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Command Responsibility in Peacekeeping Missions: Normative Obligations of Protection in a Criminal Law Environment

Lenneke Sprik*

Abstract

The passive stance taken by respectively Belgian and Dutch peacekeeping commanders towards the commission of genocide in both Kigali (Rwanda) and Srebrenica (Bosnia Herzegovina) has been challenged in domestic courts in recent years. As a result, the individual responsibility of the peacekeeping commanders involved has been addressed. Peacekeeping operations' distinct, normative character combined with the remoteness of peacekeeping troops vis-à-vis the parties to the conflict complicate any legal assessment made regarding the commanders' accountability under international criminal law.

This article explores whether a separate type of command responsibility could be developed to fit the specific circumstances in which military commanders operate, based on the command responsibility applied to occupation commanders in post-Second World War trials. Situations of occupation and peacekeeping are characterised by a similar focus on positive rather than negative obligations of protection. Such a normative context may influence how their criminality is perceived. Therefore, this article considers the use of the German *Funktionslehre* to differentiate between security control and custodial control. That distinction could separate 'peacekeeping command responsibility' from regular command responsibility. Culpability would then be incurred for the failure to act rather than for the crimes committed by a commander's subordinates. Using such a context-sensitive approach to command responsibility for peacekeeping commanders could further a fair assessment of the commander's liability by taking the normative environment in which peacekeeping takes place into account.

1. Introduction

In 2002, former Secretary-General to the United Nations (UN) Kofi Anan famously declared that '... in the history of the United Nations, ... no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that

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fall under the jurisdiction of the ICC'.¹ With the recognition of partial state responsibility for the Netherlands after Dutch peacekeepers witnessed the deportation of Muslim men in the Bosnian enclave of Srebrenica in 1995, this statement should be considered in a different light.² In 2010, the victims' relatives filed a criminal complaint against commanders of the Dutch battalion (Dutchbat) questioning their role in handing over three Bosnian members of staff over to the Bosnian Serb Army.³ The Dutch Public Prosecutor refrained from prosecuting the Dutch commanders; a decision confirmed to be legitimate by the Arnhem-Leeuwarden Court of Appeal in 2015.⁴ The role of peacekeeping commanders in the protection of civilians has been relatively overlooked in the academic debate that followed the state responsibility cases. It is not just the question whether peacekeeping commanders have a duty to protect in these circumstances that is relevant, but arguably even more pressing is the need to consider what type of criminal responsibility would follow such a failure to act in the context of peacekeeping.

The command responsibility doctrine, included in Article 28 of the Rome Statute (RS),⁵ is a well-developed, but not fully settled doctrine that is of great use in assessing the commander's responsibilities in a context of armed conflict. If the crimes under review were not committed by the commander's subordinates however, the doctrine appears to be cumbersome. Another intricate factor is that peacekeepers are only subject to international humanitarian

¹ UNSC, 4568th meeting (10 July 2002) UN Doc S/PV.4568, 8.

² The Hague District Court (10 September 2008) (*Nuhanović/Mustafić v the Netherlands*), ECLI:NL:RBSGR:2008:BF0187; ECLI:NL:RBSGR:2008:BF01; The Hague Court of Appeal (5 July 2011) (*Nuhanović/Mustafić v the Netherlands*), ECLI:NL:GHSGR:2011:BR5386; ECLI:NL:GHSGR:2011:BR53; The Hague Court of Appeal (26 June 2012) (*Nuhanović/Mustafić v the Netherlands*), ECLI:NL:GHSGR:2012:BW9014; ECLI:NL:GHSGR:2012:BW90; Dutch Supreme Court 6 September 2013 (*The Netherlands v Nuhanović/Mustafić*), ECLI:NL:HR:2013:BZ9228; ECLI:NL:HR:2013:BZ9225; The Hague District Court 10 July 2008 (*Mothers of Srebrenica v the Netherlands and United Nations*), ECLI:NL:RBSGR:2008:BD6795; The Hague Court of Appeal (30 March 2010) (*Mothers of Srebrenica v the Netherlands and United Nations*), ECLI:NL:GHSGR:2010:BL8979; Dutch Supreme Court (13 April 2012) (*Mothers of Srebrenica v the Netherlands and United Nations*), ECLI:NL:HR:2012:BW1999; The Hague District Court (16 July 2014) (*Mothers of Srebrenica v the Netherlands 2014*), ECLI:NL:RBDHA:2014:8562; The Hague Court of Appeals (27 June 2017) (*Mothers of Srebrenica v the Netherlands 2017*), ECLI:NL:GHDHA:2017:1761.

³ L 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).

⁴ Court of Appeal Arnhem-Leeuwarden (29 April 2015) (*Mustafić & Nuhanović v Karremans, Franken & Oosterveen*), ECLI:NL:GHARL:2015:2968, paras 4.1–4.3, 9.3, 11.2, 12.4, 12.5, 13.3, 13.4, 13.6.2, 14.4 and 15.3.

⁵ Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002.

law (IHL) if they are involved in the armed conflict as combatants.⁶ Peacekeepers are then bound by IHL through the national laws of their Troop Contributing Country (TCC) and through the customary status of the obligation to observe IHL under international law.⁷ How the failure to protect the civilian population placed under their care should therefore be adjudicated is unclear, since this depends on whether IHL applies and on how the mission-specific instructions relate to international law. To simplify this hypothetical exercise, this article assumes that peacekeeping commanders are subject to IHL. The doctrine of occupation command responsibility serves as an example of how command responsibility may be established in circumstances in which the commander's tasks and obligations may differ from a regular combat situation.

This article argues that the assessment of the peacekeeping commanders' criminal liability under international criminal law requires a differentiated approach. That approach needs to consider the specific circumstances that peacekeeping missions represent, as well as the specific relationship between the commanders and the civilian population in the mission area. An important reason to advocate for an alternative to the command responsibility doctrine is that the current interpretation of control and the requirement of subordination connect the commanders to the crimes committed, even if their conduct only stretches to a failure to prevent or punish.⁸ This is not in accordance with important criminal law principles as personal culpability and fair labelling.⁹ Assessing the commanders' responsibility in light of the context of peacekeeping and the applicable legal framework might shed a different light on the commanders' conduct. It could attach a fair degree of criminal responsibility to their conduct and further the consideration of criminal law principles. More importantly, it could draw out the protection of civilians as a central point of departure in the assessment of the commander's conduct.

This article first sets out to explore how peacekeeping commanders have been subjected to (international) criminal law thus far. Then, the third section looks into the analogy between the general context of occupation and peacekeeping operations (PKOs). In the fourth section, a more detailed overview of occupation command responsibility will be given. A comparison between the occupant commander and the peacekeeping commander's position in light of the elements constituting occupation command responsibility takes place in the fifth section. The article then outlines the element of control in Section 6, by discussing how a differentiated interpretation of control may establish a relationship of care

⁶ 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, s 1.1.

⁷ D Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 *The American Journal of International Law* 406, 409.

⁸ D Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925, 952–953.

⁹ *ibid.*

between the peacekeeping commander and the civilian population in the mission area. Last, the advantages and disadvantages of using a context-sensitive approach to liability for peacekeeping commanders will be discussed.

