

## State Responsibility in Peacekeeping

### The effect of responsibility on future contributions

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#### 1. Introduction

The peacekeeping apparatus of the United Nations (UN) is one of the most dynamic sectors of the Organization, both in the evolution of its format and purpose and in the extent to which it impacts the international community on a daily basis. While scholars have argued that the character of the UN as an international organization is uniquely supranational,<sup>1</sup> the actors at the forefront of its operations continue to be the sovereign member states. In light of this, common interests notwithstanding, all aspects of the Organization, and most notably peacekeeping, remain heavily affected by its members' sovereign agendas.<sup>2</sup> The reason why peacekeeping has been particularly affected by the structural complexities inherent in an organization such as the UN is its dual control nature, firstly when it comes to deciding to execute a peacekeeping mission, and later in the decisions surrounding the contribution of troops and the extent of their engagement. Namely, while Chapter VII of the UN Charter puts the Security Council in charge of recognizing a threat to the peace and mandating action accordingly, a significant proportion of the planning and execution of peacekeeping remains within the discretion of member states. This is due to the fact that, absent permanent arrangements originally envisaged by Article 43 of the Charter, the extent and circumstances of troop contributions for a peacekeeping mission are left almost entirely to the will of the contributing state. This has prompted scholars to observe that even after a decision is made to contribute troops to a particular mission, states will often micromanage their contingents in order to safeguard their interests and protect their peacekeepers.<sup>3</sup> As missions are becoming increasingly engaged in the field, however, states are rendered more vulnerable to claims of accountability for acts carried out by their troops.

This paper will look into the relationship between the state and the UN with respect to command structures during peacekeeping missions, and the effect this has on accountability for events taking place during a mission. In light of this relationship, it will look into the potential for state responsibility for events taking place during a mission, and how this affects the state's willingness to engage its contributed troops in the field. The purpose of the exploration will be to form a twofold analysis looking into (i) the potential for the responsibility of states in light of current command structures as coupled with accountability standards, and (ii) the effect that this potential may have on the states' willingness to contribute troops to peacekeeping, or to engage their contributed troops in the field. The potential for responsibility will be explored by

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1 See for example: K. Annan, *Interventions: a Life in War and Peace* (2012); S.A. Miller, 'Universal Soldiers: UN Standing Armies and the Legal Alternatives', (1992-1993) 81 *The Georgetown Law Journal*, pp. 773-828.

2 Miller, supra note 1.

3 C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', (2009) 10 *Melbourne Journal of International Law*, p. 355.

analysing the body of law governing accountability standards in international law, as well as the current academic work on the topic. The effect of this on the states' willingness to engage their troops, on the other hand, will be the operative part of the paper, explored through an analysis of state behaviour in relation to peacekeeping missions. To this end, the paper will be divided into five sections, Sections 1 and 5 being the introduction and conclusion respectively, and Sections 2, 3 and 4 each representing substantive parts of the analysis. Section 2 will introduce the current legal framework governing standards of accountability in international law, as well as the scholarly work produced in this field. Moreover, it will provide an overview of the cases which have dealt with state responsibility in peacekeeping, and have apportioned responsibility to the state. Section 3 will delve into the particular aspects of state responsibility for acts taking place during peacekeeping missions, in an attempt to illustrate what this paper deems the 'potential for responsibility'. The section will look to scholars and experts for views on the matter, and based on this it will formulate hypotheses on the effect that the potential for responsibility may have on the state. Section 4 will provide an exploration of the hypotheses by means of an example.

### 1.1. Methodology

The operative part of this paper, located primarily in Sections 3 and 4, will rely on the method of process tracing in order to evaluate the extent to which a state's willingness to engage its contributed troops in the field may be affected by the potential for responsibility for any misconduct or action by its peacekeepers. Process tracing is the systematic examination of diagnostic evidence selected and analysed in light of research questions and hypotheses posed by the investigator; thus, process tracing is the analytical tool used for drawing descriptive and causal inferences from diagnostic evidence – often understood as part of a temporal sequence of events or phenomena.<sup>4</sup> In employing this method, researchers must examine a number of case histories, archival documents, interview transcripts, and other similar sources pertaining to their specific case in order to determine whether a proposed theoretical hypothesis is evident in the sequence of a case. For the purposes of this paper, process tracing will be employed in the formulation of three hypotheses concerning the effect of the potential for responsibility on state behaviour in relation to peacekeeping. The hypotheses will be based on an analysis of the current views in academia obtained through various sources, and the views among experts obtained through interviews. Moreover, in the analysis of an example, relevant documents will be consulted. Thus, the paper will be employing process tracing in order to identify forward causation by observing a set of factors and hypothesizing a potential outcome – a method supported by David Friedman's elaborations on the success of causal process observations.<sup>5</sup> The example that will be explored is that of the Netherlands with respect to recent legal developments concerning its responsibility in the peacekeeping mission taking place in Bosnia and Herzegovina in the period of the disintegration of the former Yugoslavia. The reason why this case was chosen is the fact that presently the Netherlands is one of three states – the other two being the UK and Belgium – found responsible for acts by its contributed troops during a UN peacekeeping mission, and the only one among the three with more than one adjudged case on the issue. Thus, it is arguably a case where the potential for responsibility has been significantly felt, and therefore a good example where the effect may be examined. It must be outlined that, in light of the recent nature of the cases, no conclusive observations can be made on the effect that the potential for responsibility may have on the Netherlands' future peacekeeping policies. Namely, the decisions whereby the state was found responsible have only taken place in 2013 and 2014, and thus leave only a limited period of time that may be explored when it comes to their effect. In light of this, the purpose of the paper is primarily exploratory, in that it aims to map out all the developments that have taken place subsequent to the decisions and to make predictions as to how these developments may unravel further in the future.

4 D. Collier, 'Understanding Process Tracing', (2011) 44 *Political Science and Politics*, no. 4, p. 823.

5 D. Friedman, 'On types of Scientific Inquiry', in H. Brady & D. Collier (eds), *Rethinking Social Inquiry* (2010), p. 221.

## 2. State responsibility in international law

This section will deal with the current legal framework guiding standards of accountability in international law, partially relying on the academic work in the field. The aim will be to map out the legal and academic parameters in which the discussion on state responsibility currently dwells, thus setting the stage for the findings subsequently presented in this paper.

### 2.1. Current legal framework

The general framework guiding the responsibility of a state for an internationally wrongful act is contained in Articles 1 and 2 of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (Guiding Principles).<sup>6</sup> Guided by them, the general process of evaluating whether an internationally wrongful act has taken place consists of a two-pronged test, whereby it is firstly evaluated whether an act or omission is attributable to the state in question – an evaluation guided by the succeeding provisions of the Guiding Principles, and subsequently evaluated whether the act or omission constitutes a breach of that state's international duty – an evaluation guided by principles of international law.<sup>7</sup> As the first aspect of the two-pronged test consists of establishing that a certain act or omission is attributable to the state, in the case of peacekeeping missions the acts in need of examination are those of peacekeepers belonging to the national contingents contributed by states.<sup>8</sup> However, while the chain of command which is applicable during peacekeeping missions attempts to adequately distinguish between the authority of the state vs. the authority of the UN during a mission, the situation on the ground is often significantly less clear. In light of this, it is often difficult to trace the origin of an act up the chain of command, and subsequently difficult to evaluate which of the two commanding entities – the state or the UN – may be open to claims of liability. At this point of the analysis, therefore, the provisions of the Draft Articles on the Responsibility of International Organizations (DARIO)<sup>9</sup> become equally relevant in the evaluation process. Article 7 DARIO provides:

‘The conduct of an organ of a state (...) placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.’

Adequately reflecting the duality inherent in peacekeeping missions, the alternative scenarios presented by these two provisions evoke the standard of ‘effective control’ as a method to evaluate which actor may be liable for an act taking place during a peacekeeping mission, and to what extent. Along with its general mention in Article 7, the standard of ‘effective control’ has been utilized by several judicial bodies<sup>10</sup> in their deliberations on cases relating to incidents during peacekeeping missions. Moreover, the standard has largely been accepted by scholars<sup>11</sup> as the most adequate test used in such deliberations.

