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

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Chapter 1. The context of responsibility in collaborative military operations

This thesis examines the legal question of international responsibility in the particular context of collaborative military operations. In order to analyse responsibility in this setting, it is necessary to first apprehend circumstances and specificities that will affect the understanding and application of principles of responsibility. Jurists are not necessarily familiar with military notions such as command and control, or with the details of how military operations take place, but it is only by taking full account of this context that theoretical research on attribution can be meaningfully interpreted. The present Chapter thus proposes to shed light on relevant military facts and notions on the basis of which further analysis will be conducted.¹

The Chapter first describes the *military context* of the study. The elaborated command structures through which armies from different States cooperate are fundamental to ascertain the exercise of control over the troops, and constitute the framework within which the application of the law of responsibility can be understood in the military context. The first section provides the tools to understand how control over the acts of soldiers is exercised by States and/or international organizations in various types of operations (§1).

¹ The author would like to thank Ola Engdahl, Martin Fink and Pontus Winther for their helpful comments on a previous version of this Chapter. Any error remains the author's own.

Second, the Chapter presents the *factual context* of the study, that is, illustrations of the circumstances in which harmful conduct has occurred. Harmful conduct in the course of military operations occurs in a wide range of circumstances. Each factual example possesses distinguishing specificities, and exhaustively grasping the range of situations in which international responsibility could arise appears problematic. To overcome this, the second section engages in mapping a number of types of harmful conduct most commonly occurring and allegedly constituting violations of applicable norms, so as to provide a necessary understanding of the factual situations in which rules of responsibility are applied (§2).

1. Military context: Sharing of control in collaborative military operations

Not all the complex military aspects of the conduct of operations need to be developed for the purpose of this thesis. This section presents the military notions and realities that will be relevant for questions of responsibility. First, a series of definitions of military terms is provided (§1.1). Further, the Section presents the different forms of collaborative military operations that constitute the object of the study, and explain how control is distributed and exercised in these operations (§1.2). By explaining how control is defined and exercised in collaborative military operations, this Section lays the military background against which the legal analysis of responsibility will be conducted.

1.1. Definitions

The following Sections define a number of military terms relating to the notion of control, which will be referred to throughout the thesis. It first presents the military concept of ‘command and control’ (§1.1.1) and defines its various elements (§1.1.2). Further, it explains how command arrangements can operate in a collaborative setting (§1.1.3) and clarifies the term ‘lead entity’ (§1.1.4).

1.1.1. Command and control

In the military context, authority over organs is formalized through the notion of command and control.² Command and control can be defined as the ‘exercise of authority and direction by a properly designated

² DS Alberts and RE Hayes, *Command Arrangements for Peace Operations* (CCRP Publication Series, 1995), at 4: Command and control ‘is the military term for the management of personnel and resources’.

commander over assigned and attached forces in the accomplishment of the mission.’³

The terms ‘command’ and ‘control’ designate the varied functions exercised at different levels in the accomplishment of a military mission. In the legal literature, the military terms ‘command’ and ‘control’ are sometimes used interchangeably and without clear definition. In military doctrine, command denotes a higher degree of authority than control: command designates the general authority to direct military forces,⁴ and includes the authority to make decisions,⁵ while control is authority limited to designated activities⁶ and only includes the authority to implement command decisions.⁷

Overall, command and control designate the formal authority to direct the conduct of subordinate units, and in that sense constitutes formalised modalities of how control in a general sense can be exercised in the

³ US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 59. See also: DS Alberts and RE Hayes, *Command Arrangements for Peace Operations* (1995), *op cit*, at 4: ‘C2 involves the exercise of authority over assigned forces’; Canada, ‘Canadian Forces Joint Publication 3.0 - Operations’, *op cit*, at GL-2.

⁴ US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 59: ‘The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment’; EU Council of the European Union, ‘EU Military C2 Concept (Partial Declassification)’ (2006) Council Doc 11096/03, at 6: ‘Command is the authority vested in an individual of the armed forces for the direction, co-ordination, and control of military forces’; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-C-8: ‘The authority vested in an individual of the armed forces for the direction, coordination, and control of military forces’; UN Department of Peacekeeping Operations and Department of Field Support, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’ (2008), at 4: ‘The authority vested in a Military leader/Police Commander for the direction, coordination and control of military and police forces/personnel’.

⁵ US Department of the Army, ‘Field Manual: Peace Operations’ (1994) FM 100-23, at 104: ‘command constitutes the authority to issue orders’.

⁶ Control is defined as ‘[t]he authority exercised by a commander over part of the activities of subordinate organizations’ in various military doctrines: Australia Department of Defence, ‘Australian Defence Doctrine Publication: Command and Control’ (2009) ADDP 00.1, Glossary, at 2; US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 72; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 6-7; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-C-13.

⁷ Control ‘encompasses the responsibility for implementing orders or directives’: Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, Glossary, at 2; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 6-7; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-C-13.

military context. Command and control in the military sense are one expression of the notion of control as defined in the Introduction, more specifically of formal control (or authority).⁸

1.1.2. Elements of command and control

In collaborative operations, elements of command and control are distributed amongst participating States and/or organizations, so that it is fundamental to assess their meaning in order to understand how control over international forces operates. Their definition can vary slightly amidst States and international organizations,⁹ yet common grounds and close similarities can be found in order to assess the notions. Besides, definitions of a number of terms have merged in practice, so that different international organizations and States have adopted common definitions of some notions. Notably, definitions adopted by NATO often represent a consensus amongst national military doctrines and are occasionally subsequently adopted by others.