2. Peacekeepers as Subjects of International Criminal Law

A first concern in assessing the responsibility of peacekeeping commanders under international criminal law is the implied connection between a ‘peacekeeper’ and the commission of serious international crimes. Why aim for peacekeepers when there are ‘bigger fish’ to catch? As a legal system based on liberal values, international criminal justice has incorporated mechanisms to ensure that the aims of international criminal law are achieved in a fair and appropriate manner.¹⁰ Although the aims of international criminal justice are hard to capture in one sentence,¹¹ Galbraith summarised them as ‘bringing perpetrators to justice, deterring future international crimes, and providing retribution for the victims’.¹² The general principles of criminal law, fair labelling, legality and culpability, aid the international criminal courts in securing a fair judgment.¹³ Using these principles ensures that all individuals involved are treated as human beings, both the perpetrators and the victims.¹⁴

As referred to earlier, it was indeed long believed that peacekeepers were not likely to become subject to international criminal law, considering their limited direct participation in armed conflict. However, this has changed since peacekeepers have been authorised to use offensive force in certain situations,¹⁵ and because some have been associated with sexual misconduct,¹⁶ the criminal status

¹⁰ *ibid* 926 ff.

¹¹ M Damaška, ‘What Is the Point of International Criminal Justice?’ [2008] *Yale Law School Legal Scholarship Repository Faculty* 329, 331.

¹² J Galbraith, ‘The Pace of International Criminal Justice’ (2009) 31 *Michigan Journal of International Law* 79, 85.

¹³ D Robinson, ‘International Criminal Law as Justice’ (2013) 11 *Journal of International Criminal Justice* 699, 711. Robinson argues here that International Criminal Law aims to protect humanity on both the side of the victims and the perpetrators.

¹⁴ D Robinson, ‘How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, And A Simple Solution’ (2012) 13 *Melbourne Journal of International Law* 1, 23–24.

¹⁵ M Berdal and D H Ucko, ‘The United Nations and the Use of Force: Between Promise and Peril’ (2014) 37 *Journal of Strategic Studies* 665.

¹⁶ M Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’ (2010) 15 *Journal of Conflict and Security Law* 347; R Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current ‘status Quo’ and Responsibility under International Law* (Brill 2014); R Burke (2012) *Working paper No. 1.5 Troop-discipline and sexual offences by UN military peacekeepers: the UN’s response - moving beyond the current status quo?* Centre for International Governance and Justice; M O’Brien, ‘Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN

of which is debatable in international law.¹⁷ That peacekeepers enjoy protected status under IHL—if not involved in the conflict—makes their potential involvement in criminal conduct even more problematic. Nevertheless, their actions or inactions may be linked to the commission of serious crimes when their protected status no longer applies.

A peacekeeper's alleged involvement in the commission of crimes first triggers the exclusive criminal jurisdiction of the TCC as laid down in Article 47 of the Status of Forces Agreement (SOFA) signed between the host state and the United Nations.¹⁸ The lack of effective convictions on the domestic level, however, indicates that states are not always willing or able to prosecute their military personnel. Since the UN deployed its first peacekeeping operation in 1948,¹⁹ only a small number of criminal judgments have been delivered in the context of peacekeeping, of which a fair amount was criticised for imposing small-scale punishments. To illustrate, in 1996 the Canadian Court Martial Appeal Court acquitted Brocklebank in *R v Brocklebank* for aiding and abetting the commission of torture of a 16-year old Somali civilian.²⁰ The main perpetrators, Matchee and Brown, were respectively considered unfit for trial (Matchee) and sentenced to 5 years imprisonment (Brown), but Brown was eventually released after 1 year of imprisonment.²¹ In a similar vein, Belgian paratroopers who roasted a Somali boy above a fire received a 200 dollar fine and a month imprisonment, while other members of the same group were acquitted.²² The alleged involvement of Italian peacekeepers in sexual abuse and rape in Somalia only resulted in disciplinary action being taken against the peacekeepers, but was not considered criminal conduct.²³

Peacekeepers for Gender-Based Crimes' (2011) 11 *International Criminal Law Review* 803.

¹⁷ C Mccausland, 'From Tolerance to Tactic : Understanding Rape in Armed Conflict' (2017) 25 *Michigan State International Law Review* 150; 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.

¹⁸ UNGA 'Model Status-of-Forces Agreement to Peace-keeping Operations' (9 October 1990) UN Doc A/45/594, para 47.

¹⁹ See List of Peacekeeping Operations 1948–2013, <<http://www.un.org/en/peacekeeping/documents/operationslist.pdf>> accessed 14 August 2017.

²⁰ Court Martial Appeal Court of Canada, *R v Brocklebank* (April 1996), Case File No CMAC-38, 106 Canadian Criminal Cases (3rd) 24, 134 DLR (4th) 377.

²¹ As mentioned in the facts to the case Court Martial Appeal Court of Canada, *R v Boland* (May 1995) Case File No CMAC-374.

²² Belgian Military Court regarding violations of IHL committed in Somalia and Rwanda, Nr 54 AR 1997, (20 November 1997), *Journal des tribunaux* (24 April 1998) 286–289 as cited in B Kondocho, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) fn 84.

²³ B Bedont, 'The Renewed Popularity of the Rule of Law: Implications for Women, Impunity and Peacekeeping' in Dyan Mazurana (ed), *Gender, Conflict, and Peacekeeping* (Rowman & Littlefield 2005) 86.

A few landmark judgements did result in higher sentences however. In *United States v Ronghi*, an American peacekeeper was sentenced to life without eligibility for parole for premeditated murder of a young girl in Kosovo,²⁴ and a French peacekeeper was sentenced to 9 years of imprisonment for having sex with under aged girls.²⁵ Considering the majority of the cases outlined above however, it appears that the domestic criminal prosecution of peacekeeping personnel by the TCC does not guarantee a sentence proportionate to the wrongdoing, particularly in those cases that receive widespread media attention and can be labelled as politically sensitive.²⁶ International prosecution of such cases might be a suitable alternative to domestic prosecution, if the requirements for international criminal jurisdiction have been met. This means, *inter alia*, that the conduct under review should be classifiable as a serious international crime or a contribution to the commission of such a crime.²⁷ The peacekeeper's immunity for criminal prosecution outside the national legal order remains an obstacle in that case, but can be waived if the TCC consents to that.²⁸

Exploring international criminal jurisdiction regarding peacekeeping conduct is challenging, but necessary since domestic adjudication appears inadequate. Where O'Brien and Burke have assessed the prosecution of peacekeepers for sexual misconduct under international criminal law,²⁹ this article looks into criminalising the peacekeeping commander's failure to protect under international law—in particular by considering the command responsibility doctrine.

The more prevalent obstacles in considering command responsibility for peacekeeping commanders are the key contextual differences between an armed conflict in which regular commanders operate and the context in which peacekeeping commanders are deployed. That is, first, the fact that peacekeeping commanders are not involved in the armed conflict in the same way combat commanders are; their presence serves a different, more normative purpose of civilian protection. Peacekeeping commanders will therefore have a different relationship with the local population than the direct parties to the conflict. For peacekeeping commanders, the negative obligation to refrain from harming the civilian population will be complemented by the mandate to protect the civilian population. Secondly, the crimes from which the peacekeeping commanders 'should have protected' the local population are not committed by their

²⁴ *United States v Ronghi*, 60 MJ 83 (CAAF 2004).

²⁵ J Haskin, *The Tragic State of the Congo : From Decolonization to Dictatorship* (Algora 2005) 168;

F 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, 620.

²⁶ JM Conde Jiminian, 'Allocating Individual Criminal Responsibility to Peacekeepers for International Crimes and Other Wrongful Acts Committed during Peace Operations' (2012) 17 *Tilburg Law Review* 104, 109.

²⁷ Eg art 5 of the RS.

