and Kigali, because the troops were not involved in the armed conflicts as combatants. In contemporary PKOs however, IHL is more likely to apply considering the fact that these operations are carried out in situations in which the level of violence used is higher and may thus reach the threshold of an armed conflict more easily. The next section will first discuss the interpretation of 'protection' in regular combat operations (or armed conflict) and that of PKOs to illustrate that these definitions differ from one another. This distinction should be at the forefront in interpreting the obligations of peacekeeping commanders under IHL.

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for International Humanitarian Law, Research Paper Series 1, 21-22.

<sup>728</sup> See above n 723.

<sup>729</sup> Sassoli, 'Ius Ad Bellum and Ius in Bello' (n 723) 249; Mary Ellen O'Connell and Judith Gardam, 'ILA Final Report on the Meaning of Armed Conflict in International Law' (2010) 33; Sassoli, 'International Humanitarian Law and Peace Operations' (n 723) 103.

<sup>730</sup> Jaume Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' (2006) 58 *Hastings Law Journal* 479, 527; Engdahl (n 668) 120.

<sup>731</sup> See article 20(a) of the UN General Assembly, Convention on the Safety of United Nations and Associated Personnel (9 December 1994) UN Doc A/RES/49/59 regarding the application of IHL provisions in the context of UN operations and the binding force vis-a-vis UN personnel. See also Saura (n 730) 527-528; Lilly (n 189) 630.

### 5.5.1 Protection in IHL and Peacekeeping: a Comparison

There is a fundamental difference between the definition of ‘protection’ in PKOs on the one hand and ‘protection’ as part of IHL on the other hand. In peacekeeping, ‘protection’ refers to the affirmative task or objective to physically protect civilians from harm caused *by others*, whereas in a regular armed conflict, the IHL notion of ‘protection’ indicates that combatants need to avoid harm to non-combatants as much as possible. Whereas protection in PKOs is more similar to a positive obligation of protection, in IHL this is most often a negative obligation. The notion that protection may have a different meaning in the context of peacekeeping was reflected in the views of Weiner and Ní Aoláin, whose article on the legal framework of peacekeeping in 1996 has been an important contribution to the exploration of individual obligations and responsibilities in PKOs:

With protection as the overarching goal, it follows that peacekeepers' legal obligations should reflect the notion that they will affirmatively seek to prevent misdeeds occurring within their jurisdiction (for lack of a better word). That this may stretch beyond the humanitarian portfolio of the typical soldier is a logical consequence of an imperative that is different from the combatant's typical role.<sup>732</sup>

This also indicates that the protective norms that may apply to peacekeeping commanders would not necessarily apply to a military commander in a combat operation. That follows from the mandate being an additional instruction to the mission to offer protection to civilians from possible harm; one that is distinct from the protective provisions in IHL. The interpretation of ‘protection’ in the context of peacekeeping is not defined by IHL or IHRL, but refers to ‘physical protection of beneficiaries, usually through cooperation with host country security forces (...) to provide security inside camps and protect the recipients of humanitarian aid from attacks by third parties’.<sup>733</sup>

Weiner and Ní Aoláin argued the following regarding positive obligations of protection held by peacekeepers:

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<sup>732</sup> Weiner and Ní Aoláin (n 189) 319–320.

<sup>733</sup> Conor Foley, ‘What Do We Mean by Protection?’ (2015) 23 Michigan State International Law Review 701, 721.

While it is right to insist on a more protective orientation for the peacekeeper than the warrior, the former should be required to act only where it appears that effective protective action can be taken without undue risk. (...) [A]doption of a limiting rule - based on the ability to act effectively without unreasonable risk - would avoid imposing unworkable burdens on peacekeepers. One can imagine a hierarchy of appropriate responses that takes into account the gravity of the harm and the potential risks to the peacekeeper.<sup>734</sup>

The authors stressed the importance of the objective of protection in PKOs, but also argued that peacekeepers cannot be expected to do the impossible. Instead, an argument is made in favour of a reasonable approach to positive obligations for peacekeepers. Peacekeeping commanders will have a different role in PKOs than military commanders generally have, because of their impartial position vis-à-vis the parties to the conflict, which gives them protected status. As such, peacekeeping commanders take on humanitarian tasks, as was also the case in the Dutch and Belgian missions. This distinguishes them from commanders deployed in an armed conflict to which his or her troops are a party.

This distinction is often dealt with by interpreting IHL differently if applied to peacekeepers. For example, Bothe argued that IHL may be interpreted differently according to the context in which it is used.<sup>735</sup> In doing so, Bothe considers the Responsibility to Protect (R2P) a part of the type of relief operations that he considers peacekeeping to be and advocates an interpretation of IHL that benefits the objective of civilian protection.<sup>736</sup> Where the aim is to improve the humanitarian circumstances for the civilian population, as part of R2P, 'IHL must be adapted to the necessities of such operations'.<sup>737</sup> The reference to the general notion of R2P is however not entirely appropriate in the context of peacekeeping. An important difference between R2P and civilian protection in PKOs is that R2P is limited to the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity, whereas in peacekeeping protection of any type of physical harm is the norm.<sup>738</sup>

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<sup>734</sup> Ibid 353.

<sup>735</sup> Michael Bothe, 'The Responsibility to Protect and International Humanitarian Law' in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 225–226.

<sup>736</sup> Ibid.

<sup>737</sup> Edoardo Greppi, 'Report of Working Group 1 on Peace Operations and Protection of Civilians' in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 312.

<sup>738</sup> Khalil (n 630) 210.

A disadvantage of the contextual interpretation of IHL is the complex use of IHL principles in the context of peacekeeping when there is no armed conflict taking place and IHRL is thus the primary paradigm applicable.<sup>739</sup> The International Committee of the Red Cross (ICRC) observes in its latest report on Violence and the Use of Force that

[u]tmost attention must be paid to the obligation of law enforcement officials to respect and protect the life and security of all persons: Art. 6 (1) and 9 (1) ICCPR, Art. 2 CCLEO, Preamble (para. 3) of BPUFF and BPUFF No. 5. (...) For that purpose – as in all other law-enforcement activities – the authorities must abide by the principles of legality, necessity, proportionality and precaution.<sup>740</sup>

The report later acknowledged that ‘some principles, such as those of necessity and proportionality, are referred to in connection with both law enforcement and armed conflict in completely different senses’.<sup>741</sup> The reference to principles such as military necessity and proportionality as being applicable in peacekeeping can be overly confusing, in particular if they are considered to have a contextual meaning. To illustrate the confusion, Bothe wondered with regard to the principle of proportionality

[w]hat type of collateral damage could be considered as “non excessive” and, therefore, acceptable under IHL if it is done to the very persons and objects a peacekeeping operation is meant to protect? Is the balance sheet which governs the operation of the proportionality principle really the same in the case of peacekeeping operations?<sup>742</sup>

There is no confusion as to the application of IHL in situations in which peacekeeping troops are a party to the armed conflict, which also takes away the protected status of the peacekeeping commanders. The complexity increases however if peacekeeping troops combine tasks related to humanitarian assistance and civilian protection, while authorised to use force to protect civilians. In those circumstances the peacekeeping commander’s status (protected or combatant) becomes blurred, and so is the interpretation of IHL. Since the rationale behind PKOs is inherently different from regular combat operations with a military objective, a careful approach should be taken in using a contextual interpretation of IHL. ‘Protection’ under IHL could then be

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<sup>739</sup> Wills, ‘Continuing Impunity’ (n 22) 66. See also Greppi (n 737) 311–312.

<sup>740</sup> International Committee of the Red Cross, *Violence and the Use of Force*, September 2015, 17.

<sup>741</sup> *Ibid* 42.

<sup>742</sup> Bothe (n 735) 225.

interpreted as affirmative action when read in conjunction with a PKO's mandate. Expanding the interpretation of protective norms under IHL could affect the way in which IHL is interpreted in contexts other than PKOs.

### 5.5.2 IHL Provisions: Expansive Interpretation in the Context of PKOs?

As mentioned, some scholars interpret IHL in the context of peacekeeping, which means that the negative protection referred to in IHL is explained as a positive obligation in PKOs. This expands the practical application of IHL beyond the initial scope of application. This section discusses the provisions which are often interpreted as positive obligations in the context of peacekeeping.

For example, common article 3 to the GCs may apply to peacekeeping troops if engaged in a non-international armed conflict. Common article 3 to the Geneva Conventions is interpreted by some as a human rights norm included in IHL to the extent that it prohibits murder, torture and inhumane treatment and the taking of hostages.<sup>743</sup> It furthermore contains an obligation to treat vulnerable persons in need of protection humanely as part of customary international law<sup>744</sup> as well as the Geneva Conventions.<sup>745</sup> Weiner and Ní Aoláin interpreted common article 3 as 'another legal prism through which to articulate the positive protective duties which peacekeepers and enforcers ought to be undertaking, in operations where protection and rights implementation are the stated aims of peacekeeping and peacemaking missions'.<sup>746</sup> Wills for example referred to

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<sup>743</sup> Wills, 'International Responsibility for Ensuring the Protection of Civilians' (n 621) 241; Michel Veuthey, 'De 'Applicabilité du Droit International Humanitaire aux Opérations de Paix : Pour des Approches Juridiques, Militaires et éthiques' in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 60.

<sup>744</sup> Rules 89 and 90 of customary IHL confirm the customary status of the prohibition on violence to life and torture and cruel, inhuman or degrading treatment, see International Committee of the Red Cross, Customary IHL database <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>> accessed 24 April 2017.

<sup>745</sup> *Military and Paramilitary Activities in and against Nicaragua* (n 189) 348. See for a more elaborate discussion on the application of common article 3 to the GCs in peacekeeping operations Wills, *Protecting Civilians* (n 723) fn 215. Wills argues that common article 3 to the GCs binds all multinational forces and that these forces are equally bound by customary international law applicable in non-international armed conflicts. See also Weiner and Ní Aoláin (n 189) 348.

<sup>746</sup> Weiner and Ní Aoláin (n 189) 346-348. Weiner and Ní Aoláin held that 'this Convention is yet another basis upon which to hold that the intervening MNF was bound to apply minimum protective standards to ensure the safety and integrity of protected and vulnerable persons' (p. 348).

*Akayesu*<sup>747</sup> to justify the expansive interpretation of protection under this article, in particular the idea that individual peacekeepers would be expected to comply with common article 3.<sup>748</sup> While it is sensible to accept the explanation in *Akayesu* that the provision should be interpreted widely to broaden its protective effect, this should not change the meaning of a predominantly negative obligation of protection into a positive one. The Trial Chamber's argumentation that the scope includes individuals, eg public officials, mandated to 'to support or fulfil the war efforts' indicates that the individual should have a direct connection to the armed conflict. This should therefore be considered applicable to peacekeeping commanders directly involved in the conflict, but not to those who are a third party to the conflict. Moreover, a 'conflict' to which peacekeeping troops are a party would seldomly qualify as a non-international armed conflict but is more likely to be an international armed conflict, to which common article 3 does not apply. Two aspects should furthermore be considered here. That is first, that IHL normally prevails over human rights law because it is considered 'special law', which is more closely related to the subject-matter of war. In relation to PKOs however, IHL appears more distant from the circumstances: although it concerns a military operation, the objective of PKOs is more focused on positive norms of protection than regular combat missions are. This underlines my second point: that PKOs have positive protective aims, as Weiner and Ní Aoláin address, only demonstrates that peacekeeping is a separate type of military action. It does not indicate that the application of IHL should either be widened or that its provisions should be read in a different light when applied to peacekeeping commanders.

This is somewhat different where it concerns the protective obligations under the law of occupation, in particular article 4 of GC IV. This article is principally applicable where there is a relationship between the civilian population and the 'occupying power'.<sup>749</sup> The ICRC stated even

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<sup>747</sup> The ICTR Trial Chamber held in *Akayesu* that 'due to the overall protective and humanitarian purpose of these international legal instruments' the scope of common article 3 'should not be too restricted'. It therefore extended the scope of the duties and responsibilities under common article 3 to include 'individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts', *Prosecutor v Akayesu (Trial Judgment)* (n 478) para 631.

<sup>748</sup> Wills, *Protecting Civilians* (n 723) 97 ff.

<sup>749</sup> International Committee of the Red Cross, 'Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, Geneva 11-12 December 2003' (2003) 13 ff. See also Meron, 'The Humanization of Humanitarian Law' (n 213) 246; Marten

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from the moment that a force has *de facto* control over a territory and its inhabitants, the law of occupation should apply. Another expert agreed with this conclusion, stressing that if international humanitarian law is applicable to UN-mandated operations and the forces involved exercise control over a territory, then, in principle, the Fourth Geneva Convention should also apply.<sup>750</sup>

In *Mukeshimana*, the Brussels District Court confirmed that the refugees in the ETO had the status of protected persons under article 4 of GC IV.<sup>751</sup> The Court argued that article 136quater of the Belgian Penal Code intends to force those with the material power to intervene to prevent violations of IHL.<sup>752</sup> The Court came to the remarkable conclusion that article 4 of GC IV would apply to the conflict in Rwanda. This provision usually applies to international armed conflicts, whereas the conflict in Rwanda was classified as a non-international armed conflict.<sup>753</sup> As clarified in the judgment, Belgian legislature applied the incriminations provided for international armed conflict also to acts committed in a non-international armed conflict.<sup>754</sup> This explains why the Belgian Court applied the notion of protected persons to the refugees under Belgian control. Article 4 of GC IV defines the notion of ‘protected persons’ as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.<sup>755</sup> Also, the Belgian implementation of this rule refers to crimes that ‘affect by act or omission, the protection of people and property’, which arguably even more than article 4 of GC IV places the protection of people, in either international or non-international armed conflict, at the forefront of the sphere of application of this provision. Here, one could say that if the peacekeeping commanders are in a

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Zwanenburg, ‘Substantial Relevance of the Law of Occupation for Peace Operations’ in Gian Luca Beruto (ed), *International humanitarian law, human rights and peace operations* (International Institute of Humanitarian Law 2008) 162.

<sup>750</sup> ICRC, ‘Expert Meeting on Multinational Peace Operations’ (n 749) 14.

<sup>751</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) para 34.

<sup>752</sup> *Ibid.*

<sup>753</sup> See UN Security Council, Letter Dated October 1 from the Secretary-General Addressed to the President of the Security Council (1 October 1994) UN Doc S/1994/1125, para 91 in which it was concluded that ‘[t]he use of armed force had been carried out within the territorial borders of Rwanda and did not involve the active participation of any other State’. In Serbia, the Belgrade War Crimes Chamber also assigned the status of protected persons to former Yugoslav nationals of Kosovo, despite the fact that the conflict between the Kosovo Liberation Army and the Former Yugoslav Republic was considered non-international of character, see Anton Lekaj (judgment) Case No. K.V. 4/05, 39, para 26 as cited by Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 53.

<sup>754</sup> *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) fn 16. Translated from French.

<sup>755</sup> *Tadić (Appeal Judgment)* (n 41) para 164.

similar situation to the occupation commanders, this law may apply by analogy.

Article 58 (c) of AP 1 refers to the obligation to ‘take (...) other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations’.<sup>756</sup> Nasu argued that ‘[a]lthough, strictly speaking, those provisions are only addressed to the parties to a conflict, the failure of the state parties to shoulder their primary responsibility to protect civilians arguably results in shifting the holder of the responsibility to the international community’.<sup>757</sup> He argues that peacekeepers may be among the actors taking over this responsibility.<sup>758</sup> In his opinion:

this legal responsibility will potentially apply in all conflict areas where peacekeepers are deployed insofar as they are bound by the “principles and spirit” of international humanitarian law. The precautionary obligation to protect civilians may even arise before violence is actually committed by virtue of the nature of the obligation. However, the reach of the legal responsibility is qualified by such languages “as far as military considerations allow”, “to the maximum extent feasible” and “under their control”, which (.....) defines the extent to which action is required.<sup>759</sup>

The type of protection article 58 (c) of AP 1 refers to is a negative form of protection, whereas Nasu translates this into a positive obligation for peacekeepers. Where Nasu refers to the feasibility of such legal responsibilities and also to the factor of control, Weiner and Ní Aoláin limit the scope of the duty to that what is reasonable and within the capacity of the peacekeepers.<sup>760</sup> By reasoning that the ‘capacity to effectively address the problem create[s] a specific duty for [the soldier] to intervene’ and that the ‘individual position triggers the direct applicability of humanitarian norms’<sup>761</sup> they recognise that having the ability to act may give rise to a duty to act in situations in which such humanitarian norms apply. If capacity however lies at the basis of reasoning that peacekeeping commanders should act, I would define it as a moral

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<sup>756</sup> A similar provision is included in article 13 of AP II that refers to the obligation held towards civilians who enjoy ‘general protection against the dangers arising from military operations’. AP II only applies in non-international armed conflicts and arguably has a more limited scope of interpretation than AP I.

<sup>757</sup> Hitoshi Nasu, ‘Operationalizing the “Responsibility to Protect” and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict’ (2009) 14 *Journal of Conflict and Security Law* 209, 225.

<sup>758</sup> *Ibid*; Hitoshi Nasu, ‘Operationalizing the Responsibility to Protect in the Context of Civilian Protection by UN Peacekeepers’ (2011) 18 *International Peacekeeping* 364, 367–368 ff.

<sup>759</sup> Nasu, ‘Operationalizing the “Responsibility to Protect” and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict’ (n 757) 225.

<sup>760</sup> Weiner and Ní Aoláin (n 189) 345.

<sup>761</sup> *Ibid* 346.

obligation rather than a legal one. This will be addressed in more detail in chapters 6 and 7. The reference to the humanitarian character of peacekeeping, also referred to by Bothe, indicates once more that peacekeeping has a distinct character. It therefore seems inappropriate to use IHL to establish positive obligations of protection for peacekeeping commanders, besides in those situations similar to occupation.

In sum, IHL only gives rise to a legal obligation of protection in PKOs if the situation is analogous to that of occupation. If not however, there is only the negative obligation to protect under IHL which would not require peacekeeping commanders to undertake affirmative action to protect civilians. However, some scholars have arguably read a positive obligation into IHL by interpreting IHL through the lens of peacekeeping. This contributes to conflation of different norms of protection in peacekeeping and IHL, and would severely compromise IHL if applied in such a contextual way.

### 5.5.3 The Risk of Fragmentation of the Law

Turning protective IHL and IHRL norms into positive obligations for peacekeeping commanders could further the fragmentation of international law by expanding the original scope of these laws. This is of particular concern if such an expansive interpretation of a norm would then be used to establish criminal liability. These norms will then be developed outside their original paradigms and the interpretation given to the provisions can be altered in the different contexts in which they are being applied. An example of how courts may influence the application and interpretation of a doctrine is the judgment of the American 9th circuit court in *Hilao v Estate of Marcos*.<sup>762</sup> The Court ruled that the international law's objective to 'protect civilian populations and prisoners from brutality' is similar to that of IHRL and that, as a result, command responsibility applies also in peacetime. Similarly, *Mukeshimana* gave a different interpretation to command responsibility in the domestic context.<sup>763</sup> Although a contextual application of international law may seem desirable, it does not contribute to a universal idea of what the

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<sup>762</sup> *Hilao v Estate of Marcos*, Appeals Decision, Docket No 95-15779, 103 F.3d 767 (9th Cir. 1996), 45 Fed. R. Evid. Serv. 913, 96 Cal. Daily Op. Serv. 9090, 96 Daily Journal D.A.R. 15,085, ILDC 841 (US 1996), 17th December 1996, Court of Appeals (9th Circuit), section V.

<sup>763</sup> Text to n 140 (Ch. 2).

provisions entail. However, recognising the difference between different contexts is sometimes necessary; Mettraux may have a point in arguing that the situation in peacetime is inherently different from the situation of chaos in wartime,<sup>764</sup> and that we cannot judge one's behaviour the same in both situations. Similarly, the position that peacekeeping commanders have towards the conflict and the local population is difficult to define along the narrowly defined lines of peace and armed conflict, and thus IHRL and IHL. This appears to be an incentive to consider the development of law that is context-sensitive to ensure that it provides effective protection for the interests prioritised in that particular context, as will be discussed in chapter 8.

## 5.6 Conclusion

That the conduct of the Dutch and Belgian peacekeeping commanders in Srebrenica and Kigali was questioned and brought under legal scrutiny, raised the question of whether peacekeeping commanders are subjected to legal obligations under international law. Scholars have argued that peremptory norms included in both IHL and IHRL in conjunction with a civilian protection mandate may give rise to an obligation to act on part of the peacekeeping commander. The mandate only creates an individual obligation to use force if the wording used indicates this. Peacekeeping commanders may be required to fulfil certain tasks to which explicit reference is made. This may include an expectation to monitor, report and undertake steps to request further support for the civilians under threat.

This chapter has furthermore criticised the contextual interpretation of international law and the expansion of the interpretation of protective norms under IHL and IHRL to support a duty to protect in PKOs. The overly broad interpretation of the law could complicate military operations other than PKOs if negative obligations are explained as positive ones depending on the context in which they are applied. 'Protection' has a distinctive meaning in PKOs, one that should not be confused with protection in IHL or IHRL. Doing so contributes to the diffusion of IHL and IHRL norms by expanding the scope of application of the relevant norms, and by disregarding the purpose of the relevant law. This may result in conflicting and incoherent interpretations of

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<sup>764</sup> Mettraux (n 28) 99.

norms. Ironic as it may sound, establishing a special regime for PKOs would ensure a context-specific interpretation of the peacekeeping commanders' conduct without modifying the interpretation of IHL and IHRL norms.

