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The role of control in allocating international responsibility in collaborative military operations

Boutin, B.L.

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Introduction

The conduct of military operations by several States and international organizations in the framework of collective security has become a routine feature of international affairs. Every year, new operations are deployed to attempt to respond to new crises.¹ In the conduct of these operations, breaches of international law frequently occur. On numerous occasions, armed forces sent to maintain or enforce peace in conflict zones have committed violations of international humanitarian law, international human rights, and other areas of international law. Examples include sexual abuses by UN peacekeepers in the Democratic Republic of the Congo,² modalities and conditions of detentions by the coalition powers in Iraq,³ and civilian casualties during NATO air strikes in Afghanistan or Bosnia.⁴ At the same time, there has been a persistent lack of responsibility on the part of the participating States and international organizations.

The topic of the international responsibility of States in relation to military operations is far from new. It is through many decades of practice that States developed the conditions under which a State is liable to compensate for damages that occurred during wars. At the time when

¹ Center on International Cooperation, *Annual Review of Global Peace Operations* (Lynne Rienner, 2012); Stockholm International Peace Research Institute (SIPRI), 'Multilateral Peace Operations Database' <www.sipri.org/databases/pko>; UN, 'Peacekeeping Fact Sheet' <www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>.

² EF Defeis, 'UN Peacekeepers and Sexual Abuse and Exploitation Mukeshimana: An End to Impunity' (2008) 7(2) Washington University Global Studies Law Review 185.

³ J Long, 'What Remedy for Abused Iraqi Detainees' (2006) 187 Military Law Review 43.

⁴ T Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?' in C Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International, 2002).

the laws of war were being developed, the first issue addressed in the scholarship related to the extent to which primary rules regulated the conduct of war rather than to matters of responsibility.⁵ In terms of secondary rules, scholarship focused on determining for which acts of armed forces a State can be responsible,⁶ but very few scholars addressed questions of responsibility specifically raised by multinational operations.

In the mid-twentieth century, the involvement of the United Nations in military operations brought a reconfiguration of the debate. Not only did it have to be demonstrated that international organizations could bear international responsibility,⁷ but the question of who was to be held responsible amongst a multiplicity of participating States and international organizations also became of importance.⁸ A large body of practice and scholarship emerged from peacekeeping operations, while the codification enterprise undertaken by the ILC from 1954 to 2011 resulted in two sets of draft Articles⁹ framing the debates on

⁵ AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (Collected Courses / Recueil des Cours, vol 88, Hague Academy of International Law, 1955), at 283; GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010), at 7–10.

⁶ It was early admitted that the conduct of low-ranking soldiers and of soldiers acting beyond authority (*ultra vires*) could be attributed to the State, while off-duty conduct did not engage the State (A Ehrenzweig, 'Soldiers' Liability for Wrongs Committed on Duty' (1944) 30 *Cornell Law Quarterly* 179, at 186; AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*, at 284.)

⁷ C Eagleton, *International Organization and the Law of Responsibility* (Collected Courses / Recueil des Cours, vol 76, Hague Academy of International Law, 1950), at 385.

⁸ B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976) 32 *Revue Egyptienne de Droit International* 57, at 64; RR Baxter, 'Constitutional Forms and Some Legal Problems of International Military Command' (1952) 29 *British Yearbook of International Law* 325, at 355; F Seyersted, 'United Nations Forces – Some Legal Problems' (1961) 37 *British Yearbook of International Law* 351, at 404; P de Visscher, 'Observations sur le Fondement et la Mise en (Œuvre du Principe de la Responsabilité de l'Organisation des Nations Unies' (1963) XXIII(3) *Annales de Droit et de Sciences Politiques* (Annales de Droit de Louvain) 133, at 136.

⁹ ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (2001) General Assembly Resolution 56/83 of 12 December 2001, Annex, UN Doc A/RES/56/83; Report of the ILC on the Work of its fifty-third Session (2001) UN GAOR 56th Session Suppl no 10 (A/56/10), Yearbook of the International Law Commission 2001, volume II (Part Two), chap IV, para 76, at 26–30 ('ARS'); ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) General Assembly Resolution 66/100 of 9 December 2011, Annex, UN Doc A/RES/66/100; Report of the ILC on the work of its sixty-third session (2011), UN GAOR 66th Session Suppl no 10 (A/66/10 and Add.1), chap V, para 87, at 54–68 ('ARIO').

responsibility. In the last decades, some aspects of the topic of responsibility in collaborative military operations have been extensively researched, yet many aspects remain unaddressed.

One of the main issues with regards to responsibility in military operations concerns the *allocation* of international responsibility. When international forces commit wrongful acts, it can be difficult to determine which participant¹⁰ should be held responsible, on which ground, and to which extent. If one of the participants is tentatively brought to court, it will often attempt to shift the blame by arguing that another entity involved was responsible for the alleged conduct. This issue of the allocation of international responsibility amongst the different participants is central to this thesis.