²⁸ F Rawksi, 'To Waive Or Not To Waive: Immunity And Accountability In U.N. Peacekeeping Operations' (2002) 18 *Connecticut Journal of International Law* 103, 108.

²⁹ *ibid*; Burke (n 16).

subordinates, but by troops not directly under their command, as discussed above. Command responsibility however refers to the failure to exercise control over those who the commanders could have controlled, namely their subordinates. Although options of omission liability and liability for bystander conduct could be considered as alternative means of criminalisation,³⁰ this article looks into the option of developing a separate type of command responsibility that applies a differentiated approach to the elements required for command responsibility, eg control and with that the requirement of subordination. Advocating such a separate type of command responsibility is grounded in the idea that occupation commanders were adjudicated differently during the post-Second World War trials because the circumstances in which they operated were distinct from regular warfare. The next section comprises a review of the academic debate on the analogy between peacekeeping and occupation.

3. Occupation and Peacekeeping Operations: a Comparison

It has been argued that the analogy between peacekeeping and occupation is misplaced considering that peacekeeping in the traditional sense requires consent, which as such does not create a submissive relationship between the local population and the peacekeepers as is the case in situations of occupation.³¹ That submissive relationship is the result of the effective control held by the occupying party, which Ferraro defines as follows:

the foreign forces are effectively stationed on a given territory without the consent of the central authorities of the affected State; that the central authorities of the affected State have been rendered substantially or completely incapable of performing their functions (in particular the political direction of the country) by the intervention of the foreign forces on its territory; the foreign forces are capable of exercising the State's responsibilities in lieu and in place of the central authorities of the affected State.³²

While the traditional notion of peacekeeping will not meet this standard of effective control easily, the more forceful and integrated approach taken in

³⁰ L 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).

³¹ D Shraga, 'The Applicability of International Humanitarian Law to Peace Operations, from Rejection to Acceptance' in GL Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations* (International Institute of Humanitarian Law 2008) 97–98.

³² T Ferraro, 'The Applicability of the Law of Occupation to Peace Forces' in GL Beruto (ed), *ibid* 154. See also S Wills, 'The "Responsibility to Protect" by Peace Support Forces under International Human Rights Law' (2006) 13 *International Peacekeeping* 477, 477.

contemporary PKOs may assign powers and authority to PKOs that make them more similar to occupation.

One of the main tasks of the occupying power is that it should make sure that the population in the occupied territory is treated humanely at all times. This means that civilians should be protected from harm regardless of whether that is by their national troops or by third parties.³³ The four Geneva Conventions (GC) apply to any territory that is occupied during an international armed conflict, as set forth in Article 2 of the GC IV. Occupation is based on factual circumstances;³⁴ it is thus not relevant whether occupation has been approved by the Security Council or whether forces have been mandated to occupy certain territory. The International Committee of the Red Cross (ICRC) indicates that this is because 'the law of occupation is primarily motivated by humanitarian considerations'.³⁵ The shared focus on protective norms is another reason why the analogy between occupation and peacekeeping seems appropriate.

Even without the law of occupation formally applying to PKOs, Kellenberger stressed the importance of looking into the potential applicability of occupation law to peacekeeping:

While such applicability may appear to be a kind of taboo for the international organisations involved as well as for some troop-contributing States, one should ensure that occupation law is not discarded outright and that the rights, obligations and protections derived from it are applied when the conditions for their applicability are met.³⁶

In addition, the UN Human Rights Committee stated that the use of effective control as a threshold for the application of the law is not limited to formal situations of occupation.³⁷ Examples of cases in which control was interpreted broadly are the *Wall Opinion* and the *DRC v Uganda* cases in which the International Court of Justice referred to territory under *de facto* control of the occupying power.³⁸

³³ Art 46 of International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, (18 October 1907); arts 13, 27, 33 and 34 of the ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), (12 August 1949), 75 UNTS 287.

³⁴ JF Kleffner, 'Scope of Application of International Humanitarian Law' in M Bothe (ed), *The Handbook of International Humanitarian Law* (OUP 2013) 60.

³⁵ ICRC, 'Occupation and international humanitarian law: questions and answers' <<https://www.icrc.org/eng/resources/documents/misc/634kfc.htm>> accessed 13 August 2017.

³⁶ J Kellenberger, 'Keynote Address' in GL Beruto (ed), (n 31) 35.

³⁷ UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10.

³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 1996, para 115; *Case Concerning Armed Activities on the Territory of the Congo* (Judgment) [2005] ICJ Reports

De facto use of the law of occupation in PKOs occurred in Somalia (United Nations Operation in Somalia II, UNOSOM II)³⁹ and in East Timor (International Force for East-Timor, INTERFET), two operations authorised by the UN, but not carried out under UN command and control. In these two operations, the requirements of Article 42 of the Hague Regulations seemed to be met.⁴⁰ In other occasions however, the law of occupation was mostly not deemed applicable,⁴¹ even if the UN exercised far-going administrative powers, like in Kosovo (United Nations Interim Administration Mission in Kosovo, UNMIK) and in another mission in East Timor (United Nations Transitional Administration in East Timor, UNTAET). It is still questionable what the main difference was between these operations and operations like UNOSOM II and INTERFET, given that the mandates of UNMIK and UNTAET also contained a mandate ‘to administer’ the local government (as opposed to ‘assisting’). After all, the verb ‘to administer’ indicates that ‘the UN Administration is the ultimate “source of authority” in the territory’.⁴² This may increasingly be the case considering the specific focus on civilian protection and the multidimensional approach taken in contemporary peacekeeping missions. As Ferraro observed:

the integrated nature of the ‘new generation’ peacekeeping operations and their humanitarian, military and civilian components leave the United Nations uniquely placed—in fact, more so than most States—to take on the obligations and rights stemming from the law of occupation.⁴³

The UN as an organisation has even made the implementation of and respect for the obligations stemming from occupation, eg the obligations included in Geneva Convention IV, a priority.⁴⁴ Kelly argued as follows:

The UN particularly balks at this aspect given its frequent assertions that, as it lacks the mechanisms and resources of a state, it cannot assume many of the burdens flowing from international humanitarian law

2005, para 170. The ECtHR confirmed this as well in *Issa and others v Turkey* App No 31821/96 (ECtHR, 16 November 2004) para 74.

³⁹ Concluding Observations of the Human Rights Committee: Belgium (12 August 2004) UN Doc CCPR/C/81/BEL, para 10; Wills (n 32) 480.

⁴⁰ Shraga (n 31) 97–98.

⁴¹ Wills (n 32) 485. Note that the Independent International Commission on Kosovo did imply in its comments that UNMIK had occupation-like powers, but this was never recognised as such in UNSC Resolution 1244 that governed the mission in Kosovo, see Independent International Commission on Kosovo, Follow up to the Kosovo Report: Why Conditional Independence? (2001) 37; UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

⁴² Shraga (n 31) 98.

⁴³ Ferraro (n 32) 149.