Command and control in collaborative military operations is exercised at three levels: strategic, operational and tactical¹⁰ (§§1.1.2.a–c). In addition, States retain command of their troops at the organic level. (§1.1.2.d).

a) Strategic level

At the strategic level, command consists in formulating political objectives and translating them into military goals.¹¹ It is the highest level of the command structure,¹² where ‘a nation or group of nations

⁸ See *supra*, Intro §1.1.1.d).

⁹ B Cathcart, ‘Command and Control in Military Operations’ in TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 235–244, at 237.

¹⁰ B Cathcart, ‘Command and Control in Military Operations’ (2010), *op cit*, at 238; US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 242, 312 and 323; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, para 14; UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 5.

¹¹ EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 5; JW Houck, ‘The Command and Control of United Nations Forces in the Era of Peace Enforcement’ (1993) 4(1) *Duke Journal of Comparative and International Law* 1, at 23.

¹² US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 312; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-S-12; UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 6.

determines national or multinational security objectives and deploys national, including military, resources to achieve them.’¹³

Such level of command is exercised by the highest organs of a State or organization, and is not located in the field.¹⁴ Strategic command is exercised during the initial planning of the operation, when the assets and personnel are gathered and the organization of the force is sketched in order to accomplish the agreed objectives, and continues to be exercised during the conduct of the operation.¹⁵ The decision to contribute or to withdraw forces is also an element of strategic command, and is always retained by States.¹⁶

In the framework of international organizations, the terms ‘political control’ or ‘political direction’ are also used to refer to the level of command where an organization ‘provides the framework within which military operations can take place and defines their nature and scope.’¹⁷ For instance, in operations led or authorized by the UN, the UN Security Council has overall authority, defining the mandate of peacekeeping missions it undertakes or authorizes.¹⁸

¹³ US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 312; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-S-12.

¹⁴ UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 6.

¹⁵ EU Council of the European Union, ‘European Union Concept for Military Planning at the Political and Strategic Level’ (16 June 2008) Council Doc 10687/08; J-M Guéhenno and J Sherman, ‘Command and Control Arrangements in United Nations Peacekeeping Operations’ (2009) Background Paper for the 2nd International Forum for the Challenges of Peace Operations (New York, November 2009), at 3–4.

¹⁶ TD Gill, ‘Legal Aspects of the Transfer of Authority in UN Peace Operations’ (2011) 42 *Netherlands Yearbook of International Law* International Law 37, at 46; UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, para 21.

¹⁷ EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 5.

¹⁸ PC Cammaert and B Klappe, ‘Authority, Command, and Control in United Nations-led Peace Operations’ in TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 159–162, at 159; D Sarooshi, *The United Nations and the Development of Collective Security* (Oxford University Press, 1999), at 157; UN Secretary-General, ‘Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations Document’ (25 January 1995) UN Doc A/50/60 - S/1995/1, para 38.

b) Operational level

At the operational level, command and control concerns the conduct of an operation in the field, and consists in directing available forces for the purpose of accomplishing the objectives of the operation.¹⁹

Operational command designates the authority to direct forces, including the authority ‘to specify missions’²⁰ and assign them,²¹ ‘to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the operational commander deems necessary’²² It is exercised by senior officers and includes full authority to assign missions and to delegate operational control for the purpose of their accomplishment.

Operational control relates to the direction of forces, but this element of authority only covers the accomplishment of assigned missions, which are ‘limited by function, time or location’. It comprises the authority to deploy attached units, and to retain or delegate tactical control of those units, but does not include the power to use forces for other tasks than assigned.²³ Operational control ‘includes authoritative direction over all

¹⁹ France, ‘Code de la Défense’ (2014), Article D*1221-1; US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 242; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-O-3: ‘The level at which campaigns and major operations are planned, conducted and sustained to accomplish strategic objectives within theatres or areas of operations’; UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 74.

²⁰ Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, Glossary, at 4.

²¹ NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-O-3.

²² Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, Glossary, at 4; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 7; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-O-3. See also: France, ‘Code de la Défense’, *op cit*, Article D*1221-3: ‘Le commandant opérationnel est responsable de : 1° L’établissement des plans d’emploi et des plans opérationnels ; 2° L’exécution de ces plans et la conduite des opérations ; 3° L’attribution de leurs missions aux échelons de commandement qui lui sont subordonnés ; 4° La répartition entre ceux-ci des forces et éléments de forces mis sous ses ordres’.