The particularity of international military cooperation is that, as no international army exists, every operation is undertaken by the national armed forces of a plurality of States. In order for national contingents to operate together, control over the soldiers is distributed amongst participating States and international organizations. As a result, during the conduct of collaborative military operations, control over the soldiers is always shared amongst different entities such as the contributing State and the lead organization.¹¹ In this perspective, to address the question of allocation, the relation between control, responsibility, and military notions in the context of collaborative operations needs to be understood. If ‘control breeds responsibility’,¹² it could be argued that *shared control breeds shared responsibility*.

The main research question of this thesis concerns the role of control for allocating responsibility between States and international organizations involved in collaborative military operations. More specifically, the study aims at uncovering the relationship between legal understandings of control which serve as grounds for responsibility and military notions of command and control pursuant to which authority over international forces is distributed and exercised.

The argument developed in the thesis revolves around the idea that the sharing of military control is determinative for allocation of

¹⁰ The terms ‘participant’, ‘entity’ and ‘subject’ are used interchangeably throughout the thesis to designate the States and/or international organizations involved in a collaborative military operation.

¹¹ See *infra*, Chap 1 §1.

¹² CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (vol 2, 2nd edn, Little Brown and Company, 1947), at 922.

responsibility at three levels. First, it contends that the conduct of international forces should be attributed to the State or/and international organization vested with a form of military control that was causally linked to the occurrence of a harmful act by a soldier. In this argument, the element of command and control which is causally linked to a subsequent wrong qualifies as effective control, and constitutes the fundamental ground on which the conduct of forces is attributed. Further, the study argues that the command and control relationships between entities involved in an operation can serve as grounds to assess derived responsibility, that is, responsibility of a participant in connection with the conduct of another. The command structures according to which authority over an operation is distributed reveal the forms of indirect control that a participant can exercise over another, which in turn is essential to allocate derived responsibility. Finally, at the stage of reparation, forms and degrees of control can translate in forms and degrees of liability.

The first Section of this Introduction explains what is the topic of the study and why it was chosen. The second Section develops the research question addressed in the thesis, and puts forth how it will be answered in terms of method. Finally, the third Section describes the structure of the study and presents an overview of the arguments developed.

1. Scope and relevance of the research

This Section delimits the scope of the research conducted in this thesis, both in terms of inclusions and exclusions (§1.1), and justifies the relevance of the study (§1.2).

1.1. Scope of the research

The topic of this thesis is *the role of control in allocating international responsibility in collaborative military operations*. The following section first defines each of these terms, thereby delimiting what is included in the research (§1.1.1), before delineating what is excluded from the topic (§1.1.2).

1.1.1. Topic

a) International responsibility

The term ‘responsibility’ has a variety of meanings both in legal and ordinary language.¹³ In essence, and as used in this thesis, responsibility refers to the idea that one is answerable for its conduct. In international law, responsibility designates rules prescribing the conditions and modalities according to which States and international organizations can be held responsible when they breach their international obligations. More specifically, the term is usually used in reference to the international responsibility of States and international organizations, as addressed in the ILC Articles on the responsibility of States and of international organizations for internationally wrongful acts.¹⁴ In this sense, the term ‘international responsibility’ covers both the origin and the content of responsibility.

b) Collaborative military operations

Further, the thesis addresses international responsibility for harmful conduct occurring during the conduct of collaborative military operations. A military operation can be defined as any activity of land, air, or naval military forces aimed at accomplishing specified objectives.¹⁵

¹³ Hart referred to the following ‘simple story of a drunken sea captain’ to explain the different meanings of the term: ‘As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct, and in separate civil proceedings he was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children’ (HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, Oxford University Press, 2008), at 211.)

¹⁴ ARS, *op cit*; ARIIO, *op cit*.

¹⁵ US Department of Defense, ‘Dictionary of Military and Associated Terms (as Amended)’ (15 March 2012) Joint Publication 1-02, at 240: ‘A military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission’; P Ducheine, ‘Glossary of Terms’ in TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 629–643, at 637; NATO Standardization Agency, ‘Glossary of Terms and Definitions’ (2013) AAP-06, at 2-O-2: ‘A military action or the carrying out of a strategic, tactical, service, training, or administrative military mission; the process of carrying on combat,

The present study focuses on collaborative military operations, defined as operations involving the use of military force undertaken by the armed forces of more than one State, possibly, but not necessarily, together with an international organization.¹⁶

The term ‘collaborative’ is preferred over the commonly used term ‘multinational operations’, which terminologically refers to States but not expressly to international organizations.¹⁷ This collaborative element is very significant to the study, because the various modalities of military cooperation will at the same time inform and complicate the questions of responsibility for the acts of armed forces. Together with the notion of ‘allocation’, the term ‘collaborative’ insists that the thesis focuses on issues linked to the involvement of several entities. Besides, it implies the idea of cooperation between the several participating entities.

In terms of scope of the research, the term is wide enough to include various forms of military cooperation, while narrowing the study to responsibility for military activities, thus excluding purely civilian operations. It focuses on the military nature and collaborative character of the operation rather than its purpose, and addresses operations irrespective of whether they are considered lawful under *jus ad bellum*.¹⁸

The reason this thesis addresses military cooperation is because of the particular character of international forces, which are, during an

including movement, supply, attack, defence and manoeuvres needed to gain the objectives of any battle or campaign’.