⁴⁴ M Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Kluwer Law International 1999) 179–180.

relevant to its armed forces. This concern would appear to be based in an unjustified apprehension of the extent of these obligations; obligations which ought to be weighed against the utility of the rights that accrue under the Fourth Convention. In addition, UN's relief, development and disaster agencies, which have almost always been present at the same time as recent UN military interventions, render the UN uniquely placed to meet a significant level of responsibility. In fact, this capacity is well beyond that of most states.⁴⁵

Both Kelly and Ferrero posit that the UN is in certain circumstances the most suitable actor to act and take on certain obligations or responsibilities. However, the dual legal position that peacekeepers fulfil complicates an assessment of their legal obligations and responsibilities: they act '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'.⁴⁶ As such, peacekeepers are subject to their domestic laws and treaties to which their TCC is a signatory, yet, they are also subject to the laws applicable to the UN. In particular, the way in which these laws interact has not been clarified. Another complicating factor in considering peacekeepers as 'guardians' of the local population is the fact that military officials are trained to be deployed in situations in which the use of force on a large scale is common, whereas in PKOs the use of force is a last resort and traditionally only allowed in self-defence.⁴⁷ Even when involved in the armed conflict, the use of force could jeopardise the relationship of the peacekeepers vis-à-vis the civilian population. The position of peacekeepers as an indirect party to the armed conflict is therefore different than that of armed forces who take active part in the conflict, who are neither bound by the principle of impartiality nor expected to offer positive protection to the civilian population. The distinct role that peacekeepers fulfil should be kept in mind when looking into the analogy between occupation and peacekeeping commanders.

4. What is Occupation Command Responsibility?

Scholars such as Mettraux, Ambos and Bantekas have discussed both command responsibility in its ordinary form (also referred to as operational command responsibility) and the responsibility incurred by occupation commanders.⁴⁸

⁴⁵ *ibid.*

⁴⁶ A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 *Human Rights Law Review* 151, 161.

⁴⁷ United Nations Department of Peacekeeping Operations, 'United Nations Peacekeeping Operations: Principles and Guidelines' (2008) 35.

⁴⁸ G Mettraux, *The Law of Command Responsibility* (OUP 2009); I Bantekas, *Principles Of Direct And Superior Responsibility In International Humanitarian Law* (Juris Pub : Manchester University Press 2002); K Ambos, 'Superior Responsibility' in Antonio

A key difference between the two forms of responsibility is that the liability of occupation commanders is not assessed by means of a vertical hierarchical relationship between the commanders and their subordinates. Instead, their duty extends to guaranteeing the wellbeing of the civilian population in the geographical area under their command or control.⁴⁹

Van Sliedregt distinguished three elements that characterise occupation command responsibility: first, the occupation commander 'is charged with responsibility for maintaining peace and order within the area over which his executive authority extends, and the duty of crime prevention rests upon him'.⁵⁰ Superior responsibility may thus be incurred by occupation commanders if crimes are committed in the *area* under their control. Secondly, 'control' is important in assessing the commander's responsibility for crimes committed by those *not* under his or her command.⁵¹ A third factor is the element of knowledge.⁵² The mental element for command responsibility has been subject of debate. The jurisprudence of the *ad hoc* tribunals accepted the 'had reason to know' standard to avoid the superior being required to actively 'seek knowledge' of crimes being committed. Article 28 of the RS fuelled the debate by including the higher threshold of 'should have known'.⁵³ By limiting the supposed knowledge to the 'circumstances at the time' however, this standard is now considered similar to the 'had reason to know' standard.

While command responsibility requires command and control,⁵⁴ control is thus the determinant factor in assessing the responsibility of occupation commanders. This was confirmed in *US v Wilhelm List* in which the War Crimes Chamber held that 'to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command'.⁵⁵ Instead, control in the context of occupation could be interpreted in two ways: first, it can pertain to troops exercising 'some level of authority' in foreign territory.⁵⁶ Or second, one party

Cassese (ed), *The Rome Statute of the International Criminal Court. A Commentary* (OUP 2002); K Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "most Responsible"' in A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (CUP 2009).

⁴⁹ Mettraux, *ibid* 154.

⁵⁰ E Van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability And/or Separate Offense?' (2009) 12 *New Criminal Law Review* 420, 424 citing WH Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 83.

⁵¹ *ibid*.

⁵² *ibid*.

⁵³ *ibid* 425.

⁵⁴ E Van Sliedregt, *The Criminal Responsibility Of Individuals For Violations Of International Humanitarian Law* (T M C Asser Press 2003) 148–149.

⁵⁵ *United States v Wilhelm List et al* ('Hostages trial'), 8 LRTWC 34, 72.

⁵⁶ This is the approach taken by the ICRC in its 1958 Commentary to Geneva Convention IV as the ICRC refers to in 'Occupation and international humanitarian law: questions and answers' (n 35).

to the conflict exercises ‘sufficient authority over enemy territory to enable it to discharge all of the duties imposed by the law of occupation’.⁵⁷ The common denominator of the two interpretations is the reference to territory.

Where a superior position vis-à-vis the perpetrators usually provides the commander with the material ability to exercise such control, in the case of occupation this stems from control over the geographical area. This notion of control is more similar to the type of governmental control that is also relevant in determining who is responsible for securing basic human rights in an area. More specific, having such effective control in occupation means that the commander’s responsibility may extend to ‘any crime directed at the civilian population within his zone of responsibility’.⁵⁸ This is substantially broader than the ICTY Appeals Chamber’s interpretation of effective control in *Delalić et al.* The Chamber referred to ‘the material ability to prevent offences or punish the principal offenders’, which means that ‘the accused had the power to prevent, punish or initiate measures leading to proceedings against the alleged perpetrators where appropriate’.⁵⁹ Effective control may thus be interpreted differently depending on the context in which it is being applied. The combination of effective control and knowledge of the crimes taking place may constitute criminality on part of the occupation commander.⁶⁰

Before turning to the analysis of how these elements shed light on the responsibility of peacekeeping commanders, it is worth noting that the entire doctrine of occupation command responsibility is based on the post-Second World War trials. As a result, the doctrine saw no considerable development after its use at the time, despite occasional references to it in contemporary jurisprudence.⁶¹

⁵⁷ *ibid.* It is unclear by whom or what the second interpretation of control has been developed.

⁵⁸ Mettraux (n 48) 155.

⁵⁹ *Prosecutor v Delalić et al (Appeal Judgment)* IT-96-21-A (20 February 2001) para 256.

⁶⁰ *United States v Wilhelm von Leeb and others* (1948) 12 LRTWC 1, 9 TWC 462 (‘High Command case’) 632. The Court was of ‘the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality’.

⁶¹ See eg *Prosecutor v Kordić & Čerkez (Trial Judgment)* IT-95-14/2-T (26 February 2001) para 411. In addition, some political superiors were held responsible based on the reasoning that they exercised executive authority, see eg *Prosecutor v Bisengimana (Trial Judgment)* (2006) ICTR-00-60-T (13 April 2006) para 120. The Trial Chamber argued as follows: ‘As representative of the executive power at the communal level, the Chamber finds that the Accused had a duty to protect the population in the commune, he did not take any action to prevent the massacres which occurred there’. Bisengimana was held responsible because his passive attitude would have encouraged the perpetrators in committing the crimes, and was thus not considered liable under the doctrine of command responsibility. See also *Prosecutor v Mpambara (Trial Judgment)* ICTR-01-65-T (11 September 2006); *Prosecutor v Ndahimana (Trial Judgment)* (2011) ICTR-01-68-T (30 December 2011) paras 782–783.

This might be explained by the fact that most contemporary conflicts are non-international of character, which considerably limits the relevance of occupation law in the present time. However, the development of the law of occupation command responsibility is of indicative value for the academic debate on the responsibility of peacekeeping commanders.