As discussed here, the expectations imposed on peacekeeping commanders do not stem from the law per se, but are based on their position as state agents and public officials or on the mandate. Peacekeeping commanders may therefore have a moral duty to act, similar to the one mentioned in *Rutaganira*. The professional quality of the peacekeeping commander as a public official creates the expectation that he or she acts in response to violations of the law. Chapter 6 discusses the notion of bystander liability, which stresses the moral expectations that stem from the profession of the military commander and pays attention to the impact of the commander's inaction on the main perpetrator.

## Chapter 6: The Peacekeeping Commander as Bystander: A Moral Obligation to Act?

### 6.1 Introduction

In little more than half an hour, a middle-class neighbourhood in New York City passively witnessed how Kitty Genovese was stabbed to death on the street. The fact that her screams for help were left unanswered, allowed the attacker to return to the scene of the crime two more times to make sure that the stabbing would result in her death.<sup>765</sup> As became clear in the trial of Genovese's murderer, he had actually felt encouraged in his commission of the crime, due to the lack of response.<sup>766</sup> Winston Moseley, her attacker, was initially convicted to a death sentence,<sup>767</sup> but this was later reduced to life imprisonment.<sup>768</sup> The murder of Kitty Genovese left the United States in shock: why did no one prevent this woman's death? All it would have taken to save her life was a phone call as soon as her distress was noticeable to the public. Instead, people waited until the damage was already done. Some of the neighbours declared later that they were afraid to get involved.<sup>769</sup>

What sets this situation apart from the omissions discussed in chapters 3 and 4 is the neighbourhood not having a specific duty to act vis-à-vis Kitty Genovese, but that not intervening encouraged the perpetrator in the commission of his crime. Therefore, it is possible to argue that the neighbours' inaction contributed to the crime by means of a positive act rather than a negative act. It is sometimes perceived as offering moral support or moral encouragement and is generally more focused on the mental element (*mens rea*) than omission liability. Since this form of liability requires no legal duty, it may be a suitable alternative to omission liability. Bystander liability considers the effect the inaction had on the mental state of the perpetrator. It also pays more attention to the mental state of the bystander. Whereas omission liability is mainly based on an

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<sup>765</sup> United States v *Moseley* 251 N.Y.S.2d 552 (n ew York 1964); see also Clare Elaine Radcliffe, 'A Duty to Rescue: The Good, the Bad and the Indifferent-the Bystander's Dilemma' (1986) 13 Pepperdine Law Review 387, 387; May, 'Complicity and the Rwandan Genocide' (n 574)141.

<sup>766</sup> Gur-arye (n 295) 14.

<sup>767</sup> Ibid.

<sup>768</sup> *People v Moseley*, 20 N.Y.2d 64, 281 N.Y.S.2d 762 (1967).

<sup>769</sup> Radcliffe (n 765) 387.

objective standard, namely a failure to fulfil a duty to act, bystander responsibility will take into account the fact that the bystander made a *choice* to witness the commission of a crime without attempting to intervene. This is then considered a culpable decision. If the bystander could have made a difference, this is particularly worthy of blame. At least, this is how this type of responsibility is approached in theory. This chapter will assess whether bystander liability in practice does indeed focus on the positive effect of the inaction. This is done by establishing which elements are the main determinants for bystander responsibility in both theory and practice, on the domestic level. In chapter 7 we will make the same assessment on the international level.

We will consider the possibility that the inaction of the Dutch and Belgian commanders can be perceived as such ‘bystander conduct’. If we focus on the effect of their passive behaviour on the main perpetrator, a different type of liability may be established than in chapters 3 and 4. This chapter therefore provides insight into another rationale behind the criminalisation of inactive conduct, which may explain on what grounds the Dutch and Belgian commanders could have been held liable apart from basing criminal liability on their failure to fulfil a duty to act. Yet, bystander responsibility is partly based on the same elements as omissions; as this chapter will point out, the ability to act and the profession of the commander are also important in establishing bystander liability. The difficulty is that not all systems distinguish between omission liability and bystander liability. At times, the distinction made in this thesis may therefore seem artificial to advocates of the viewpoint that both subcategories are part of the broader category of omission liability. I presume here that without a legal duty to act, there can be no liability for omissions.

I will first define the concept of a ‘bystander’ and consider what can be expected from a bystander. That expectation is referred to as the general duty of the bystander, which is mostly linked to his or her authority or ability to act; that authority might stem from his or her profession. The next section then addresses the moral duty that underlies the notion of bystander. In the sections that follow, I will discuss how this type of responsibility is perceived in civil and common law and how the elements of *actus reus* and *mens rea* are defined for bystander liability. Then the degree of liability incurred by the defendants, and thus potentially the Dutch and Belgian commanders, will be analysed.

Chapter 7 will later address the differences and similarities between domestic and international criminal law. In the context of peacekeeping, the domestic view is of interest as the TCC has the primary right to deal with peacekeeping conduct that could reach the threshold of criminal conduct. In addition, domestic law may provide jurisprudence that could contribute to the development of general principles of international law.<sup>770</sup>

## 6.2 Bystander: A Definition

The term ‘bystander’ is used frequently, but when used in a legal context the definition should be established in more detail. The general definition of bystander is ‘someone who is standing near and/or watching something that is happening but is not taking part/participating in it’.<sup>771</sup> However, regarding the crime of genocide, Vetlesen defined bystanders in a broad sense: ‘every contemporary citizen cognizant of a specific ongoing instance of genocide, regardless of where in the world, is a bystander’.<sup>772</sup> Laura Fletcher defines

bystanders [as] those who did not participate in crimes but nonetheless did not intervene to stop the carnage. They may have been silent supporters or opponents of the political and military forces that waged the war, but their role in the events is defined by their inaction and passivity.<sup>773</sup>

Where the former definition refers to a mental aspect, cognizance, the latter refers to the physical component of inaction. Both elements may be relevant for bystander liability though. If we want to apply the notion of bystander to the peacekeeping cases discussed in chapter 2, we will need a more specific definition that clearly separates peacekeepers as a third party from the actual parties to the conflict. This is where Vetlesen’s notion of ‘bystanders by formal appointment’ is useful. In this scenario, the bystanders are ‘professionally engaged as a “third party” to the interaction between the two parties directly involved in acts of genocide’.<sup>774</sup> Just as peacekeepers are instructed to be, these bystanders by appointment will usually take a neutral and impartial stance

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<sup>770</sup> Text to n 512 and n 530 (Ch. 4).

<sup>771</sup> Cambridge dictionary <<http://dictionary.cambridge.org/dictionary/british/bystander>> accessed 25 April 2017.

<sup>772</sup> Arne Johan Vetlesen, ‘Genocide: A Case for the Responsibility of the Bystander’ (2000) 37 *Journal of Peace Research* 519, 520.

<sup>773</sup> Laurel E Fletcher, ‘From Indifference to Engagement: Bystanders and International Criminal Justice’ (2005) 26 *Michigan Journal of International Law* 1013, 1027.

<sup>774</sup> Vetlesen (n 772) 521.

to the parties involved. This notion of bystander responsibility, where a profession or a certain form of control or authority is relevant, distinguishes bystander liability from pure omissions. Interestingly, Barlett referred to the specific response of bystanders to the commission of serious crimes. He indicated that only two responses to mass killing can be expected from bystanders: ‘to join in the fray, or turn their heads the other way’.<sup>775</sup> He then continued by holding that ‘[r]elatively few (...) resist mass killing. The majority will either willingly join in the violence, or they will comply, submit, and remain passive when faced by brutality’.<sup>776</sup> The impartial stance is therefore not likely to be maintained. The confrontation with crimes of this nature and scale will likely push bystanders in either the active or inactive group. Either way, a distance with the victims is created and the crimes are ‘allowed’ to continue, which means that they could be either bystanders or more actively involved in the commission of the crime(s).

Bystanders are usually defined as such, because they had the ability to act or power to intervene. Especially if the bystanders were formally appointed, like peacekeepers, this is a realistic option. As the next sections point out, the inaction combined with one of the required factors establishes this type of liability. The factors required are physical presence, control or authority as part of the objective element and a mental element. These factors may give rise to the culpability of the bystander as not intervening in the commission of war crimes may be interpreted as a signal of approval or encouragement. With that comes the decision to stay inactive, which implies that the bystander must have considered the likely consequences of remaining passive.

### 6.3 Bystander Liability: A Moral Duty to Act

The peacekeeping commander is expected to exercise his profession diligently. Where this may be a basis for a legal duty to act, as argued in chapter 3, it could also result in a moral obligation to act. Whether this can result in legal responsibility is debatable. However, I argue that the responsibility framed as encouragement or tacit approval is arguably based on failing to fulfil a moral obligation to act. This does not exclude the option that the inaction facilitated the

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<sup>775</sup> Steven James Barlett, *The Pathology of Man: A Study of Human Evil* (Charles C Thomas Publisher, LTD 2005) 177.

<sup>776</sup> Ibid.

commission of the crime, which could be considered a positive contribution to the crime. The main reason for exploring this alternative rationale for bystander liability is that the jurisprudence indicates that bystanders may be held responsible based on a special quality, eg authority. This will be more visible on the international level in chapter 7 than on the domestic level however.

Bystander liability may be perceived as a middle-way between liability for omissions and command responsibility. The main difference with the legal duty required for omissions is that there is no specific legal relationship between the defendant and the victim in this type of obligation. One could rather speak of ‘a failure to fill an assumed role’.<sup>777</sup> The law is therefore unnecessary to establish that duty; neither is this obligation derived from a relationship; it belongs to the profession. Take for example the reference made by Chiesa to a decision of the High Court of Puerto Rico in which a police officer was held liable as an accomplice to homicide for failing to prevent the killing of an innocent person despite having the time to intervene.<sup>778</sup> Although there is an expectation that the police officer should have acted, there was no specific relationship between the police officer and the victim in place. Yet, he may be held responsible as a party to the commission of homicide. The responsibility would be based on the fact that he ignored the ability he had to intervene. If the police officer also fulfils the required *mens rea*, this could result in complicity.<sup>779</sup>

Such a general, moral duty can also be connected to the military commanders. In theory, this could result in bystander liability if the commander’s inaction would imply that he approves or encourages the commission of a crime by the main perpetrator. Rowe refers to the general duty imposed on every soldier and civilian to come to the aid of the civil power to enforce law and order when necessary.<sup>780</sup> This may give rise to an obligation to act on part of the military commander when ‘in *very exceptional circumstances*, a grave and sudden emergency has arisen which in the opinion of the commander demands his immediate intervention to protect life and

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<sup>777</sup> May, *Genocide: A Normative Account* (n 582) 168.

<sup>778</sup> Luis E Chiesa, ‘United States’ in Michael Bohlander and Alan Reed (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 475–476.

<sup>779</sup> *Ibid.*

<sup>780</sup> Peter Rowe, ‘Military Law in the United Kingdom’ in Georg Nolte (ed), *European Military Law Systems* (Gruyter Recht 2003) 840. Note that the general nature of the duty would distinguish this from a specific duty required for omission liability.

property’.<sup>781</sup> The reference to ‘very exceptional circumstances’ may distinguish an obligation to prevent ‘any crime’ from the obligation to act when witnessing mass atrocities. We discussed in chapter 5 how certain expectations from military commanders in PKOs may be higher than what is expected from military commanders in regular warfare, in particular if the operations have a civilian protection mandate. Although military commanders are expected to act adequately in situations of distress,<sup>782</sup> also absent a specific instruction, this would be expected even more from a peacekeeping commander considering his role as a guardian of the overall security situation. A failure to meet a moral obligation may constitute a positive contribution to the crime, if the expectation of intervention was so high that the decision not to intervene implies that the commander allowed the crime to take place or carelessly accepted the likely consequences of his or her inaction. This was also held by the Dutch Court of Appeals in *Mustafić & Nuhanović v Karremans, Franken & Oosterveen*.<sup>783</sup> One can see how the moral obligation-approach presented here may still result in the encouragement or approval that bystander liability is based on in theory. The next section sets out the different forms of ‘*actus reus*’ for bystander liability in domestic criminal law.

#### 6.4 Typology of Bystander Liability and the Required Elements

Having clarified the concept of bystander conduct and now we have assessed how a moral obligation to act (as distinct from a specific duty) may be connected to the resulting encouragement or approval of the commission of the crime, this section considers the elements to establish criminal liability for bystander conduct in more detail. In the domestic sphere, this is often referred to as moral or psychological aid,<sup>784</sup> abetting or ‘not distancing oneself from the crime’. Each individual approach contains similar elements and aspects. These sub forms of bystander liability mainly differ in the effect they have. While morally or psychologically aiding and abetting are similar in that they mainly encourage the main perpetrator to commit the crime,

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<sup>781</sup> Ibid. (emphasis added)

<sup>782</sup> Coolen and Walgemoed (n 442) 41.

<sup>783</sup> Text to n 231 (Ch. 2).

<sup>784</sup> In German law, specific reference is made to ‘*psychische Beihilfe*’ as part of section 27 of the GCC, which classifies it as aiding and not, as in common law, as abetting.

‘not distancing oneself from the crime’ contains a positive contribution to the crime.<sup>785</sup> As will become clearer in this section, the presence is then considered voluntary; in other words, the choice to be present creates the will for the crime to happen.

The first type of bystander liability is characterised by the defendant having control or authority vis-à-vis the principal.<sup>786</sup> In most cases, we will see that a court assumes that the inaction signals that the defendant approves, encourages or does not oppose the commission of the crime. In case of PKOs, not using the control or authority may be based on other rationales like fear, risk calculation and other external factors. We will here consider the way bystander liability is established in the domestic sphere. This type of liability is considered aiding and abetting the commission of the crime, provided that the required elements are fulfilled. Different jurisdictions may however apply different requirements; with differing standards for participation in civil and common law systems, the outcomes may thus vary.

The next section discusses the main similarities and differences between the two systems. This includes, as in chapters 3 and 4, the required *actus reus*, consisting of encouragement through control, authority and presence, and the *mens rea* required for bystander responsibility as well as the degree of liability that results from the interpretation of these elements. Causation is left out of the equation, because it is not part of bystander liability as such.<sup>787</sup> I will take the scenarios in

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<sup>785</sup> This is often criminalised as co-perpetration of the crime. Co-perpetration as recognised in Dutch law requires a ‘conscious, close and comprehensive cooperation’, where in German law it requires the ‘existence of a common plan between two or more persons and a substantial contribution by each co-perpetrator with regard to the realization of the objective elements of the offence’ (section 25(2) of the GCC), Ambos and Bock (n 350) 331. Having no control over the act often means that the defendant could only have aided the commission of the crime, as Ambos and Bock stated here. Co-perpetrators may each have fulfilled part of the objective elements. Each individual co-perpetrator needs to show the subjective element him- or herself. In contrast, accomplices usually do not fulfil the *actus reus* of the main crime themselves and the *mens rea* of the accomplice is derived from the main perpetrator’s liability. See Van der Leij and Elzinga (n 334) 115; Wolswijk (n 350) 360. In Belgium, co-perpetration is not fully recognised as it is in Germany and the Netherlands, Vanheule (n 349) 686 ff.

<sup>786</sup> Tolmie, ‘New Zealand’ (n 407) 381–382. Tolmie argues here that aiding or abetting needs to be accomplished through assistance in the sense of bringing the person in the position to commit the offence or possessing ‘control or ownership of the vehicle or premises in which the offending takes place, such that there is the power to intervene and the deliberate non-exercise of that power. Deliberate presence can, of course, directly contribute to the offending if it is proved to provide the principal with an audience, signify to them that they have backup should the need arise, coerce them in their offending or intimidate the victim so that they do not resist’.

<sup>787</sup> If the contribution is causal, the conduct of the commanders would after all more likely be classified as instigation. See David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* (OUP 2015) 216–217; Gerhard Timpe, *Beiträge Zum Strafrecht* (Books on Demand 2014) 93; Jonathan Herring, *Criminal Law: Text, Cases, and*

Srebrenica and Kigali as examples to see how the application of the law could affect the potential responsibility of the Dutch and Belgian peacekeeping commanders.

#### 6.4.1 Actus Reus

In both civil and common law, the presence of the defendant is an important element in establishing the *actus reus* required for bystander liability.<sup>788</sup> Overall, presence can be interpreted in two ways. First, moral support can be seen as approval of the principal perpetrator's conduct, when someone is present while having authority or control over the principal perpetrator of the crime committed. This may strengthen the principal in his or her belief that his or her actions are approved of or may encourage the defendant while committing the crime.<sup>789</sup> Second, there is the type of support that will require a more tangible physical act. The responsibility is then not just based on the moral influence, but also on the effect someone's presence may have had on the main perpetrator. In those cases, authority or control as a complementary factor is not relevant. Instead, one should be able to draw the positive act from the defendant's inactive behaviour. This is for example the case if the defendant does not distance him- or herself from the crime or if it can be argued that the presence is voluntary. Both notions of *actus reus* for bystander liability and the required elements are discussed below.

##### 6.4.1.1 Presence and Control or Authority as Approval or Encouragement

This first form of bystander liability has been recognised in both civil and common law. Under common law, this is the so-called failure to use a certain form of 'empowerment'. Someone might have the power or ability to control something or someone's behaviour without having the legal duty to do so.<sup>790</sup> It represents the defendant's ability to act and is therefore close to an omission. The lack of a duty to act however distinguishes this type of bystander liability from omission

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*Materials* (OUP 2014) 906; Claire De Than and Russell Heaton, *Criminal Law* (OUP 2013) 455.

<sup>788</sup> *R v Coney* (1882) 8 QBD 534. Initially judge Hawkins stated that '[i]t is no criminal offence to stand by, a mere passive spectator of a crime, even of murder', but the Crown Court decided that the voluntary presence at a bare-knuckle fight was culpable.

<sup>789</sup> Vanheule (n 349) 501.

<sup>790</sup> Robert Sullivan, 'Conduct and Complicity: Liability Based on Omission and Risk' (2008) 39 *Cambrian Law Review* 60, 69.

liability. A typical example of this type of bystander liability is the owner of a car who allows a friend to drive his car and does not intervene when he or she drives carelessly.<sup>791</sup> Jurisprudence shows that this likely results in abetting the crime or misdemeanour committed by the principal.<sup>792</sup> This liability is based on the fact that the owner had the ability to intervene, leading to him or her becoming culpable as soon as he or she realised that the driver was driving dangerously. The UK Law Commission referred to these situations specifically as ‘failing to exercise an entitlement right of authority to prevent or control the actions of [the perpetrator]’.<sup>793</sup>

A problematic aspect in this type of bystander liability (or the *actus reus* thereof) is whether actual encouragement is required. The landmark case *Du Cros v Lambourne* indicated that the driver of the car need not feel encouraged by the other’s lack of intervention.<sup>794</sup> It is instead seen as allowing the crime to take place,<sup>795</sup> which in international criminal law would be considered tacit approval.<sup>796</sup> This is not undisputed however as Sullivan held that in these cases failing to exercise control *should have assisted or encouraged* the driver.<sup>797</sup> Neither the jurisprudence nor the literature shows a unitary approach regarding this failure to exercise control and the required effect this must have.<sup>798</sup> The New Zealand Court of Appeal concluded in *Witika* that a failure to intervene in these cases *must encourage* the principal in committing the crime.<sup>799</sup> Similarly, in *Clarkson* the mere presence of two soldiers in a room where two of their fellow soldiers raped a

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<sup>791</sup> See the Scottish case *Du Cros v Lambourne* (1907) 1 KB 40. The Court held the owner of a car responsible, because the driver drove too carelessly in his car. Therefore, the owner aided or abetted the crime of careless driving. His responsibility followed from the defendant’s knowledge of the crime and his power to control the driver’s conduct. This was later confirmed in *R v Webster* (2006) EWCA Crim 415. A drunk driver caused a passengers’ death by driving while being drunk. The owner of the car was convicted for abetting the crime, because he allowed his friend to drive, despite his obvious drunkenness.

<sup>792</sup> *Ibid.*

<sup>793</sup> Law Commission, ‘Inchoate Liability For Assisting And Encouraging Crime (LC300)’ (2006) 63.

<sup>794</sup> *Du Cros v Lambourne* (n 791); see also Simester and Brookbanks (n 282) 182.

<sup>795</sup> *Ibid.*

<sup>796</sup> *Prosecutor v Sesay, Kallon and Gbao (Appeal Judgment)* SCSL-04-15-A (26 October 2009) para 541; *Prosecutor v Nyiramasuhuko and others (Trial Judgment)* ICTR-98-42-T (24 June 2011) paras 10, 13; *Prosecutor v Kalimanzira (Trial Judgment)* ICTR-05-88-T (22 June 2009) para 392.

<sup>797</sup> Sullivan (n 790) 65.

<sup>798</sup> Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart Publishing 2014) 159; De Than and Heaton (n 787) 455; Ormerod and Laird (n 787) 216.