¹⁶ Australia Department of Defence, ‘Australian Defence Doctrine Publication: Multinational Operations’ (2011) ADDP 00.3, at 1–2: ‘Collective military operations [...] involve military actions conducted by forces of two or more nations, undertaken within the structure of a coalition, alliance or under the supervision of an international organisation such as the United Nations (UN)’; Canada Department of National Defense, ‘Canadian Forces Joint Publication 3.0 - Operations’ (2011) B-GJ-005-300/FP-001, at GL-2: ‘Combined operation: An operation conducted by forces of two or more nations acting together’; P Ducheine, ‘Glossary of Terms’ (2010), *op cit*, at 638; US, ‘Multinational Operations’ (16 July 2013) Joint Publication 3-16, at ix: ‘Multinational operations are operations conducted by forces of two or more nations, usually undertaken within the structure of a coalition or alliance. Other possible arrangements include supervision by an intergovernmental organization (IGO) such as the United Nations (UN), the North Atlantic Treaty Organization (NATO), or the Organization for Security and Cooperation in Europe’.

¹⁷ US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 218–219: defines multinational as ‘[b]etween two or more forces or agencies of two or more nations or coalition partners’, and a multinational force as ‘[a] force composed of military elements of nations who have formed an alliance or coalition for some specific purpose’.

¹⁸ See *infra*, Intro §1.1.2.

operation, partially placed under the control of an entity other than their national State, while the national State simultaneously retains elements of control, so that authority over them is shared. Besides, military organs are intrinsically different from other organs, in that they are uniquely structured and under the allegiance of their State.¹⁹ In collaborative military operations, participating States transfer some elements of authority over their troops (typically, operational control) while always retaining organic command, so that military organs can never be ‘fully seconded’.²⁰ The fact that different forms of control over the troops are distributed amongst several entities, and that during the time of the delegation the State retains some control, has consequences in terms of responsibility. The modalities under which control is shared in collaborative military operations will be presented in details in the first Chapter of this thesis,²¹ and the implications for responsibility will be analysed in the following Chapters.²²

c) Allocation of responsibility

The approach underlying the use of the term ‘allocation’ is that the central question of responsibility in collaborative military operations is *which* participating States and international organizations bear responsibility in case of harmful conduct, rather than *whether* they bear responsibility at all. The occurrence in military operations undertaken by several States and/or international organizations of conduct in violation of international obligations is taken as an assumption, based on harmful conduct that has been observed on the ground. Faced with a multiplicity of participants involved in military operations and shifting responsibility to each other, the issue standing out is the allocation amongst them of responsibility for the harmful conduct of their forces.

¹⁹ UK, House of Lords, *Attorney General v Nissan* (11 February 1969), [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629; (1969) 113 S.J. 207, at 223; Arbitral Tribunal, *Estate of Jean-Baptiste Caire (France) v United Mexican States* (7 June 1929), Reports of International Arbitral Awards, vol V, 516-534 (*‘Caire’*), at 529: ‘Les caractères spéciaux qui distinguent les militaires des fonctionnaires civils ne peuvent pas ne pas influencer sur les conditions et l’étendue de la responsabilité que leurs actes engagent’.

²⁰ ILC, ‘Draft Articles on the Responsibility of International Organizations, with Commentaries’ (2011) Report of the ILC on the work of its sixty-third session (2011), UN GAOR 66th Session Suppl no 10 (A/66/10 and Add.1), chap V, para 88, at 69–172 (*‘ARIO com’*), commentary to Article 7, para 1.

²¹ See *infra*, Chap 1 §1.

²² *Ibid*, Chap 2 §2, Chap 3 §2, Chap 4 §2.

The notion of allocation is broadly understood as covering both the questions of *locating* the responsible entities (origin of responsibility), and, if necessary, *apportioning* the secondary obligations amongst them (content of responsibility). At the stage of locating responsibility, allocation is an *either/or* question, enquiring which participant is responsible and which is not in relation to a given harmful act. At the stage of apportionment, allocation is a question of *degrees*, addressing the extent to which a participant bears responsibility. The use of the term allocation presumes that answers to the two questions of locating and apportioning responsibility are intrinsically related and are grounded in the same concepts, such as the form and degree of control. The question of the implementation of responsibility is not analysed in this study as it raises different issues and rests on distinct arguments.²³

d) Control

The allocation of international responsibility in collaborative military operations is analysed under a particular angle, namely through the concept of control, and more specifically its causal dimension. Overall, the thesis argues that responsibility arises when an entity controlled and thereby caused a particular conduct, in the sense that it exercised influence over the occurrence of the conduct, or failed to do so. By analysing responsibility in military operations through the lens of causal control, the thesis aims at contributing to the understanding of the fundamental connections between responsibility, control, and causation.

– The concept of control

Control is defined as ‘the power to influence or direct people’s behaviour or the course of events’,²⁴ or the act of exercising influence upon the conduct of others.²⁵ The notion of control is linked to the notions of power (‘the capacity or ability to direct or influence the behaviour of

²³ JK Kleffner, ‘Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure’ (2002) 15(1995) *Leiden Journal of International Law* 237; J Long, ‘What Remedy for Abused Iraqi Detainees’ (2006), *op cit*; CE Sweetser, ‘Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel’ (2008) 83(2006) *New York University Law Review* 1643; L Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’ (2003) 85 *International Review of the Red Cross* 497.