The *High Command* trial, for example, is relevant because the Military Tribunal explained in this judgment why it considers the role of occupant commanders in the commission of serious international crimes worthy of punishment on this level. The Tribunal held that:

under International Law and accepted usages of civilized nations, . . . [the commander] has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area The situation is somewhat analogous to the accepted principle of International Law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.⁶²

This reasoning forms a counterargument to the objection that the strict elements of command responsibility simply cannot be fulfilled by occupation commanders, and that their conduct can therefore not be criminalised under international criminal law. Some may even put forward that a failure to exercise control does not trigger the application of international criminal law.⁶³ Trying to find ways to do so by expanding the scope of the law could then harm the general principles of criminal law. This is in particular the case when the requirements of control and knowledge are interpreted widely to ensure the conviction of occupation commanders.

Yet, in *High Command* the Tribunal referred to the general principles of criminal law and stressed the importance of respecting these principles in establishing liability:

[t]here must be a personal dereliction. That can occur only where the act is directly traceable to [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.⁶⁴

For this purpose, it is relevant that the development of a doctrine carefully considers the circumstances and the degree of liability it may impose on the

⁶² High Command trial (n 60) 544–545.

⁶³ Robinson (n 8) 952.

⁶⁴ High Command trial (n 60) 543.

defendant. Widening the scope of an existing doctrine like command responsibility to include commanders who may otherwise not fall within the scope of the doctrine is in contravention of the restrictive character of criminal law that the general principles of criminal law aim to respect. Taking the specific context into account in developing a *separate* doctrine however, may contribute to a fair and just outcome.

The *High Command* trial demonstrated that occupation commanders were considered to have certain duties as a result of occupying a territory; duties for which nowadays the state rather than the individual commander would be deemed responsible. This section also considered how the effective control requirement pertains to control over a certain territory rather than control over subordinate troops. The following section assesses whether peacekeeping commanders can be said to have a similar type of control over the mission area or the civilian population in it.

5. Occupation Command Responsibility for Peacekeeping Commanders?

We discussed above how occupation command responsibility rests on control and a knowledge requirement, like command responsibility generally does. Taking the elements together, occupation command responsibility requires that, first, the commander should be responsible for maintaining peace and order within a territory under his or her control; second, the level of control needs to be sufficient to meet the ‘effective control’ threshold; and third, the commander should have had constructive knowledge of the crimes (about to be) committed in the area under his or her effective control. Whether each of these elements is met in a particular case should be assessed based on the specific circumstances of that case. The *mens rea* does not differ from the one required for ordinary command responsibility and will therefore not be discussed in the remainder of this article. The more relevant question is whether the type of control held by peacekeeping commanders is similar to that held by occupation commanders. One of the main questions in that regard is what level of command would exercise the required level of control in PKOs.

In practical terms, it is highly complex to establish who would exercise executive authority in a peacekeeping chain of command. As the *High Command* trial case above suggested, for tactical commanders matters of subordination would be the basis for command responsibility, considering that they are in specific command of the battalion. Executive authority however, relevant in establishing occupation command responsibility, is broader and implicates that the commander is involved in governing the state’s territory. In the particular circumstances of occupation, it relates to the responsibility for the wellbeing of the local population, which exceeds the authority of the regular tactical commander. It is difficult to assess whether a similar type of responsibility arises in PKOs when, for example, the TCC is the only state capable of protecting certain

human rights in the mission area (if the host state is no longer able to do so), or when the mission is mandated to protect civilians. Although IHRL and occupation law are part of two different paradigms, the effective control standard is rather similar. Nasu argued that the type of effective control under IHRL, to which also *Mothers of Srebrenica* referred,⁶⁵ may arise ‘where the law of occupation applies, to which general human rights jurisdiction arguably extends, not as the obligation of an occupying power to restore and ensure public order and safety, but merely because certain factual conditions for an extraterritorial application of human rights obligations are met’.⁶⁶ Such conditions may for example arise on the UN compound, which is a fenced-off area within which peacekeeping troops may be expected to fulfil positive human rights obligations.⁶⁷ For example, the Hague District Court held in *Mothers of Srebrenica 2014* that ‘through Dutchbat after the fall of Srebrenica the [Dutch] State had *effective control* as understood in the Al-Skeini judgment over the compound’.⁶⁸ How far this effective control may be extended beyond the borders of the compound is debatable and will have to be assessed on a case-to-case basis. In these circumstances however, a form of executive authority may arise, because the TCC on whose behalf the tactical commanders act has certain extraterritorial human rights obligations. However, it should be kept in mind that it is unclear whether the tactical commander is, in fact, able to exercise that type of authority, and whether that effective control under IHRL can be used to trigger the application of occupation law.

Although the authority held by occupation commanders is similar to the one established under IHRL, the source for their criminal responsibility lies in Article 87 of Additional Protocol 1 (AP 1). The article as such does not differ from command responsibility under Article 28 of the RS. Article 87 ‘requires any commander who is aware that subordinates or *other persons under his control* are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof’.⁶⁹ In light of the textual interpretation of Article 87, the obligation of the occupant commander seems drawn from the provision’s reference to ‘other persons under his control’. However, when considering the ICTY Trial Chamber’s position on responsible command in the *Kordić and Čerkez* case, it appears to be the relationship between the local

⁶⁵ *Mothers of Srebrenica v the Netherlands 2014* (n 2) para 4.160.

⁶⁶ H 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, 227.

⁶⁷ H Nasu, ‘Operationalizing the Responsibility to Protect in the Context of Civilian Protection by UN Peacekeepers’ (2011) 18 *International Peacekeeping* 364, 368.

⁶⁸ *Mothers of Srebrenica v the Netherlands 2014* (n 2) para 4.160.

⁶⁹ Art 87 of AP 1 (emphasis added).

population and the commander that creates responsibility on part of the occupation commander. The Chamber quotes a report from the International Committee of the Red Cross (ICRC) on the meaning of responsible command under Article 87 of AP 1 to illustrate that this article ‘envisages a superior-subordinate relationship wider than a strictly hierarchical one’.⁷⁰ The passage to which the Chamber refers concerns the position of occupation commanders:

It is particularly, though not exclusively, in occupied territory that this concept of indirect subordination may arise, in contrast with the link of direct subordination which relates the tactical commander to his troops. ... Consequently the commander on the spot must consider that *the local population entrusted to him is subject to his authority in the sense of Article 87*, for example, in the case where some of the inhabitants were to undertake some sort of pogrom against minority groups. He is responsible for restoring and ensuring public order and safety as far as possible, and shall take all measures in his power to achieve this, even with regard to troops which are not directly subordinate to him, if these are operating *in his sector*. A fortiori he must consider them to be under his authority if they commit, or threaten to commit, any breaches of the rules of the [Geneva] Conventions *against persons for whom he is responsible*. As regards the commander who, without being invested with responsibility in the sector concerned, discovers that breaches have been committed or are about to be committed, he is obliged to do everything in his power to deal with this, particularly by informing the responsible commander.⁷¹

If we look at the emphasised provisions in this passage, two types of control are ascribed to the occupation commander. On the one hand, the report refers to the authority the commanders have over a part of the population that might have the tendency to harm other members of the civilian population. This is also what ‘authority in the sense of article 87’ refers to. On the other hand, there is a reference to the authority to protect those people within the civilian population from violations of the Geneva conventions. Control is thus explained as a form of protection vis-à-vis one part of the population and as an obligation to repress criminal behaviour in the sense of the Geneva conventions by other members of the population. The common denominator here is the territory on which this type of control depends. The following section looks into this distinction between different types of control in more detail and will assess how a differentiated approach to control could affect the peacekeeping commander’s liability.

⁷⁰ *Prosecutor v Kordić & Čerkez (Trial Judgment)* (n 61) para 411.