6 International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts, with commentaries’, in *Yearbook of the International Law Commission* (2001), Vol. II.

7 Art. 3 of the Guiding Principles.

8 Peacekeepers are considered organs of the state within the meaning of Art. 4 of the Guiding Principles.

9 International Law Commission, ‘Draft Articles on the Responsibility of International Organizations, with commentaries’, in *Yearbook of the International Law Commission* (2011), Vol. II.

10 See for example: the European Court of Human Rights, the House of Lords in the UK, the Hague District Court, and most recently the Supreme Court of the Netherlands.

11 See for example: R. Burke, ‘Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets’, (2012) 16 *Journal of International Peacekeeping*, pp. 1-46; R. Buchan et al., ‘The Externalization of Peacekeeping: Policy, Responsibility and Accountability’, (2011) 15 *Journal of International Peacekeeping*, pp. 281-315; F. Rawski, ‘To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations’, (2013) 18 *Connecticut Journal of International Law*, no. 103, pp. 103-132; T. Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, (2010) 51 *Harvard International Law Journal*, pp. 114-192; Leck, *supra* note 3.

### 2.1.1. Command structures during peacekeeping missions

Before going into the particularities of the ‘effective control’ standard, it is important to briefly summarize the command structures employed during peacekeeping missions in order to illustrate the reason why the test of ‘effective control’ should be applied. The command structures employed during UN peacekeeping missions have been aptly summarized in what has come to be known as the Capstone Doctrine of the UNDPKO developed in March of 2008.<sup>12</sup> As scholars have pointed out, however, while the command and control structures of a UN peacekeeping mission may seem straightforward in theory, they are seldom so in practice.<sup>13</sup> Namely, while still soldiers in their domestic national service, peacekeepers are also international personnel acting pursuant to Security Council authorization, and temporarily placed under the formal control of the UN.<sup>14</sup> This duality gives birth to a chain of command whereby peacekeepers remain primarily within the control of their sending states by virtue of a National Contingent Commander (NCC) of the contributed troops, but are also under the direction of a Force Commander who is the UN senior military official for the peacekeeping mission. This has led scholars to characterize the chain of command by describing the UN as having operational control over the troops, while the effective control remains with the state.<sup>15</sup> The first thing that needs to be pointed out is that in a UN peacekeeping operation, all components of the mission – military, police, and civilian – come under the operational authority of the Head of Mission.<sup>16</sup> The Head of Mission is in turn typically a special representative appointed by the Secretary-General, and a civilian entity. In addition to this, the head of the military component of a mission – the Force Commander, or a chief military observer – is also appointed by the Secretary-General. In instances when the peacekeeping mission is exercised under a strictly military mandate the head of the military component may also be the head of the overall mission; however, generally the Head of Mission is a civilian and represents authority on behalf of the Secretary-General in the field.<sup>17</sup> It is important to note that the Capstone Doctrine lays strong emphasis on the fact that, although the Force Commander is the head of the military component of a peacekeeping mission, the military personnel provided by contributing states are placed under the operational control of the Force Commander, but not under United Nations command.<sup>18</sup> Thus, the authority of the Force Commander is limited exclusively to the mandate of the peacekeeping mission and the operational control of the mission runs directly from the Secretary-General, through the Head of Mission, and to the Force Commander.<sup>19</sup> The final link between the UN and national contingents on the ground is the NCC. While the Head of Mission and the Force Commander are appointed individually and by the UN, the national contingents are provided by the contributing states in discrete and indivisible units whose internal command structures cannot be violated.<sup>20</sup> In light of this, the NCC is the national commander of the contributed contingent, and transfers the orders from the Force Commander to the respective contingent. The NCC is thus the most senior officer from the contributing state on the ground, and may serve as the commanding officer of the contributed contingent.<sup>21</sup> This has led scholars to observe that peacekeeping forces are under UN command *through* their NCCs; however, recent characterizations have moved away from such observations and have rather adopted the term ‘operational’ when referring to UN control and command. It is essential to point out that national contingents are contributed by states under circumstances of a previously agreed mandate and rules of engagement for the contributed troops, setting a distinct limit on what the Force Commander may ask of them. The NCC thus arguably represents the interests of the contributing state on the ground, and may contravene the direction of the Force Commander if it is deemed

12 United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) [hereinafter: *Principles and Guidelines*].

13 See Leck, *supra* note 3, p. 352.

14 See Dannenbaum, *supra* note 11, p. 114.

15 *Ibid.*

16 *Ibid.*

17 Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations* (2003), p. 68 [hereinafter: *Handbook*].

18 *Principles and Guidelines*, *supra* note 12, p. 68.

19 See Dannenbaum, *supra* note 11, p. 144.

20 *Ibid.*, p. 145.

21 See Leck, *supra* note 3, p. 353.

that they are contrary to what has been agreed prior to deployment.<sup>22</sup> This final bifurcation in the command structure between the Force Commander and the NCC is a vital one, as it is at this instance that most of the ambiguities arise on the ground. As scholars<sup>23</sup> have noted, it is precisely in this instance of the structure that the test of ‘effective control’ becomes relevant, as it is often in this instance of the chain of command that direction relating to the mission runs astray.

### 2.1.2. The standard of effective control

While Article 7 DARIO outlines the standard of ‘effective control’ in general terms, in its Commentary to this article the ILC has clarified that the ‘effective control’ test is not to be applied generally to the overall conduct of the organ, but rather only to the acts that are considered to be unlawful. The aim of this is to consider whether the unlawful act in question was performed under the control of the international organization or the relevant state, thereby attributing responsibility accordingly.<sup>24</sup> This becomes increasingly important when one considers examples of peacekeeping missions where during moments of crucial importance troops have refused to abide by the general direction of the Organization, and have chosen instead to wait for or act on national orders. While cases relating to peacekeeping missions are a relatively recent occurrence, the standard of ‘effective control’ has been defined by the International Court of Justice (ICJ) as early as 1986 in relation to the case of *Nicaragua*, and further developed in the *Bosnian Genocide* case of 2007. In these two foundational cases the Court found that for ‘effective control’ to be established the perpetration of acts would have had to be ‘directed or enforced’<sup>25</sup> by the state, whereby the state would have had effective control over the operations where the disputed violations occurred.<sup>26</sup> Moreover, for an entity to be considered an organ of the state and thus trigger responsibility, the entity must have acted under the state’s effective control, whereby control was exercised with respect to each operation in which the alleged violation occurred and not generally in respect of overall actions.<sup>27</sup> Contrasted with the standard established by the ICJ, other judicial bodies have somewhat altered the evaluation. Namely, in the case of *Tadic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) introduced the standard of ‘overall control’ as an allegedly more appropriate test for attribution when it comes to evaluating a state’s control over armed groups.<sup>28</sup> Similarly, in its decision in *Behrami and Saramati* the European Court of Human Rights (ECtHR) seemed to favour the ‘overall control’ test over the ‘effective control’ one. Namely, while the ECtHR did not explicitly depart from the standard of ‘effective control’ it adopted a standard of ‘ultimate authority and control’, thereby effectively making the test for attribution more lenient.<sup>29</sup> In comments on the differences between these standards, scholars have tended to opt for ‘effective control’ as the appropriate test, at least when it comes to peacekeeping scenarios. Namely, Buchan and White have observed that the key factor in assessing liability is the level of command, authority, and control, arguing that it is the degree of control being exercised that ultimately points to the liable authority.<sup>30</sup> Similarly, they have outlined that it has generally been accepted that the overall control/ultimate authority test established by the *Tadic* and *Behrami* decisions is an erroneous interpretation of the standard posed by Article 7 DARIO, at least when it comes to peacekeeping scenarios.<sup>31</sup> These observations notwithstanding, Buchan and White maintain that if the ‘effective control’ test is adopted, liability is more likely to be placed with the state, whereas if the ‘overall control/ultimate authority’ test is applied, liability

22 See *Handbook*, supra note 17, pp. 67-68.

23 See for example Buchan et al., supra note 11; Leck, supra note 3.

24 DARIO Commentary, Art. 7, para. 8.

25 *Military and Paramilitary Activities in and Against Nicaragua*, Judgment of 27 June 1986, [1986] ICJ Reports 14, para. 115.