²⁴ Oxford Dictionary of English.

²⁵ Cambridge Dictionary: ‘the act of controlling something or someone, or the power to do this’; Oxford English Dictionary: ‘To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command.’

others or the course of events'²⁶), authority ('the power or right to give orders, make decisions, and enforce obedience'²⁷), and influence ('the capacity to have an effect on the [...] behaviour of someone or something'²⁸).

As defined in this thesis, control designates the influence exercised over the occurrence of a harmful conduct. Control is thus analysed *ex post* rather than in terms of ability to exercise control. Control is used in the study as a term covering the act of exercising influence either pursuant to a formal right or pursuant to a factual capacity. In this perspective, the notions of power and authority are used to refer to the origin of control. As defined in this thesis, control exercised pursuant to a formal right is referred to as 'authority' (or 'formal control'), while control exercised pursuant to a factual capacity is referred to as 'power' (or 'factual control').

– Military control

In the military context, control is a fundamental notion. The premise of armed forces is that they are a disciplined and obedient body operating on the basis of clearly defined relationships of control.²⁹ Control in the military sense is exercised at different levels following a formal chain-of-command. Specifically, in collaborative operations, military authority over the conduct of soldiers is shared amongst a multiplicity of States and/or international organizations.³⁰ The question of the relationship between the formal distribution of military control between participants, the actual exercise of power, and the allocation of responsibility for the conduct of international forces is fundamental to this study.

²⁶ Oxford Dictionary of English. A Nollkaemper, 'Power and Responsibility' (2014), SHARES Research Paper 42 (2014), ACIL 2014-22, forthcoming in A Di Stefano (ed), *Un Diritto Senza Terra? Funzioni E Limiti de Principio Di Territorialità Nel Diritto Internazionale E Dell'Unione Europea / A Lackland Law? Territory, Effectiveness and Jurisdiction in International and European Law* (Giappichelli, 2014), at 1.

²⁷ Oxford Dictionary of English.

²⁸ Oxford Dictionary of English.

²⁹ H McCoubrey and ND White, 'Military Discipline and Judicial Proceedings' in *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth, 1996), 177; P Rowe, 'Military Misconduct During International Armed Operations: 'Bad Apples' or Systemic Failure?' (2008) 13(2) *Journal of Conflict and Security Law* 165, at 166.

³⁰ See *infra*, Chap 1 §1; See *supra*, Intro §1.1.1.b).

– Legal control

In legal terms, control is a criterion used to address issues of responsibility. The relationship between control and responsibility under international law has been analysed by a number of authors who showed that the two notions are intrinsically linked.³¹ In essence, the responsibility of States under international law originates from the control they exercise over a person or territory.³² The possibility of holding international organizations responsible has been acknowledged on the same ground.³³ Specifically in the context of military operations, responsibility has often been assessed on the ground of control-based criteria.³⁴ Control and responsibility are related in different respects.³⁵ It is often on the basis of the control that States and international organizations exercise over the conduct of individuals that this conduct is attributed.³⁶ Besides, the control that States and international organizations exercise over each other constitutes the ground on which responsibility in connection with the conduct of another can be assessed.³⁷

In view of the particular feature of military control being shared amongst participants in collaborative military operations, this study aims

³¹ B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976), *op cit*, at 66; C Eagleton, *The Responsibility of States in International Law* (The New York University Press, 1928), at 206; C Eagleton, *International Organization and the Law of Responsibility* (1950), *op cit*, at 385; CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1947), *op cit*, at 922; A Nollkaemper, 'Power and Responsibility' (2014), *op cit*.

³² C Eagleton, 'The Responsibility of the United Nations: Responsibility Derives From Control' in *International Organization and the Law of Responsibility* (Collected Courses / Recueil des Cours, vol 76, Hague Academy of International Law, 1950), at 386; 'The responsibility of a state in international law rests largely upon a territorial basis, but behind this territorial basis lies the broader concept of control'; CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1947), *op cit*, at 922: 'A State must be deemed to be internationally responsible for the consequences of internationally illegal conduct within any area over which it in fact asserts control in time of war or peace'; A Nollkaemper, 'Power and Responsibility' (2014), *op cit*, at 9.

³³ B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976), *op cit*, at 66; C Eagleton, 'The Responsibility of the United Nations: Responsibility Derives From Control' (1950), *op cit*, at 386.

³⁴ See *infra*, Chap 2 §1.

³⁵ A Nollkaemper, 'Power and Responsibility' (2014), *op cit*, at 8.

³⁶ See *infra*, Chap 2 §2.1.2.

³⁷ *Ibid*, Chap 3 §2.1.2; A Nollkaemper, 'Power and Responsibility' (2014), *op cit*, at 16.

at assessing the significance of control as a legal criterion to allocate responsibility in the context of military operations.

– Causal control

In this thesis, control is framed in causal terms, whereby the link between control exercised by States and organizations and the occurrence of harmful conduct is characterized as a causal link. In that sense, saying that an entity controlled a conduct is equivalent to saying that the entity caused the conduct to occur. Indeed, by influencing or directing a conduct, States and international organizations can be seen as giving rise to the conduct.