⁷¹ *ibid*, citing ICRC Commentary (Additional Protocol I), paras 3554–3555. (emphasis added)

6. A Differentiated Approach to the Control Requirement in Peacekeeping Operations

In light of the previous section, it appears necessary to focus more on what control in the context of criminal law means and how this relates to the effective control held by the peacekeeping commanders under IHL. Commanders who have executive authority are arguably entrusted with the care of and responsibility for the safety of the local population in the area under the commander's control. The ICRC commentary to AP I however broke this down in two types of control.⁷² Such a differentiated approach to the element of control is also part of the German *Funktionslehre*, as will be discussed below. That would result in the option of approaching the commander's failure to act as either a failure to fulfil his duty to protect potential victims of harm or as the failure to exercise control over a potential source of danger.⁷³ The latter interpretation of control is the one currently used in command responsibility, but the first one is more similar to the type of control required for occupation command responsibility. According to the understanding of the ICRC, both interpretations of control would be part of the executive authority held by the occupant commander.⁷⁴ This distinction between different approaches to the control theory has not been made in international criminal law thus far, but is an established theory in assessing omission liability under German criminal law.

The *Funktionslehre*, liberally translated as the functional theory on liability for omissions, accepts that one may have a duty to protect (*Beschützergaranten*) or a duty of supervision (*Überwachergaranten*).⁷⁵ Berster refers to these types of obligations as custodial control (*Obhutsherrschaft*) and security control (*Überwachungsherrschaft*).⁷⁶ In case of the first, the defendant had a duty to protect something or someone and failed to do so. In the latter case however, the defendant had a duty to control a certain source of danger.⁷⁷ This distinction

⁷² *ibid.*

⁷³ This distinction has been researched in detail by Lars Berster in Lars Christian Berster, *Die Völkerstrafrechtliche Unterlassungsverantwortlichkeit* (Utz 2008); LC Berster, "'Duty to Act" and "Commission by Omission" in International Criminal Law' (2010) 10 *International Criminal Law Review* 619; LC Berster, 'General Introduction: Article III' in C Tams, L Berster and B Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide* (Hart Publishing 2014).

⁷⁴ See above n 71.

⁷⁵ M Bohlander, *Principles Of German Criminal Law* (Hart Pub 2009) 41; Berster, *Die Völkerstrafrechtliche Unterlassungsverantwortlichkeit* (n 73) 166 ff; Berster, 'General Introduction: Article III' (n 73); Berster, "'Duty to Act" and "Commission by Omission" in International Criminal Law' (n 73); M Dubber and T Hörnle, *Criminal Law : A Comparative Approach* (OUP 2014) 220; Urs Kindhäuser, *Strafrecht Allgemeiner Teil* (Nomos Verlagsgesellschaft 2013) 313, 318–319; C Roxin, *Täterschaft Und Tatherrschaft* (W de Gruyter 1963) 259 ff.

⁷⁶ Berster, "'Duty to Act" and "Commission by Omission" in International Criminal Law' (n 73) 636; Berster, 'General Introduction: Article III' (n 73) 105–106; Berster, *Die Völkerstrafrechtliche Unterlassungsverantwortlichkeit* (n 73) 166 ff.

⁷⁷ *ibid.*

may be helpful in understanding how different types of control could result in omission liability. However, certain professions may be associated with both types of control, or neither type seems to prevail. That was visible in the discussion of the ICRC commentary to Article 87 of AP I above.⁷⁸ Another example referred to by Haas is the pool intendent who can be considered to have both types of control: he or she is expected to protect swimmers (custodial control) from water as a potential source of danger (security control).⁷⁹ In a recent case in the Netherlands, three pool intendents were convicted for involuntary manslaughter (by negligence) after a 9-year old girl drowned on their watch.⁸⁰ The Court argued that they should have been more cautious in carrying out their job.⁸¹ In case of the peacekeeping commanders, one could say that the responsibility to protect is more likely present than the obligation to control a certain source of danger. Where the latter is key to operational command responsibility, the custodial form of control seems more strongly embedded in occupation command responsibility.

The mission-specific mandate applicable to a PKO may explicitly state that civilian protection is an important objective or task assigned to the troops. The question is whether a civilian protection mandate is necessary to establish the control necessary to give rise to custodial care, in particular considering the debatable impact the mandate has on individual obligations in PKOs.⁸² It appears more logical to argue that Article 87 of AP I leaves space for this type of care to fall under the notion of control, just like it seems to do for occupation commanders. An additional source under international law, such as the GC IV and the Hague Regulations for occupation, is however missing. Or as a compromise, one could argue that the normative character of peacekeeping is further supported by a civilian protection mandate, and by the developed interpretation of peacekeeping as becoming more protection-focused.⁸³ Nevertheless, the command responsibility doctrine appears too narrowly constructed to include situations in which commanders failed to protect rather than to prevent or punish.

⁷⁸ See above n 71.

⁷⁹ V Haas, 'Die Beteiligung Durch Unterlassen' (2011) 5 ZIS - Zeitschrift für Internationale Strafrechtsgematik 392, 395.

⁸⁰ District Court Midden-Nederland (22 June 2017), ECLI:NL:RBMNE:2017:3081. The pool intendents were sentenced to a period of community service.

⁸¹ *ibid.*, para 8.3.

⁸² cf M Khalil, 'Legal Aspects of the Use of Force by United Nations Peacekeepers for the Protection of Civilians' in H Willmot and others (eds), *Protection of Civilians* (OUP 2016); S Wills, 'International Responsibility for Ensuring the Protection of Civilians' in H Willmot and others (eds), *ibid.*

⁸³ See eg D Lilly, 'The Changing Nature of the Protection of Civilians in International Peace Operations' (2012) 19 *International Peacekeeping* 628, 628; DH Levine, *The Morality of Peacekeeping* (Edinburgh University Press 2014) 215–216 ff; H Willmot and S Sheeran, 'The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' [2013] *International Review of the Red Cross* 517.

If a relationship of control or care between the defendant and the victim(s) exists, we usually accept that the defendant had a certain *Garantenstellung*. This means that a guarantor needs to guarantee that a certain result does not occur.⁸⁴ However, the existence of such a relationship is not sufficient to state that the commander is obligated to act. Criminal liability is only likely to arise if the defendant had knowledge of possible harm, which is required to establish a duty to act (*Garantenpflicht*).⁸⁵ In addition, the victim should have relied on the protection of the defendant, or should have assumed that he or she could rely on that protection.⁸⁶ This aspect is particularly difficult in PKOs, since the local population often places a great deal of trust in the presence of peacekeeping troops regardless of whether this is justified based on the existing agreements and laws. At the same time however, the *Garantenstellung* provides an objective benchmark which is derived from a 'factual or social position'.⁸⁷ It is therefore questionable whether the type of reliance or trust referred to here would also be necessary if it concerns a form of command responsibility, or whether an additional legal source to establish a relationship of care is required. Relevant is however that a distinction should be made between peacekeeping and occupation commanders and other types of military commanders.

If in these circumstances, the guarantor fails to act despite having that duty, the guarantor may be held responsible as a perpetrator rather than being seen as an accomplice.⁸⁸ Surely, failing to fulfil such a duty is the full responsibility of the defendant, despite the fact that it may aid or abet a third actor in committing a crime. In order to avoid responsibility for the criminal result, no causation is required, at least not where it concerns a duty to report or punish.⁸⁹ The benefit is that the guarantor most likely will be considered responsible for his or her own failure to act, and is not necessarily connected to the crime committed. In using the *Funktionslehre*, it is often assumed that failing to fulfil a duty related to security control results in liability as an accomplice, while a failure to exercise custodial control results in being held responsible as a perpetrator.⁹⁰ If we were to apply this to the peacekeeping commanders, this seems sensible: the commander would be too far removed from the forces committing the crimes (eg the Bosnian Serb Army in Srebrenica) for the commander to exercise security control, but the commander has a direct relationship with the civilian population and could take measures to provide them shelter or other forms of protection.