26 *Ibid.*, paras. 115-116.

27 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 26 February 2007, [2007] ICJ Reports, para. 400.

28 *Prosecutor v. Dusko Tadic*, Decision of 11 November 1999, [1999] International Criminal Tribunal for the Former Yugoslavia, IT-94-1, para. 122.

29 *Agim Behrami and Bekir Behrami v. France and Ruzdhi Saramati v. France, Germany and Norway*, Decision of 2 May 2007, [2007] ECHR, para. 140-141.

30 Buchan et al., supra note 11, p. 300.

31 *Ibid.*

may be placed with the UN instead.<sup>32</sup> It might be worth noting that while all the decisions dwell within the realm of attribution according to the extent of control exercised, they differ slightly, or even substantially, in the facts that they assess. Namely, the test of effective control in the case of *Nicaragua* was one aimed at assessing attributability when it comes to the behaviour of a group of private individuals. The test in the *Bosnian Genocide* case, as well as in *Tadic* on the other hand, concerned the actions of organized armed groups, and *Behrami and Saramati* ultimately ‘hit home’ by assessing attribution when it came to missions of the UN and its member states. These differences notwithstanding, there seems to be a consensus in academia that when it comes to attempts at attribution during peacekeeping missions, the test of ‘effective control’ is more appropriate than its more lenient counterpart.

## 2.2. Peacekeeping cases

The cases that have arguably shaped the jurisprudence on state responsibility in peacekeeping, and that will be discussed in this section include *Mothers of Srebrenica* before the District Court of The Hague, *Nuhanovic* and *Mustafic* which reached the Supreme Court of the Netherlands, *Jaloud v. the Netherlands* before the ECtHR, and *Mukeshimana* before the Brussels Court of First Instance. The section will also look into the case of *Al-Jedda* adjudged by the ECtHR, which although not a classic example of peacekeeping, presents a valuable source of judicial reasoning on the issue of attribution.

### 2.2.1. Al-Jedda

The case of *Al-Jedda* concerned liability for violations committed against a detainee in Iraq by UK troops acting at the time as part of a mission on the territory of Iraq. The case was brought before the ECtHR after a series of domestic proceedings adjudged in favour of the Government.<sup>33</sup> In assessing the case, the ECtHR employed the ‘effective control’ standard as described by Article 7 DARIO (then Article 5),<sup>34</sup> eventually attributing the conduct in question (Mr Al-Jedda’s detention) to the UK.<sup>35</sup> The Court found proof of the state’s exercise of effective control in that the camp where Mr Al-Jedda was detained was controlled exclusively by UK forces, and the decision to keep Mr Al-Jedda in detention was made by the British officer in command of the facility.<sup>36</sup> Moreover, the force deployed in Iraq, albeit moderated by Security Council resolutions, was not like other UN peacekeeping missions in that the troops contributed remained largely within the control of the contributing state. Mindful of its previous decisions, the Court took special care to differentiate *Al-Jedda* from its earlier reasoning in *Behrami and Saramati*, outlining that the circumstances of the cases differed significantly.<sup>37</sup> It may be argued that the *Al-Jedda* decision is limited to the circumstances at hand, since the mission in Iraq was a very specific example of state intervention coupled with UN approval. Nonetheless, the espousal by the ECtHR of the ‘effective control’ standard, as opposed to its earlier employment of ‘overall control’ in *Behrami and Saramati*, has been observed by scholars as the proverbial step in the right direction when it comes to the establishment of a standard that ought to be used when apportioning responsibility between the state and the UN.<sup>38</sup>

### 2.2.2. Jaloud

The case of *Jaloud* concerned the death of the applicant’s son, resulting from a shooting by Dutch forces manning a checkpoint in Iraq. The event took place at a time when the Netherlands participated in the SFIR mission in Iraq, as part of a division under the command of an officer of the UK armed forces.<sup>39</sup> The sections

32 Ibid.

33 J. Pejic, ‘The European Court of Human Rights’ *Al-Jedda* Judgment: the Oversight of International Humanitarian Law’, (2011) 93 *International Review of the Red Cross*, p. 840.

34 *Al-Jedda v. The United Kingdom*, Decision of 7 July 2011, [2011] ECHR, para. 84.

35 Ibid., para. 86.

36 Ibid., paras. 84-85.

37 Ibid., para. 80.

38 C. Ryngaert, ‘Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the “Effective Control” Standard after *Behrami*’, (2012) 45 *Israel Law Review*, p. 176.

39 *Jaloud v. The Netherlands*, Decision of 20 November 2014, [2014] ECHR, para. 53.

of the case pertinent to this paper are the ones containing the Court's reasoning as to whether the relevant events occurred within the Netherlands' jurisdiction (to which the Court answered in the affirmative), and the adjoined discussion on attribution. On the issue of jurisdiction, in response to the Netherlands' argument that the acts in question took place under the operational control of the UK,<sup>40</sup> the Court observed that 'executing a decision or an order given by an authority of a foreign state is not in itself sufficient to relieve a Contracting state of the obligations (...) under the Convention'; thus, the Netherlands was not 'divested of its jurisdiction (...) solely by dint of having accepted the operational control of (...) a UK Officer'.<sup>41</sup> Furthermore, the Court observed that while the Dutch troops may have taken their day-to-day orders from foreign Commanders, the formulation of essential policy remained within the domain of the individual state.<sup>42</sup> Therefore, the Dutch troops were not placed 'at the disposal' of any foreign power, nor were they 'under the exclusive direction or control' of any other state.<sup>43</sup> Turning to the issue of attribution, the Court underscored the difference between the tests employed to establish jurisdiction on the one hand, and state responsibility on the other.<sup>44</sup> Nonetheless, it observed that the facts giving rise to the complaint did derive from alleged acts or omissions by Dutch military and investigative personnel, and as such may give rise to the responsibility of the Netherlands.<sup>45</sup> Commentators have pointed out that the conflated discussion of jurisdiction and attribution in the reasoning may give rise to confusion.<sup>46</sup> Insofar as this paper is concerned, the contribution of *Jaloud* seems to lie in the introduction of the notion of 'full command' as an indicative standard of the extent of control exercised by a state. Nonetheless, it seems difficult to extrapolate this standard from *Jaloud* alone, as it is somewhat unclear whether it could serve for the attribution of conduct or the attribution of jurisdiction to the state.