The analysis of control in causal terms relies on the control exercised *ex post*, rather than the capacity to control *ex ante*.³⁸ It is the actual exercise of power or authority, or the failure to exercise it, that is seen as causally linked to the occurrence of a harmful act. In this perspective, control can be assessed in negative terms, whereby responsibility can originate from a failure to make use of an element of power or authority. Indeed, the failure of a participant to control a conduct can be seen as causing this conduct.³⁹

It is useful to briefly define at this stage notions of causation that will be referred to in the study. In a general sense, causation designates the relationship of cause and effect between events.⁴⁰ To determine what can be seen as a cause of a particular event, causal tests have been devised. Tests of factual causation are used to objectively identify every event that was, in fact, causally connected to the event.⁴¹ Traditionally, the ‘but-for’ test is used to identify factual causes. Under this test, an event is a factual cause of another when, but for the former, the latter would not have occurred. It thereby identifies which events are necessary conditions of the occurrence of the harm.⁴² In situations where there is a plurality of causes, more refined tests have been developed to allow

³⁸ T Honoré, ‘Causation in the Law’ in EN Zalta (ed), *Stanford Encyclopedia of Philosophy* (2010), Section 1: ‘the focus is on selecting from the whole complex the particular condition or conditions that best explain a given outcome’.

³⁹ See *infra*, Chap 2 §2.2.1.c) and Chap 3 §2.1.2.a)

⁴⁰ Oxford Dictionary of English.

⁴¹ T Honoré, ‘Causation in the Law’ (2010), *op cit*, Section 3.1.

⁴² *Ibid*, Section 3.1: ‘the action must in the circumstances be necessary to the outcome (a but-for condition)’. Accordingly, ‘factual cause’ and ‘necessary cause’ are used interchangeably in this thesis.

identifying factual causes. Notably, under the NESS test, a condition that is a necessary element of a sufficient set qualifies as factual cause.⁴³

Further, tests of legal causation have been developed to subjectively delimit which factual causes should be taken into account for the purpose of a legal enquiry. Tests of legal causation determine the circumstances in which a causal link is sufficient to warrant legal consequences, thereby delimiting the scope of responsibility. Terms such as proximate, adequate, direct, or efficient are used to evoke the idea that a factual cause must be more or less closely related to an event in order to qualify as a legal cause to which law attaches consequences.⁴⁴ Tests of legal causation vary depending on the applicable law, but usually revolve around the idea of proximity and foreseeability. As used in this study, a proximate cause is defined as an event that was a direct and foreseeable cause of the occurrence of a harmful conduct.⁴⁵

That being said, the notion of causation is complex. The difficulties associated with causal analyses in law have been outlined by a number of authors, pointing out the inescapable difficulties associated with defining causation and assessing causal links.⁴⁶ While being aware that the causal analysis can present some limits, this study considers that the notion of causation allows to conceptualize responsibility based on control. The study does not have the ambition to engage in a fundamental discussion on how to define and assess causation, but relies on the notion as defined above as a tool to analyse responsibility in military operations.

1.1.2. Limits and exclusions

By focusing on the allocation of international responsibility between States and international organizations, the thesis addresses one specific

⁴³ *Ibid*, Section 3.1; RW Wright, 'Causation in Tort Law' (1985) 73(6) California Law Review 1735, at 1788.

⁴⁴ T Honoré, 'Causation in the Law' (2010), *op cit*, Section 3.2.

⁴⁵ See *infra*, Chap 2 §2.2.1.a).

⁴⁶ HLA Hart and T Honoré, *Causation in the Law* (Clarendon Press, Oxford University Press, 1985); C Quézel-Ambrunaz, 'Définition de la Causalité en Droit Français' (2010), presented at: Séminaire du Groupe de Recherche Européen sur la Responsabilité Civile et L'assurance (GRERCA), 'La Causalité dans le Droit de la Responsabilité Civile Européenne' (26-27 March 2010, Geneva), at 1-2: 'La causalité serait « le problème le plus complexe de la responsabilité civile », un « redoutable mystère », une notion « d'une extrême difficulté », « toujours irritante », un problème « insoluble » ; « l'un des champs de discussion les plus difficiles et aussi les plus confus de la doctrine », et « l'une des questions les plus insaisissables de notre droit » ; sa théorisation serait une « recherche absolument vaine ».' (footnotes omitted).

part of the search for accountability that has plagued collaborative military operations.⁴⁷ The study concerns the international responsibility of States and international organizations, and therefore does not address the responsibility of individuals or other actors such as private security companies, NGOs, or rebel groups. Notably, the question of the criminal responsibility of soldiers is not discussed. The responsibility of States and individuals for wrongful conduct is independently determined and can possibly be concurrent.⁴⁸ Although the responsibility, or lack thereof, of individual perpetrators is often the point of focus of victims of harmful conduct, international responsibility serves a different function.⁴⁹