⁸⁴ See eg s 13(1) of the German Criminal Code 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'.

⁸⁵ BGH, 29.05.1961 - GSt 1/61, para 13.

⁸⁶ Haas (n 79) 395.

⁸⁷ J Vogel, 'How to Determine Individual Criminal Responsibility In Systemic Contexts: Twelve Models' [2002] *Cahiers de Défense Sociale* 151, 163.

⁸⁸ Kindhäuser (n 75) 303.

⁸⁹ C Safferling, *Internationales Strafrecht* (Springer 2011) 142.

⁹⁰ M Krüger, 'Beteiligung Durch Unterlassen an Fremden Straftaten' (2011) 1 *Zeitschrift für Internationale Strafrechtsdogmatik* 1, 6.

Using the *Funktionslehre* to consider different perspectives on the control requirement facilitates the analogy between occupation and peacekeeping. After all, peacekeeping commanders are not likely to control military forces not under their command. If however the control pertains to the territory and to controlling what happens within that territory, one could imagine how this may apply to peacekeeping commanders. For example, in the case of Srebrenica, the Netherlands was assumed to have command and control over the compound or ‘mini safe area’, and thus the Dutch troops could be said to have had the authority to control the well-being of the population within that area. It is more difficult to argue that they were able to control the aggressors in that area, as argued above.

If we look at the historical development of command responsibility, it appears that protective duties were more dominant in establishing command responsibility in its early days. Some of the first cases dealing with command responsibility referred to obligations of protection. Robinson even recalled that the command responsibility doctrine was derived from the ‘purpose of the laws of war, namely to protect civilians’.⁹¹ The *Yamashita* judgment, sometimes referred to as the first command responsibility case, 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.⁹²

However, the meaning of this judgment has been subject of debate. The dissenting opinions of Justice Murphy and Rutledge concentrated on the fact that this judgment would be contrary to the principles of legality and personal culpability. It was, in their opinion, not clear how *Yamashita* had the required knowledge, and it was insufficiently evident that *Yamashita* contributed to the commission of the crimes himself.⁹³ The Justices furthermore pointed at the consequences of setting a precedent like that:

The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those

⁹¹ Robinson (n 8) 937.

⁹² In *Re Yamashita*, 327 US 1 (1946) (US SC) 15, also accessed through LRTWC (1948) Vol IV (hereafter: *Yamashita*).

⁹³ *ibid* 28–29.

implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability.⁹⁴

Robinson agrees when he posits that '[i]n the absence of [a] contribution [to the crime], to convict a person for genocide, crimes against humanity, or war crimes, and to impose the stigma that such crimes bear, contradicts the principle of culpability which ICL claims to respect'.⁹⁵ This approach appears sensible if one focuses on the connection between the commander's conduct and serious international crimes to explain how it falls within the jurisdiction of an international court. Another view to this matter is that the commander is actually punished for his or her personal conduct if the liability only extends to the failure to act and does not link the commander to the crimes committed. In fact, this is what the *Funktionslehre* arguably relies on: failing to exercise custodial control constitutes liability for just the failure to act, and not for the crimes committed – unlike a failure to exercise security control. One could state that an occupation or peacekeeping commander is held responsible for more than just his personal conduct if this would be any different. Of course, *Yamashita* stretched the scope of command responsibility, but it did so in a way that alleviated the degree of responsibility assigned to him.

The American Court furthermore stressed that *Yamashita* owed general moral responsibilities to the civilian population,⁹⁶ which thus seemed sufficient for criminal liability. This indeed modifies the interpretation of command responsibility to possibly an imputed form of liability. To avoid stretching the scope of the doctrine too far, developing separate doctrines for the different types of control could be considered. The context will then be relevant in analysing the control required, either custodial or security control. In practice, this will distinguish combat commanders with a negative obligation to protect under IHL (to refrain from doing harm) from commanders who may have a positive obligation to protect under international law or the applicable norms (to take reasonable measures to prevent harm). Failing to fulfil a normative obligation vis-à-vis the local population imposes a different stigma on the commander than failing to exercise security control. In circumstances of peacekeeping and occupation, imputed liability may thus arise and as long as the Court ensures that the commander is deemed responsible for his or her failure to act alone, this does not contravene the principles of criminal law per se - quite the contrary.

⁹⁴ *ibid* 28.

⁹⁵ Robinson (n 14) 20.

⁹⁶ T Weigend, 'Bemerkungen Zur Vorgesetztenverantwortlichkeit Im Völkerstrafrecht' (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 999, 1001.

The subsequent step of trying to define what peacekeeping commanders would be required to do if the obligation would be triggered is rather complicated. In general, command responsibility is established if the commander failed to 'take the reasonable and necessary measures' to prevent or punish misconduct by subordinates.⁹⁷ Reasonableness provides an objective yardstick for what could have been expected from the commander. For peacekeeping commanders, one could think of the requirement to take reasonable and necessary measures to protect civilians under the commander's care. This could include the requirement to report the observed or expected risks of harm to the civilian population to higher chains of command. It follows from the discussion here that the peacekeeping commander's responsibility could be established in an appropriate way if the context in which the commanders operate is taken into account. Contextual interpretations of the law may contravene the principle of legal certainty,⁹⁸ a concern that could be dispelled through the development of different types of command responsibility, each corresponding with the specific type of control discussed. In the section that follows, several advantages and disadvantages of applying a context-sensitive approach to the commander's liability will be discussed.

7. A Context-Sensitive Approach to Peacekeeping Liability?

We concluded thus far that it is difficult to assess how peacekeeping commanders, operating in a relatively normative environment, can be held accountable for their failure to act since command responsibility as such seems not suitable to be applied. The circumstances in which peacekeeping commanders have been deployed are in part similar to situations of occupation, which has strong resemblances with responsibilities that usually arise in law enforcement operations. Yet, PKOs may not meet the formal requirements for the law of occupation to be applied. This section discusses the potential strengths and weaknesses of developing a separate doctrine tailored to the specific circumstances of peacekeeping. Although peacekeeping is not regulated by one specific legal paradigm, and missions take place on the borderline between armed conflict and law enforcement, peacekeeping has its own norms and objectives. The normative underpinnings of PKOs separate them from combat operations, which is an important reason to consider the way in which a failure to act in the context of peacekeeping should be assessed.

Developing a context-sensitive command responsibility doctrine for peacekeeping commanders ensures that the law is specifically tailored to the

⁹⁷ R 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, 217.

⁹⁸ 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 12.

circumstances in which it is being applied.⁹⁹ The fact that peacekeeping commanders have an impartial position towards the parties to the conflict, but may have a relationship of care with the civilian population in the area under their control, justifies a separate approach. In contrast however, one could argue that international law claims to be neutral and that a single standard should apply to situations of a similar nature.¹⁰⁰ For example, the peacekeeping commanders may be subjected to IHL when they are actively involved in the conflict. Command responsibility could then be said to apply in its traditional form, regardless of the position therein of the peacekeeping commanders and notwithstanding the purpose of their presence in the mission area. There is then no need to assess their role in a different way. However, as discussed above, if there is no relationship of subordination between the commander and the main perpetrators, any assessment based on operational command responsibility will fail. The peacekeeping commander's failure to protect will then be regarded as a disciplinary misdemeanour at most.