²³ Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, Glossary, at 4; France, ‘Code de la Défense’, *op cit*, Article D*1221-4: ‘I. - Dans certaines conditions, le commandant opérationnel peut confier à une autre autorité le contrôle opérationnel de forces placées sous son autorité dont il définit la mission et la composition. II. - L’autorité chargée du contrôle opérationnel a la responsabilité de : 1° Déployer en vue de leur mission les forces qui lui sont confiées ; 2° Leur donner les ordres et les informations nécessaires à l’accomplissement de leur mission. III. - L’autorité chargée du contrôle opérationnel n’a pas le pouvoir d’affecter tout ou partie de ces forces à d’autres missions’; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 7; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-O-3: The authority

aspects of military operations [...] necessary to accomplish missions assigned' and 'normally provides full authority [...] to employ those forces as the commander in operational control considers necessary to accomplish assigned missions'.²⁴ Since the level of authority encompassed in operational control enables to manage an operation in the field, States participating in collaborative military operations usually delegate it to the entity leading the operations.²⁵

c) Tactical level

Command and control at the tactical level concerns the direction of forces by subordinate commanders, as decided at the operational level. It covers the detailed and local direction of forces in order to complete specific tasks.²⁶ Tactical command includes the authority to formulate tasks of assigned forces 'for the accomplishment of the mission specified by higher authority',²⁷ while tactical control is limited to the 'detailed and, usually, local direction and control of movements and manoeuvres necessary to accomplish missions or tasks assigned'.²⁸

delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units.; UN, 'Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations', *op cit*, at 4: 'The authority granted to a Military Commander in a United Nations Peacekeeping Operation to direct forces assigned so that the Commander may accomplish specific missions or tasks which are usually limited by function, time, or location (or a combination), to deploy units concerned and/or military personnel, and to retain or assign Tactical Command or Control of those units/personnel'.

²⁴ US, 'Dictionary of Military and Associated Terms (as Amended)', *op cit*, at 241.

²⁵ Australia, 'Australian Defence Doctrine Publication: Multinational Operations', *op cit*, at 4–5; B Cathcart, 'Command and Control in Military Operations' (2010), *op cit*, at 235; US, 'Field Manual: Peace Operations', *op cit*, at 24; See *infra*, Chap 1 §1.2.

²⁶ US, 'Field Manual: Peace Operations', *op cit*, at 115.

²⁷ Australia, 'Australian Defence Doctrine Publication: Command and Control', *op cit*, at 3–9; EU, 'EU Military C2 Concept (Partial Declassification)', *op cit*, at 7; UN, 'Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations', *op cit*, at 4.

²⁸ Australia, 'Australian Defence Doctrine Publication: Command and Control', *op cit*, at 3–10; US, 'Dictionary of Military and Associated Terms (as Amended)', *op cit*, at 322; EU, 'EU Military C2 Concept (Partial Declassification)', *op cit*, at 7; UN, 'Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations', *op cit*, at 4.

Tactical control is included in operational control, and can be retained or delegated by the Force Commander.²⁹ It ‘includes all subordinate command levels established within the military command frameworks (for example Brigade, Regional, Sector Commanders)’.³⁰

d) Organic command of the State

States possess intrinsic authority over their national armed forces. Such elements of authority are ‘inherent manifestations of national sovereignty’,³¹ and are the exclusive prerogative of the national State of a contingent.³² The organic command of a State ‘equates to “ownership” of the force’,³³ and embodies the specific non-severable link of military organs, which always ‘remain in their own national service’.³⁴

Organic command includes all elements of authority relating to the preparation and maintenance of armed forces.³⁵ It covers a diffuse range of non-operational matters related to the personal management of the troops, including the authority to hire and train forces, pay salaries, ensure the maintenance and safety of troops, and decide on promotions.³⁶

²⁹ NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-O-3: operational control includes the authority ‘to retain or assign tactical control’; UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 4.

³⁰ UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 10.

³¹ T Durell-Young, ‘Command in Coalition Operations’ in TJ Marshall et al (eds), *Problems and Solutions in Future Coalition Operations* (US Army War College, Strategic Studies Institute, 1997), at 29. See also: A Thibault, ‘La Responsabilité de L’OTAN dans les Conflits Armés’ in K Bannelier and C Pison (eds), *Le Recours à la Force Autorisé Par le Conseil de Sécurité - Droit et Responsabilité* (Pédone, 2014), at 238.

³² Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, at 3–3; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 7; TD Gill, ‘Legal Aspects of the Transfer of Authority in UN Peace Operations’ (2011), *op cit*, at 46; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-F-7.

³³ Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, at 3–3.

³⁴ UK, House of Lords, *Attorney General v Nissan*, (1969), *op cit*, at 223: ‘The functions of the force as a whole are international. But its individual component forces have their own national duty and discipline and remain in their own national service’.

³⁵ France, ‘Code de la Défense’, *op cit*, Article D*1221-1: ‘Dans les armées, la préparation des forces relève du commandement organique et leur emploi du commandement opérationnel’.

³⁶ Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, at 3–12; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-A-3; UN, ‘Policy Directive

Disciplinary authority over the forces is also part of the organic command of States.³⁷ In the military sense, discipline does not only concerns the authority to initiate and conduct post-facto disciplinary or criminal procedures,³⁸ but also encompasses all means by which a State regulates its armed forces to ensure that they are disciplined, that is, well-trained, obeying orders and adopting proper behaviour.³⁹

Terminologically, this range of elements of control is alternatively referred to as ‘full command’,⁴⁰ ‘national command’,⁴¹ ‘organic command’⁴² or ‘administrative control’.⁴³ The term organic command is preferred in this study, as it reflects the specific inherent authority of a State over its armed forces. The term ‘full command’, although common in military doctrine, could be misleading in a collaborative context where States delegate other forms of control but still retain full command in the sense of organic command.⁴⁴

While organic authority does not directly pertain to field operations, it is important to understand that they are not irrelevant to the occurrence of

on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 3.