### 2.2.3. Mukeshimana

The case of *Mukeshimana* was brought against the state of Belgium for acts by Belgian peacekeepers contributed to the MINUAR mission in Rwanda. The case claimed liability on the part of Belgium for the damages suffered in the course of a massacre that followed the evacuation of peacekeepers operating at the Official Technical School in Kigali. At the time of the events, the area of the school was a *de facto* refugee camp under the protection of Belgian MINUAR troops. The claim thus concerned the departure of the Belgian soldiers from the school, whereby the Rwandan refugees were left behind and massacred within hours of the peacekeepers' departure.<sup>47</sup> It must be noted that the decision in *Mukeshimana* is one by a court of first instance, and as such may be subject to alterations. Nonetheless, the reasoning employed by the Court in deciding which entity exercised control over the decision to evacuate peacekeepers, and was subsequently liable for the outcomes of that decision, remains relevant. As was noted by reporters of the case, 'the most notable aspect was the court's determination that the decision to evacuate was taken by Belgium, and not by the UN, and that the Belgian UN peace keepers were *de facto* under Belgian command and control. Thus, the acts of the peacekeepers were attributable to Belgium, and could engage Belgium's responsibility'.<sup>48</sup> In reaching this observation, the Court did not directly refer to the 'effective control' standard outlined by Article 7 DARIO, but did seem to reason within those lines. Namely, the Court noted the operational character of effective control, establishing ultimately that 'in reality, in the midst of a UN peacekeeping operation, as a result of the chaotic conditions in the field and corresponding communication problems,

40 Ibid., para. 115.

41 Ibid., para. 143.

42 Ibid., para. 147.

43 Ibid., para. 151.

44 Ibid., para. 154.

45 Ibid., para. 155.

46 See for example: A. Sari, 'Untangling Extra-territorial Jurisdiction from international Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions', (2015) 53 *Military Law and the Law of War Review*, no. 2, p. 287; F. Haijer & C. Ryngaert, 'Reflections on *Jaloud v. Netherlands*: Jurisdictional Consequences and Resonance in Dutch Society', (2015) 19 *Journal of International Peacekeeping*, pp. 174-189.

47 *Mukeshimana-Ngulinzira and others. v. Belgium and others.*, [2010], Brussels Court of First Instance, RG No. 04/4807/A, F3-F6.

48 Ibid., A2.

UN effective command and control over national troop contingents may shift to the troop-contributing state. In that case, the state is to be held responsible if wrongful acts were committed.<sup>49</sup>

#### 2.2.4. The Srebrenica cases

The *Mothers of Srebrenica* case adjudged in 2014 is the last in a line of cases attempting to establish the entity liable for some of the damages suffered by individuals in and around the enclave of Srebrenica, which at the time was declared a 'safe area' of the UN guarded primarily by peacekeeping troops contributed by the Netherlands (Dutchbat). *Mothers of Srebrenica* finds its origin in the similar case of *Mothers of Srebrenica et al. v the State of the Netherlands and the United Nations*, brought before the District Court of The Hague. Namely, the earlier case was a civil action filed before the District Court of The Hague, claiming compensation from the UN and the Netherlands by alleging that both were responsible for the failure to prevent the Srebrenica genocide.<sup>50</sup> In 2008 the District Court of The Hague ruled that the UN enjoys absolute immunity, and the Court therefore did not have jurisdiction to hear the case. This decision was upheld all the way up to the Supreme Court of the Netherlands in 2012, and only the case against the state continued. As scholars have noted,<sup>51</sup> *Mothers of Srebrenica* is relevant for several reasons. Most notable for this paper, however, is the fact that the Court attributed a number of acts carried out in the framework of a UN operation to the troop-contributing state on the basis of the 'effective control' standard. In assessing the acts of Dutchbat, the Court outlined that the aim is to establish 'whether inasmuch as they took place under the flag of the UN the unlawful acts of which it is accused may indeed be attributed to the state'.<sup>52</sup> The Court outlined that the relevant criterion was the standard of 'effective control' as defined by Article 7 DARIO,<sup>53</sup> outlining that while the standard was primarily forwarded as a guide in the attribution of acts to an international organization, it is equally relevant in deliberations concerning the attribution to states.<sup>54</sup> Effective control was described as 'the actual say or "factual control" of the state' over the relevant acts. The Court briefly recollected Article 48 DARIO, outlining that the same acts may be attributed to both the state and the UN under the concept of dual attribution.<sup>55</sup> In its deliberations the Court acknowledged that, for the purposes of the mission, the command and control over Dutchbat was transferred from the state to the UN.<sup>56</sup> Thus, the Court considered which acts of Dutchbat were committed *ultra vires* in relation to UN direction, observing that it is the state which 'has a say over the mechanisms underlying *ultra vires* actions', and therefore such acts are attributable to it.<sup>57</sup> While *ultra vires* acts do not form part of the 'effective control' test, scholars have agreed with the Court that it is the state, rather than the UN, which typically has a say in the mechanisms relevant to preventing *ultra vires* abuses.<sup>58</sup> In assessing the acts of Dutchbat in order to ascertain which acts may be attributed to the Netherlands, the Court considered the instructions given by the state in contravention to the general mandate,<sup>59</sup> the extent of effective control exercised by the state in the time prior to the fall of Srebrenica,<sup>60</sup> and the participation of Dutch commanding officers in high-level decisions after the fall of Srebrenica.<sup>61</sup> Bearing all of that in mind, the Court decided that, while the Netherlands did not have effective control over Dutchbat prior to the fall of Srebrenica, it did exercise such

49 See Ryngaert, *supra* note 38, p. 176.

50 ICD *Mothers of Srebrenica*.

51 See for example: C. Ryngaert, 'Srebrenica Continued: Dutch District Court holds the Netherlands Liable for Cooperation with Bosnian Serbs', (2014) 61 *Netherlands International Law Review*, no. 3, pp. 365-454; K. Boon, 'Mothers of Srebrenica Decision: Dutch Court holds the Netherlands Responsible for 300 Deaths in 1995 Massacre', *Opinio Juris*, 17 July 2014.

52 Rechtbank Den Haag 16 July 2014, ECLI:NL:RBDHA:2014:8748, paras. 4.29-4.30 (*Mothers of Srebrenica*).

53 *Ibid.*, para. 4.33.

54 *Ibid.*

55 *Ibid.*, para. 4.34.

56 *Ibid.*, para. 4.38.

57 *Ibid.*, para. 4.57.

58 See for example: Dannenbaum, *supra* note 11; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: the Behrami and Saramati case', (2008) 8, *Human Rights Law Review*, pp. 151-170.

59 *Mothers of Srebrenica*, *supra* note 52, paras. 4.62-4.66.

60 *Ibid.*, para. 4.79.

61 *Ibid.*, para. 4.83.



control for certain acts during the so-called ‘transitional period’ after the fall of the enclave.<sup>62</sup> Therefore, the Court attributed responsibility to it for these activities.

Parallel to the overarching cases brought against the Netherlands and the UN, the events surrounding the international involvement in Srebrenica have also given rise to *Mustafic* and *Nuhanovic*, and an attempted criminal case against three commanding officers of Dutchbat. *Mustafic* and *Nuhanovic* claimed responsibility for the damages suffered by the relatives of a Bosnian electrician (*Mustafic*) who worked as a local employee in the enclave and was killed by Bosnian Serb forces, and the damages suffered by an interpreter who worked as a UN employee for Dutchbat (*Nuhanovic*) for the death of his relatives following their eviction from the compound.<sup>63</sup> While the cases were submitted separately, the Court employed a predominantly similar reasoning. Namely, the Court held that ‘the criterion for determining whether Dutchbat’s conduct should be attributed to the UN or to the state is which of them had effective control over Dutchbat at the time of the [relevant] conduct’.<sup>64</sup> The Court acknowledged that more than one party may exercise effective control over the conduct of peacekeepers, therefore leaving the possibility for dual attribution open.<sup>65</sup> Nonetheless, in employing the criterion of effective control in the present cases, the Court ultimately found the actions to be attributable to the Netherlands, subsequently holding the state liable for the death of the three men referred to in the cases.<sup>66</sup>

The attempted criminal case against the three commanding officers of Dutchbat reached the Arnhem-Leeuwarden Court of Appeal, where it upheld an earlier decision not to prosecute.<sup>67</sup> Most recently, survivors have appealed to the ECtHR, claiming that the Netherlands did not properly investigate the case against the three officers,<sup>68</sup> but the outcome of this appeal is still to be observed.