⁴⁷ E Abraham, 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo' (2003) 52 *American University Law Review* 1291; J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12(3) *European Journal of International Law* 469; T Dannenbaum, 'Translating the Standard of Effective Control Into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51(1) *Harvard International Law Journal* 113; EF Defeis, 'UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008), *op cit*; M Halling and B Bookey, 'Peacekeeping in Name Alone: Accountability for the United Nations in Haiti' (2008) 31(1) *Hastings International and Comparative Law Review* 461; M Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15(2) *Journal of Conflict and Security Law* 347; J Peck, 'The UN and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?' (1995) 21 *Syracuse Journal of International Law and Commerce* 283; F Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2002) 18 *Connecticut Journal of International Law* 103; A Sari and RA Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in B Vooren et al (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013); P Shiner, 'The Iraq War, International Law and the Search for Legal Accountability' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008), 17–154; S Starmer, 'Responsibility for Troops Abroad: UN-Mandated Forces and Issues of Human Rights Accountability' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008), 264–283; M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, 2005).

⁴⁸ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (26 February 2007), ICJ Reports 2007, 43, para 173; A Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International and Comparative Law Quarterly* 615; JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume III* (International Committee of the Red Cross, 1960), at 129.

⁴⁹ G Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers' (2011) 16(3) *Journal of Conflict and Security Law* 473, at 476. While the topic of this research is limited to the international responsibility of States and international organizations, questions of individual responsibility will be incidentally analysed, as far as they are relevant within the research.

Further, the thesis concentrates on the responsibility of States and international organizations engaged in an operation, and not on the possible responsibility of the host State or third States. Besides, responsibility is analysed at the international level, for breaches of international obligations, and not in terms of domestic civil responsibility for damages.

This thesis does not enquire into the legality under *jus ad bellum* or the legitimacy of military interventions and does not distinguish operations on that ground. It focuses on the issue of allocating responsibility in the event that acts violating *jus in bello* or other bodies of law are committed during the operation. Indeed, *jus ad bellum* and *jus in bello* operate independently, so that the question of the legality of an operation under *jus ad bellum* does not affect issues of responsibility for harmful conduct occurring during a military operation.⁵⁰

Finally, the study does not extensively enquire into whether the conduct of international forces in the field constitutes a breach of an applicable primary rule and rather concentrates on secondary rules. It takes as an assumption that conduct violating applicable obligations is committed, and enquires into the allocation of responsibility for such conduct. In other words, the focus of this thesis is not *whether* a subject is responsible, but rather *which* subject is. Nonetheless, as the interface between primary and secondary rules cannot be ignored,⁵¹ primary norms are analysed in the thesis in so far as they affect the determination of responsibility.

1.2. Relevance of the study

The study constitutes a contribution to existing research on the topic in two respects. First, by covering both operations led by an international organization and coalitions operations, the thesis offers a comprehensive analysis of scenarios often examined separately (§1.2.1). Further, by focusing on control both in military and legal terms, the thesis aims at

⁵⁰ Y Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press, 2011), at 111; T Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *International Review of the Red Cross* 561, at 568; J Moussa, 'Can Jus Ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law' (2008) 90(872) *International Review of the Red Cross* 963.

⁵¹ A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) *Michigan Journal of International Law* 359, at 408.

contributing to the understanding of complex legal notions in complex factual scenarios (§1.2.2).

1.2.1. Comprehensive analysis of both IO-led operations and coalitions

By defining the scope of research as covering both operations led by an international organization and coalitions of States, the thesis constitutes a contribution to existing research on responsibility in military operations, which rarely analyses together different forms of cooperation.⁵² Existing research often addresses only one type of operation,⁵³ yet a comprehensive analysis is justified because the two types of operations have comparable characteristics and raise similar issues.

As mentioned above,⁵⁴ in all operations involving armed forces of several states, military command over troops is shared amongst a multiplicity of actors.⁵⁵ The fact that in practice an operation can start as a coalition and later be put under lead of an international organization shows that comparable scenarios and issues appear in each form of collaborative operations. The thesis does not claim to cover every possible scenario of military operations, but addresses existing practice of collaborative military operations both with and without international organizations.

1.2.2. Translating military control in legal control

The present study aims at taking full account of military notions and realities, and translating them to legal concepts. In the military context, the notion of control over troops has a specific meaning and comports several elements, such as ‘operational’ or ‘strategic’ control. To reach a determination of responsibility, the significance of the different ways of exercising control over military acts needs to be understood, so as to translate the meaning of control in the military context into legal notions of control.

⁵² A notable exception is: TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), which addresses both forms of operations

⁵³ eg. P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008); RCR Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (Martinus Nijhoff, 1991); M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit.*

⁵⁴ See *supra*, Intro §1.1.1.b).

⁵⁵ See *infra*, Chap 1 §1.

In this respect, the thesis carries an analysis that goes beyond existing practice and scholarship, by taking full account of the relevance of all forms of military control for the purpose of determining responsibility. Existing legal research occasionally simplifies the factual realities of military operations and underestimates the importance of the variety of forms of military control. For instance, it is often considered that operational control is determinative for attribution of conduct as long as it is effectively exercised.⁵⁶ This thesis rather takes the position that, depending on the wrongful conduct considered, effective control can be established on the basis of other forms of military authority. It will notably be shown that the elements of authority retained by participating States can provide them with actual control over certain types of conduct, for instance if it is shown that an incident was the result of poor training from the sending State.⁵⁷

Although grounded in a particular context, the thesis intends to more generally contribute to academic research on questions on international responsibility and in particular on the meaning and significance of control.