³⁷ F Naert, ‘The International Responsibility of the Union in the Context of its CSDP Operations’ in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing, 2013), 313–338, at 329.

³⁸ UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, at 3.

³⁹ H McCoubrey and ND White, ‘Military Discipline and Judicial Proceedings’ (1996), *op cit*.

⁴⁰ B Cathcart, ‘Command and Control in Military Operations’ (2010), *op cit*, at 239; L Condorelli, ‘Le Statut des Forces de L’ONU et le Droit International Humanitaire’ (1995) 78 *Rivista Di Diritto Internazionale* 881, at 886; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 7; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-F-7.

⁴¹ T Durell-Young, ‘Command in Coalition Operations’ (1997), *op cit*, at 29.

⁴² France, ‘Code de la Défense’, *op cit*, Article D*1221-6; L Condorelli, ‘Le Statut des Forces de L’ONU et le Droit International Humanitaire’ (1995), *op cit*, at 887; Netherlands, Supreme Court (First Chamber), *The Netherlands v Hasan Nuhanovic* (6 September 2013), 12/03324, ECLI:NL:HR:2013:BZ9225, para 3.10.2.

⁴³ US, ‘Dictionary of Military and Associated Terms (as Amended)’, *op cit*, at 4; UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, para 49.

⁴⁴ The ECtHR appears to have been confused by this term in *Jaloud*, where it considered that the fact that the Netherlands retained ‘full command’ during an operation implied that it did not delegated operational control over its troops (ECtHR (Grand Chamber), *Jaloud v the Netherlands*, Judgment (20 November 2014), para 159–161).

harmful conduct,⁴⁵ and it will be later shown how discipline failures by States can result in wrongful acts in the field.⁴⁶

1.1.3. Command and control in collaborative operations

a) Command arrangements

Cooperation between armies requires specific arrangements amongst participants on the distribution of authority and exercise of command over forces. From the initial decision taken at the highest level to launch an operation, to the detailed accomplishment of specific tasks on the field, each international mission is conducted in a specific framework where the various elements of command and control are distributed amongst organs and entities in what is termed ‘command structures’ or ‘command arrangements’ in military language.⁴⁷

Command structures designate not only the chain-of-command⁴⁸ through which orders are passed, but also the whole organizational structure through which a force operates.⁴⁹ They are agreed upon prior to an operation in formal agreements between participating States and/or international organizations. Clearly defined command relationships are indispensable to the effectiveness of military operations, as they allow coordinating the conduct of all elements of armed forces.⁵⁰ It will nonetheless be seen that, on some occasions, the exercise of control on the ground can differ from formal arrangements.

b) Transfer and withdrawal of command and control

Command and control are inherently the prerogative of States, and therefore need to be delegated if another State or an organization is to exercise some of them. In principle, basic formalities concerning the

⁴⁵ P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 178.

⁴⁶ See *infra*, Chap 2 §2.3.2.

⁴⁷ DS Alberts and RE Hayes, *Command Arrangements for Peace Operations* (1995), *op cit*; J-M Guéhenno and J Sherman, ‘Command and Control Arrangements in United Nations Peacekeeping Operations’ (2009), *op cit*.

⁴⁸ A chain-of-command is defined as the ‘succession of commanding officers from a superior to a subordinate through which command is exercised’ (NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-C-3.).

⁴⁹ DS Alberts and RE Hayes, *Command Arrangements for Peace Operations* (1995), *op cit*, at 11.

⁵⁰ DS Alberts and RE Hayes, *Command Arrangements for Peace Operations* (1995), *op cit*, at 11; B Cathcart, ‘Command and Control in Military Operations’ (2010), *op cit*, at 236.

delegation, transfer and resumption of elements of command and control are followed. It must, however, be stressed that, ultimately, national States remain the holders of military authority over their forces. In collaborative military operations, any element of control that is not expressly delegated remains with the State, and States always conserve the ability to resume authority so as to exercise control over their troops.

Prior to any operation, contributing States delegate some level of command and control to the entity leading the operation, by what is formally called a Transfer of Authority.⁵¹ When agreeing to a Transfer of Authority, States will precisely define what is or not included in the level of authority delegated,⁵² and the extent of authority transferred by contributing States varies in each operation. Usually, States delegate operational control (which includes tactical control),⁵³ so that the lead entity can direct the contingent for the purpose of an agreed mission, as well as some degree of strategic authority.⁵⁴

Other modalities of the contribution, notably concerning elements of control retained by contributing States, are detailed in Contribution Agreements,⁵⁵ Memoranda of Understanding,⁵⁶ or Status of Forces Agreements (SOFA).⁵⁷ These agreements do not directly regulate

⁵¹ EU, 'EU Military C2 Concept (Partial Declassification)', *op cit*, para 23(b); UN, 'Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations', *op cit*, para 15.

⁵² TD Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011), *op cit*, at 63.