Overall, it may be observed that there are currently two tests guiding the attribution of responsibility for acts committed during peacekeeping missions – the test of ‘effective control’ and the test of ‘overall control’. The current command and control structures of peacekeeping missions have led scholars to believe that liability may be apportioned to a different actor depending on the different test applied, observing that states are more likely to be found liable if the test of ‘effective control’ is applied, while the UN is more likely to be found liable if ‘overall control’ is used. More importantly, the ILC and the relevant judicial bodies, as well as scholars writing on the topic, have agreed that assessments of liability should pertain only to control over the wrongful act in question, as opposed to the overall behaviour of the peacekeepers during the relevant mission. Finally, while different courts have introduced different approaches for attribution, the prevailing consensus seems to be that it is the standard of ‘effective control’ as opposed to ‘overall control’ that needs to be employed when assessing responsibility in the scenario of peacekeeping missions. Bearing this in mind, this paper will endeavour to examine how this finding has affected states’ perception of peacekeeping, and the extent to which it may prompt them to reconsider future arrangements.

### 3. The potential effect of legal developments on the state

The aim of the previous section was to illustrate the tendency of different judicial bodies in recent judgments to use the ‘effective control’ standard in their deliberations on state responsibility in peacekeeping, as opposed to earlier standards such as the ‘overall control’ one. In doing so it demonstrated that different courts have used similar arguments for their attribution of responsibility to the state as opposed to the UN. Nonetheless, it also acknowledged that these cases are both too recent and too specific to claim an objective standard. The following section will look into the reactions in academia which predict that the potential for responsibility may affect the states’ willingness to contribute to peacekeeping missions in the future. Furthermore, it will look into the reactions of experts, who have similarly outlined that it may

62 Ibid., para. 4.87.

63 *The State of the Netherlands v. Hasan Nuhanovic*: Summary (2003), available at: <<http://www.internationalcrimesdatabase.org/Case/1005/The-Netherlands-v-Nuhanovi%C4%87/>> (last visited 14 December 2015).

64 Hoge Raad 6 September 2013, ECLI:NL:HR:2013:BZ9225, para. 3.5.2 (*The State of the Netherlands v. Hasan Nuhanovic*).

65 Ibid.

66 Supra note 63.

67 R. Irwin, ‘No Criminal Charges for Dutch Officers’ Srebrenica role’, *The Amsterdam Herald*, 8 March 2013.

68 D. Dzidic, ‘Netherlands Taken to Euro Court over Srebrenica’, *Balkan Insight*, 26 October 2015.

give rise to several effects on the behaviour of states, affecting the willingness to contribute as well as the willingness to engage already contributed troops in the field.

### 3.1. The views of scholars

In her reaction to *Mothers of Srebrenica*, Kristen Boon notes that ‘it will be of interest to Troop Contributing Countries, in that the determination of a national court that a state is responsible for the failure to prevent an atrocity and might be found liable for wrongs committed during a peacekeeping mission, despite an overarching UN Mandate, broadens the spectre of legal liability significantly’.<sup>69</sup> In that vein, Lenneke Sprik argues that the verdict might result in a visible decline in the willingness of states to contribute troops to international peacekeeping missions, especially in cases of contributions by developed countries.<sup>70</sup> Sprik ascribes this to the already existing pressure generated by the high expectations of peacekeeping missions, which puts states at risk of losing prestige in the eyes of the international community should any failure be related to their troop contribution. Decisions such as the one of *Mothers of Srebrenica*, Sprik argues, ‘only exacerbate this tendency’.<sup>71</sup> General observations on state responsibility in peacekeeping seem to resonate with the above views. In commenting on UN immunities and alternative accountability procedures that flow from it, Nico Schrijver notes that holding states responsible for events during peacekeeping may have an ‘undesirable effect’ on future peacekeeping arrangements, prompting states to interfere with command structures in order to protect their interests, thereby undermining the unity of the operation. In the alternative, ‘any potential responsibility of troop-contributing countries would make member states less willing to participate in international peace operations’ altogether.<sup>72</sup> Similarly, in an analysis of the outcome of *Nuhanovic* and *Mustafic*, Noelle Higgins observes that while the cases might not threaten to pose a trend in the law of attribution they may nonetheless affect future behaviour of states when it comes to peacekeeping. Namely, as Higgins observes, states may become more reluctant to contribute troops to peacekeeping, especially in light of UN immunity which renders them ever more vulnerable to liability claims.<sup>73</sup> In the same vein, Otto Spijkers warns that the perceptions of contributing states, as well as the general public, may be negatively influenced in spite of the finer details which outline that the circumstances of the cases were extraordinary and thus will not necessarily set a precedent. Namely, as Spijkers argues, such judgments will ‘of course scare off potential troop contributing states’, even if the UN attempts to take responsibility for acts of UN peacekeepers.<sup>74</sup> This is owed to the fact that the courts seem to disregard the UN’s willingness to take responsibility and instead only look at who has effective control over the relevant acts; thus the UN becomes protected by its immunity and the contributing states become the victims in the proceedings.<sup>75</sup> The Supreme Court of the Netherlands in *Nuhanovic* seemed to acknowledge the potential adverse effect that its decision may have on states in relation to peacekeeping, but did not yield to the call for judicial restraint made by the Dutch state during the proceedings.<sup>76</sup> Similar adamant views may be noted in the works of scholars such as Dannenbaum and Leck, where claims are made that states need to be included either individually or in models of dual responsibility for acts during peacekeeping missions, in order to adequately reflect the relationship of the state and the UN to the troops in the field. In arguing for responsibility on the part of the state, however, Leck acknowledges that this may indeed have a negative impact on states’ willingness to participate in peacekeeping missions, or may lead to a future of peacekeeping where states increasingly micromanage their contributed troops on the ground

69 Boon, *supra* note 51.

70 L. Sprik, ‘Mothers of Srebrenica v the Netherlands: the Law as Constraint for Peacekeeping’, *E-International Relations*, 24 September 2014.

71 *Ibid.*

72 N. Schrijver, ‘Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations’, (2013) 10 *International Organizations Law Review*, no. 2, p. 595.

73 N. Higgins, ‘The Responsibility of the Netherlands for the Actions of Dutchbat: an Analysis of Nuhanovic and Mustafic’, (2014) 14 *International Criminal Law Review*, p. 658.

74 O. Spijkers, ‘Responsibility of the Netherlands for the Genocide in Srebrenica: the Nuhanovic and Mothers of Srebrenica cases Compared’, (2014) 18 *Journal of International Peacekeeping*, no. 3, p. 289.

75 *Ibid.*

76 Hoge Raad 6 September 2013, ECLI:NL:HR:2013:BZ9228, para. 3.18.3 (*The State of the Netherlands v. Mustafic et al.*).

in order to avoid situations which might increase the risk of liability.<sup>77</sup> In an analysis of *Al-Jedda*, Jelena Pejic observes, with respect to ECHR states, that the potential for responsibility may prompt contributing states to pay more attention to the formulation of conditions of internment in the mandates of future missions.<sup>78</sup> Burke has similarly noted that the potential for responsibility may provide an incentive for states to address violations by peacekeepers more adequately.