<sup>799</sup> Simester and Brookbanks (n 282) 183, 177. Note that *Witika* (n 358) also dealt with omission charges. See also Law Commission, *Participating in Crime (LC305)* (2007) 29. Within the Canadian law framework, it might even amount to principal liability if the encouragement would be a ‘significant contributing cause’ of the result, see Lafontaine (n 39) 987. For opposing views see the Canadian case *R v Greyeyes* [1997] 2 S.C.R. 825 and Bayley (n 350) 79. In English law the counterargument was also supported by Jonathan Herring (n 787), but see also Sullivan (n 790) 65.

woman could not result in liability for abetting rape, because it was not clear that the soldiers who stood by *actually encouraged* the rape.<sup>800</sup> Military officials can be held responsible on this basis under section 47 of the British Armed Forces Act. Section 47 also includes the option to criminalise presence if it had an encouraging effect or was intentional.<sup>801</sup> Canadian law finds the *effect* of the contribution irrelevant, but also bases this type of responsibility on the intent of the defendant.<sup>802</sup> Colvin and Annand indicate that encouragement must have been effective.<sup>803</sup> While the jurisprudence is divided, a majority recognises the actual encouragement requirement. Most literature, however, takes the opposite approach.<sup>804</sup> I argue that actual encouragement cannot be a formal requirement, since it is difficult to demonstrate that the defendant encouraged the main perpetrator. The influence of the defendant is then hypothetical. It seems realistic to argue that the defendant may or could have encouraged the defendant. This can be based on more objective factors like the possession of authority or control. That would also be in line with the rationale used in civil law systems.

In civil law, reference was made to situations in which the defendant was present and possessed a certain level of authority. That someone who might be expected to intervene does not actually intervene creates the impression that the defendant allows the main principal to commit the crime or approves of that crime being committed. It is therefore considered a form of approval that carries additional weight because of that authority.<sup>805</sup> It is not the absence of intervention despite a duty to act that is criminalised, but the expression of agreement and approval that the silent presence represents.<sup>806</sup> This was for example the argument used in two Belgian cases in which a father was expected to act against a crime committed by his son and an older defendant was expected to stop his younger friend from committing a crime.<sup>807</sup> Their authority created that

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<sup>800</sup> *R v Clarkson* [1971] 1 WLR 1402.

<sup>801</sup> Section 47, British Armed Forces Act 2006 in Manual on Service Law, 1-8-72.

<sup>802</sup> Lafontaine (n 39) 986–987.

<sup>803</sup> Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell 2007) 564.

<sup>804</sup> See above n 798.

<sup>805</sup> Vanheule (n 349) 497. In Cass. 17 December 2008, AR P.08.1233.F, the Court of Cassation held that passively attending the commission of a crime may result in criminal participation if ‘refraining from giving any form of response is the expression of the intent to cooperate in the commission of the crime by means of contributing to enabling or facilitating the crime’.

<sup>806</sup> Andenæs, *The General Part of the Criminal Law of Norway* (n 301) 140. In *R v Bland* [1988] Crim LR 41 the Court confirmed that some form of control or encouragement is required.

<sup>807</sup> *Gent 25 June 1999, T. Strafr. 2001, 32; Gent 20 February 1992, R.W. 1992-93, 305; Vanheule (n 349) 502, 560;*

expectation to act. Not acting *against* the commission of these crimes created approval of the committed acts. In both cases, the defendants were held responsible as co-perpetrators.<sup>808</sup> These cases were classified as omissions in textbooks on Belgian criminal law.<sup>809</sup> However, there is no indication that there was a clear legal obligation to prevent criminal acts. There is no legal duty requiring a parent to prevent criminal acts committed by their children. This was also not the argument used by the Court. Instead, the criminality was based on the approving effect that contributed substantially to the commission of the crimes.<sup>810</sup> That the defendant had the power or ability to do something, but refrained from doing so, was considered culpable in both scenarios.

The British Armed Forces Act also contains control as a form of authority. In addition to its reference to presence as a form of encouragement, section 47 of the British Armed Forces Act also refers to liability for inaction while having the ability to exercise control.<sup>811</sup> I argue here that this is not control as the car owner held towards the driver of the car, but that this control refers to the authority that is part of the military profession. As such, a military official could be liable for inaction based on a failure to exercise his or her authority, which shows strong similarities with command responsibility. However, it does not reflect the special nature of the PKO in which a peacekeeping commander is deployed, and is therefore less focused on a duty of care. Without defining over whom or what the service member ought to have had control, this provision can be interpreted as broadly as seems desirable. That this provision does not refer to a specific person or group over whom the military official should have exercised authority, distinguishes this ‘obligation’ from a legal duty that could result in an omission. The generality of the provision indicates an increased expectation of the military official to act diligently where he or she could have done so. This may include situations in which peacekeeping commanders are able to influence a third party from harming people under their care, which would be in line with the idea that a military official may have a general moral obligation, as discussed in section 6.3.

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Christine Van den Wyngaert and Steven Vandromme, *Strafrecht, Strafprocesrecht & Internationaal Strafrecht* (Maklu 2006) 136.

<sup>808</sup> *Ibid.* In *Gent 25 June 1999*, this type of bystander conduct was even sufficient to form the ‘essential contribution’ required.

<sup>809</sup> Van den Wyngaert and Vandromme (n 807) 136; Vanheule (n 349) 502, 560.

<sup>810</sup> Vanheule (n 349) 529.

<sup>811</sup> Section 47 of the British Armed Forces Act 2006.

In assessing how this interpretation of the *actus reus* could, *in arguendo*, be applied to the Dutch and Belgian commanders, it should thus be established 1) whether their presence could or may have encouraged the principals or 2) whether they failed to exercise their ‘entitlement right of authority to prevent or control’ while standing by and as such approved of the crimes committed.

In discussing the first option, that the Dutch and Belgian commanders may or could have encouraged the commission of crimes, it is important to take into account that the Belgian commanders were not actually present during the commission of the crimes. They left before the crimes were committed. It follows that the Belgian commanders did not encourage the principal perpetrators with their presence, and the authority held by the commanders was not of a nature that could amount to encouragement. In Srebrenica, one could argue the same. Although the Dutch commanders were present while the men and women were separated, their relationship with the BSA was not one that would have resulted in encouragement. Despite their authority over the area in which the civilians resided, the relationship was arguably not close enough to influence the commanders of the BSA.

In both Kigali and Srebrenica one could argue that leaving the potential victims in the hands of the aggressor could be a failure to exercise their ‘entitlement right of authority to prevent or control’ which sent out a signal of tacit approval. Although the commanders were not able to control the main perpetrators or the means used to commit the crimes, one could argue that the commanders held authority regarding the access to the area in which the refugees resided. Giving the aggressors access to the victims could be interpreted as facilitating the commission of the crimes that followed and arguably as approval of or agreement with the foreseeable fate that awaited the refugees. This does not imply that the commanders *wanted* the crimes to happen, but rather that they accepted the likelihood that these crimes would take place. Based on the example of an owner of a car who is expected to take over control from a friend who is driving dangerously, one could argue that the commanders should have exercised their authority or control over the area under their effective control.

#### 6.4.1.2 Presence as an Active or Effective Contribution to the Crime

The second type of *actus reus* for bystander liability is presence that expresses that the defendant does not distance him- or herself from the crime. It gives the impression that the choice to be present was voluntary and therefore he or she is culpable.<sup>812</sup> This observation can be used to argue that the participant shares the intent of the perpetrator, which could result in co-perpetration rather than complicity. It is therefore also relevant to the *mens rea* which will be discussed in the next section. In this scenario, this type of presence can be interpreted as encouragement of the main perpetrator to commit the crime.<sup>813</sup> Presence does not serve as a stand-alone element and a conviction will therefore always require other supporting evidence of the defendant's involvement in the commission of the crime.<sup>814</sup> This additional evidence can be a positive contribution to the crime, also considered an 'effective contribution'. French and German courts have applied this effective or active contribution requirement in their judgments.<sup>815</sup> For the German courts, it is less important whether the presence of the defendant influences the mental state of the main perpetrator; instead the main issue is whether the defendant's presence can be considered a physical contribution to the commission of the crime.<sup>816</sup> This is in contrast to the stance taken in Canadian law, where the mental aspect is most relevant.<sup>817</sup>

An example of how presence was considered an effective contribution to the commission of an offence is the Belgian case *Luik 9 April 1992*.<sup>818</sup> A group of young people attacked a man; while the group was standing around the victim, some members of this group were actively using violence. Others stood by and did nothing. In the opinion of the Court, the bystanders made the circle denser, which could be interpreted as encouraging the physical perpetrators in the group and was therefore considered an active contribution to the crime. All individuals in the group were

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<sup>812</sup> Colvin and Anand (n 803) 566 regarding the Crown Court's conclusions in *Coney* (n 788).

<sup>813</sup> This was also confirmed in *Wilcox v Jeffrey* [1951] 1 All E.R. 464. In *Allan* [1965] 1 QB 130 the actual encouragement was not proven whereas in *Clarkson* (n 800) the intent to encourage was not found.

<sup>814</sup> BJV Keupink, 'Enkele Opmerkingen over Niet-Distantiëren bij Medeplegen. Een Verkenning van een Jurisprudentiële Ontwikkeling' in PHPHMC Van Kempen and Thomas Kraniotis (eds), *De Gedraging in Beweging: Handelen en Nalaten in het Materiële Strafrecht, Strafprocesrecht en Sanctierecht* (Wolf Legal Publishers (WLP) 2007) 94–95.

<sup>815</sup> Kerstin Weltz, *Die Unterlassungshaftung im Völkerstrafrecht: Eine Rechtsvergleichende Untersuchung des Französischen, US-Amerikanischen und Deutschen Rechts* (Edition Iuscrim 2004) 177.

<sup>816</sup> BGH 17.03.1995 - 2 StR 84/95.

<sup>817</sup> Text to n 802.

<sup>818</sup> *Luik 9 April 1992*, *J.L.M.B.* 1993, 8.

convicted as co-perpetrators for the use of violence.<sup>819</sup> Another example is the German case *BGH 2 StR 84/95*.<sup>820</sup> The German Federal Court stressed here that ‘mere presence at the commission of the principal crime cannot in itself establish assistance’<sup>821</sup> and requires an ‘active contribution to the crime’.<sup>822</sup> This is for instance the case if the defendant ‘accompanies the principal perpetrator while knowing of his plan to commit the crime, and joins him therein, and his presence reinforces the principal perpetrator in his decision to commit the crime and gives him a feeling of increased safety’.<sup>823</sup> This arguably coincides with the Dutch position that requires a ‘conscious, close and comprehensive cooperation’ to establish co-perpetration.<sup>824</sup> The Dutch Supreme Court clarified in December 2014 the exact distinction between co-perpetration and complicity.<sup>825</sup> The Court held that co-perpetration requires an intellectual or material contribution that carries sufficient weight, also defined as a ‘significant or essential contribution’, whereas any less substantial contribution can be classified as complicity.<sup>826</sup>

This brings us to the passive presence of the commanders in Srebrenica and Kigali and the question how that could be explained in the light of this second interpretation of the *actus reus* element. Although it seems unlikely that the conduct of both the Belgian and the Dutch commanders could be classified as such an active contribution to the crime, it cannot be ruled out that an objective assessment of the facts would allow this behaviour to be explained in such a way. The rationale behind the ‘not distancing’ argument is that the defendant accepts the commission of a crime and lets it occur, even if he or she does not agree but does not act against it. That arguably

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<sup>819</sup> Ibid. The Court argued furthermore that the ‘group effect’ may have prevented the victim from running from his attackers, and this could also be seen as strengthening the perpetrators in their conviction to commit the crime.

<sup>820</sup> BGH 17.03.1995 (n 816).

<sup>821</sup> Ibid para 9.

<sup>822</sup> Ibid. See also BGH 13.04.2010 - 3 StR 24/10, para 11. In July 2010, the German Federal Court held in a ruling that ‘for the adoption of mental support through positive actions (...) careful and accurate findings that the committed offences were objectively *encouraged or facilitated* in their specific design are required’, BGH 06.07.2010 - 3 StR 12/10, para 2. (emphasis added)

<sup>823</sup> Ibid.

<sup>824</sup> In Dutch Supreme Court 12 April 2005 (*Wurgung met Spin*), ECLI:NL:HR:2005:AS2769 the Supreme Court based its conclusion that the defendant was guilty of co-perpetrating manslaughter on the fact that he did not distance himself from the crime. In this case, the victim was strangled by the main perpetrator while the defendant was present. The defendant did not prevent the main perpetrator from committing the offence. Combined with his presence during the commission of the crime and the fact that he did not distance himself from the crime, despite having the ability to do so, the defendant was held responsible as a co-perpetrator of homicide, see Andre Klip, *Substantive Criminal Law of the European Union* (Maklu 2011) fn 82 at 191.

<sup>825</sup> Dutch Supreme Court 2 December 2014, ECLI:NL:HR:2014:3474.

<sup>826</sup> Ibid para 3.2.1.

happened in Srebrenica and Kigali. The killings seemed inevitable, and because the commanders felt unable to intervene effectively, they let it happen. In the case of Kigali, the commanders withdrew their troops. One could point at the Dutch and Belgian commanders being in highly complex and difficult situations, which may justify their bystander conduct to some extent. However, the defence raised in the case *Mukeshimana* that the Belgian commanders took measures to protect the civilians was considered irrelevant to the conclusion that their conduct was culpable.<sup>827</sup>

#### 6.4.2 Mens Rea

Whether the commanders acted culpably by being present during the deportation (Srebrenica) or leaving the ETO (Kigali) in the hands of militia also depends on the mental state required for bystander responsibility. This section discusses first, the use of a recklessness and/or awareness standard in common and civil law and second, the voluntary presence as a way of fulfilling the *mens rea* element.

##### 6.4.2.1 Recklessness and/or Awareness

Something often seen in common law is that the law requires knowledge or intent as the threshold for the mental element, but that lower standards may suffice in practice. For example, in English law the presence required for aiding and abetting by encouragement ('bystander liability') should have been *aimed* at encouraging the commission of the crime,<sup>828</sup> which means that intent is required, but the Law Commission later indicated that this intent may be fulfilled by advertent recklessness.<sup>829</sup> The intent itself is then not relevant to establish liability; instead the probability of the consequences occurring and the overall evidence available indicate the defendant's guilt.<sup>830</sup> This means that the defendant did not have to *desire* the consequences per se to demonstrate his or her intent.<sup>831</sup> An additional requirement in New Zealand is that the defendant knew of the

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<sup>827</sup> See text to n 134 (Ch.2).

<sup>828</sup> Law Commission, *Participating in Crime* (n 799) 29.

<sup>829</sup> Andrew Ashworth, 'United Kingdom' in Kevin Jon Heller and Mark Dubber (eds), *Handbook on Comparative Criminal Law* (Stanford University Press 2010) 539; Sullivan (n 790) 65.

<sup>830</sup> Chapter 12, Part 3 of the British AFA, paras 32-34, 1-12-10.

<sup>831</sup> However, there are still cases where regular intent is required, eg in *Clarkson* (n 800), the defendants' presence

‘essential matters’ of the principal’s crime.<sup>832</sup> Canadian law requires specific intent, which creates a high threshold for bystander liability.<sup>833</sup>

*Dolus eventualis*, or conditional intent, is sufficient to constitute the required intent in Germany, the Netherlands and to some extent also in Belgium.<sup>834</sup> This means it should be demonstrated that with his or her conduct the participant accepted the ‘reasonable chance’ that the result would occur in the ordinary course of events.<sup>835</sup> This means that a standard similar to recklessness applies in practice. This was for example the mental element applied in *Bacchus*,<sup>836</sup> the landmark case in Dutch law. Two brothers and their brother-in-law were kicked out of a club, after which the three men went to brother Z’s house to get his gun before going back and demanding access to the club again. When they were still not allowed entrance to the club, brother F fired shots at the club; as a result, two girls were killed. Brother Z was held responsible as a co-perpetrator in the commission of homicide, because he did not distance himself from the crime, knowing there was a chance that his brother would actually use the gun. With *dolus eventualis* being sufficient to fulfil the intent requirement, the Court argued that Z consciously accepted the considerable chance that his brother would use violence to realise their common objective of getting access to the club.<sup>837</sup> The Court concluded that this proved that the defendants intended to kill the victims. It neither explained how the brothers fulfilled the required double intent for co-perpetration nor did the Court refer to a joint intent that is presumably included in the close and conscious cooperation required for co-perpetration.

The joint intent requirement was important in the German case *BGH 3 StR 398/81*.<sup>838</sup> Here the

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was not considered culpable because they did not intend their fellow soldier to commit the crime of rape.

<sup>832</sup> Simester and Brookbanks (n 282) 184; Tolmie, ‘The “Duty to Protect” in New Zealand Criminal Law: Making It up as We Go Along?’ (n 295) 735.

<sup>833</sup> Colvin and Anand (n 803) 583; Lafontaine (n 39) fn 72.

<sup>834</sup> Vanheule (n 349) 401 ff.

<sup>835</sup> Ohlin, Sliedregt and Weigend (n 39) 733; Josh Scheinert, ‘Refusal to Save Lives: A Perspective from International Criminal Law’ (2013) 13 *International Criminal Law Review* 627, 638; Robinson, ‘The Two Liberalisms’ (n 120) 124. See also *Blaškić (Appeal Judgment)* (n 120) para 39; Geert-Jan Knoops, *Defenses in Contemporary International Criminal Law* (Martinus Nijhoff Publishers 2008) 5; Arnold (n 28) fn 147; Neha Jain, ‘Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration’ (2013) 61 *American Journal of Comparative Law* 831, 862; Robinson, ‘The Identity Crisis’ (n 39) 940.

<sup>836</sup> Dutch Supreme Court 8 May 2001 (*Bacchus*), ECLI:NL:HR:2001:AB1472.

<sup>837</sup> *Ibid.*

<sup>838</sup> BGH 10.02.1982 - 3 StR 398/81.

defendant was held responsible for aiding extortion, despite claiming in his defence that he was only silently present. The Court argued that the defendant was indeed quietly sitting alongside his co-defendants, but could not establish a *joint intent* to commit the crime.<sup>839</sup> It merely found an agreement of intent aimed at the result; this led the Court to believe that the defendant, considering his limited involvement, intended his assistance to the commission of the crime, but did not intend to commit the crime himself.<sup>840</sup> His silent presence was considered encouragement of the crime of extortion.<sup>841</sup> Distancing himself from the crime or actively intervening in the course of events could have avoided that effect from taking place.<sup>842</sup> In *BGH 5 StR 492/90*, the defendant was however held responsible as a co-perpetrator based on *dolus eventualis* despite distancing himself from the crime.<sup>843</sup>

In contrast, the German Federal Court could not establish assistance on other occasions because the required intent was not found. In *BGH 3 StR 455*, the defendant joined the principal for a ride to Düsseldorf.<sup>844</sup> During the ride, the principal told the defendant that he had cocaine in the back of his car. The defendant was obviously not *aware* that getting in the car with the principal perpetrator meant that he would get involved in an illegal drugs transport. He did not have that intention; he just needed a ride to Düsseldorf. Therefore, the question of whether the defendant aided the principal in his illegal drugs transport was answered negatively by the Court. The only aspect that could be considered blameworthy is that he did not force the principal to pull over the car when he learned of the true aim of the ride.<sup>845</sup> It seems likely that the difference between this

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<sup>839</sup> Ibid.

<sup>840</sup> Ibid para 10.

<sup>841</sup> Ibid para 12.

<sup>842</sup> Ibid.

<sup>843</sup> Two men agreed to commit crimes to provide themselves with an income. Therefore, one of the men arranged a gun for himself and his 'colleague'. This 'colleague' decided instantly that he did not want to use the weapon, but accepted it anyway. When the two men were pulled over by the police, the other man shot two policemen dead with his gun, while his 'colleague' surrendered straight away by putting his arms up in the air. The case was complicated as the principal perpetrator may not have been able to see that his 'colleague' surrendered. Nevertheless, his 'colleague' was held responsible since, by his presence, he voluntarily accepted the risk that this could happen. His presence would have encouraged the principal perpetrator, which fulfils the objective requirement of co-perpetration. Important to mention is that the Court also found that the defendant had no reason to assume that he could neither have known of the principal's intent to shoot nor could he have prevented it. He happened to be in the same car. The Court was also not able to establish any agreement of the defendant with the principal's plan, BGH 15.01.1991 - 5 StR 492/90; Ingeborg Puppe, 'Der Gemeinsame Tatplan Der Mittäter' (2006) 7 Zeitschrift für Internationale Strafrechtsdogmatik 234, 234.

<sup>844</sup> BGH 17.11.2009 - 3 StR 455/09.

<sup>845</sup> Ibid paras 6-8.

case and the German extortion case, to which reference is made above,<sup>846</sup> is that in that case the defendant probably *was aware* of the chance that extortion might be the result. Awareness was also the mental element applied in a number of other German and Belgian cases.<sup>847</sup>

One could argue that as soon as the defendant becomes aware of the crime being committed, the defendant is expected to act; at least to create a distance between him- or herself and the crime and at most to intervene to halt the ongoing events. This was also the argument used by The Hague District Court regarding the assistance offered by the Dutch battalion to the BSA in evacuating the UN compound.<sup>848</sup> The Court confirmed that the cooperation with the BSA should have been ended when there were clear signs that the men who were escorted to the buses by Dutchbat were at serious risk of being killed in a genocide. From the moment that the awareness of that risk arose, their assistance could become a positive contribution to the crime committed.