⁵³ See *supra*, Chap 1 §1.1.2.b) and c).

⁵⁴ See *infra*, Chap 1 §1.2, describing command arrangements in various types of operations.

⁵⁵ UN, 'Contribution Agreement Between the United Nations and [Participating State] Contributing Resources to [The United Nations Peace-Keeping Operation]' (9 July 1996) UN Doc A/50/995, Annex.

⁵⁶ UN, 'Model Memorandum of Understanding Between the United Nations and [participating State] Contributing Resources to [the United Nations Peacekeeping Operation]' (2009) UN Doc A/C.5/63/18 (COE Manual, Ch 9, 162-224) ('UN Model MoU').

⁵⁷ Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel (adopted 23 November 1995) Appendix B to Annex 1A to the General Framework Agreement for Peace in Bosnia and Herzegovina ('Dayton Agreement'); UN Doc A/50/79C - S/1995/999, p 27; 35 ILM 89 (1996), p 102 ('NATO-Bosnia SOFA'); Agreement Between the Republic of Croatia and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel (adopted 23 November 1995) Appendix B to Annex 1A to the General Framework Agreement for Peace in Bosnia and

control over the troops. Commonly, they recall the exclusive jurisdiction and administrative authority of a State over its national contingent,⁵⁸ and provide for rights and obligations of soldiers in the area of operation.⁵⁹

Contribution of military troops is voluntary, and States always retain the authority to withdraw their forces.⁶⁰ Nonetheless, some procedures are usually agreed on, whereby a State needs to provide some notification and delay before withdrawing its troops, to allow a smooth transfer of authority. For example, States pulling out of Afghanistan coordinate with NATO to ensure continuity of the rest of the operation. When States unilaterally withdraw their forces from an operation without following appropriate procedures, the distribution of authority between the lead entity and the contributing State becomes very unclear, with circumstances where both are exercising some control over the forces. Such situations occurred for instance when Belgium evacuated its troops

Herzegovina ('Dayton Agreement'); UN Doc A/50/79C – S/1995/999, p 35; 35 ILM 89 (1996), p 104 ('NATO-Croatia SOFA'); Agreement Between the United Nations and the African Union and the Government of Sudan Concerning the Status of the African Union/United Nations Hybrid Operation in Darfur (adopted 9 February 2008, Khartoum) ('UNAMID SOFA'); Agreement Between the United Nations and the Government of Bosnia and Herzegovina on the Status of the United Nations Protection Force in Bosnia and Herzegovina (adopted 15 May 1993) 1722 UNTS 77 ('UNPROFOR SOFA'); Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces From Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (adopted 17 November 2008, Baghdad) ('US-Iraq SOFA'); Arrangements Regarding the Status of the International Security Assistance Force (adopted 4 January 2002) Annex A to the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration') ('ISAF SOFA'); EU Council of the European Union, 'Draft Model Agreement on the Status of the European Union-led Forces Between the European Union and a Host State' (18 May 2005) Council Doc 8720/05; UN General Assembly, 'Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries' (9 October 1990) UN Doc A/45/594 Annex ('UN Model SOFA'); Accord Sous Forme d'Échange de Lettres Entre le Gouvernement de la République Française et le Gouvernement du Mali Déterminant le Statut de la Force « Serval » (France – Mali) (adopted March 2013, Bamako, Koulouba) Journal Officiel de la République Française n°101 du 30 avril 2013, 7426; UNMIK Regulation, 'Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo' (18 August 2000) UNMIK/REG/2000/47 ('UNMIK and KFOR SOFA').

⁵⁸ ISAF SOFA, *op cit*, Section 1(3); UN Model MoU, *op cit*, Article 7 quinquies.

⁵⁹ Typically, international forces benefit from immunities and must respect local laws (ISAF SOFA, *op cit*, Section 1(2); UN Model SOFA, *op cit*, Section IV paras 6 and 15).

⁶⁰ TD Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011), *op cit*, at 39; UN, 'Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations', *op cit*, para 21.

from UNAMIR,⁶¹ and when the Netherlands withdrew its contingent from UNPROFOR.⁶²

1.1.4. Lead entity

The term 'lead entity' is used in two contexts, where it has different meanings. On one hand, and as used in this thesis, the term can designate the entity leading the operation in the sense of having operational control over the force. For instance, UNMIK was a UN-led operation, while KFOR was a NATO-led operation. On the other hand, the term is occasionally used in a broader sense, to designate the main contributing State in a coalition operation, whose military organs often head the chain-of-command.⁶³ Those organs, however, do not necessarily act on behalf of their State alone.

To avoid confusion, a strict use of the term will be preferred throughout this thesis, whereby the lead entity is the entity by whom operational authority over the forces is exercised. As defined in this study, the entity (or entities) leading an operation can be ascertained by identifying the international subject(s) on behalf of whom the Force Commander⁶⁴ vested with operational control is acting.⁶⁵ In case of an IO-led operation, the Force Commander takes order from the leading organization. In coalitions, depending on the command arrangements adopted, a Force Commander can be under the authority of one or State, or possibly under the joint authority of several States.⁶⁶

⁶¹ Belgium, Court of First Instance of Brussels, *Mukeshimana-Ngulinzira and ors v Belgium and ors* (8 December 2010), RG No 04/4807/A and 07/15547/A; ILDC 1604 (BE 2010) ('*ETO case*').