### 3.2. The views of (military) experts<sup>79</sup>

In a comment on *Mothers of Srebrenica*, Colonel Metodi Hadji-Janev<sup>80</sup> of the Macedonian Army notes that he does not believe that this decision is a precedent, but rather an implementation of the rule of law. Namely, the decision would be a precedent if there was no clear line of responsibility linking Dutchbat to the attributed acts, which, as is evident by the Court's elaborate discussion on the various circumstances, is not the case. In an overall observation on the potential influence of this decision, Colonel Hadji-Janev outlines that it might give rise to various reactions on the part of states when it comes to peacekeeping. Primarily, he acknowledges that it may indeed make states reluctant in their contribution to peacekeeping missions, or at least make them increasingly prudent in the circumstances of engagement that they agree on for their contributed contingents. As Colonel Hadji-Janev outlines, legal implications may have an inhibiting effect on the liberty with which states engage their contributed troops in the field, especially if the contributing state has had a previous negative experience whereby some of its soldiers, or the state as a whole, have been subjected to legal proceedings in relation to peacekeeping missions. In the alternative, however, decisions such as *Mothers of Srebrenica* may have an educational effect on states in preparation for peacekeeping missions instead of inhibiting their participation. Namely, Colonel Hadji-Janev believes that such decisions may make states more diligent in preparing their troops for peacekeeping, prompting them to include legal considerations in the preparation of their doctrines. In what he deems a creative approach to devising rules of engagement for peacekeeping missions, Colonel Hadji-Janev believes that these decisions may be instructive for future generations of peacekeeping, enabling them to calculate legal implications in their preparation for a mission. Major Dominique Crevecoeur<sup>81</sup> of the Belgian Army similarly acknowledges that the potential for legal risks may act as a deterrent to a state's contribution to a peacekeeping mission. He outlines that the decision to contribute troops is a result of risk assessment, including the assessment of legal risks that a mission might imply. Thus, Major Crevecoeur notes, *Mothers of Srebrenica* may give rise to a trend of attributing the acts of peacekeepers to the contributing state, which could in turn deter states from future contributions, or alternatively invite them to only opt for a 'low risk' contribution of forces. As for a potential instructive effect on future peacekeeping policies, Major Crevecoeur remains persuaded that, at least in the short term, the effect will primarily be a negative one, in that it will deter states from making contributions to missions. However, he does not exclude the possibility of long-term effects including a change in peacekeeping strategies which will account for the potential for liability in the preparation of troops prior to deployment. Experts familiar with the Dutch example in detail, on the other hand, have been more cautious in expressing conclusive expectations. Dr. Joop Voetelink, who is familiar with the example of the Netherlands both academically and through his professional involvement with the armed forces, has observed that while legal considerations will play a role in the decision-making process prior to contribution, that will not necessarily be the crucial consideration when deciding to contribute forces. Instead, issues like state responsibility will more likely have an impact on the follow-up discussions concerning the manner in which forces are deployed. In that instance, Dr. Voetelink observes, the potential for responsibility may

77 See Leck, *supra* note 3, p. 364.

78 See Pejic, *supra* note 33, p. 842.

79 The views expressed in this paper are a reflection of the personal experiences of experts who were willing to participate in the research. These views do not reflect the official position of the institutions to which the experts are affiliated.

80 Colonel Metodi Hadji-Janev is currently an Associate Professor of Law, and the Vice Dean for education and scientific research at the military academy 'General Mihajlo Apostolovski' in Skopje, Macedonia. He has had experience with preparing and participating in several missions, including missions in Iraq and Afghanistan.

81 Major Dominique Crevecoeur is currently a *Directeur de Session* at the Centre for Military Law Studies and the Laws of War in Brussels, Belgium. He has participated in several peacekeeping missions, including UNPROFOR in Bosnia and UNTAES in Croatia where he served as Platoon Commander, and KFOR in Kosovo where he served as Company Commander.

make the state keen on maintaining a stronger level of control over the troops in order to avoid a wrongful act. Moreover, he outlines, as court cases make everybody more conscious of possible wrongs, the potential for responsibility may lead to an additional focus on potential improvements in the training process.

### 3.3. Three potential effects

In the views of scholars and experts three general tendencies may be noted with respect to the effects of the potential for the responsibility of states. In light of this, this paper presents three hypotheses on the effect that the potential for liability may have on the behaviour of states in peacekeeping:

- i. a negative effect on the willingness to contribute troops to future peacekeeping missions;
- ii. a restrictive effect on the manner of engagement of troops already contributed in the field, particularly with respect to the use of force; and
- iii. an instructive effect on the future preparation of troops to be contributed, with respect to the training of prospective peacekeepers.

## 4. The example of the Netherlands

The previous section forwarded three hypotheses on the possible effect of the potential for responsibility on the behaviour of states in relation to peacekeeping, based on the views of scholars and experts in the field. In light of this, this section will endeavour to refine these hypotheses by exploring the example of the Netherlands, and applying the method described in the introduction.

In a recent report on the Netherlands' peacekeeping contribution profile (2014), the Clingendael Institute observed that 'Dutch contributions to UN-led missions have significantly declined in the past decade'.<sup>82</sup> The report ascribed the decline to several factors, including 'the Dutch Parliament's trauma over the Srebrenica massacres' and 'mistrust of UN command and control structures'.<sup>83</sup> While this report accounted for a significant amount of factors,<sup>84</sup> it did not include the most recent judicial developments concerning the Netherlands' liability in its observations. This is understandable, as the judgments are both very recent and are still to be explored in any depth. This paper will thus currently provide an exploratory overview of the Netherlands' contribution to peacekeeping in the period after the *Nuhanovic* and *Mustafic* decisions (September 2013) and the *Mothers of Srebrenica* decision (July 2014) – referred to hereinafter as 'the relevant period' – in an attempt to identify indications of shifts in behaviour or policy that may have taken place or are underway. In light of the recent timing of the judgments, however, at this point in time only tentative observations can be made concerning the three hypothesized effects.

Observations on each of the hypotheses can be made by looking into different relevant aspects of the state's contribution. Namely, for hypothesis (i), the willingness to contribute troops may be observed by looking into data indicating the amount of troops deployed to peacekeeping missions, as well as the amount of missions the state has embarked on. For hypothesis (ii), the nature of the contributed troops, as well as the nature of the missions they have been contributed to may give indications of the willingness of states to engage their troops. This, in turn, may be explored by looking into the amount of military personnel that have been contributed by the state, the rules of engagement of the contributed troops guiding their behaviour on the ground, outlined conditions of engagement prior to deployment, as well as the general mandate demonstrating the character of the mission. Finally, for hypothesis (iii), indications of an instructive effect of the potential for responsibility may be evidenced in changes of policies with respect to the training of peacekeepers, as well as doctrinal changes in the general approach to peacekeeping espoused by the state.

82 J. van der Lijn & S. Ros, 'Peacekeeping Contributor Profile: The Netherlands' (2014), available at: <<http://www.providingforpeacekeeping.org/2014/04/08/contributor-profile-the-netherlands/>> (last visited 14 December 2015).

83 Ibid.

84 See the 'competing explanations' section below.

### *The willingness to contribute troops to peacekeeping missions*

Currently, the Netherlands is an active participant in five peacekeeping missions mandated by the UN. These missions are of various characters, and include the United Nations Truce Supervision Organization (UNTSO) in the Middle East, the United Nations Disengagement Observer Force (UNDOF) in the Israel-Syria region, the United Nations Mission in the Republic of South Sudan (UNMISS), and the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).<sup>85</sup> In addition to this, the Netherlands is also part of the United Nations Assistance Mission in Afghanistan (UNAMA) – a special category political mission established at the request of the Government of Afghanistan.<sup>86</sup> The current priorities of the Netherlands with respect to its contribution to international peace and security are stated to focus on the stability of several regions in the world, and rest on the belief that the UN plays a crucial role in this area.<sup>87</sup> Thus, it may be observed that the Netherlands still retains a great deal of emphasis on its role in the maintenance of international peace and security, and conflict stabilization. Looking specifically at the contribution of the Netherlands in the relevant period, it may be observed that the Netherlands' contribution to peacekeeping missions in terms of the amount of troops contributed has steadily increased. This is partially owed to the fact that since September 2013 the Netherlands has made new commitments to the two missions of UNDOF and MINUSMA, and has since then maintained its contribution to both missions. Moreover, the contributions to the MINUSMA have steadily increased, going from one contingent member at the time of joining (November 2013)<sup>88</sup> to 665 contingent troops and 18 individual police staff currently (April 2015), making this mission the one to which the largest portions of the Netherlands' overall contribution are focused.<sup>89</sup> As subsequent sections will identify, changes in the amount of troops contributed may be owed to competing factors in the domestic as well as international relations of the Netherlands, and will thus not directly reflect the recently experienced potential for responsibility. Nonetheless, at this point it may be observed that the expected effect of a decrease in troop contributions cannot be observed in the contributions made by the Netherlands in the relevant period of time. A second reason why such changes are not yet evident may be the fact that after the period in which the potential for responsibility has strengthened with the decision in *Mothers of Srebrenica* (i.e. after July 2014), the Netherlands has not engaged in a new mission but has rather maintained its current commitments. Thus, no circumstances have arisen when completely new contributions, arguably influenced by the newly emerged potential for responsibility, may be observed. In light of this it should be noted that hypothesis (i) may be revisited when the Netherlands commits to new missions in a post-*Mothers of Srebrenica* scenario. Then, the amount of contributions may be examined again, and expectations with respect to the effect on contribution revisited.