The different interpretations of what is considered culpable and how the troops should have acted may be confusing. Not distancing oneself from the crime is considered culpable here, because it amounts to passive presence. In chapter 2 however, we considered passive presence as a protective measure that could have had a deterrent effect on the main perpetrators of the crime.<sup>849</sup> One could argue that where the defendant had authority or control, merely distancing oneself does not suffice to be relieved from culpability. Rather, the defendant would be expected to intervene. This particularly applies if the commission of the crime is foreseeable or is ongoing and the defendant remains passive. Passive presence as a deterrent mechanism is, despite the reference to passiveness, a type of intervention that would be appropriate. The intervention is then passive in the sense that using force is unnecessary, but the commander or defendant is expected to verbally express disagreement with the foreseeable or ongoing commission of a crime, and/or should attempt to discourage the perpetrator from committing the crime.

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<sup>846</sup> See text to n 838.

<sup>847</sup> BGH 17.03.1995 (n 816). See also BGH 01.04.2008 - 3 StR 493/07, para 15; *Gent 20 February 1992* (n 807); *Gent 25 June 1999* (n 807); BGH 16.01.2008 - 2 StR 535/07, para 10; BGH 20.12.1995 - 5 StR 412/95 accessed through BGH NStZ 1996, 563, 564.

<sup>848</sup> See above n 167 (Ch. 2).

<sup>849</sup> Text to n 141 (Ch. 2).

#### 6.4.2.2 Voluntary Presence as Mens Rea

We have just discussed how the awareness or foreseeability of the commission of crimes may raise an expectation to act and may create culpability if the defendant refrained from acting. The voluntary presence of the defendant is then sometimes considered a choice.<sup>850</sup> In certain situations the choice to be or stay present equals accepting the risk that he or she might be associated with the crime.<sup>851</sup> Technically, a physical component is then used to establish the mental element required for this type of liability. Referring back to the example of *Genovese*, it is clear how the lack of intervention may encourage the perpetrator to continue or to go even further in his criminal behaviour. Turning a blind eye to what happens or is likely to happen may thus, from a legal perspective, create the will for it to happen. This refers back to the statement made by Barlett that there is no such thing as impartiality.<sup>852</sup> Knowing or being aware that a certain result may likely occur and refraining from trying to prevent that result from occurring creates the impression that the defendant *accepts* that result. Without being even remotely involved in the commission of the crime, this type of inaction may be classified as complicity in the commission of a criminal act.

The question that arises is how voluntary presence can fulfill the *mens rea*, considering that complicity in most civil law countries such as Germany and the Netherlands requires double intent.<sup>853</sup> Double intent means that the participant should have intended both his own contribution to the commission of the crime and the commission of the crime itself. In German and Dutch law, the intent of the accomplice then follows the intent of the principal, giving him or her the intent that belongs to the crime eventually committed by the principal perpetrator.<sup>854</sup> This is different for co-perpetration, where the co-perpetrator is judged based on his or her own intent. For co-perpetration, the defendant must have wanted the joint perpetration combined with the commission of the crime itself.<sup>855</sup> The double intent requirement establishes a connection between

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<sup>850</sup> Dutch Supreme Court 2 December 2014 (n 825).

<sup>851</sup> Colvin and Anand (n 803) 567; Jain, *Perpetrators and Accessories in International Criminal Law* (n 798) 157–158.

<sup>852</sup> Text to n 775.

<sup>853</sup> See above n 350 (Ch. 3).

<sup>854</sup> Article 49 (4) of the DCC; Ambos and Bock (n 350) 323, Ambos and Bock's translation of section 27 of the GCC mentions the fact that the 'sentence for the aider shall be based on the penalty for a principal' and that 'it shall be mitigated pursuant to section 49(1)'.  
<sup>855</sup> Constantijn Kelk, *Studieboek Materieel Strafrecht* (Kluwer 2005) 388; Keupink (n 814) 105; Vanheule (n 349)

the defendant and the crime committed for both complicity and co-perpetration.

However, as concluded in the previous section, recklessness or *dolus eventualis* is often used to establish the *mens rea* for bystander liability. This means that the defendant does not have to share the principal's intent. The foreseeability of the result and the acceptance of the risk that the criminal result may occur is sufficient to hold that the defendant *wanted* the result to occur. This although it only shows the awareness that a criminal result *may* follow. In the Danish case reported at *TFK 2002.164 Ø*, the defendant's passive behaviour (despite having the ability to act) was explained as amounting to a 'prior intention' to bringing the result about.<sup>856</sup> Here, the Court blamed the defendant for not foreseeing that his friend would use excessive violence. Although the two men cooperated with the aim to steal the victim's moped, the defendant should have known, based on the fact that his friend carried a wheel and a crash helmet with him, that it was likely that these items would be used to attack the victim.<sup>857</sup> One may notice that this is closely related to co-perpetration in the German and Dutch system and joint criminal enterprise as recognised by the ICTY. However, the defendant was considered an accessory based on the rationale that the foreseeability of the result and his ability to act together created the defendant's 'prior intention'.<sup>858</sup>

Dutch commentators already pointed out that the physical component of co-perpetration is often used to explain both the *actus reus* and the required intent in Dutch law.<sup>859</sup> That the defendant did not distance him- or herself from the crime is then considered sufficient to establish the intent. This although the Dutch Supreme Court stressed in a recent explanatory judgment that 'not distancing oneself from the crime' should not be weighted too heavily in establishing a conviction for co-perpetration.<sup>860</sup>

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<sup>856</sup> Case reported at *TFK 2002.164 Ø* as cited in Møller-sørensen (n 361) 119.

<sup>857</sup> This same argument was used in cases reported at MEDD 1997.140 V; NRT 1995.355; *UfR 1984.338 H* and in a Danish case reported at *UfR 1994.562 H*. In the latter case, the defendant was held responsible as an accomplice to murder after the main perpetrator became unexpectedly aggressive towards the victim and killed him. The defendant was not physically present in the room where the killing took place. All these cases were discussed and referred to in Møller-sørensen (n 361) 119.

<sup>858</sup> *Ibid.*

<sup>859</sup> Keupink (n 814) 105; Kelk (n 855) 388.

<sup>860</sup> Dutch Supreme Court 2 December 2014 (n 825).

The Dutch Supreme Court attempted to limit the importance of ‘not distancing’ by overturning a judgment in which co-perpetration was based on this aspect. The Court of Appeals had argued that the defendant did not distance himself, ‘despite having sufficient possibility to do so, for example by attempting to prevent his co-defendant from committing the intended robbery or by warning the victims or by taking sufficient distance from the scene where the crime would take place at a time before the crime took place’.<sup>861</sup> Although the Dutch Supreme Court stated that using this reasoning to establish co-perpetration was in this case incorrect,<sup>862</sup> other judgments regarding presence at the scene of the crime have also indicated that there may have been an implicit obligation to intervene because of the defendant’s presence at the scene of the crime and his or her ability to act. The only requirement for co-perpetration that is discussed in Dutch case law is the conscious, close and comprehensive cooperation, which can be fulfilled tacitly by non-distancing.<sup>863</sup>

To return to the main point discussed in this section, the *mens rea*, one can conclude that awareness or recklessness seems sufficient to establish liability for both complicity and co-perpetration for bystanders. The main difference with omission liability is that negligence is hardly used as a requirement, despite the important role of the profession and the control and/or authority of the defendant. Without a duty to act and a clear physical, objective requirement, one would expect a more substantial mental element. It is therefore sensible to use a threshold slightly higher than negligence. Bystander liability as such is not part of omission liability, but should be recognised as a separate type of liability, as it includes no legal duty to act and applies a higher threshold for the mental element.

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<sup>861</sup> Ibid para 2.3 in which the Dutch Supreme Court summarises the conclusions of the Court of Appeal on the count of co-perpetration.

<sup>862</sup> Ibid para 4.2, the Supreme Court concluded that the Court of Appeal was indeed incorrect in assigning co-perpetration to the defendant based on this reasoning.

<sup>863</sup> Nico Kwakman, *Strafbare Deelneming aan Delicten in Schema*, 17 January 2012, available at <<http://nicokwakman.blogspot.co.uk/2012/01/strafbare-deelneming-aan-delicten-in.html>> accessed 28 September 2015.

## 6.5 Degree of Liability

As in chapter 3, the main problem in establishing a fair degree of liability for the defendant is that in common law systems there is no differentiation between participants and principal perpetrators of crimes, because they will both be held liable for the crime committed. The degree of responsibility is then the same in both situations. However, differentiation may still be applied in the sentencing stage: the punishment will be lower for an accomplice than for a principal.<sup>864</sup> Besides the lower sentence, the stigma imposed on the defendant is still that of being responsible for the main offence.<sup>865</sup> The connection between the defendant and the criminal result is established because of the relatively strict adherence in common law to the idea that actual encouragement is required for bystander liability. In addition, the double intent requirement for participation in civil law countries and New Zealand also justifies the conclusion that the participant is held responsible for the result of his or her inaction.<sup>866</sup> That some countries have applied this principle more diligently and others have been reluctant in doing so complicates the assessment of the degree of criminal liability applied here.

Remarkable is the conclusion that in most civil law cases the defendant is held responsible as a co-perpetrator. German law requires at least more objective evidence to be held liable as a co-perpetrator in the sense of moral support. Still, there seems to be a general tendency to distil the culpability either from a factor like authority or from a speculative influence on the commission of the crime. The ‘not-distancing’ form of bystander liability in civil law was often based on the idea that acceptance of the commission of the crime fulfils both the physical and mental element required.

In considering how this could potentially be applied to the Dutch and Belgian commanders, we have to consider their special position as military officials, which is likely to influence their

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<sup>864</sup> Bayley (n 350) 78–79.

<sup>865</sup> Ibid.

<sup>866</sup> Cf with international criminal law in which intent is indeed required for the broader category of complicity, but where generally ‘knowledge’ is sufficient for the narrow category of aiding and abetting. Intent is also the mental element required for perpetration in international criminal law and is often mentioned as the element that distinguishes between a perpetrator (with intent) and an aider and abettor (knowledge).

criminal responsibility. It has been argued that authority coupled with presence is likely to come across as approval of the commission of the crime. Although we have considered examples where this may have been the case, I consider it unlikely that this could be the reasoning in assessing the Dutch and Belgian commanders' conduct. It appears reasonable to argue that the Dutch and Belgian commanders involuntarily accepted the likely consequences of not-intervening, which differs slightly from 'approving' of the crimes being committed. Considering that the subjective element is less relevant than the objective elements (presence and authority), the lack of intent may not be an obstacle to a conviction per se. However, as will become more evident in chapter 7, the lack of a clear and predictable application of the law in cases of bystander conduct makes liability under these conditions unpredictable and not sufficiently foreseeable for the commanders. Also, it is difficult to see how the Dutch and Belgian commanders would be justly connected to the crime without adequate evidence supporting that connection. Although acceptance of the criminal result arguably creates that connection, how that connection is established has not been sufficiently supported in the cases dealing with bystander liability.

## 6.6 Comparative Perspective and Concluding Remarks

A few remarks can be made regarding the similarities and differences in common law on the one hand and civil law on the other hand. The first noticeable conclusion is that under civil law most situations of bystander responsibility will result in liability for co-perpetration rather than complicity. This is based on the argument that the inaction constituted a positive contribution to the crime, often sufficient to argue that the defendants jointly perpetrated the crime. Yet, in common law the lack of differentiation makes the defendant responsible for the result, regardless of which 'label' is used.<sup>867</sup> Additionally, both systems have applied a relatively low threshold for the mental element: recklessness or awareness. This although the civil law countries under review require double intent, for which *dolus eventualis* suffices in most instances.

The second observation is that common law uses 'control' as factor to establish encouragement, where civil law applies 'authority' as an equivalent. The initial concept is however the same. The

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<sup>867</sup> See also Ohlin, 'Co-Perpetration' (n 618) 519.

control or authority will also have an encouraging effect, although the conviction often rests on the theory that it might have encouraged the principal. Another form of *actus reus* applied was interpreting presence as a voluntary choice as opposed to distancing oneself from the crime. Therefore, presence would be considered blameworthy. Most convictions for bystander conduct in civil law have been based on the latter form where the presence as such was said to be a voluntary choice which creates the will for the crime to be committed. In common law, convictions for bystander liability were mostly based on the reasoning that the defendant encouraged the perpetrator in committing the crime. In the civil notion of bystander liability, an objective contribution to the crime is then required. These objective contributions were however not always sufficiently demonstrated.

The presence of military commanders during the commission of a crime can be considered more culpable compared to people who do not fulfil such a public function. This combines the rationale presented in the beginning that bystander liability focuses on the effect of someone's presence, with the moral obligation to act that this creates because of the authority held by the defendant. This moral obligation may be stronger if it concerns a peacekeeping commander who has been assigned protective tasks. To some extent, these protective tasks may be derived from the authority that comes with the commander's profession. But, as discussed in chapter 5, the UNSC mandate may also create the expectation that the peacekeeping commanders carry out such tasks. In addition, an expectation of protection may be created by the obligations of the TCC under international law. The peremptory norms of IHRL apply in all types of PKOs, but establish no legal duty to act on part of the peacekeeping commanders but rather on their TCC. These obligations can only be fulfilled through their state agents, who are the main point of contact for the civilian population. In both domestic systems failing to fulfil such a 'moral obligation' may then result in direct responsibility for the result: in civil law, because it is evident from the jurisprudence that acceptance or approval of the crime being committed follows from the presence of the defendant, which is sufficient to consider the defendant a co-perpetrator; in common law because the accomplice had an encouraging effect on the principal, which is sufficient to consider him or her a party to the main offence committed.

In the cases of the Dutch and Belgian peacekeeping commanders however, the facts do not

demonstrate to a satisfactory extent that the commanders either approved of the crime taking place or accepted it by their presence. This was the result of the incompetency of the commanders to act against the crimes likely to be committed. Due to a lack of a relationship between the commanders and the aggressors it also appears unlikely that they encouraged the main perpetrators with their inaction. Where the defendant had authority or an 'entitlement of control' , one could speak of a moral duty to act, because the effect of the inaction was distilled from the element of authority, control or capacity. It could be argued that the peacekeeping commanders should have used their authority over the compounds where the refugees resided to keep the aggressors away from their potential victims. This does not necessarily establish a positive effect, but could simply be considered a moral duty to act. Failing to fulfil such a moral obligation would be punished too severely by the mode of liability discussed in this chapter.

## Chapter 7: Bystander Conduct in International Law: “aiding and abetting through tacit approval or encouragement”

### 7.1 Introduction

While on the domestic level the bystander position of the Dutch and Belgian commanders was explained by drawing a parallel with a police officer, the possibility of holding peacekeeping commanders responsible as bystanders in the international context will be easier to picture. On the international level, aiding and abetting through tacit approval or encouragement has been used rather frequently in conjunction with command responsibility. For obvious reasons, the two approaches are linked through the authority required and the element of inactive conduct. This type of bystander responsibility is however considered a mode of liability and therefore has to fulfil the requirements for aiding and abetting as briefly touched upon in chapter 4.<sup>868</sup> In addition, the elements that result in tacit approval or encouragement need to be fulfilled. Combining the specific requirements for bystander liability with the requirements for aiding and abetting means that to constitute aiding and abetting by moral support or encouragement the defendant should have been present while being in a position of authority (*actus reus*), this must have had a substantial effect on the commission of the crime,<sup>869</sup> but requires no causal relationship between the assistance and the crime committed.<sup>870</sup> In the following sections, we will discuss these elements in more detail.

### 7.2 Actus Reus

#### 7.2.1 Authority

The authority of the defendant as part of the *actus reus* of aiding and abetting by encouragement or tacit approval seems more dominant in international law than in the domestic law reviewed. This could be explained by the fact that the international judgments deal almost exclusively with alleged war criminals who have a certain level of authority over others. That authority affects the

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<sup>868</sup> See above pp. 114-117 (Ch. 4).

<sup>869</sup> *Furundžija (Trial Judgment)* (n 476) para 233.

<sup>870</sup> *Ibid.*

commission of crimes comes from the *Einsatzgruppen* case<sup>871</sup> in which the defendant Captain Felix Ruehl's authority was considered too low to be of influence on the commission of crimes: 'Ruehl's position (...) was not such as to "control, prevent, or modify" those activities. His low rank failed to "place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation"'.<sup>872</sup> The concept of authority as such, is however vague if there is no tangible yardstick to measure authority. The ICTY Trial Chamber confirmed in *Furundžija*<sup>873</sup> that 'the supporter must be of a certain status for [presence] to be sufficient for criminal responsibility',<sup>874</sup> but in *Akayesu* the ICTR Trial Chamber failed to elaborate on the exact requirements for authority. The Trial Chamber held that

the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, **by virtue of his authority**, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place: [. . .]<sup>875</sup>

That the authority held by the Dutch and Belgian commanders was substantial, was recognised as such by the Dutch and Belgian courts.<sup>876</sup> Given that there is no clarity as to the level of authority required to have an effect on the commission of the crime, it is difficult to determine whether the authority held by peacekeeping commanders may have been sufficient. The SCSL Appeals

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<sup>871</sup> Trial of Otto Ohlendorf and Others (*Einsatzgruppen*), in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. IV.

<sup>872</sup> *Furundžija (Trial Judgment)* (n 476) para 219.

<sup>873</sup> Ibid para 274, Furundžija was a commander of a special military police unit of the HVO and had witnessed the rape of a female victim by one of his colleagues during a 'witness testimony'. Although the Trial Chamber argued that Furundžija co-perpetrated the crime of torture preceding the rape, he was also held responsible for aiding and abetting the war crime of outrages upon personal dignity based on the fact that his 'presence (...) and his continued interrogation aided and abetted the crimes committed by Accused B'.

<sup>874</sup> Ibid para 209.

<sup>875</sup> *Akayesu (Trial Judgment)* (n 478) para 693. (emphasis added)

<sup>876</sup> The Hague District Court held that Dutchbat had *de facto* control, ergo effective control, over the compound -a fenced area- and that this authority was respected by the Bosnian Serb Army, see *Mothers of Srebrenica v the Netherlands 2014* (n 7) para 4.160. In the Belgian case *Mukeshimana-Ngulinzira and others v Belgium and others* there was a rather implicit recognition of the authority held by the Belgian troops vis-à-vis the Interahamwe rebels outside the ETO. The Brussels District Court held that '[t]he mere passive presence of Belgian soldiers sufficed to guarantee the Rwandan refugees' security. Besides, the rules of engagement of their mandate authorized them to use force in self-defence in case their encampment had been attacked', see *Mukeshimana-Ngulinzira and others v Belgium and others* (n 11) para 48. In para 51, the Court concluded that '[i]t was undeniable that the refugees were not endangered as long as the Belgian blue helmets were at the ETO, and that they were massacred after the Belgian blue helmets' departure'.

Chamber reasoned as follows in *Gbao* regarding the level of authority required:

Gbao's position of authority was a factor in the Trial Chamber's determination that he tacitly approved Kallon's assault on Jaganathan and thereby aided and abetted Kallon's conduct, however the Trial Chamber did not, and need not have, relied upon findings that he was "the senior RUF commander" (i.e., as Gbao states, the most senior RUF commander) with "the largest number of fighters" at the Makump DDR camp in order to find that his conduct amounted to aiding and abetting.<sup>877</sup>

At this point therefore, it is not clear what the exact level of power or authority should be to exert influence. Although a 'more senior position is not required to exert influence', it may serve as an aggravating circumstance in addition to the responsibility for aiding and abetting. This was the case in both *Prosecutor v Krnojelac* and *Prosecutor v Aleksovski*. The ICTY Trial Chamber reasoned in *Krnojelac* as follows:

The Trial Chamber considers that the Accused's aiding and abetting of the cruel treatment and persecution of the detainees is aggravated by the fact that he held the most senior position in the KP Dom. This is a case in which the Accused chose to bury his head in the sand and to ignore the responsibilities and the power which he had as warden of the KP Dom to improve the situation of the non-Serb detainees. The sentence in this case must make it clear to others who (like the Accused) seek to avoid the responsibilities of command which accompany the position which they have accepted that their failure to carry out those responsibilities will still be punished. The extent of that aggravation in the present case must nevertheless be tempered to at least some extent by two possibly countervailing factors.<sup>878</sup>

The ICTY Trial Chamber refers implicitly to the concept of wilful blindness as the culpable factor combined with the defendant's senior position in the chain of command. This judgment does not clarify entirely whether 'responsibilities of command' should be interpreted as having a duty to act, but this duty is not explicitly mentioned here, as the Chambers usually do in other cases if appropriate. Also in relation to Krnojelac's inability to exercise his authority, the Trial Chamber argued that this does not mitigate his responsibility, since he 'voluntarily accepted this position of authority'.<sup>879</sup> This judgment also limited Krnojelac's responsibility to liability for crimes committed in the geographical area in which he exercised that level of authority, namely the KP Dom. *Aleksovski* however demonstrated that this is not necessarily restricted to crimes committed

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<sup>877</sup> *Sesay, Kallon and Gbao (Appeal Judgment)* (n 796) para 1313.

<sup>878</sup> *Krnojelac (Trial Judgment)* (n 522) para 514.