However, the fact that the context in which the commanders operate is one of armed conflict potentially justifies an assessment of their liability under international criminal law. Context, after all, influences the criminality of the defendant's conduct.¹⁰¹ Crimes committed in the context of armed conflict are considered more serious than domestic crimes because these crimes are often committed on a large scale. This even applies if the commander's culpability only stretches to a failure to act. Surely, the circumstances in which crimes are committed influence our perception of what is considered appropriate and what is or is not against the law. Thus, despite the normative environment in which PKOs take place, the fact that the commander's failure to act occurred against the background of serious international crimes being committed renders a liability assessment under international criminal law plausible.

Another point to consider is that context-sensitive law, or special law developed for specific circumstances, may guarantee a certain level of fairness of the judicial verdict. The jurisprudence on aiding and abetting under international criminal law is sometimes criticised for not specifying how someone's liability is supported; a reference to the main crime committed seems to suffice.¹⁰² Generally, the concept of aiding and abetting seems not specific enough to explain what degree of liability is incurred by the defendants.¹⁰³ Another

⁹⁹ Shane Darcy already addressed the importance of context-related assessment of criminal conduct in S Darcy, 'Imputed Criminal Liability and the Goals of International Justice' (2007) 20 *Leiden Journal of International Law* 377, 378.

¹⁰⁰ See T Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 *Leiden Journal of International Law* 701, 706–707 who contests this ideological perception of legal rules.

¹⁰¹ *ibid* 704–705.

¹⁰² JG Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 *Leiden Journal of International Law* 1, 32 ff.

¹⁰³ *ibid*; FZ Giustiniani, 'The Responsibility of Accomplices in the Case-Law of the Ad Hoc Tribunals' (2009) 20 *Criminal Law Forum* 417, 418.

criticism voiced is that the criminal law principles do not always comply with certain modes of liability or doctrines of international criminal law.¹⁰⁴ These principles aim to guarantee a fair judicial process and make criminal law restrictive in its application, as opposed to the normative and idealistic character of human rights law and IHL. For example, command responsibility under Article 28 of the RS requires a causal connection to the crimes committed, which jeopardises the culpability principle as it may not criminalise the commander for his or her failure to act, but for the crimes committed by others.¹⁰⁵ Although the requirement of causation is debatable in relation to the failure to prevent or punish,¹⁰⁶ occupation command responsibility lacks such a requirement. The occupant commander's responsibility thus pertains to the duty to do anything within the commander's capabilities to safeguard the wellbeing of the civilian population in the area under his supervision. The latter approach assigns a lower degree of criminal responsibility to the commander, while at the same time addressing the culpability of the commander's failure to protect. In *Yamashita*, as referred to earlier, the Court also stressed Yamashita's responsibility for his own personal conduct, namely the duty 'to take such measures as were within his power and circumstances to protect prisoners of war and the civilian population'.¹⁰⁷ It clearly classified Yamashita's failure to protect as the basis for his criminal liability.¹⁰⁸ By no means does this judgment imply that Yamashita was an accomplice in the commission of genocide.¹⁰⁹ By developing a

¹⁰⁴ Robinson (n 8) 926 ff.

¹⁰⁵ See the discussion of the culpability principle in relation to command responsibility in 'Robinson (n 14) 12; AJ Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30 *Michigan Journal of International Law* 251, 255; B Burghardt, 'Die Vorgesetztenverantwortlichkeit Nach Völkerstrafrecht Und Deutschem Recht (§ 4 Vstgb)' (2010) 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 695, 711.

¹⁰⁶ The debate regarding the classification of command responsibility as either a mode of liability or a separate offence was addressed in *Prosecutor v Bemba Gombo* (Trial Judgment) ICC-01/05-01/08 (21 March 2016) para 211; *Prosecutor v Prosecutor v Bemba Gombo (Pre-Trial Judgment)* ICC-01/05-01/08 (15 June 2009) para 426. The ICC's Pre-Trial Chamber was of the opinion that the causal contribution required in art 28 of the RS only related 'to the commander's duty to prevent the commission of future crimes' and 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'. This was confirmed by the ICC Trial Chamber which held that article 28 'does not require the establishment of "but for" causation between the commander's omission and the crimes committed'. See regarding the causation requirement also *Prosecutor v Delalić and others (Trial Judgment)* IT-96-21-T (16 November 1998) para 398; *Prosecutor v Halilović (Trial Judgment)* IT-01-48-T (16 November 2005) para 78; *Prosecutor v Orić (Trial Judgment)* IT-03-68-T (30 June 2006) para 338; *Prosecutor v Blaškić (Appeal Judgment)* IT-95-14-A (29 July 2004) para 83.

¹⁰⁷ *Yamashita* (n 92).

¹⁰⁸ *ibid.*

¹⁰⁹ JS Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond' (2007) 5 *Journal of International Criminal Justice* 638, 648.

context-sensitive approach, one avoids having to use alternative options such as aiding and abetting by omission or encouragement, which may depict the commander as being responsible for the criminal result rather than for his or her failure to act.

Applying the command responsibility doctrine in its current form to peacekeeping commanders appears difficult, because it has evolved from a duty-based doctrine into a result-based doctrine. As Robinson posits, criminal law in general seems nowadays more concerned with whether the defendant contributed to the commission of the crime and is essentially less focused on questions of protection and the prevention of harm.¹¹⁰ That appears to be the key issue in applying command responsibility to peacekeeping commanders: there is no scope to take into account the normative nature of peacekeeping, which refers to the element of custodial control rather than security control. This strong focus on the criminal result in international criminal law should be tackled if we want to be able to impose a differentiated degree of liability to commanders, depending on the context in which they operated. Essentially, this would happen in the form of considering a separate doctrine and not by adjusting our interpretation of the required elements, as this would run contrary to the general principles of criminal law. A context-sensitive approach to the control requirement could thus contribute to differentiation of the commander's liability. This requires us to move away from the result-based approach to criminality, and accept that only a control-based or duty-based approach to liability takes the normative environment of peacekeeping into account.

8. Conclusions

Peacekeeping has changed; with its increased focus on civilian protection, this may give rise to questions of liability if peacekeeping commanders fail to offer such protection. Where command responsibility in its current form appears unfit to be applied in these circumstances, the post-Second World War trials demonstrated that a variant of the command responsibility doctrine may be applied if the circumstances deviate from regular warfare. The role of occupation commanders appeared, just like that of peacekeeping commanders, more normative and –potentially- subject to positive obligations of protection rather than negative ones. Control as a central element to command responsibility could then be interpreted in a differentiated way, for example by distinguishing a relationship of custodial care from security control.

The application of a separate form of command responsibility based on the peacekeeping commander's normative and protection-focused tasks would furthermore contribute to the fair and proportionate adjudication of peacekeeping commanders. Both aiding and abetting and command responsibility are increasingly perceived as being result-based, which jeopardises the characterisation of

¹¹⁰ Robinson (n 14) 19.

the commander's fault as it is: a failure to act rather than a conscious contribution to the commission of the crime. Developing a separate approach for peacekeeping commanders would alleviate the degree of liability for the commanders. They are after all not connected to criminal conduct, but have failed to offer protection of a custodial nature in the context of armed conflict. The normative basis of their presence in or near the armed conflict should be reflected in the assessment of their criminality to ensure that peacekeeping commanders are not unjustly portrayed as accomplices in the commission of serious international crimes. As such, the serious consequences of a failure to protect are being recognised, while inaction does not result in impunity by definition.