### *The manner of the engagement of already contributed troops in the field*

Evidence of the nature of the missions to which the Netherlands has committed contributions in the relevant period may be found in the mandates of the missions, along with the specific agreements between the Netherlands and the UN concerning the conditions of engagement in the mission. This, in turn, may be indicative of the expectation that the potential for responsibility may prompt a state to commit its troops to missions with 'low risk' circumstances, limit the circumstances under which its troops may engage in precarious scenarios during the mission, and overall direct the circumstances of involvement as well as actions in the field more closely. Of the five missions in which the Netherlands is currently engaged, the missions to which contributions have been committed in the relevant period are the UNDOF and the MINUSMA. The UNDOF mission has the mandate to maintain the ceasefire between Israel and Syria, to supervise the disengagement of Israeli and Syrian forces, and to supervise the areas of separation and

85 United Nations Peacekeeping, Department of Peacekeeping Operations: Peacekeeping Fact Sheet Archive (2015), available at: <<http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>> (last visited 14 December 2015).

86 United Nations Information and Communications Technology Division, United Nations Assistance Mission in Afghanistan: Official Website (2002), available at: <<http://unama.unmissions.org/>> (last visited 14 December 2015).

87 Permanent Mission of the Kingdom of the Netherlands to the UN, the Netherlands and the UN: Dutch Priorities (2015), available at: <<http://www.netherlandsmission.org>> (last visited 14 December 2015).

88 Supra note 85: Monthly report of country contribution detailed by mission (November 2013).

89 Supra note 85: Monthly report of country contribution detailed by mission (April 2015).

limitation.<sup>90</sup> The mission has taken place from 1974 onwards, and as such has experienced both peaceful and violent periods. In the period of the Netherlands' commitment to the mission in September 2013 the stability of the region was considered to have been deteriorating,<sup>91</sup> and the Netherlands had committed troops to the mission in times when states such as Austria, Croatia and Japan withdrew theirs due to security concerns.<sup>92</sup> However, the Netherlands' contingent is the smallest contingent within UNDOF, and consists of two staff members on the ground. Moreover, as is recorded in the latest report on the mission, the involvement of Dutch staff is limited to a period of six months at a time, pending renewal.<sup>93</sup> Thus, while it seems that the increasingly volatile situation of the mission has not deterred the Netherlands from making its contribution, it must be noted that this contribution is limited both in size and in the duration of its availability which is dependent on renewed approval by the Netherlands. MINUSMA was established in 2013 in the region of Mali, with the aim of supporting political processes in the country and carrying out a number of security-related tasks.<sup>94</sup> The mission was established under Chapter VII of the UN Charter, with a mandate to stabilize key population centres, to support the implementation of a transitional roadmap, to protect civilians and UN personnel, to promote and protect human rights, and to provide support for humanitarian assistance, cultural preservation, and national and international justice.<sup>95</sup> In support of the mandate, the mission was authorized to use all necessary means within the limits of its capacities and areas of deployment,<sup>96</sup> thus effectively gaining approval for the use of force as well. Unlike UNDOF, MINUSMA has a significantly larger and more engaged contribution from the Netherlands. As outlined above, the overall contribution of the Netherlands has increased steadily from its initial contribution in 2013, and currently includes military personnel, supporting equipment, as well as police and civilian personnel.<sup>97</sup> The aim of the Dutch presence in MINUSMA is primarily reported to focus on the collection and processing of intelligence in support of their military partners.<sup>98</sup> The Dutch Minister of Defence has made it explicit that MINUSMA is not a combat mission for the Dutch troops deployed, but that the deployed troops remain equipped to answer in a situation of combat.<sup>99</sup> As for control over the Dutch troops contributed to MINUSMA, the official transfer of authority to the UN took place in June 2014.<sup>100</sup> The Dutch troops have thus been under the control of the UN since 2014, and are currently expected to remain part of MINUSMA until the end of 2015; a possible extension of the contribution depends on reconsideration by the Netherlands at the end of the year.<sup>101</sup>

#### *Instructive effect in the future preparation of troops to be contributed*

Indications of the instructive effect in the future preparation and training of troops could be found in changes in the preparation and screening procedures of peacekeepers, or changes in the training and education of future generations of military personnel. Unlike the previous two effects which may be observed in both shorter and longer-term indicators, doctrinal changes in the manner in which peacekeepers are trained and prepared for missions are bound to be implemented and visible only after a more significant period of time has elapsed. Therefore, there are currently no categorical observations that can be made for such changes in the relevant period. It might be worth noting, however, that while no indications are currently present as to an instructive effect on the potential for responsibility as an individual factor, the Netherlands has

90 United Nations Information and Communications Technology Division, United Nations Disengagement Observer Force: Official Website (2002), available at: <<http://undof.unmissions.org/>> (last visited 14 December 2015).

91 S/RES/2108.

92 Security Council Report, UNDOF (Golan Heights): March 2013 Monthly Forecast (2013).

93 S.H. Billing (ed.), *UNDOF: 40 Years in the Service of Peace* (2014), UNDOF HQ, Media and Public Relations.

94 United Nations Information and Communications Technology Division, United Nations Multidimensional Integrated Stabilization Mission in Mali: Official Website (2003), available at: <<http://www.un.org/en/peacekeeping/missions/minusma/>> (last visited 14 December 2015).

95 S/RES/2100.

96 *Ibid.*, para. 17.

97 Netherlands Ministry of Defence, Dutch Contributions in Mali (2014), available at: <<https://www.defensie.nl/english/topics/mali/contents/dutch-contributions-in-mali>> (last visited 14 December 2015).

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*

altered its policies in relation to peacekeeping in the general aftermath of Srebrenica. Firstly, changes have been implemented in the decision procedure employed prior to contributing troops to UN missions. The decision-making process in the Netherlands follows the so-called 'Article 100 procedure' (referring to Article 100 of the Dutch Constitution<sup>102</sup>), which was initially developed prior to the events in Srebrenica. Since then, however, the procedure has been updated<sup>103</sup> to contain a detailed list of checks pertaining to the reasons for deployment, specifications of the conditions of deployment, as well as attention to command and control structures.<sup>104</sup> Similarly, changes have been made in the circumstances under which Dutch troops are to be contributed to peacekeeping. As was aptly summarized in a statement by the Defence Minister at the time:

'After 1995, Dutch soldiers have never been deployed again under conditions comparable to those of Dutchbat. The Hague has learnt the lessons that were necessary, albeit at a high price for Dutchbat. Many things changed after 1995: no more "double keys" in the line of command, stricter conditions for the feasibility of peacekeeping missions, strongly improved intelligence capacity, better armament and better aftercare. (...) All these changes [now] contribute to a good and well prepared participation of the Netherlands in crisis management operations.'<sup>105</sup>

These two examples of improvements that have taken place in the decision-making procedure, as well as the preparation prior to deployment, are illustrative of a 'lessons learned' approach on the part of the Dutch state. It may thus be argued that strong experiences such as the disaster of Srebrenica have had the effect of altering Dutch policy, and similarly it may be expected that strong experiences such as the potential for responsibility as manifested in the recent judgments will have a further instructive influence on the future training and preparation of peacekeepers.