<sup>879</sup> *Ibid* para 516.

within that area, as the ICTY Trial Chamber considered Aleksovski's involvement in crimes committed *outside* of the prison territory.<sup>880</sup> The Trial Chamber argued that

the accused contributed substantially to the practice being pursued by not ordering the guards over whom he had authority to deny entrance to HVO soldiers coming to get detainees and by participating, be it on an on-and-off basis, in picking out detainees. Likewise, by his attitude towards Witness Novalic and his passive presence when the detainees were taken away to serve as human shields, he manifested his approval of this practice and contributed substantially to the commission of the crime.<sup>881</sup>

This argument did not lead to a conviction as the Trial Chamber failed to establish that Aleksovski participated *directly* in the mistreatment of detainees. This was in contrast with the *Furundžija* and *Akayesu* judgments that never required direct participation.<sup>882</sup> The Appeals Chamber overturned the Trial Chamber's ruling on this count and considered that 'insufficient weight [was given] to the gravity of the conduct of the Appellant and [the Chamber] fail[ed] to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the ICTY Statute'.<sup>883</sup> The Appeals Chamber held that the Appellant aided and abetted the mistreatment by HVO soldiers of detainees outside the prison compound, and therefore can be held criminally responsible under article 7(1) of the ICTY Statute.<sup>884</sup> It is clear from this judgment that the Appeals Chamber considered the contribution of the commander grave, partly because of his position of authority. That seemed to outweigh other considerations, like whether his authority was still perceived as such outside of the compound.

The main aspect these cases lack is a detailed explanation of how the commanders actually encouraged or influenced the principal in committing the crime. Where 'presence' was an important element in the domestic law under review, the notion of presence has not been interpreted strictly in the cases under review; instead, authority was the main consideration on

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<sup>880</sup> *Prosecutor v Aleksovski (Trial Judgment)* IT-95-14/1-T (25 June 1999) para 129.

<sup>881</sup> *Ibid.*

<sup>882</sup> In *Akayesu* a particularly broad approach to aiding and abetting was taken, since the defendant did not even have to be present in order for him to encourage the perpetrators. The ICTY Trial Chamber referred in *Furundžija (Trial Judgment)* (n 476) para 232 to the International Law Commission Draft Code that led the Chamber to believe that 'the use of the term "direct" in qualifying the proximity of the assistance and the principal act [is] misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting'.

<sup>883</sup> *Aleksovski (Appeal Judgment)* (n 503) para 187.

<sup>884</sup> *Ibid* para 189.

which the conviction for bystander responsibility was based. As a result, I argue that according to current practice, the fact that someone fulfilled an authoritative position is often sufficient to consider that person responsible for the crimes committed. These cases have so far not demonstrated what factors limit this type of responsibility, as both presence at the scene of the crime and authority are objective factors. That the requirement of presence was interpreted in a rather liberal manner also means that this need not be interpreted strictly in the peacekeeping cases under review. In the context of Srebrenica, the fact that part of the killings was committed outside the immediate area under Dutch control, does not necessarily relieve the commanders from responsibility. The same can be held regarding the Belgian commanders in Kigali who had left by the time that the killings actually took place. The required level of subordination between the commanders and the perpetrators and the establishment of the required mental element may be factors that could limit the suitability of bystander responsibility for our peacekeeping cases.

### 7.2.2 Authority: Subordination

It is important to establish whether the relationship between the defendant and the principal perpetrator should be a relationship of subordination in order to aid and abet a crime as bystander. In *Prosecutor v Perišić*, the ICTY Trial Chamber held that in cases of moral encouragement, the defendant usually ‘held a position of authority over the principal perpetrator and was present at the scene of the crime’.<sup>885</sup> This is however not a requirement, as other judgments have demonstrated. The ICTR Appeals Chamber held in *Muhimana* that ‘[f]or an accused to be convicted of abetting an offence, it is not necessary to prove that he had authority over the principal perpetrator’.<sup>886</sup> More recently, the SCSL Appeals Chamber elaborated on this point of view in its *Gbao* judgment:

Gbao’s argument that he did not possess the requisite superior authority or effective control over Kallon and Kallon’s men is misconstrued. In the context of aiding and abetting by tacit approval and encouragement, the aider and abettor need not be a “superior authority” or have “effective control” over the principal perpetrator. Rather, cases typically involve an accused who holds a position of authority and is physically present at the scene of the crime, such that his nonintervention provides tacit encouragement to the principal perpetrator. As a Trial Chamber of the ICTY has put it, ‘an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity’. It may be that, in

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<sup>885</sup> *Perišić (Trial Judgment)* (n 505) para 136.

<sup>886</sup> *Muhimana v Prosecutor (Appeal Judgment)* ICTR-95-IB-A (21 May 2007) para 189.

practice, the aider and abettor will be superior to, or have control over, the principal perpetrator; however, this is not a condition required by law.<sup>887</sup>

That a relationship of subordination is not required was also confirmed in the *Bisengimana trial* judgment<sup>888</sup> which specified that aiding and abetting can take place through encouragement (‘a significant encouraging effect’) ‘particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority’ and had a decisive effect on the crime.<sup>889</sup> Authority can thus be defined in a broad sense; there is no requirement of a strict superior-subordinate relationship. In the *Brđanin* trial judgment, which is also considered an authority on this matter, the Court focused on the ‘public attitude’ of the defendant:

There is also ample evidence that throughout the entire period when the Accused was President of the ARK Crisis Staff, not only did the Accused not take a stand either in public or at the meetings of the ARK Crisis Staff but that he adopted a laissez-faire attitude. In the light of his position as the President of the ARK Crisis Staff, the Trial Chamber is satisfied beyond reasonable doubt that his inactivity as well as his public attitude with respect to the camps and detention facilities constituted encouragement and moral support to the members of the army and the police to continue running these camps and detention facilities in the way described to the Trial Chamber throughout the trial.<sup>890</sup>

It seems fair to argue that there are no strict requirements for this type of aiding and abetting. The requirements set are open to a relatively wide interpretation, since the authority is not limited to a relationship of subordination or control. In a number of cases, presence at the exact location of the crime was not even required to establish aiding and abetting by encouragement.<sup>891</sup> By considering presence to be an element that needs to be interpreted ‘against the background of the factual circumstances’,<sup>892</sup> there is scope for a broad interpretation of what someone’s presence means for the commission of the crime and how this needs to be assessed.

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<sup>887</sup> *Sesay, Kallon and Gbao (Appeal Judgment)* (n 796) para 541.

<sup>888</sup> *Prosecutor v Bisengimana (Trial Judgment)* ICTR-00-60-T (13 April 2006) para 34.

<sup>889</sup> *Ibid.*

<sup>890</sup> *Brđanin (Trial Judgment)* (n 505) para 537.

<sup>891</sup> *Akayesu (Trial Judgment)* (n 478) para 693. Akayesu’s responsibility was not limited to the conduct that took place on the premises of the ‘bureau communal’ where he was when the crimes took place, but also extended to conduct that took place near the premises. In *Semanza*, the Trial Chamber argued that ‘criminal responsibility as an “approving spectator” does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct’, *Semanza (Trial Judgment)* (n 478) para 386; *Prosecutor v Ndahimana (Trial Judgment)* ICTR-01-68-T (30 December 2011) para 828.

<sup>892</sup> *Semanza (Trial Judgment)* (n 478) para 386.

### 7.2.3 Actus Reus: How do Authority and Presence Result in Encouragement or Approval?

Due to the lack of strict requirements regarding this specific type of aiding and abetting, authority can arguably be seen as a contextual factor,<sup>893</sup> as the *Kayishema and Ruzindana* Appeals Chamber made clear by referring explicitly to ‘the Accused’s failure to oppose the killing’ which it held ‘constituted a form of tacit encouragement *in light of his position of authority*’.<sup>894</sup> The inaction equals not using the opportunity to intervene, which is similar to an omission, except for the fact that it does not require having the legal duty to do so. The authority is used to implicitly demonstrate the defendant’s contribution to the crime. Authority thus becomes the foundation of the liability imposed on the commander. This would be different if the judgment had elaborated on how the principal was encouraged by the defendant’s presence.

In other cases, however, the Court expressed more clearly how silent presence may have a positive effect on the commission of the crime, as in *Kalimanzira* where ‘sous-préfet Ntawukulilyayo instructed the refugees to move to Kabuye hill, promising them protection. [As] Kalimanzira stood next to the sous-préfet, saying nothing, he showed his tacit approval, lending credibility and authority to the sous-préfet’s assurances of safety’.<sup>895</sup> In *Ndahimana* the ICTY Appeals Chamber also based aiding and abetting the crime of genocide and extermination on tacit approval.<sup>896</sup> Besides pointing *Ndahimana* at his authority, the Court also held that ‘*Ndahimana*’s attendance at meetings held prior to 16 April 1994 ‘conveyed the impression of him as an “approving spectator” and that *Ndahimana* could not have ignored that the fact that he did not openly object to the killings would likely be considered as tacit approval of the attacks’.<sup>897</sup> The Court’s explanation shows that the notion of approval relies primarily on two factors: the defendant is present and he has authority. Besides ‘not openly objecting to the killings’, there is no reason to conclude that

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<sup>893</sup> The ICTR Trial Chamber pointed out in *Kalimanzira* that authority is just one of the ‘contextual factors’ to be taken into consideration, see *Kalimanzira (Trial Judgment)* (n 796) para 20.

<sup>894</sup> *Prosecutor v Kayishema and Ruzindana (Appeal Judgment)* ICTR-95-1A (1 June 2001) para 201. (emphasis added)

<sup>895</sup> *Kalimanzira (Trial Judgment)* (n 796) para 392.

<sup>896</sup> *Ndahimana (Appeal Judgment)* (n 507) paras 98, 141.

<sup>897</sup> *Ibid* paras 144, 148.

Ndahimana contributed to the crime in an active manner. It is thus similar to the notion of ‘not distancing oneself from the crime’ which was used to explain that this is similar to accepting the criminal consequences, which creates the will for those consequences to occur. It could however be argued that in the domestic notion of ‘not distancing’ the defendant at least agreed to undertake criminal conduct with the principal perpetrator, whereas being near the commission of any of the core crimes as a military commander does not require such agreement per se.

#### 7.2.4 Actus Reus of Aiding and Abetting: Substantial Contribution

The analysis so far shows there is a lack of strict requirements regarding this mode of liability. Only the general elements for aiding and abetting could provide limitations to the factors of ‘presence’ and ‘authority’. The question of whether the defendant has contributed substantially to the crime is important in that light, which will also give insights into the connection between the defendant and the crimes committed.<sup>898</sup> In chapter 4 we have discussed the substantial contribution requirement in relation to omissions. The requirement may be applied differently if it concerns a positive contribution to the commission of a crime. The rationale used in *Furundžija* was that ‘facilitation’ should be the threshold for aiding and abetting, which does not require ‘the conduct of the aider and abettor to cause the commission of the crime’.<sup>899</sup> This was furthermore confirmed by the ICTY Trial Chamber in *Milutinović and others*:

Although the practical assistance, encouragement, or moral support provided by the accused must have a substantial effect upon the commission of the crime or underlying offence, the Prosecution need not prove that the crime or underlying offence would not have been perpetrated but for the accused’s contribution.<sup>900</sup>

It is clear that the conduct need not be a *conditio sine que non* for the crime to have been committed. If we take the defendant’s presence out of the causal chain, the result may still occur.

The exact meaning of the substantial contribution required in this context is difficult to define

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<sup>898</sup> *Furundžija (Trial Judgment)* (n 476) para 234.

<sup>899</sup> *Ibid* para 231; *Kayishema and Ruzindana (Appeal Judgment)* (n 894) para 201. In *Kayishema* it was confirmed that this responsibility under art 6(1) ICTRSt could apply to the ‘commission of any of the offences specified in the tribunal’s statute’. (emphasis added)

<sup>900</sup> *Milutinović and others (Trial Judgment) - vol 1* (n 523) para 92.

since the jurisprudence shows that different terms have been used to define the contribution required. In *Furundžija* the ICTY Trial Chamber held that:

the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility.<sup>901</sup>

It follows that the Court requires that a contribution made a ‘significant difference’ but that it should not have been *essential* for the result to occur. It was confirmed that causation is not required to constitute this type of aiding and abetting. These two factors seem difficult to reconcile with one another. The lack of a causation requirement is sensible on the one hand as causation would connect the defendant to a crime to which he or she was little more than a silent witness, yet it is difficult to perceive how a substantial contribution that made a significant difference is not causal to the crime itself. Although it is in line with the idea that aiders and abettors are generally considered less culpable than the principal perpetrators, it should be kept in mind that not requiring causation lowers the threshold for liability considerably.

The question that arises is how passive behaviour can have a substantial or significant effect without being essential for the crime to be committed. A good example of a case in which this assessment was made is the SCSL’s *Gbao* Appeal judgment. Augustine Gbao was a former police officer and commander of the Revolutionary United Front (RUF) in Sierra Leone.<sup>902</sup> Gbao’s *remote presence* from the scene of the crime was considered to have a *substantially contributing effect* on the commission of the crime. The Chamber noted that Gbao was outside of the prison camp when the crimes within the camp took place. The Trial Chamber had established that his culpable behaviour consisted of being a passive bystander and that Gbao took up arms while being away from the camp. The principal perpetrator was *in* the camp and he did not seem to know that Gbao took up arms. The question posed by the Appeals Chamber was ‘whether Gbao’s presence outside the camp can be said to have had a substantial effect on the perpetration of the crime’.<sup>903</sup> The Appeals Chamber took the view that ‘it is within the discretion of a reasonable trier of fact to

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<sup>901</sup> *Furundžija (Trial Judgment)* (n 476) para 443. (emphasis added)

<sup>902</sup> The Hague Justice Portal <<http://www.haguejusticeportal.net/index.php?id=8322>> accessed 24 February 2016.

<sup>903</sup> *Sesay, Kallon and Gbao (Appeal Judgment)* (n 796) para 545.

hold that such presence did have a substantial effect on the perpetration of the offence'.<sup>904</sup> Although the Court referred to 'presence' as creating the substantial effect, the Court fails to explain *how* the presence contributed significantly to the commission of the crime. It seems unreasonable for the Court to assume that Gbao's presence outside the camp would have encouraged the main perpetrators in the camp. As long as the defendant was *aware* of the possible effect of his presence on the commission of the crime, liability for aiding and abetting may be incurred by the defendant. The defendant is then linked to the result without the *actus reus* supporting that satisfactorily.

It is also worth noting here that the specific direction requirement, discussed in chapter 4,<sup>905</sup> could increase the barrier for this type of responsibility. This was for example applied in *Ndahimana*. Here, the ICTR Appeals Chamber required specific direction and a substantial effect to constitute aiding and abetting by encouragement and/or tacit approval.<sup>906</sup> An interesting parallel can be drawn between *Prosecutor v Ndahimana* and the cases of the Dutch and Belgian commanders. In this case, an estimated group of 1000-2000 Tutsi's from the Kivumu community sought refuge at Nyange parish while facing genocide. As the mayor of this community, Ndahimana was present while the people in the parish were killed in the course of ten days. The Appeals Chamber observed that the Trial Chamber 'relied on the authority [Ndahimana] exerted, his prior conduct, and the fact that he did not openly object to the killings'.<sup>907</sup> Ndahimana was eventually charged with genocide and extermination as a crime against humanity.<sup>908</sup> Regarding the contribution of Ndahimana to the commission of the crime, the Court confirmed once more that proof of a cause-effect relationship was not required.<sup>909</sup> Obviously, the relationship between Ndahimana as a political figure and the population differs from the relationship between peacekeeping commanders and the civilians under their care. In both situations, however, a type of moral responsibility expects them to act, even though this is framed as a direct contribution to the commission of the crime.

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<sup>904</sup> Ibid.

<sup>905</sup> See section 4.5.3 (Ch. 4).

<sup>906</sup> *Ndahimana (Appeal Judgment)* (n 507) para 147.

<sup>907</sup> Ibid para 148.

<sup>908</sup> Ibid para 251.

<sup>909</sup> Ibid para 149.

### 7.3 Mens Rea

The mental element is one of the most uncertain aspects of aiding and abetting by presence. As was also visible in the review of domestic law regarding bystander liability, presence is not necessarily an indication of wanting the crime to happen, but might still be interpreted as such. Given the vague interpretation of the objective elements required for bystander liability, a clear and preferably higher threshold for the mental element is necessary to avoid a claim that this type of liability amounts to vicarious liability. The *mens rea* in *Furundžija*, our starting point, was described as knowledge that the defendant's actions will assist the perpetrator in the commission of the crime.<sup>910</sup> It is unnecessary to share the intent of the perpetrator or to contribute with the purpose of committing the crime.<sup>911</sup> In other judgments, it was held that, in addition, the defendant should be aware of the essential elements of the crime.<sup>912</sup>

The specific *mens rea* applicable to bystander liability relies, just like the *actus reus*, strongly on the presence of the defendant. Not distancing oneself from the crime after becoming aware of the crime being committed will eventually lead to the same result as active participation in the commission of the crime: the crime will be committed anyway. The only way to avoid this is to actively intervene after becoming aware of the crime about to be committed. It can therefore be argued that, as soon as the awareness arises, the defendant is required to make a conscious decision to either a) witness a crime if not actively contributing to it; or b) make efforts that could halt the commission of the crime. Being present while being aware of the crimes (likely to be) committed may be interpreted as the defendant's choice to be present, as *Prosecutor v Mpambara* also confirmed.<sup>913</sup> The ICTR Trial Chamber held that 'by choosing to be present, the accused is taking a positive step which may contribute to the crime. Properly understood, criminal responsibility is derived not from the inaction alone, but from the inaction combined with the choice to be present'.<sup>914</sup> It follows that the mental state of the defendant may provide evidence for

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<sup>910</sup> *Furundžija (Trial Judgment)* (n 476) para 245.

<sup>911</sup> *Ibid* para 274.

<sup>912</sup> *Aleksovski (Appeal Judgment)* (n 503) para 162; *Vasiljević (Trial Judgment)* (n 522) para 71; *Lukić & Lukić (Appeal judgment)* (n 592) para 426.

<sup>913</sup> *Mpambara (Trial Judgment)* (n 483) para 22.

<sup>914</sup> *Ibid*.

the commission of a positive act.<sup>915</sup> It links the presence of the defendant to the crime committed, arguably creating a connection between the defendant and the crime through the mental element.

Interestingly, it is not just ‘presence’ that plays an important role in both the *actus reus* and the *mens rea* of bystander liability. Authority has also been mentioned in both contexts. The ICTR Trial Chamber in *Bisengimana* held that ‘if the aider and abettor is in a position of authority, his *mens rea* may be deduced from the fact that he *knew* his presence would be interpreted as a sign of support or encouragement’.<sup>916</sup> Although this refers to knowledge of the likely effect of the defendant’s presence, the authority is mentioned as a conditional element. Different from the regular approach to aiding and abetting is that requiring knowledge that the presence combined with authority may be perceived as support or encouragement does not necessarily equate with knowing that one assists or facilitates the commission of the crime. The latter might be one step further.

The connection to the crime was however made in *Boškoski & Tarčulovski*, in which the ICTY Trial Chamber referred to the required *mens rea* as ‘knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence, a knowledge which need not have been explicitly expressed and may be inferred from all the relevant circumstances’.<sup>917</sup> The latter part of this citation is however rather vague. It implies there is judicial discretion regarding the interpretation of what actually constitutes knowledge that one’s conduct facilitates or encourages the commission of the crime. Again, this provides no clear definition of how such knowledge can be established. That would arguably allow the inference of the *mens rea* from being present silently, without establishing clear guidelines as to how this knowledge should be demonstrated.

In *Ndahimana*, the ICTR Trial Chamber actually adopted the approach taken in *Boškoski & Tarčulovski* by inferring the *mens rea* from the circumstances. In reasoning why *Ndahimana*’s presence amounted to blameworthy conduct, the ICTR Trial Chamber argued that *Ndahimana*

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<sup>915</sup> *Ibid.*

<sup>916</sup> *Bisengimana (Trial Judgment)* (n 888) para 36.

<sup>917</sup> *Boškoski & Tarčulovski (Trial Judgment)* (n 669) para 403.

‘could not have ignored nor been ignorant’ of the fact that the main perpetrators intended to commit genocide.<sup>918</sup> In doing so, the Trial Chamber inferred Ndahimana’s *mens rea* from the factual circumstances. It applied an objective approach to the mental element; an approach considerably more objective than usually required for aiding and abetting. This was also the conclusion regarding the knowledge of the Belgian commanders in *Mukeshimana*.<sup>919</sup> The Brussels District Court held that the Belgian commanders could not have been ‘ignorant of’ the crimes’ that were (about to be) committed.<sup>920</sup> In both *Ndahimana* and the case of the Belgian commanders, this is arguably undesirable as it appeared difficult to establish the culpable contribution of the defendants beyond reasonable doubt. Considering the parallel between the peacekeeping cases and *Ndahimana*, it would have been desirable to establish clear culpability regarding the required knowledge that genocide was about to be committed. ‘Could not have ignored’ implies that it could be reasonably inferred from the circumstances that the third party had an intention to commit genocide, and this should or must have been clear to the defendant. This is similar to the negligence standard used for command responsibility and omission liability. It once again points out how closely related omission liability, command responsibility and bystander liability are.