⁶² Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*; Netherlands, Supreme Court (First Chamber), *The Netherlands v Mehida Mustafic-Mujic, Damir Mustafic, and Alma Mustafic* (6 September 2013), 12/03329, ECLI:NL:HR:2013:BZ9228.

⁶³ Australia, 'Australian Defence Doctrine Publication: Command and Control', *op cit*, Glossary, at 3; US, 'Dictionary of Military and Associated Terms (as Amended)', *op cit*, at 193; See *infra*, Chap 1 §1.2.4.

⁶⁴ Australia, 'Australian Defence Doctrine Publication: Multinational Operations', *op cit*, at 4-5; US, 'Multinational Operations', *op cit*, II-3: a Multinational Force Commander is defined as 'a commander who exercises command authority over a military force composed of elements from two or more nations'.

⁶⁵ N Tzagourias, 'The Responsibility of International Organisations for Military Missions' in M Odello and R Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff, 2011), 245-265, at 255: referring to 'the institution on whose behalf the commander acts'.

⁶⁶ See *infra*, Chap 1 §1.2.4 and Chap 2 §1.2.2. In case of a coalition under integrated multinational command where the Force Commander acts on behalf of several States,

In the same vein, it can be noted that the position of ‘regional lead’ within an operation does not amount to the status of lead entity as defined. A commander in charge of a regional sub-command receives tactical authority from the operational commander and reports to him, therefore the status of ‘lead nation’ over a region of the mission does not equate to the notion of lead entity.⁶⁷ As formulated by the ECtHR regarding regional brigades within KFOR, ‘[n]either the status of “lead nation” of a [regional brigade]⁶⁸ and its consequent control of a sector of Kosovo nor the nationality of the French and Norwegian COMKFOR could detach those States from their international mandate.’⁶⁹

1.2. Forms of collaborative military operations and command arrangements

In view of the contextual method adopted, it is of the utmost importance to precisely understand how military control is exercised in order to assess responsibility in collaborative military operations. This Section reviews the various forms of collaborative military operation and describes how elements of command and control are formally distributed and actually exercised in each type of operation. It addresses successively UN-led operations (§1.2.1), NATO operations (§1.2.2), EU operations (§1.2.3), coalitions operations (§1.2.4), and finally other types of military cooperation (§1.2.5). For each type of operations the following Sections describes their background, command structures, and relevant legal characteristics.

such as the Allied Powers during the second World War, the lead entity can thus be constituted by a group of States jointly leading an operation (See: US, United States Court of Claims, *Anglo-Chinese Shipping Company Ltd v United States* (11 January 1955), 22 International Law Reports 982, at 986: ‘Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. [...] The Supreme Commander was acting as the agent for each of them’).

⁶⁷ KM Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012), at 207.

⁶⁸ ECtHR (Grand Chamber), *Behrami and Behrami v France, and Saramati v France, Germany and Norway*, Admissibility decision (2 May 2007), App no 71412/01 and App no 78166/01, para 3: ‘KFOR contingents were grouped into four multinational brigades (“MNBs”) each of which was responsible for a specific sector of operations with a lead country’.

⁶⁹ *Ibid*, para 91.

1.2.1. UN-led peacekeeping

The undertaking of military activities by the UN progressively developed following the inclusion of the system of collective security in its Charter. The United Nations Emergency Force (UNEF) deployed in Egypt in 1956 was the first military operation undertaken by the UN,⁷⁰ on the basis of which further practice developed. Other operations followed, such as the UN Operation in Congo (ONUC) in 1960. These first-generation operations were subject to the consent of the host State, had to be neutral, and troops could only use force in case of self-defence.⁷¹ In 1992, the UN Secretary-General report 'An Agenda for Peace' outlined the possibility of establishing UN missions without the consent of the host State and for the purpose of forcibly enforcing rather than maintaining peace,⁷² and the UN progressively undertook more forceful actions, such as UNOSOM II in 1993. In the two decades that followed, the UN engaged in numerous military operations and developed through practice modalities to exercise control over UN forces.

The command structure applicable to UN operations has been formalized in a Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations⁷³ drafted in 2008 by the DPKO. At the strategic level, command and control is exercised by the highest UN organs. The UN Security Council provides 'high-level strategic direction and political guidance'⁷⁴ to the UN Secretary-General, which – acting through the Under-Secretary-General for Peacekeeping Operations⁷⁵ – is

⁷⁰ M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 12.

⁷¹ J Cockayne and D Malone, 'United Nations Peace Operations Then and Now' (2005) 9 *International Peacekeeping: The Yearbook of International Peace Operations* (Brill), at 3; RS Lee, 'United Nations Peacekeeping: Development and Prospects' (1995) 28 *Cornell International Law Journal* 619, at 619–624; N Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2006) 11(3) *Journal of Conflict and Security Law* 465; R Wedgwood, 'The Evolution of United Nations Peacekeeping' (1995) 28 *Cornell International Law Journal* 631, at 633.

⁷² UN Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping' (17 June 1992) UN Doc A/47/277 - S/24111 ('Agenda for Peace'), para 42; R Higgins, 'Second-Generation Peacekeeping' (1995) 89 *American Society of International Law Proceedings* 275.