2. Research question and methods

2.1. Research question

As expressed in the title, the main research question of this thesis is as follows: what is the role of the notion of control in allocating international responsibility in collaborative military operations? In a context where elements of military control over forces are shared amongst several States and organizations, the thesis interrogates how military control relates to responsibility. The underlying hypothesis is that forms and degrees of control can serve as a basis to allocate responsibility amongst a multiplicity of participants. Analysing principles of responsibility in conceptual terms, the research enquires into the fundamental relevance of the concepts of control and causation at various levels of analysis of responsibility, especially in the context of collaborative military operations. The thesis thereby aims at demonstrating the fundamental role played by the notion of control in allocating international responsibility in collaborative military operations.

⁵⁶ *Ibid*, Chap 2 §2.2.1.b).

⁵⁷ *Ibid*, Chap 2 §2.3.2.

2.2. Methodology

In order to answer this question, the study engages in a reinterpretation (§2.2.2) of existing rules and interpretations (§2.2.1) through the lens of the concept of causal control (§2.2.3) taking full account of the context of military operations (§2.2.4).

2.2.1. Existing rules and interpretations

The analysis starts from a solid account of the existing principles which it aims at reinterpreting. It describes established rules and mainstream interpretations on the topic of responsibility in military operations, as well as the difficulties associated with their application.⁵⁸

This survey is based on a positive law analysis carried on the basis of traditional sources of international law.⁵⁹ Concerning primary sources, the work of the ILC carries a particular importance. As an authoritative codification of the law of responsibility grounded in customary law, the ILC Articles establish the framework through which responsibility in international law is discussed.⁶⁰ Some of the rules formulated by the ILC constitute progressive developments of the law of responsibility, in which case their normative value is discussed in the thesis. Besides, the ILC commentaries to the ARS and the ARIO as well as the extensive background work of the ILC on the topic published in various reports contains very rich developments on the theory and practice of international responsibility allowing to analyse and interpret principles of international responsibility.

The analysis is also conducted by references to secondary sources of international law. This include the available practice on responsibility in collaborative military operations, found notably in the case law of international and domestic courts, and in internal military doctrines of States and international organizations. Since practice on the topic is rarely uniform or recurrent, it is referred to in this study as illustrations of possible ways of interpreting certain principles.

Finally, interpretations found in scholarship are presented. The topic of international responsibility has been studied by many scholars, who

⁵⁸ *Ibid*, Chap 2 §1, Chap 3 §1 and Chap 4 §1.

⁵⁹ Statute of the International Court of Justice (adopted 26 June 1945, San Francisco) 3 Bevens 1179; 59 Stat 1055; TS No 993 ('ICJ Statute'), Article 38; See *infra*, Bibliography.

⁶⁰ D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96(4) *American Journal of International Law* 857.

produced a significant body of work on the basis of which further research can be done. Besides, the thesis refers to legal and military scholars which have analysed a number of specific issues concerning responsibility in military operations. It notably draws from the wide body of literature on responsibility in military operations and reads it against the background of military literature and practice.

In carrying out this descriptive analysis of existing rules, the study shows that established rules and interpretations can be unclear, incoherent, or unable to grasp certain factual scenarios arising in military operations, thereby calling for their reinterpretation.

2.2.2. Reinterpretation

The thesis proposes to conduct a reinterpretation, that is, to develop new ways of understanding and applying existing principles in particular factual scenarios. When conducting in-depth interpretations of existing rules and their background, there is a fine line between stating what the law is and what it should be. Such an analysis, that critically evaluates existing principles and proposes new ways of understanding and applying them is what can be termed reinterpreting.

In Chapters 2 and 3, the thesis reinterprets a number of principles of responsibility so as to formulate a more coherent framework for allocating responsibility in military operations. The angle of research is slightly different in Chapter 4, which addresses issues on which few established views can be found, so that there is not much to reinterpret. In the absence of existing answers, this Chapter therefore proposes possible interpretations rather than reinterpretations.

In this thesis, interpretations and reinterpretations are carried on the basis of a conceptual analysis applied to the context of military operations.

2.2.3. Conceptual analysis

In order to guide the reinterpretation of responsibility in military operations, the study relies on a conceptual analysis uncovering fundamental notions underlying rules of international responsibility. Established rules are analysed at a conceptual level in order to identify notions that are decisive in order to allocate responsibility.⁶¹

⁶¹ See *infra*, Chap 2 §2.1, Chap 3 §2.1.

Specifically, the concept of control is analysed as a key notion intrinsic to international responsibility in collaborative military operations and allowing allocating responsibility. Further, the analysis reveals the causal dimension of the concept of control for the purpose of responsibility. By reinterpreting existing rules through the lens of causal control, the thesis shows how responsibility can be allocated on account of the forms and degrees of control exercised by States and international organizations at different levels.

2.2.4. Contextual approach

Further, the reinterpretation is guided by a contextual approach, which aims at taking full account of the specificities and factual realities of military operations, and at understanding how rules of responsibility can be interpreted when applied to particular scenarios of collaborative military operations.