The ICTR Trial Chamber confirmed moreover that ‘the accused’s presence is circumstantial evidence that can be taken into consideration to establish the *mens rea* of the approving spectator’.<sup>921</sup> This supports my argument that both the *mens rea* and the *actus reus* are derived from objective circumstances. Ndahimana’s *mens rea* is not based on his actual mental state, but is established using an objective approach to determine his *mens rea*. This was also the approach used in *Altfuldisch*<sup>922</sup> and is therefore also referred to as the ‘*Altfuldisch* approach’.<sup>923</sup>

That the ad hoc courts have not been able to develop a unitary approach to the mental element

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<sup>918</sup> *Ndahimana (Trial Judgment)* (n 891) para 828.

<sup>919</sup> See above n 130 (Ch. 2).

<sup>920</sup> *Ibid.*

<sup>921</sup> *Ndahimana (Trial Judgment)* (n 891) para 830.

<sup>922</sup> *United States v Hans Altfuldisch and others* (1947), Deputy Judge Advocate’s Office, 7708 War Crimes Group, Review and Recommendations of the Deputy Judge Advocate for War Crimes, Case No 000.50.5 4.

<sup>923</sup> *Ibid* 17-18. In *Altfuldisch*, knowledge was deduced ‘from presence in the Camp (...) that, in combination with the ‘criminal nature’ of ‘the circumstances, conditions, and the very nature’ of the Camp, formed the basis for the finding of guilt of the officials, guards and employees.’ See Caspar Plomp, ‘Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court’ (2014) 30 *Utrecht Journal of International and European Law* 4, 10.

required for this specific type of liability was also clear in *Brima and others*.<sup>924</sup> The SCSL Trial Chamber constructed Brima's *mens rea* as follows:

Brima's presence at the scene gave moral support which had a substantial effect on the perpetration of the crime. In addition, given the systematic pattern of crimes committed by the AFRC troops throughout the District, the [Trial Chamber] is satisfied that the Accused Brima was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.<sup>925</sup>

The 'awareness of the substantial likelihood that...' is the *mens rea* used for ordering, instigating and planning the commission of a crime, which is a more direct contribution to the crime than aiding and abetting by presence is. This, again, is a low threshold to establish aiding and abetting; considerably lower than the usually required knowledge. The defendant's desire to see the crimes take place is relatively strong if he orders, instigates or plans the commission of the crime. The defendant is then not just liable for accepting the crime to take place, but for clearly wanting the commission of the crime.<sup>926</sup> The SCSL Appeals Chamber adopted the same approach in its *Gbao* judgement by referring to the 'awareness of the substantial likelihood that his acts would assist the perpetrator in committing a crime' as the minimum threshold for the *mens rea*.<sup>927</sup> The Court thus considers it sufficient that the defendant *accepts the risk* that the defendant's contribution *may* affect the commission of the crime. This is similar to recklessness, or *dolus eventualis*, and is a threshold lower than actual knowledge.<sup>928</sup>

Another aspect that makes the mental element for aiding and abetting wide in scope is the approach adopted in *Brđanin* that 'it is not necessary that the aider and abettor had knowledge of the *precise* crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would *probably* be committed, including the one actually

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<sup>924</sup> *Prosecutor v Brima and others (Trial Judgment)* SCSL-04-16-T (20 June 2007).

<sup>925</sup> *Ibid* para 1768. (emphasis added)

<sup>926</sup> Human Rights Watch, 'Genocide, War Crimes and Crimes Against Humanity' (2010) 338; *Prosecutor v Limaj (Trial Judgment)* IT-03-66-T (30 November 2005) para 515; *Brđanin (Trial Judgment)* (n 505) para 270; Stewart, 'The End of "Modes of Liability"' (n 39) 38 ff; *Prosecutor v Kordić & Čerkez (Appeal Judgment)* IT-95-14/2-A (17 December 2004) para 30.

<sup>927</sup> *Sesay, Kallon and Gbao (Appeal Judgment)* (n 796) para 546.

<sup>928</sup> Olásolo, *The Criminal Responsibility Of Senior Political And Military Leaders* (n 28) 79–80. James Stewart also discussed the tendency of tribunals to apply awareness of the risk that someone's conduct might assist or facilitate a crime under the 'header' of knowledge, see Stewart, 'The End of "Modes of Liability"' (n 39) 39 ff.

committed'.<sup>929</sup> Again, this substantially widens the scope of this element and lowers the bar for aiding and abetting a crime. If the contribution was essential, this *mens rea* could under the Rome Statute (article 25(3) of the RS) even be sufficient to hold someone responsible as a co-perpetrator.<sup>930</sup>

Having established here that the mental element required for bystander liability is considerably low, similar to a negligence or recklessness standard, the question arises as to what explains the use of this low threshold. It is likely that the courts have weighted the authoritative position of the defendant as an important factor in their judgement. The lower threshold for the *mens rea*, similar to command responsibility, reflects that diligent conduct is expected from the commander. I referred to this earlier as a moral duty to act in section 6.3. This is arguably an aspect that command, bystander and omission liability have in common. Where this is less reflected on the domestic level, the international level demonstrates this because it mostly deals with the responsibility of public officials who have a certain level of authority.

An objective standard is thus applied to demonstrate that more is expected from the commanders, but also to ensure that the commander's conduct is assessed based on what was considered reasonable in the circumstances. That could explain the focus on the circumstantial factors. Without neither a clear contribution requirement nor a clear *mens rea* requirement, presence and authority as objective factors are most relevant in establishing bystander liability. If the presence is used to demonstrate that the commander wanted, agreed with or accepted the commission of the crime, a connection (albeit not causal) with the crime is established based on these factors.

#### 7.4 Degree of Liability

Although there is no causation-requirement for bystander liability, the mental state of the perpetrator cannot be influenced by the defendant if there was not some kind of relationship between the defendant and the principal or between the defendant and the commission of the crime. In most judgments under review, authority and presence arguably established such a

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<sup>929</sup> *Brđanin (Trial Judgment)* (n 505) para 272. (emphasis added)

<sup>930</sup> Antonio Cassese, *International Criminal Law : Cases and Commentary* (OUP 2011) 363.

connection between the defendant and the commission of the crime. If so, this also imposes a relatively high degree of responsibility to the defendant for what can objectively be defined as inaction. On the international level a moral obligation to act is arguably derived from the defendant's authority. This is strengthened by the idea that inaction combined with authority and awareness of the crimes taking place is considered acceptance of the likely consequences. That acceptance, or sometimes even the will that these crimes are committed, connects the defendant to the overall crime(s) committed. As such, this does not create the alleviated degree of liability that one expects if the defendant was a bystander to the commission of the crime(s).

Besides the fact that the inaction may encourage the principal perpetrator or suggest approval of the main perpetrator's conduct, it is also likely that not intervening while this could be expected from the defendant, simply takes away an obstacle for the principal perpetrator in the commission of the crime(s). As such, the bystander facilitates the commission of the offence, which coupled with acceptance of foreseeable consequences may prove sufficient to incur liability by the defendant. The tendency to establish the *mens rea* for bystander responsibility using a relatively low standard furthermore stresses the importance of the superior position of the commander in establishing this responsibility. The combination of this low threshold for the mental element and the use of objective, circumstantial factors to fulfil the *actus reus* could facilitate a conviction of military commanders in PKOs who stand idly by while crimes are likely to be committed. It is not inconceivable that this could hypothetically place the Dutch and Belgian commanders in a position in which they may incur liability for their inaction.

The commanders, however, cannot expect this low standard for the mental element to be used, as the law requires a subjective standard such as intent or knowledge. This means that applying bystander liability to the cases of the Dutch and Belgian commanders would be problematic, given the principle of legality that requires the law to be predictable and insightful to its subjects. In addition, it is debatable whether the commander would be held liable for his or her personal conduct if the inaction is connected to the criminal result. Only if encouragement or approval of the crimes would be realistic, this could be a justifiable conclusion. We already considered that this is not likely in the Dutch and Belgian cases under review. Whether involuntary acceptance by the Dutch and Belgian commanders of the crimes committed justifies liability for that result is

highly questionable.

## 7.5 Comparative Perspective and Concluding Remarks

In both domestic and international law, it has been accepted that the presence of someone in authority may have an approving or encouraging effect on the commission of the crime. In international law, it was more evident that, although tying it to the approving or encouraging effect on the principal, the commander's authority creates an expectation of action and is a sufficient basis for the conclusion that the commander accepted or wanted the consequences of his or her inaction. In the case of the Dutch and Belgian peacekeeping commanders, this acceptance would most likely be involuntary and the suitability of this type of liability for the cases central to this thesis is questionable. Conclusions that the inaction had an encouraging effect on the principal perpetrator were often poorly argued. After all, when is it evident that someone's inaction may have encouraged the principal? I therefore observed that conclusions regarding the liability of bystanders have the authority as a stable and less speculative element in common. In domestic law however, the majority of cases dealt with responsibility for encouragement in which authority was not always relevant, but either a factor of control was important or a volitional element was inferred from the defendant's presence. This is related to the idea that someone who is present and aware of the intentions of the principal is effectively consenting the commission of the crime. On both the domestic and the international level it became apparent that awareness of the likely consequences may suffice.

In the civil law systems under review, the will expressed through the presence of the defendant was often criminalised as co-perpetration; a relatively high degree of responsibility for a contribution that merely consists of passive behaviour. In both scenarios, with or without authority, the rationale seems to be that someone who is present at the scene, combined with awareness of the crimes about to be committed, and had an ability to act, had a moral obligation to act. It is controversial that this may lead to criminal responsibility, which is why some domestic systems require an active contribution to the crime such as encouragement or approval.

Both omission and bystander liability can be seen as modes of liability in which the objective part

of the defendant's behaviour (duty+failure to act, presence+authority) is crucial. For both omission and bystander liability the mental state of the defendant is difficult to determine; therefore, these modes of liability should normally not generate a high degree of criminal liability. But somehow they do, as was also brought forward in the submissions to *Prosecutor v Kenyatta and others*: 'Crimes committed in this way have attracted substantial sentences at the ad hoc tribunals, belying the claim that crimes committed in this way are inherently of low gravity'.<sup>931</sup> The main idea behind these types of liability seems to be that an authoritative position or an element of control raises expectations that make the application of the usual requirements for aiding and abetting less necessary. As such, it is possible to argue that liability for inaction forms a category of its own. That includes command responsibility, omission liability and bystander liability.

The options available under both domestic and international law to impose liability on the peacekeeping commanders for their inaction are limited. Omission liability would be difficult to establish because the legal duty required for omission liability could not be found in chapter 5. Regarding bystander liability, one could conclude that the moral obligation to act which appears to be the basis for bystander liability could be established on part of the Dutch and Belgian commanders, but their positive contribution to the crime would be limited. That contribution should be established by their presence having an encouraging or approving effect on the mental state of the main perpetrators. This seems unrealistic in the circumstances. Their awareness of the substantial likelihood that crimes would be committed indicates that they may have accepted the criminal consequences, but this appeared to be out of complete incompetence to act otherwise. The Belgians were not factually present when the crimes were committed, but their withdrawal symbolises a certain level of acceptance of the fate of the civilians under their care. Some might even label their decision to withdraw as 'carelessness'. Despite the latter observation, the principles of legality and culpability are likely to halt potential verdicts for the commanders' bystander conduct.

In sum, despite the recognition of bystander liability in domestic and more so in international criminal law, it fails to deliver the moderate degree of liability expected for having a bystander

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<sup>931</sup> *Submissions in the Prosecutor v Kenyatta and others case* ICC-01/09-02/11 (14 October 2011) para 38.

role in the commission of international crimes. Albeit understandable since the ‘bystander effect’ should not be underestimated, anything between omission liability and bystander liability cannot be accounted for in both domestic and international criminal law, unless it amounts to command responsibility. Alternative forms of responsibility should be considered in order to strengthen the impact of civilian protection mandates in PKOs.

## Chapter 8: The *Lege Ferenda* Perspective on the Legal Framework of Peacekeeping

### 8.1 Introduction

Throughout the thesis, we have considered whether both domestic and international law require peacekeeping commanders to act against harm done to the civilian population under their care. This thesis subsequently assessed to what extent it is likely that not acting against the aggressors would result in individual responsibility for the commanders. Based on the cases discussed in chapter 2, the starting point in making that assessment was criminal responsibility for a failure to act, in contrast to the unsuccessful attempt to establish criminal liability for a positive contribution to the commission of crimes. This choice of perspective was further strengthened by the increased attention for the failure to act by peacekeepers in countries like South Sudan and the DRC.

This chapter aims to present the reader with alternatives to the criminal law options discussed in this thesis. In cases to which IHL applies, the introduction of a separate type of command responsibility for peacekeeping commanders under international criminal law is an option. A second option is the use of domestic tort liability for failures to act. If the peacekeeping commanders would be subject to a duty to act, for example under domestic law as discussed in chapter 3,<sup>932</sup> one could draw a parallel between the peacekeeping commander's failure to act and a state's failure to meet a due diligence obligation. Focusing on the commander's responsibilities as obligations of due diligence would have certain benefits, eg the responsibility that follows is based on the commander's failure to act within the means available to him or her. A third option discussed is the development of a separate legal paradigm for peacekeeping that could be used in all situations of peacekeeping, irrespective of whether the commanders are involved in the conflict; this could be a special regime that complements IHL and IHRL.

The second section sheds light on the need for accountability for a failure to act. One may question why this seems so pertinent to peacekeeping, even though we had to recognise that the

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<sup>932</sup> See above section 3.4.1 (Ch. 3).

options assessed in the thesis would not be suitable to use in relation to peacekeeping conduct. Then, the third section considers the development of a new or separate doctrine for peacekeeping conduct *within* criminal law, which could be similar to occupation command responsibility. Command responsibility serves as an example of a separate doctrine developed to fill a gap in international criminal law, because the existent law was not deemed applicable to a failure to fulfil a duty by superiors. I will also explain the benefits this would have for international criminal law. Section 8.4 considers the use of civil responsibility as a reasonable alternative to criminal liability. Another option is the development of special law governing PKOs, which will be discussed in section 8.5.

## 8.2 A Failure to Act: Why Accountability on the Individual Level?

The outcome that the current modes of liability addressing inaction are not suitable to be applied to peacekeeping commanders raises the question of whether individual accountability is necessary in situations in which peacekeeping commanders failed to act.

Two points underline the need for liability. That is, first, the assumption that liability increases the effectiveness of civilian protection mandates. Without liability on the individual level, states are the only actors that can be held to account for a failure to act in PKOs, since the UN relies heavily on its immunity. As a result, there is no incentive to act adequately on the individual level, since protection can be framed as ‘not our responsibility’, but that of the state or the organisation authorising the mission. This is also referred to as ‘passing the buck’.<sup>933</sup> Individual liability would end the claim that protection is only of concern to the higher chains of command,<sup>934</sup> which always made it an ‘institutional’ rather than an individual matter. Also, the lack of sanctions for inaction makes a passive response to misconduct in the mission area a feasible alternative to action. The OIOS report indicated that the fact that inaction is not punished lowers the incentive to take action, since ‘[t]here are penalties for action, but no penalties for inaction’.<sup>935</sup> Action increases the risk of using excessive forms of violence or violating

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<sup>933</sup> Cambridge dictionary <<http://dictionary.cambridge.org/dictionary/english/pass-the-buck>> accessed 24 May 2017.

<sup>934</sup> OIOS report (n 26) para 85.

<sup>935</sup> Ibid para 50.

international law, which prevents peacekeepers from acting even though they are capable of doing so.<sup>936</sup> The legal actions taken by the plaintiffs in the Dutch and Belgian cases under review demonstrate how peacekeeping failures should not be taken for granted and that redress should also be sought on the individual level.

That peacekeepers and their commanders may be hesitant to act because of the risk of sanctions reinforces the need to look into how peacekeeping commanders could be encouraged to act within their capacity to protect civilians. In both domestic and international law there appears to be a gap between the law dealing with inaction and the failure to fulfil certain tasks diligently. This does not indicate that a failure to do so by peacekeeping commanders is ‘thus not worthy of punishment’. In part, the lack of suitable forms of liability results from the inconsistent and incorrect application of the law, which increases the degree of liability to a great extent. Judiciary appear uncomfortable adjudicating inaction, as their attempt to link liability for inaction with the criminal result demonstrates. Command responsibility is a good example of an attempt to fill the gap between liability for positive conduct and inaction by criminalising the separate failure to act. Tort liability is another alternative to direct criminal liability for a serious crime. Both options will be discussed below.

The second point that supports the need to consider individual liability for a failure to act is that civilian protection has become a focus point in peacekeeping policy and in the politics of peacekeeping. The law however is lagging behind in its development towards prioritising civilian protection in PKOs. In 2015, the Ramos-Horta report stressed the following:

Protection of civilians is a core obligation of the United Nations, but expectations and capability must converge. Significant progress has been made in promoting norms and frameworks for the protection of civilians. And yet, on the ground, the results are mixed and the gap between what is asked and what peace operations can deliver has widened in more difficult environments.<sup>937</sup>

In his response to this report, the UN Secretary-General wrote that ‘[e]very peacekeeper – civilian, military, police – must do all they can when civilians are under imminent threat’, and

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<sup>936</sup> Khalil (n 630) 214.

<sup>937</sup> UNGA/SC ‘Report of the High-level Independent Panel on Peace Operations on Uniting Our Strengths for Peace: Politics, Partnership and People’ (n 429) 11.

[w]here missions have an explicit mandate to protect civilians, uniformed personnel must play their part, including, where necessary, through the use of force. This has been defined to mean preventive, pre-emptive and tactical use of force to protect civilians under threat of physical violence. The source and the nature of violence are not the determinant for action.<sup>938</sup>

The 2015 DPKO Policy brief on the Protection of Civilians in United Nations Peacekeeping reflects this position by referring to a responsibility for peacekeepers to act ‘within their capabilities’ ‘where the state is unable or unwilling to protect’.<sup>939</sup>

Where the state is unable or unwilling to protect civilians, or where government forces themselves pose such a threat to civilians, peacekeepers have the authority and the responsibility to provide such protection within their capabilities and areas of deployment. Particularly, peacekeepers will act to prevent, deter, pre-empt or respond to threats of physical violence in their areas of deployment, no matter the scale of the violence and irrespective of the source of the threat.<sup>940</sup>

UN policy expresses a strong will to protect the civilian population by affirmative action, even though the law does not demonstrate a similar intent. The recently established ‘Kigali Principles’<sup>941</sup> furthermore express the intention to strengthen civilian protection mandates. Each member state endorsing the principles pledges to

be prepared to use force to protect civilians, as necessary and consistent with the mandate. Such action encompasses making a show of force as a deterrent; interpositioning our forces between armed actors and civilians; and taking direct military action against armed actors with clear hostile intent to harm civilians<sup>942</sup>

(...)

Not to hesitate to take action to protect civilians, in accordance with the rules of engagement, in the absence of an effective host government response or demonstrated willingness to carry out its responsibilities to protect civilians.<sup>943</sup>

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<sup>938</sup> UNGA ‘The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations’ (2 September 2015) UN Doc A/70/357–S/2015/682, para 18.

<sup>939</sup> UN DPKO/DFS Policy Brief, Protection of Civilians in United Nations Peacekeeping, effective from 1 April 2015 <<http://www.ccopab.eb.mil.br/biblioteca/documentos/150323%20POC%20policy%20final.pdf>> accessed 25 April 2017.

<sup>940</sup> Ibid para 20.

<sup>941</sup> United Nations Headquarters, ‘The Future of Civilian Protection in Peace Operations: Endorsing and Implementing the Kigali Principles’, 11 May 2016 <<http://www.globalr2p.org/media/files/kp-principles-list-for-high-level-event.pdf>> accessed 25 April 2017.

<sup>942</sup> Ibid principle no. 3.

<sup>943</sup> Ibid principle no. 8.

The Netherlands and main troop contributor Bangladesh are among the 19 countries that have endorsed the principles. The exact meaning of this is difficult to determine if the principles are non-binding after enforcement. Although the UN increasingly works towards a stronger civilian protection mechanism in PKOs, the lack of any legal rules contributing to such a mechanism makes it overly ineffective.<sup>944</sup> As Besmer rightly stated in relation to the effectiveness of codes of conduct and other forms of self-regulatory measures: 'codes, whether self-imposed or not, are only as meaningful as their enforceability'.<sup>945</sup>

Establishing some form of liability ultimately contributes to a sense of justice for the relatives of those who have been killed despite the UN's intentions to protect them. Justice can be a powerful solution to conflict; a solution that is often overlooked if political efforts are more readily available.<sup>946</sup> Relatives however mainly seek justice for the loss they have suffered,<sup>947</sup> even if the ones they hold responsible did not take direct part in the conflict. This was visible in the aftermath of the Srebrenica and Kigali affairs, in which 'justice' was sought at all possible levels: from the TCC to the individual commanders. A balance should then be struck between the need to legally address those extreme cases in which peacekeepers and their commanders could have reasonably acted, but failed to do so, and those situations in which peacekeeping commanders were incapable of acting. The legal sanctions should be suitable to the specific circumstances in which peacekeeping commanders operate. The establishment of an accountability system that respects both the victims' claims and the position of the peacekeepers would be a fundamental contribution to the legal framework governing PKOs.