#### 4.1. Alternative explanations

In the report of the Clingendael Institute referred to above, changes in the Netherlands' contribution have been ascribed to a variety of potential factors. At this point, these competing explanations will be briefly summarized, in order to underscore the point that while there are expectations in both academia and among experts that the potential for responsibility may have an influence on future peacekeeping policies, it may prove to be only one of several reasons why states alter their policies with regard to peacekeeping. In assessing the factors deterring the Netherlands from contributing, in addition to the above-mentioned 'Srebrenica trauma' and 'mistrust in UN command structures', the report has outlined that domestic political factors may have a strong influence on the contribution. These factors may include alternative political or strategic priorities (e.g. a preference to contribute to NATO missions as opposed to the UN), hesitance among political parties in light of their own politics (e.g. austerity measures, a focus on domestic security), or even 'exceptionalism' insofar as a contribution is only perceived as favourable in high-end missions.<sup>106</sup> Other barriers to contribution may be identified in the costs of contribution, discomfort in the domestic policy sphere with the expanding UN agenda, or even resistance from the military to peacekeeping participation.<sup>107</sup> Interestingly enough, the report also cites legal obstacles as a potential deterrent to contribution. This is only mentioned, however, with respect to the domestic decision-making framework which according to the report is incompatible with the time requirements of deployment for missions.

102 Art. 100 reads in pertinent part:

'The [Cabinet] will provide [Parliament] with advance information on the intended use of the armed forces for the purposes of maintaining or promoting the international legal order.'

103 Supra note 82 p. 3.

104 Ibid., p. 4 (box 2).

105 E. Rijdsdijk, *Forever Connected: State Narratives and the Dutch Memory of Srebrenica* (2014), Springer Series in Transitional Justice, Vol. 8, p. 140.

106 Supra note 82, p. 5.

107 Ibid., p. 6.

## 4.2. Concluding observation

Having knowledge of competing explanations for a certain phenomenon is crucial in evaluating one or more hypothesis concerning the relationship between a postulated cause and an observed effect. It is especially relevant in the case at hand, as the decision of a state to contribute troops to peacekeeping is often a mixture of several factors. These, in turn, may prove to be wholly independent, or in cooperation. In the case of the Netherlands, so far there are two peacekeeping missions that have taken place in the relevant period, and as such could have offered some insight as to the hypotheses this paper forwarded. Of these two missions, the Netherlands committed to both of them in 2013, after the *Nuhanovic* and *Mustafic* judgment, and to no new ones in 2014, after the *Mothers of Srebrenica* judgment. Moreover, the commitment to both missions came amid an already perceived decline in contributions during the past decade.

With respect to hypothesis (i), the Dutch contribution to UNODF somewhat corresponded with expectations; namely, while the Netherlands did contribute to this mission, the contribution was what the Clingendael Institute has deemed ‘a token contribution’<sup>108</sup> in that it only consisted of two staff members who were committed for a limited period of time. Moreover, the UNDOF contribution arguably corresponded with the expectations of hypothesis (ii) as well, stating that the potential for responsibility may prompt a state to restrict its troops in the field; namely, while the Netherlands contributed to the UNDOF in what was considered to be a volatile period for the mission, the overall status of the mission has been a relatively stable one, requiring very little or no engagement in the use of force.

The contribution to MINUSMA, on the other hand, does not correspond with the expectation of a decline in contribution posited in hypothesis (i). The Dutch contribution to this mission has steadily increased since its initial commitment in 2013, and has included both military and civilian staff, as well as supporting equipment. The Clingendael report similarly acknowledges the MINUSMA contribution as one stepping out of the declining trend, as it is quite in contrast to the token contributions of the Netherlands in the past decade.<sup>109</sup> With respect to hypothesis (ii), the MINUSMA contribution strikes what may be observed to be a middle ground. Namely, while the mandate of the Dutch troops has been stated to be one of reconnaissance and intelligence support, the overall mandate of MINUSMA is a Chapter VII one, authorizing the use of all means necessary in support thereof. Similarly, while the Dutch Minister of Defence has outlined that this is not a combat mission for the Dutch, she has acknowledged that the troops may be faced with a combat scenario and are ready to respond accordingly. What is more, the transfer of control over the Dutch troops has officially been handed over to the UN as of 2014. Notably, however, the Netherlands has limited its contribution to the end of 2015 pending further domestic approval, thus arguably retaining the right to withdraw its troops should it deem the circumstances to be too precarious.

The expectations stated in hypothesis (iii) have been acknowledged to be ones which can only be observed after a more significant period of time has elapsed. Namely, for an instructive effect of the potential of liability to be felt in the coming period, changes in the training and preparation methods of Dutch peacekeepers will have to be identified, and changes of this nature take a longer period of time to be implemented and detected. This notwithstanding, this paper has observed that changes in the Netherlands’ policies with respect to peacekeeping preparations have taken place in the aftermath of Srebrenica, as a result of the traumatic experience that it has posed. Such changes have been evident in the alterations to the decision-making procedure prior to contribution that have been recorded by the Clingendael report,<sup>110</sup> and revisions in the line of command, the conditions for the feasibility of peacekeeping missions, intelligence capacity, armament, and aftercare, reported by the Minister of Defence at the time. This leads the paper to observe that strong experiences such as the one in Srebrenica have led the Netherlands to implement changes in the relevant sectors, and it is thus reasonable to expect that the same thing may also happen after the recently emerged potential for responsibility. As has been acknowledged from the start, however,

108 Ibid., p. 1.

109 Ibid.

110 Ibid.



the observations posed by this paper are significantly limited by the recent timing of the decisions that have given rise to the potential for responsibility.

## 5. Conclusion

This paper endeavoured to explore the effects that the potential for responsibility – as manifested in recent decisions apportioning responsibility to the state for acts committed by its peacekeepers – may have on states' contributions to peacekeeping in the future. In doing so, the paper provided an overview of the current legal framework governing state responsibility in international law in general, and peacekeeping in particular, by exploring primary rules, foundational jurisprudence, scholarly contributions in the field, and the recently developed jurisprudence on responsibility specifically in peacekeeping. This overview yielded the conclusion that the current general standard in international law which is used to attribute acts to the state is 'effective control' over the relevant behaviour. The standard has emerged as a result of Article 2 and subsequent provisions of the Guiding Principles regulating the attribution of conduct to the state, as well as Article 7 DARIO regulating the attribution to an international organization vis-à-vis the state. This has been evident in cases such as *Nicaragua* and *Bosnian Genocide*. A parallel standard to 'effective control' has been the standard of 'overall control', employed particularly in cases such as *Behrami and Saramati* and *Tadic*. The use of 'overall control', however, has encountered criticism in the aftermath of these decisions, and a predominant proportion of scholars have agreed that the 'effective control' standard is more appropriate. This paper further looked into cases dealing with state responsibility specifically in peacekeeping scenarios. In these cases, it was evident that courts have opted for the 'effective control' standard, and have employed it in several ways in their deliberations. These have included detailed considerations of the extent of control exercised by the state as opposed to the UN in the field, considerations of acts committed *ultra vires* to a mission mandate, as well as an acknowledgement of the particular circumstances of peacekeeping. The courts have been careful to delineate the specific acts for which they have attributed responsibility to the state, so as to avoid generalizations or a misuse of the standard in the future. All the cases examined in this paper have resulted in a finding of responsibility on the part of the state. Thus, the paper asked the question of how this newly arisen potential for responsibility might influence a state's decision to contribute to peacekeeping in the future. Subsequently, the paper endeavoured to explore views in academia and among experts concerning the recently emerged potential for responsibility. Based on this, the paper formulated three hypotheses on the possible effects, including (i) a negative effect on the amount of contributed troops, (ii) a restrictive effect on the manner of the engagement of troops already contributed, and (iii) an instructive effect on future policies in relation to peacekeeping. These three hypotheses were explored through the example of the Netherlands with regard to its contribution to peacekeeping in the last few years. Overall, this paper acknowledged that it is early to make categorical observations on the effect that judicial developments may have on future state behaviour. Nonetheless, the predictions identified in this paper present a valuable starting point for future research once sufficient time has elapsed and more diagnostic information is available. ■