⁷³ UN, 'Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations', *op cit*, para 4.

⁷⁴ *Ibid*, paras 18.

⁷⁵ *Ibid*, para 19.

in charge of formulating ‘operational guidelines based on Security Council resolutions’,⁷⁶ and of ‘all matters relating to the planning, establishment and conduct of UN peacekeeping operations’.⁷⁷ States retain the strategic authority to contribute and withdraw troops.⁷⁸

In the field, operational control over military troops is exercised by a UN Force Commander,⁷⁹ who establishes the chain-of-command below him⁸⁰ and can delegate tactical control to sub-commanders in defined areas.⁸¹ Operational orders are decided by the Force Commander and executed by contributed troops, organized in national contingents, headed by their respective National Contingent Commander. Contributing States retain organic command, which is exercised in the field by the National Commanders vested with administrative control, including disciplinary authority, over their troops.⁸²

In military terms, the command structure in UN operations is *multinational*, *integrated*, and *unified*. It is ‘multinational’ because it involves the forces of more than one State, ‘integrated’ because the commander of the forces is acting on behalf of all participating entities equally, and is ‘unified’ in the sense that all contingents are placed under the authority of a single Force Commander.⁸³

In practice, some consultation inevitably occurs between the UN and contributing States. This is notably because States are not signing blank checks on the use of their armies, and occasionally accompany command and control delegations with caveats limiting the situations in which a contingent can use force.⁸⁴ In that case, the UN Force Commander may

⁷⁶ *Ibid*, para 19.2.

⁷⁷ *Ibid*, para 19.4.

⁷⁸ *Ibid*, para 21.

⁷⁹ *Ibid*, para 29.

⁸⁰ *Ibid*, para 30.

⁸¹ *Ibid*, paras 45–46.

⁸² *Ibid*, para 50.

⁸³ US Department of the Army, ‘The Army in Multinational Operations’ (April 2014) Field Manual FM 3-16, at 2-3.

⁸⁴ J Cerone, ‘Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo’ (2001), *op cit*, at 486; NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-C-2: Caveats are defined as ‘any limitation, restriction or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan’; J-M Guéhenno and J Sherman, ‘Command and Control Arrangements in United Nations Peacekeeping Operations’ (2009), *op cit*, at 6; C

need to consult with a NCC prior to assigning tasks to a contingent,⁸⁵ showing that, in some situations, the UN Force Commander cannot exclusively assert operational control and that States can retain some degree of operational control.⁸⁶ Within the formal framework of command arrangements as implemented in concrete missions, control over contributed troops comport nuances, and its exercise by the UN can be constrained.

Furthermore, at various levels and degrees, reality does not always match what was formally agreed. As one author observed, the UN command structures 'are straightforward in theory, but seldom so in practice.'⁸⁷ In practice, States occasionally intervene in the operational management of their troops in contravention with the agreed distribution of command and control, thereby undermining the authority of the UN Force Commander.⁸⁸

In legal terms, the key feature of peacekeeping forces is that some degree of control over them is delegated to the UN, while States retain significant elements of command and control at the same time. The UN is vested with strategic and operational control, but during a mission States retain organic command (including discipline), some degree of strategic command (the authority to withdraw forces, to oppose caveats) and occasionally a degree of operational control.

Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 *Melbourne Journal of International Law* 346, at 354; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 48.

⁸⁵ C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009), *op cit*, at 356; R Murphy, 'UN Peacekeeping in Lebanon: A Case Study' (2008) *International Relations and Security Network (ISN)*, at 8; RCR Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (1991), *op cit*, at 115.

⁸⁶ See *infra*, Chap 2 §2.3.

⁸⁷ C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009), *op cit*, at 352. See also: P de Visscher, 'Observations sur le Fondement et la Mise en Œuvre du Principe de la Responsabilité de l'Organisation des Nations Unies' (1963), *op cit*, at 136: 'en fait sinon en droit, l'effectivité de la soumission des contingents nationaux à l'autorité de l'Organisation était loin d'être parfaite'.

⁸⁸ For instance, in UNOSOM II: UN Security-Council, 'Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them' (1 June 1994) UN Doc S/1994/653, paras 243–246.

As a result of this sharing of military control between two subjects of international law, troops qualify as partially delegated organs, acting in some respects under the control of the UN and in some others under the control of their States.⁸⁹ Depending on the circumstances of the harmful conduct considered, a peacekeeper can be seen as either *under the control of the UN or its State or both*. This distinct status of UN forces is the reason why, in the context of collaborative military operations, control is fundamental to allocate responsibility.⁹⁰

1.2.2. NATO-led operations

NATO is a formalized military alliance, which was endowed from the outset with established military doctrines, extensive military assets and standing military bodies. The organization benefits from permanent military facilities across its member States territories, but does not dispose of an army of its own. As the UN, it relies on troop contributions from its Member States when conducting military operations.