### 8.3 'Failure to Protect' as a Separate Offence in Criminal Law?

It can be argued that with no connection to the criminal result, international courts or tribunals would not have jurisdiction to adjudicate these inactive contributions to the commission of

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<sup>944</sup> Katja Creutz, 'Law versus Codes of Conduct: Between Convergence and Conflict' in Jan Klabbers and Touko Piiiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (CUP 2013) 180.

<sup>945</sup> Veronica Besmer, 'The Legal Character of Private Codes of Conduct: More than Just a Pseudo-Formal Gloss on Corporate Social Responsibility' (2006) 2 *Hastings Business Law Journal* 279, 294.

<sup>946</sup> M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9, 11–12.

<sup>947</sup> *Ibid* 12.

serious crimes.<sup>948</sup> Command responsibility is a good example of a failure to act that falls within the jurisdiction of the international courts despite lacking such a direct connection with the criminal result. This section explores first how command responsibility can be classified as a separate offence. Then, this section looks into command responsibility as an example of a doctrine prioritising civilian protection within international criminal law.

### 8.3.1 Command Responsibility as an Example of a Separate Failure to Act

Command responsibility illustrates how a failure to act can be criminalised without linking the commander to the criminal result *per se*. Two arguments support the idea that command responsibility is, in contrast to omission and bystander liability, considered a separate offence. First, the argument that the requirements for command responsibility are, in theory, different from the modes of liability included in the statutes. A second argument is that causation is not always required for command responsibility to arise.

It is first argued here that the requirements for command responsibility are inherently different from the modes of liability included in the statutes. Both article 7(3) of the ICTY Statute and article 28 of the RS refer to a commander who ‘failed to take the necessary and reasonable measures to prevent’<sup>949</sup> a crime committed by the superior’s subordinates. This creates a separate *actus reus* that differs from the one required for complicity in ICTY jurisprudence, which is defined as ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime’.<sup>950</sup> The RS lacks a reference to an *actus reus* for complicity, which according to Ambos (writing in 1999) made sense as the jurisprudence seemed undecided on the exact requirements for aiding and abetting.<sup>951</sup> However, it may be inferred from the limited practice of the ICC that a contribution to the crime should be ‘substantial’<sup>952</sup> which is

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<sup>948</sup> Robinson, ‘The Identity Crisis’ (n 39) 952.

<sup>949</sup> To be precise, article 28 (a)(ii) of the RS reads as follows: ‘(...) failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission (...)’

<sup>950</sup> *Furundžija (Trial Judgment)* (n 476) paras 235, 249; *Vasiljević (Appeal Judgment)* (n 46) para 102; *Blaškić (Appeal Judgment)* (n 120) para 45.

<sup>951</sup> Kai Ambos, ‘General Principles Of Criminal Law In The Rome Statute’ (1999) 10 *Criminal Law Forum* 1, 11.

<sup>952</sup> *Concurring Opinion of Judge Christine Van den Wyngaert to the Judgment pursuant to Article 74 of the Statute in the case of The Prosecutor v Mathieu Ngudjolo Chui (Trial Judgment)* (n 513) para 44; *Prosecutor v Callixte Mbarushimana (Pre-Trial Chamber I) Decision on the confirmation of charges* (n 513) para 279.

then again based on the jurisprudence of the ad hoc tribunals. There is no reason to assume that the ICC would deviate from the point of view taken by the ad hoc tribunals.<sup>953</sup>

The *mens rea* for command responsibility is described as knowledge or ‘had reason to know’ in the ICTY Statute which is again broader than the *mens rea* required for complicity. It represents the expectation that a commander may have or may have been able to have information available to him, based on which he should have known that crimes were about to be committed. The Rome Statute has incorporated this provision but changed the wording slightly to ‘should have known’ in article 28 of the RS. Although it only implies a slight change in meaning, it triggered a debate regarding the imposition of a duty to know on commanders.<sup>954</sup> Whereas ‘had reason to know’ seems more similar to a type of ‘wilful blindness’ by reproaching the commander that he ignored the knowledge he had, the ‘should have known’ clause seems to blame the commanders for not *obtaining* the knowledge, depending on how one interprets the language used. Confusion is caused by the mental element required for aiding and abetting under the RS, knowledge, whereas the jurisprudence has demonstrated that more objective standards like awareness, or recklessness may suffice.<sup>955</sup> The negligence standard in command responsibility is lower than the thresholds used for aiding and abetting by omission. The ‘should have known’ requirement stretches the scope of the mental element further than a ‘could have foreseen’ or ‘could have known’ requirement that the awareness and recklessness standard used in the jurisprudence on aiding and abetting by omission represent.

Regarding the second argument, that causation is not always required for command responsibility, it should first be noted that article 28 of the RS requires a causation requirement because it creates responsibility for crimes ‘committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces’. This provision was however explained

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<sup>953</sup> Héctor Olásolo and Enrique Carnero Rojo, ‘Forms of Accessorial Liability under Article 25(3)(b) and (c)’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 579.

<sup>954</sup> Harmen Van der Wilt, ‘The Duty to Know: enkele beschouwingen over het leerstuk van Command Responsibility’ in Nico Corstens, GJM Groenhuijsen, MS Keijzer (eds), *Rede en recht: opstellen ter gelegenheid van het afscheid van Prof. mr. N. Keijzer van de Katholieke Universiteit Brabant* (Gouda Quint 2000); Arnold (n 28); *Delalić and others (Appeal Judgment)* (n 503) paras 228-241.

<sup>955</sup> See above sections 4.5.4 (Ch. 4) and 7.3 (Ch. 7).

by the Pre-Trial Chamber in *Bemba* as ‘only relat[ing] to the commander’s duty to prevent the commission of future crimes’.<sup>956</sup> The Chamber argued that ‘[a]s punishment is an inherent part of prevention of future crimes, a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future’.<sup>957</sup> The ICC Trial Chamber confirmed that it agrees with the Pre-Trial Chamber and held that the text of article 28 ‘does not require the establishment of “but for” causation between the commander’s omission and the crimes committed’.<sup>958</sup> We may infer from this that the causation requirement refers to the duty to punish and not to the duty to prevent. If the causation requirement does not connect the commander to the crimes *already* committed but only to *future* crimes, this would lead to the same problematic outcome as seen in the previous chapters: with little or no active involvement, the commander would be held responsible for crimes committed by another actor.

Article 7(3) of the ICTY Statute does not include a causation requirement. Therefore, the ad hoc tribunals have rejected causation in some of the landmark cases on command responsibility. In *Delalić and others* for example, the ICTY Trial Chamber held that

[n]otwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.<sup>959</sup>

A similar opinion was expressed in *Prosecutor v Halilović* where the ICTY Trial Chamber held that command responsibility ‘as a *sui generis* form of liability, (.....) is distinct from the modes of individual responsibility set out in Article 7(1), [and therefore] does not require a causal link’.<sup>960</sup> Alternatively, one can argue that its status as a separate offence does not take away the requirement of a causal link.<sup>961</sup> With the clear stance taken by the ICTY and the approach

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<sup>956</sup> *Prosecutor v Bemba Gombo (Pre-Trial Judgment)* (n 602) para 426.

<sup>957</sup> *Ibid* para 424.

<sup>958</sup> *Prosecutor v Bemba Gombo (Trial Judgment)* (n 37) para 211.

<sup>959</sup> *Delalić and others (Trial Judgment)* (n 503) para 398.

<sup>960</sup> *Halilović (Trial Judgment)* (n 502) para 78; *Orić (Trial Judgment)* (n 522) para 338; *Blaškić (Appeal Judgment)* (n 120) para 83.

<sup>961</sup> Ambos, ‘Superior Responsibility’ (n 28) 833.

adopted by the ICC in *Bemba* there is in practice sufficient support to argue that causation is not required for past crimes, only for future crimes. As such, the duty to prevent is arguably a separate offence, not related to the crime committed. The commander's responsibility is therefore considered separate from the crime committed by his or her subordinates, arguably defining it as a separate offence rather than a mode of liability. This is supported by the idea that classifying command responsibility as a mode of liability would render command responsibility superfluous in international criminal law.<sup>962</sup> It would be a variant of aiding and abetting by omission:<sup>963</sup> the outcome would be the same, but slightly different elements would be applied.

### 8.3.2 Command Responsibility: the Prioritisation of Civilian Protection

There is a notable similarity between peacekeeping commanders and commanders who have been convicted for command responsibility thus far. Some of the earliest convictions for command responsibility referred to the protection of civilians as an important task of the commander.<sup>964</sup> In *Yamashita*, Yamashita's duty to 'take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population' was explicitly mentioned.<sup>965</sup> The judges in *High Command* even held the following:

With regard to the second aspect of this order, that is the obligation to prosecute soldiers who commit offenses against the indigenous population, this obligation as a matter of international law is considered doubtful. The duty imposed upon a military commander is the protection of the civilian population.<sup>966</sup>

The judges were not sure how this duty should be fulfilled, but ascribed liability for failing to prevent or punish the libelled conduct of the commander's subordinates against the civilian population. In *High Command*, the military tribunal further stressed the importance of the protective duties of the commander when it based the responsibility of General Hermann Hoth

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<sup>962</sup> *Orić (Trial Judgment)* (n 522) para 338.

<sup>963</sup> Robinson, 'How Command Responsibility Got So Complicated' (n 28) 25. Robinson presents this as one of the reasons why command responsibility could be considered as a separate offence, but argues on p. 29 that this is not true in his opinion.

<sup>964</sup> *Yamashita* (n 500); *United States v Wilhelm von Leeb and others* (1948) 12 LRTWC 1, 9 TWC 462 (hereafter: *High Command case*); *United States v Wilhelm List and others* (1948) 11 TWC 757, 8 LRTWC 34 (hereafter: *Hostage trial*).

<sup>965</sup> *Yamashita* (n 500) 91.

<sup>966</sup> *High Command case* (n 964) para 523.

on the fact that ‘he turned over (...) large numbers of the civilian population over whom he had power and whom he was under a duty to protect’.<sup>967</sup> Also in more recent jurisprudence we have seen references to a superior’s duty to protect the civilian population or a duty to protect basic principles of humanity.<sup>968</sup> The ICTY Trial Chamber referred to superior responsibility as ‘[aiming] at obliging commanders to ensure that subordinates do not violate IHL, either by harmful acts or by omitting a protective duty’.<sup>969</sup> This indicates that, where the commander cannot control the perpetrators of the crime directly, his or her duty to protect does not cease to exist.

The obligations held by occupation commanders are a good example thereof. The separate command responsibility doctrine for occupation commanders is exemplary for how ‘peacekeeping command responsibility’ could be constructed.<sup>970</sup> Commanders deployed in an area occupied by their home state have executive powers in this geographical area. This means that they also fulfil certain duties normally exercised by the public administration. One can also think of the protection of human rights obligations in that regard.<sup>971</sup> Occupation commanders have the specific duty to ‘maintain order and protect the civilian population against illegal acts’.<sup>972</sup> Peacekeeping commanders are, more than combat commanders, tasked with monitoring the overall security situation in the mission area, which may include civilian protection as discussed in chapter 5. The comparison between peacekeepers and occupation commanders is not flawless however. Arnold already pointed out the difference between tactical level

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<sup>967</sup> Ibid para 613.

<sup>968</sup> Eg *Rutaganira (Trial Judgment)* (n 539) paras 75-83.

<sup>969</sup> *Orić (Trial Judgment)* (n 522) para 300. Note that this case refers to a failure to fulfil a protective duty of the commander’s subordinates.

<sup>970</sup> The analogy of occupation command to assess the obligations of peacekeepers was supported in O’Brien, ‘Protectors On Trial? Prosecuting Peacekeepers For War Crimes And Crimes Against Humanity In The International Criminal Court’(n 36); Bruce M Oswald, ‘Developing a Course on the Law of Peace Operations: Method and Practice—making Ends Meet’ (2007) 4 *Journal of Peace Education* 57; Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Kluwer Law International 1999) 145 ff; Michael Kelly and others, ‘Legal Aspects of Australia’s Involvement in the International Force for East Timor’ (2001) 841 *International Review of the Red Cross*, available at <<https://www.icrc.org/eng/resources/documents/misc/57jqz2.htm>> accessed 13 October 2015. An opposing view was held by Zwanenburg in Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers 2005) 198–199.

<sup>971</sup> In *Loizidou vs. Turkey* App no 15318/89 (ECtHR, 28 November 1996) the ECHR confirmed that human rights and IHL may be more dominant in situations of occupation than in other situations of conflict.

<sup>972</sup> *High Command case* (n 964) para vii (11), p. 78.

commanders, such as the peacekeeping commanders of national contingents, and the executive commanders in situations of occupation.<sup>973</sup> The executive commander has the duty to supervise a geographical area rather than troops under his or her command.<sup>974</sup> The nature of this typology of command responsibility is therefore genuinely different from regular command responsibility: it does not establish responsibility for the crimes committed by his subordinates. It is focused on the protective obligations and maintenance of law and order in the area under his control. The executive commander's duties were described in the *Hostage trial* case as

maintaining peace and order, punishing crime and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been assigned to them.<sup>975</sup>

The national contingent commanders in PKOs operate at the tactical level of command, but the circumstances in which the commanders in Srebrenica and Kigali operated may have been similar to occupation. This would depend on the factual situation, but also on the tasks assigned to the peacekeeping troops, and thus on the language used in the mandate. We considered in chapter 5 that there was no explicit obligation to act or protect, but that peacekeeping commanders may be expected to monitor the overall security situation and fulfil a duty to report. The very fact that a peacekeeping mission may have civilian protection as its main objective gives rise to an expectation of protection. In peacekeeping even more than in situations of occupation the relationship of trust between the population and the commanders creates that expectation.

In sum, command responsibility is an example of a doctrine used to punish a failure to fulfil protective duties. Weigend even argued that 'post WW 2 tribunals were more focused on less specific (*undifferenzierte*) moral responsibilities'.<sup>976</sup> As such, there is scope to argue that the different nature of peacekeeping does not necessarily rule out liability for failing to fulfil a (moral) obligation of protection that is similar to that of command responsibility in its early

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<sup>973</sup> Arnold (n 28) 202 ff.

<sup>974</sup> Ibid 202.

<sup>975</sup> *Hostage trial* (n 964) para A(3)(x), p. 71.

<sup>976</sup> Thomas Weigend, 'Bemerkungen Zur Vorgesetztenverantwortlichkeit Im Völkerstrafrecht' (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 999, 1001.

stages. The command responsibility doctrine demonstrates that the punishment of the failure to prevent may be of a separate nature than the other forms of liability, sufficiently so to establish a separate doctrine like command responsibility arguably is. The doctrine could be defined in such a way that it represents the peacekeeping commander's moral duty to report or monitor certain conduct in line with the instructions given by the mandate. It would be placed between bystander and omission liability. However, it would only apply if the peacekeeping commanders are involved in the armed conflict and their involvement triggers the application of IHL.

The principle of legality would be respected if the doctrine clearly prescribes the circumstances in which it applies and what elements need to be fulfilled. The principle of fair labelling would be met if the doctrine would balance the blameworthiness of the commander and the label addressed to him or her. For example, the peacekeeping commander would be reproached for failing to fulfil a duty to report or monitor that may have had serious consequences, but would not be labelled as an accomplice in the commission of war crimes.

#### 8.4 Civil Responsibility

Another alternative to the options discussed in this thesis, and more restricted in scope is using civil law to establish individual liability. The peacekeeping commanders' conduct could then be classified as a tort, for example if the peacekeeping commanders violated IHRL. As concluded in chapter 5, it seems currently unlikely that peacekeeping commanders are directly responsible for fulfilling positive obligations under IHRL. However, the responsibility of the state does not exclude claimants from bringing suit against the individual state agents, as *Kaya v Turkey* confirmed:

If an act is found to be illegal or tortious and, consequently, is no longer an “administrative” act or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer.<sup>977</sup>

A good example of domestic civil redress for human rights violations is the American Alien Tort Statute, in which tort liability is based on a combination of criminal and international law, and

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<sup>977</sup> *Mahmut Kaya v. Turkey* (n 257) para 71.

liability is based on the 'breach of a customary international criminal norm'.<sup>978</sup> The main differences with criminal liability are the financial compensation for damages instead of criminal sanctions, the lower intent requirement of knowledge, the burden of proof, the fact that a private person can initiate these cases and the fact that it is being dealt with in 'courts of general jurisdiction'.<sup>979</sup> Let us first consider how civil claims are handled in domestic courts.

Civil claims for compensation may be brought before a domestic civil court. This can be a court in the host state where it concerns personal conduct committed outside the scope of the peacekeepers' duties, but when it involves conduct related to their official capacity, the TCC has the right to exercise civil jurisdiction.<sup>980</sup> That clarifies why the alleged civil responsibility of the Belgian commanders was brought before a Belgian court. Individual civil responsibility for human rights violations is rare, but the Alien Tort Statute has been invoked in several cases. In *Kadic v Karadžić*,<sup>981</sup> victims of the conflict in Bosnia and Herzegovina claimed compensation from the former Bosnian Serb political leader Radovan Karadžić under this Statute and the Torture Victims Protection Act. The case was controversial because the Court confirmed that private individuals can be held responsible for breaches of 'the law of nations'. As the United States Court of Appeals for the Second Circuit held: '[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals'.<sup>982</sup> In *Filártiga v Peña-Irala*<sup>983</sup> the (American) Second District Court limited the responsibility of individuals for violations of international law to state officials, a limitation not applied in the *Kadic v Karadžić* case.<sup>984</sup> In *Filártiga v Peña-Irala*, the Court analysed historical examples of individual responsibility for human rights violations and found that piracy and slave trade were examples for which also non-state actors

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<sup>978</sup> Mark A Drumbl, 'Extracurricular International Criminal Law' (2016) 16 *International Criminal Law Review* 412, 414.

<sup>979</sup> *Ibid.*

<sup>980</sup> International Peace Academy, *Peacekeeper's Handbook* (Pergamon 1984) 368; Raymond Sommereyns, 'United Nations Forces' in Rudolf Bernhardt (ed), *Use of Force · War and Neutrality Peace Treaties (n -Z)* (North-Holland 1982) 257; United Nations, *United Nations Juridical Yearbook 2004*, 325.

<sup>981</sup> *Kadic v Karadžić*, 70 F 3d 232 (2nd Cir 1995).

<sup>982</sup> *Ibid.*, section 1 (no para numbers available).

<sup>983</sup> *Filártiga v Peña-Irala*, 630 F.2d 876 (2nd Cir 1980).

<sup>984</sup> Sascha Bachmann, *Civil Responsibility for Gross Human Rights Violations The Need for a Global Instrument* (PULP 2007) 27.

were held accountable.<sup>985</sup> The important implications drawn from the *Kadic v Karadžić* case are that state obligations may be obligations of individuals, and that individuals can enforce their (human) rights, at least under the Alien Tort Statute.<sup>986</sup> The possibility of individual responsibility for human rights violations under domestic civil law as seen in the US by means of the Alien Tort Statute is however rather unique.<sup>987</sup>

Yet, the (interim) responsibility incurred by the Belgian commanders in *Mukeshimana* was also based on civil law. The Court used domestic criminal law to establish this type of responsibility, and not human rights law as referred to above. Cross-referencing to criminal norms in establishing tort liability in a domestic court of general jurisdiction, as seen in *Mukeshimana*, may have negative consequences. The interpretation of legal norms may be modified and expanded if used in a court that lacks the specialised knowledge and experience in dealing with norms of that specific regime. Also, the interpretation of norms of an international character in a domestic context and vice versa could be altered, which potentially weakens the universality of these norms.<sup>988</sup> For example, American jurisprudence on the Alien Tort Statute refers directly to international criminal jurisprudence regarding the interpretation of customary international law on several occasions.<sup>989</sup> However, certain concepts in criminal law and civil law are inherently different from one another and cannot be interpreted similarly in both contexts. Drumbl points at the risk of changing the requirements for aiding and abetting as a mode of liability, the elements required for crimes against humanity and genocide, and the debatable use of command responsibility in a private context (eg in private companies).<sup>990</sup> In chapter 4, we discussed how controversial the specific direction requirement is within international law, but the differing interpretation of this requirement in the jurisprudence on the Alien Torts Statute has complicated this even further. For example, the Ninth Circuit Court held on to the specific direction requirement, whereas the District of Columbia Circuit did not apply this requirement since

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<sup>985</sup> *Filártiga v Peña-Irala* (n 983) section V (n o para numbers available).

<sup>986</sup> David P Kunstle, 'Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations under the Alien Tort Claims Act?' (1996) 6 *Duke Journal of Comparative & International Law* 319, 321. Older jurisprudence under the ATCA also confirmed that individuals had both obligations and rights under international law. Examples are: *Bolchos v Darrell*, 3 F. Cas. 810 (D.S.C. 1795); *Moxon v The Brigantine Fanny*, 17 F. Cas. 942 (D. Pa. 1793).

<sup>987</sup> *Bachmann* (n 984) 47–48.

<sup>988</sup> *Drumbl* (n 978) 415.

<sup>989</sup> *Ibid* 423.