First, this approach consists in fully grasping and understanding the military context of the study and avoiding oversimplifying military realities. It aims at understanding military notions and practice and apprehending the diversity of scenarios in which harmful acts occur in collaborative military operations, so as to propose interpretations able to address various military scenarios. Chapter 1 therefore engages in a relatively detailed description of the military context.

Further, the contextual approach aims at confronting legal and military notions of control, in order to appreciate what military control means in a legal context, so as to reinterpret legal principles of responsibility in the context of their application to military operations. It enquires into the relationship between the distribution and exercise of military control and responsibility. By applying the interpretations developed through the conceptual analysis to the full context of military operations, the thesis formulates solutions permitting to apprehend the diversity and complexity of harmful acts in military operations. The framework for responsibility emerging from the analysis allows allocating international responsibility in the context of international military operations.

3. Overview of the thesis

The main body of the thesis consists in four Chapters, addressing successively the military context, attribution of conduct, derived responsibility, and reparation. Chapters 2 to 4, addressing the three main issues of responsibility, follow a similar structure. In each, the first Section presents established rules with regards to the relevant aspect of responsibility together with their mainstream interpretations and how they have been applied in practice. In the second Section, a reinterpretation of existing principles based on a conceptual analysis

applied to the military context is proposed, demonstrating in each Chapter that control and its causal dimension are fundamental notions when enquiring into allocation of responsibility in military operations. Finally, the third Section presents as conclusions a systematic method of how each of the three aspects of responsibility can be decided following the proposed interpretations in a variety of factual situations.

Chapter 1 presents military notions and factual realities that will allow understanding the context in which matters of responsibility will be analysed. It defines the meaning of control in the military context, and describes the modalities according to which military control is shared amongst participants.⁶² Further, it presents factual scenarios of harmful conduct in military operations, in order to identify the main types of harmful acts and the factual context in which they occur.⁶³

Chapter 2 addresses attribution, and argues that the conduct of soldiers should be attributed to the entity which exercised the form of military control which was causally connected to the conduct of a soldier. In the first part, it engages in a review of established rules and interpretations concerning attribution of conduct in operations led by an international organization and in coalitions operations, and identifies the problems and limits of the current legal framework.⁶⁴ In a second part, it engages in a reinterpretation of these rules based on a conceptual analysis of the fundamental notions underlying attribution of conduct, and identifies how control in the military sense informs the determination of responsibility. The thesis argues that control forms the basis for attribution of conduct because controlling the conduct of a soldier means in a sense causing that conduct to occur. Applied to the military context, each form of military control (such as operational or strategic) can be causally linked to different types of harmful conduct. For the purpose of attribution, the form of military control that can be seen as a cause of the harmful conduct of a soldier qualifies as effective control and forms the ground on which the conduct can be attributed.⁶⁵

In Chapter 3, it is argued that derived responsibility can be seen as grounded in the exercise (or lack thereof) of indirect control over the conduct of other participants pursuant to command arrangements. The Chapter first reviews the varied grounds on which responsibility in

⁶² *Ibid*, Chap 1 §1.

⁶³ *Ibid*, Chap 1 §2.

⁶⁴ *Ibid*, Chap 2 §1.

⁶⁵ *Ibid*, Chap 2 §2.

connection with the conduct of another can be assessed under current law. It addresses both general rules of derived responsibility found in secondary rules, such as aid or assistance, and specific rules of derived responsibility arising from primary norms applicable to military operations, such as the duty to ensure respect for humanitarian law, and pinpoints a number of difficulties arising when applying them to complex scenarios of military collaboration.⁶⁶ In its second part, a reinterpretation of derived responsibility in military operations in terms of indirect causal control is proposed. It enquires into the significance of the different ways through which participants can exercise influence over the conduct of another in the military context, and identifies indirect control causally contributing to the conduct of another as an overarching ground for derived responsibility in military operations. Control is indirect in that it is not exercised directly over the conduct of a soldier, but rather over another participant which itself exercises control over the conduct of the soldier. Indirect control constitutes a ground for derived responsibility both positively when it is unduly exercised, and negatively when a failure to control is linked to the wrongful conduct of another.⁶⁷

Finally, Chapter 4 addresses the distribution of secondary obligations amongst responsible entities, and argues that where more than one entity bears responsibility with regards to a harmful outcome, secondary obligations can be distributed based on the forms and degrees of control identified in Chapters 2 and 3. It first reviews relevant existing rules, showing that they provide limited answers to the issues raised by the distribution of secondary obligations in collaborative military operations,⁶⁸ before suggesting possible solutions analysing the content of responsibility through the lens of control. To determine whether reparation should be solidary or proportionate, it proposes to refer to the form of control which gave rise to responsibility. Further, the Chapter argues that reparation can be apportioned by referring to the relative causal significance of the forms and degrees of control identified in the thesis.⁶⁹

⁶⁶ *Ibid*, Chap 3 §1.

⁶⁷ *Ibid*, Chap 3 §2.

⁶⁸ *Ibid*, Chap 4 §1.

⁶⁹ *Ibid*, Chap 4 §2.