<sup>990</sup> *Ibid* 428.

customary international law does not recognise it as part of aiding and abetting.<sup>991</sup> Cross-referencing the law may result in expansion of the interpretation and impact of the law, which means that the law is developed outside its own normative environment. This is what Drumbl calls ‘an extracurricular movement’.<sup>992</sup>

Alternatively, if the peacekeeping commanders are expected to fulfil a certain task or objective and they fulfil to do so within the means available to them, it should be considered whether this amounts to tort liability similar to a state’s responsibility for its failure to exercise due diligence in carrying out its obligations. This may seem far-fetched, but due diligence shows strong resemblances with omission and bystander liability without being an obligation of result. The obligation to act diligently is one of conduct or ‘best efforts’.<sup>993</sup> It is also similar to command responsibility, besides the fact that it creates civil liability and not criminal accountability. Criminal liability was in practice often based on lower thresholds like foreseeability, recklessness or negligence, which violated the principle of legality. Tort liability would be a reasonable alternative to criminal liability, as it assigns a lower degree of responsibility to the commanders by not framing them as criminals. In addition, the use of a knowledge threshold for tort liability will at least be foreseeable for peacekeeping commanders. In our analogy, liability for a failure to meet a due diligence obligation would thus result in responsibility for not having used the means available to the peacekeeping commanders, rather than being linked to the criminal result. These two elements are beneficial in considering the development of such an obligation and a concomitant form of responsibility.

Whether a domestic court sanctions violations of IHRL by its nationals under civil or criminal law is up to the discretion of the state.<sup>994</sup> Article 2(2) of the ICCPR deals with the enforcement of human rights law in domestic courts and requires the signatories to arrange the enforcement of its provisions in the domestic legal order, without specifying what type of liability it should provide

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<sup>991</sup> Ibid 429.

<sup>992</sup> Drumbl (n 978) 444.

<sup>993</sup> Elif Askin, *Opinio Juris: Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers*, 1 March 2017 <<https://www.ejiltalk.org/due-diligence-obligation-in-times-of-crisis-a-reflection-by-the-example-of-international-arms-transfers/>> accessed 2 May 2017.

<sup>994</sup> Jane Wright, *Tort Law and Human Rights* (Hart Publishing 2001) 141; Bantekas, ‘Individual Responsibility and the Evolving Legal Status of the Physical Person’ (n 718) 438–439.

for. In chapter 2 we have also considered how domestic authorities have a duty to investigate any potential violations of article 2 of the ECHR in areas where it exercises effective control in the meaning of the ECHR.<sup>995</sup> If both local courts and the TCC involved have no jurisdiction, a failure to act can be sanctioned by establishing a UN claims commission.<sup>996</sup> This option is laid down in paragraph 51 of the Model SOFA for PKOs which applies to 'damage caused by members of the force in the performance of their official duties and which for reasons of immunity of the organization and its members could not have been submitted to local courts'.<sup>997</sup> Claims against the UN as an organisation can be made based on General Assembly Resolution 52/247. However, 'if (...) loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the [TCC], the [TCC] will be liable for such claims'.<sup>998</sup> Damage caused by necessary actions in the light of the mandate or considered necessary to fulfil the peacekeeping duties, is excluded from liability.

In sum, civil liability, whether or not similar to the concept of due diligence, is beneficial because of the lower intent requirement and the fair degree of responsibility it would impose on the peacekeeping commanders. However, cross-referencing the law to establish tort liability may result in the undesirable expansion and incoherent interpretation of the applicable norms. The next section therefore explores the development of special law for peacekeeping.

## 8.5 A Separate Paradigm for Peacekeeping?

To support my argument that peacekeeping may need law specifically tailored to the context of peacekeeping, I will first refer back to the main issue encountered in applying international law to PKOs discussed in chapter 5. In this chapter, the contextual interpretation of the law was criticised, by indicating that the use of norms outside their normative environment could

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<sup>995</sup> See above section 2.5.2 (Ch. 2).

<sup>996</sup> UNGA Resolution 52/247, 'Third-Party Liability: temporal and financial limitations' (17 July 1998) UN Doc A/RES/52/247.

<sup>997</sup> UNGA Resolution A/51/389, 'Report of the Secretary-General on the Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the the United Nations Peace Forces headquarters; Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations' (20 September 1996) UN Doc A/51/389, paras 6-8.

<sup>998</sup> Article 9, MOU (n 178).

result in a modified interpretation of the law, to such an extent even that its meaning and scope of application are altered. Several authors have suggested alternative solutions to the complicated application of IHL and IHRL to PKOs. For example, Clapham, Murphy and Hadden argued that peacekeeping should mainly be governed by human rights.<sup>999</sup> Murphy even concluded that 'mainstreaming human rights in peace operations should be the priority and an international human rights framework outlined governing all UN operations'.<sup>1000</sup> Ensuring compliance with IHRL in PKOs could for example be achieved through establishing a bulletin that explicitly deals with IHRL.<sup>1001</sup>

The problem with an IHRL-dominated approach is that IHL and IHRL may continue to apply alongside each other, even if peacekeepers would not be bound by IHL directly. Also, 'protection' could still be interpreted in conflicting ways, with three definitions (IHL, IHRL and peacekeeping) applying to the same circumstances. It is imperative to consider the objectives of IHRL and IHL and carefully assess how each norm should be applied without losing the purpose of the law out of sight. This is of particular importance if these laws are used to establish criminal accountability. As also addressed in chapter 5, IHRL prioritises the protection of human beings generally, whereas (international) criminal law aims to end impunity and to contribute to retribution for the harm done.<sup>1002</sup> IHL on the other hand, aims to protect individuals who take no direct part in the conflict.<sup>1003</sup> As such, these paradigms address different legal subjects.<sup>1004</sup> Where IHL and IHRL share their focus on protection and are open to an expansive interpretation of their norms if it benefits the aim of protection, (international) criminal law aims to establish individual

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<sup>999</sup> Clapham (n 695) 146-147; Ray Murphy, *Opinio Juris: Protection of Civilians Symposium: Will an Improved Legal Framework Affect the Situation on the Ground?* 7 September 2016 <<http://opiniojuris.org/2016/09/07/protection-of-civilians-symposium-2/>> accessed 2 June 2017; Tom Hadden, 'Battling For Human Rights?' (2010) 17 *International Peacekeeping* 309.

<sup>1000</sup> Murphy (n 999). See also Conor Foley, 'The Human Rights Obligations of UN Peacekeepers' (2016) 8 *Global Responsibility to Protect* 431, 433.

<sup>1001</sup> *Ibid.*

<sup>1002</sup> UNGA 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 680) 5.

<sup>1003</sup> Separate and Dissenting Opinion Judge Li to *Prosecutor v Erdemović* (Appeal Judgment) IT-96-22-A (7 October 1997) para 8.

<sup>1004</sup> UNGA 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 680) 35.

culpability and the general principles of criminal law protect the law from expansion.<sup>1005</sup>

With peacekeeping having its own norms and principles, there is scope to argue that it could be regulated by law tailored to peacekeeping. Two ways of developing special law can be considered. That is first, by codifying a certain contextual interpretation of IHL and IHRL to make sure that it is applied consistently in cases of peacekeeping and is only applied as such in that particular context. Special law may develop when exceptions to certain rules become so regular that the law is recognised as being distinct from the general law.<sup>1006</sup> A second option is that the law of peacekeeping is established as a self-contained regime, that has its own principles and rules of application.<sup>1007</sup> This would offer more effective protection to the specific aims and objectives of peacekeeping by developing a context-specific set of rules. The principles of impartiality, consent and the non-use of force could then be taken into account,<sup>1008</sup> if these principles are still considered valid in contemporary peacekeeping. Developing special law for peacekeeping would respond to the issue of applying IHL and IHRL in a context that does not seem fit for these areas of law to be applied to without taking the specific nature of peacekeeping into account.

The more tailored a rule is to a specific situation, the more likely it is that the rules are complied with.<sup>1009</sup> Now peacekeeping commanders are predominantly trained in IHL prior to deployment. Making the assessment of which law applies when in the field is often cause for confusion. If peacekeepers would be governed by a specific set of rules, the confusion and insecurity that is often cause for inaction in PKOs would be minimised. It could also reduce the gap between peacekeeping policy and the law. Without wanting to define the parameters of special law, one could think of a set of rules better equipped to work alongside a civilian protection mandate by adopting the same definitions as currently used in the mandate and ROE. In addition, the paradigm could incorporate clear rules regarding the use of force and in what circumstances that

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<sup>1005</sup> Robinson, 'The Identity Crisis' (n 39) 946.

<sup>1006</sup> UNGA 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 680) 56 ff.

<sup>1007</sup> Ibid 65 ff.

<sup>1008</sup> See above n 79 (Ch. 2).

<sup>1009</sup> UNGA 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 680) 36-37.

force should be used, focus in more detail on the protective tasks of peacekeepers and consider the ROE applicable to PKOs generally. A duty to report and a duty to monitor the overall security situation could be defined. The rules should clearly explain in what situations action is required and in what circumstances inaction is deemed inappropriate. Most important however, the rules should be clear on how the law will be enforced, what legal sanctions peacekeepers can expect in what circumstances and whether the TCC or the UN is responsible for holding peacekeepers accountable for violations of these rules.

## 8.6 Conclusions

This chapter aimed to assess how impunity for peacekeeping commanders' failure to act could be avoided by considering alternative means to sanction a failure to act. I first argued that accountability is necessary, because it could motivate peacekeeping commanders to act where otherwise an inactive position would be taken to avoid criminal liability for excessive behaviour. Also, the UN has strengthened its commitment to civilian protection in PKOs in its policy, but the law has not developed accordingly. This results in a gap between peacekeeping policy and the law regulating PKOs which complicates a peacekeeping commander's assessment of the action required of him or her.

Three alternatives to omission and bystander liability were then discussed. That was first, the option of developing a type of command responsibility for peacekeeping commanders by arguing that command responsibility was also created to sanction a failure to protect as a distinct type of liability in international criminal law. Another option discussed was tort liability for a failure to act. I even considered the option of imposing a type of due diligence obligation on peacekeeping commanders similar to that of states. Although this may seem far-fetched in our current understanding of the law, due diligence would fill the gap between bystander and omission liability. It would create tort liability rather than criminal liability. Tort liability has two main advantages over criminal liability: it requires knowledge as the threshold for the mental element and as a due diligence type of liability, it would create liability for the commander's separate failure to act and not for the serious crimes committed by others. This results in a fair degree of liability.

However, that tort liability in domestic courts may be based on criminal law, as was the case in *Mukeshimana*, or international law could cause further diffusion regarding the interpretation of legal norms, in particular if the norms are modified outside their normative environment. To avoid the interpretation of IHL and IHRL norms being expanded to support a positive obligation of protection in the context of peacekeeping, further development of the law is necessary, ideally resulting in the development of special law governing PKOs.

## Chapter 9: Conclusions

### 9.1 Overview

This thesis posed the question of whether peacekeeping commanders can be held responsible for their failure to protect civilians against serious harm committed by third parties. The starting point for this assessment was the conclusion by the Hague Court of Appeal that the Dutchbat commanders could not be convicted for their alleged participation in the commission of serious crimes against the late relatives of Nuhanović and Mustafić. We therefore considered that framing the conduct of the Dutch and Belgian peacekeeping commanders as negative conduct could be more successful. For liability for a criminal omission to arise, a legal obligation to protect the civilians would have been required. This gave rise to the question whether peacekeeping commanders have an obligation to act against serious crimes being committed under international law.

My research studied the literature, the law and relevant jurisprudence to draw conclusions regarding the questions posed. Chapters 3, 4, 6 and 7 consisted of a comparative study, comparing the findings in common and civil law systems within the domestic law chapters with the outcome of the chapters focusing on international criminal law. A main gap in the scholarship and practice of international criminal law was addressed in the introduction: command responsibility only applies to conduct committed by the commander's subordinates and would therefore not apply if the commander is a third party to the perpetrator(s) of the crime. The literature and jurisprudence often use 'control' as a factor to determine whether the commanders could be held liable, which is why this study aimed to explore other approaches to sanctioning the peacekeeping commander's failure to protect the civilian population. The post-Second World War jurisprudence focused on a duty to take care of the civilian population, albeit it in a context of armed conflict rather than peacekeeping. Admittedly, my work touches upon a range of different issues that may not always evidently relate to each other. On the one hand, this research reflected upon the relationship between omission, bystander and command responsibility and discussed how each doctrine would be difficult to apply in the context of

peacekeeping. Omission and bystander liability establish a connection with the criminal result principally committed by someone else, whereas command responsibility establishes responsibility for the commander's failure to prevent or punish conduct committed by a subordinate. On the other hand, the relationship between IHL and IHRL formed an important part of this study, in particular the complex application of norms stemming from these paradigms to PKOs. The norms applicable to PKOs appear to be distinct from those in IHL and IHRL. Both of these observations are relevant to international law. The conclusions drawn illustrate that peacekeeping is distinct from both peace and warfare, making the application of international law to this type of military operations not as simple as is sometimes believed. At the same time, the conclusion that peacekeeping has a distinct nature also supports the idea that omission and bystander liability would impose too high a degree of liability on the peacekeeping commander; he or she was after all not directly involved in the commission of serious international crimes. Without taking into account the specific nature of peacekeeping, international law is not sufficiently tailored to be applied to PKOs.

Applying international law to peacekeeping in a contextual way, as some scholars apparently do, has considerable drawbacks. It would, first, expand the interpretation of IHL and IHRL norms without taking into account the initial purpose of the paradigm to which these norms belong. This potentially affects their application in contexts other than peacekeeping. Second, it is precisely the modification of the law by scholarship and judicial interpretations that places criminal law at risk of becoming unpredictable and unforeseeable for its subjects. The general principles of criminal law provide a benchmark to secure a fair and just result of an assessment of criminal accountability; it keeps the interpretation of criminal law within certain pre-established boundaries. Establishing a specific paradigm with clear rules of interpretation and benchmark criteria would benefit peacekeeping and international law by making the contextual interpretation of international law redundant.

My work contributes, first, to the literature on international criminal law by continuing the discussion on the scope of the command responsibility doctrine as initially held by Bakentas and Mettraux among others.<sup>1010</sup> Where an adapted version of the doctrine has been used to apply to

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<sup>1010</sup> For references to these authors' works see n 28 (Ch. 1).

occupation commanders, we have observed whether a similar adaption could be made for peacekeeping commanders by using the analogy often made between situations of occupation and peacekeeping. In doing so, I have added a different angle to the debate by focusing on the obligations of the peacekeeping commander vis-à-vis the local population, which sets them apart from military commanders in combat operations. Also, I placed command responsibility in a wider context by arguing that it is a combination of omission and bystander liability, but distinct because of its characterisation as a separate offence. Ideally, the responsibility for peacekeeping commanders should combine elements of command responsibility and bystander responsibility, focusing more on authority and expectations stemming from both the profession and the civilian protection mandate without requiring a legal duty. Although a relationship of care between the peacekeeping commanders and the local population would make omission liability a suitable paradigm, such a relationship could not be established, at least not to the extent that it would amount to a legal obligation on the international level.

Second, this thesis contributes to the ongoing debate among those who study the law on peacekeeping that focused on the extent to which the troops are legally obliged to undertake civilian protection tasks. My research looked more in-depth at the obligations held by peacekeeping commanders as opposed to the troops, and focused on establishing *individual accountability* for failing to fulfil an obligation. I recognised that there has been a conscious effort by scholars such as Wills and Khalil to advocate that troops may be obliged to use force (Khalil) or to fulfil the specific instructions given to them in the mandate (Wills). Some authors support their argument by expanding the protective scope of IHL or IHRL. Additionally, scholars such as Meron and Kaelin argued that IHL and IHRL are intertwined to such an extent that together they form the basis for certain positive norms of protection. The main issue their approach gives rise to is that ‘protection’ has distinctive meanings in both IHL and IHRL and each paradigm has a distinctive nature and purpose. Distinguishing between the two paradigms is therefore necessary, also because not doing so complicates the enforcement of norms stemming from these paradigms.

Where peacekeeping policy has developed at the same pace as the reality of peacekeeping has, the law is still lagging behind. The outlook perspective offered in chapter 8 indicated that developing law tailored to the situation of peacekeeping is recommended.

## 9.2 Suggestions for Further Research and Outlook Perspective

Despite the increased attention in international law scholarship for obligations and the responsibility of peacekeepers, further knowledge should be gathered regarding this matter. The development of special law for peacekeeping should be explored in more detail, as it was beyond the scope of this thesis to make an in-depth assessment of the content of such law. Therefore, further normative research might well be conducted in order to define a) the parameters of special law for peacekeeping, b) how such a paradigm would relate to IHL and IHRL, c) how matters of enforcement and accountability would be dealt with within that paradigm and d) how it would address the dual legal role of peacekeepers. Particular attention should go out to clarifying the relationship between the peacekeeping commanders and the civilian population, as UN policy implicates that commanders are expected to protect civilians within the mission area. If the UN commits itself to strengthening civilian protection in PKOs to such an extent, the law should reflect that intent in order to ensure that law and policy do not contravene each other. The division of civilian protection tasks within the chain of command must be clarified, as well as the extent to which the different levels of command share responsibility for not fulfilling these tasks. This should prevent the actors from ‘passing the buck’ when legal accountability is brought under consideration. More attention for the special nature of peacekeeping and the impact this has on the application of international law would furthermore deepen the academic debate on failing to protect civilians in the context of peacekeeping.

With the emerging point of view that individuals should be recognised as actors in international law, the role of individual peacekeepers or peacekeeping commanders should be addressed more prominently in scholarship on peacekeeping and international law. With the exception of a few scholars who argued in favour of looking at the obligations of individual peacekeepers in more detail,<sup>1011</sup> this view often remains overlooked in the context of peacekeeping. Overemphasising the responsibility of states may have negative consequences in relation to peacekeeping, if we consider that PKOs depend on the voluntary contributions of UN member states. The

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<sup>1011</sup> Wills, *Protecting Civilians* (n 723); Sabine Hassler, ‘R2P and the Protection Obligations of Peacekeepers’ (2010) 1 *Journal of International Humanitarian Legal Studies* 205; Foley (n 1000).

unsuccessful attempt of the relatives of the victims in *Mothers of Srebrenica* to question the legal responsibility of the UN as the main organisation responsible and the arguable conclusion that individual criminal responsibility could not be incurred by the Dutch commanders, remind us of the fact that states are currently the only actors that can be held accountable. This is an important first step in moving towards a more effective approach to civilian protection in PKOs, although it may have considerable disadvantages. A broad perspective in assessing accountability for potential failures in PKOs is necessary; that includes considering the role of the TCC, the UN and the individual peacekeeping commanders in carrying out peacekeeping tasks diligently. Making peacekeepers and the organisation that indirectly employs them immune from legal sanctions may not be in the best interest of international justice.

The prospect of tort claims as seen in the cases of Kigali and Srebrenica may decrease the willingness of states to contribute troops to PKOs even further. This is not unlikely, considering that this has been a trend for a considerable period of time now. PKOs are nowadays primarily carried out by less developed countries whereas in the 1990s peacekeeping was dominated by developed countries.<sup>1012</sup> This will eventually complicate the future of peacekeeping and would make it increasingly difficult to protect civilians from serious harm where the host state is not capable of doing so.

### 9.3 Conclusions

The main conclusion in this thesis is that international law in its current state is not sufficiently

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<sup>1012</sup> The number of TCCs has increased over the years, but the main contributors of the 1990s are now contributing less. A few of the greatest contributors in April 1995 were 1. France: 5079 troops (922, December 2014) 3. United Kingdom: 3935 troops (289, December 2014) 6. United States of America: 3296 troops (127, December 2014) 7. Canada: 3045 troops (113, December 2014) and 10. The Netherlands: 1928 (592, December 2014). Major contributors in December 2014 were 1. Bangladesh: 9400 troops (3339, April 1995) 2. India: 8139 troops (1119, April 1995) 3. Pakistan: 7936 troops (3980, April 1995) 4. Ethiopia: 7807 troops (834, April 1995). Remarkably, less developed countries have increased their contribution enormously over time, while the political ‘big powers’ from the western part of the world significantly decreased their contributions. The figures are based on the United Nations Troop and Police Contributors Archive, <[http://www.un.org/en/peacekeeping/resources/statistics/contributors\\_archive.shtml](http://www.un.org/en/peacekeeping/resources/statistics/contributors_archive.shtml)> accessed 17 October 2015. The numbers from December 2014 are the most recent ones available. This comparison was also used in Lenneke Sprik, ‘Military Commanders as Bystanders to International Crimes: A Responsibility to Protect?’ in Vassilis P Tzevelekos and Richard Barnes (eds), *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia 2016) 411.

tailored to hold peacekeeping commanders accountable for their failure to protect civilians if they were tasked to do so. Although some have argued that international law should then be applied to PKOs in a contextual way, this would result in an expansive and incorrect interpretation of existing legal norms. This does not contribute to a fair outcome of an assessment of the peacekeeping commander's accountability for a failure to act. Therefore, this thesis concludes that the development of special law for peacekeeping is desirable, although other options such as the use of tort liability or the development of an alternative form of command responsibility may suffice. These recommendations should be read in the light of current PKOs still failing to protect civilians on a regular basis. As such, this is not a phenomenon of the 1990s. Although inaction can in part be ascribed to the lack of effective means to protect, and to confusion regarding whose responsibility it is to do so, the absence of legal instruments regulating peacekeeping more effectively also contributes to the continuation of this practice.

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