NATO's strong military capacities and the willingness of its member States to participate in missions have made it an essential actor of UN-authorized operations, notably for coercive missions.⁹¹ It assumed a major role in former Yugoslavia where it engaged in several air and land enforcement operations. In 1995 and 1999, NATO conducted bombing campaigns over Bosnia and Serbia, following which it deployed multinational forces under its authority (IFOR/SFOR and KFOR).⁹² In Afghanistan, NATO led the large International Security Assistance Force (ISAF) from 2001 to 2014,⁹³ and carried out an air-strike campaign

⁸⁹ B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976), *op cit*, at 57; L Condorelli, 'Le Statut des Forces de L'ONU et le Droit International Humanitaire' (1995), *op cit*, at 886; P de Visscher, 'Observations sur le Fondement et la Mise en Œuvre du Principe de la Responsabilité de l'Organisation des Nations Unies' (1963), *op cit*, at 137.

⁹⁰ See *infra*, Chap 2 §1.1.2.a).

⁹¹ T Gazzini, 'NATO's Role in the Collective Security System' (2003) 8(2) Journal of Conflict and Security Law 231, at 233; R Higgins, 'Second-Generation Peacekeeping' (1995), *op cit*, at 276.

⁹² L Wentz (ed), *Lessons From Bosnia: The IFOR Experience* (CCRP Publication Series, 1998); L Wentz (ed), *Lessons From Kosovo: The KFOR Experience* (CCRP Publication Series, 2002).

⁹³ MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (International Law Studies, vol 85, Naval War College, 2009).

and maritime embargo operation in Libya in 2011 (Operation Unified Protector).⁹⁴

Similarly to UN missions, NATO operations are conducted under an multinational integrated unified command.⁹⁵ At the head of the chain of command, the North Atlantic Council (NAC) — composed of representatives of each Member State⁹⁶ — exercises political and strategic direction over NATO's operations with the support of a Military Committee.⁹⁷ Decisions of the NAC and the Military Committee are taken unanimously.⁹⁸ When undertaking a given mission, NATO establishes local headquarters and appoints a Commander under its authority.⁹⁹ The Commander exercises operational control in the field, with tactical control delegated to regional sub-commands formed by national contingents.¹⁰⁰ Since NATO has a limited membership, it has developed mechanisms for the participation of non-member States in the operations it leads, whereby non-NATO States are integrated in the command structure.¹⁰¹

The detailed exercise of command during NATO operations comports subtleties. In a number of NATO missions, national representatives of

⁹⁴ C de Cock, 'Operation Unified Protector and the Protection of Civilians in Libya' (2011) 14 Yearbook of International Humanitarian Law 213; MN Schmitt, 'Wings Over Libya: The No-Fly Zone in Legal Perspective' (2011) 36 Yale Journal of International Law Online 45.

⁹⁵ US, 'The Army in Multinational Operations', *op cit*, para 2-18; T Gazzini, 'NATO's Role in the Collective Security System' (2003), *op cit*, at 249.

⁹⁶ North Atlantic Treaty (Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America) (adopted 4 April 1949, Washington) 34 UNTS 243, Article 9.

⁹⁷ NATO Standardization Agency, 'Allied Joint Doctrine for the Conduct of Operations' (2011) AJP-3(B), at 2-2.

⁹⁸ P Gallis, 'NATO's Decision-making Procedure' (2003) CRS Report for Congress RS21510, at 3-4.

⁹⁹ NATO, 'Allied Joint Doctrine for the Conduct of Operations', *op cit*, at 2-3; NATO Allied Command Operations, 'NATO's Current Operational Military Command Structure'.

¹⁰⁰ T Durell-Young, 'Command in Coalition Operations' (1997), *op cit*, at 31; L Wentz (ed), *Lessons From Bosnia: The IFOR Experience* (1998), *op cit*, at 38 (flowchart of IFOR's command structure).

¹⁰¹ NATO Public Diplomacy Division, 'NATO Handbook' (2006) ISBN 92-845-0178-4 HB-ENG-0406, at 199; NATO, 'Political-Military Framework for NATO-led PfP Operations', para 17; NATO, 'Political Military Framework for Partner Involvement in NATO-Led Operations' (2011), paras 8-13.

contributing States are able to oppose a ‘red card’ to certain sensitive missions, thereby sharing operational control with the NATO Commander.¹⁰² In other cases, some operational decisions are taken by the NAC, which means they are unanimously approved by NATO member States representatives. For instance, in Operation Allied Force, sensitive targets presenting a high risk of collateral damage required approval by the NAC.¹⁰³ This particular situation where member States exercise large control over certain decisions of the organization illustrates the variety of circumstances in which control over the conduct of international forces can be shared. This procedure is however not used in every NATO operations, and only applies to certain categories of targets.¹⁰⁴

The NATO command structure is similar to UN operations and consequently NATO forces have the same legal characteristics. Since NATO has international legal personality,¹⁰⁵ troops acting under the operational control of NATO do not act on behalf of their States. Notably, regional command headed by national Commanders are established by the NATO Commander delegating tactical control, so that regional commanders are in principle not under the control of their national States. As in UN operations, States delegate specific elements of authority over their forces to an international organization and retain other elements of military command. Depending on the circumstances, contributed troops are under the control of either NATO or their State or both.

¹⁰² J Cerone, ‘Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo’ (2001), *op cit*, at 486; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 48.

¹⁰³ NATO SHAPE, ‘Allied Command Operations Comprehensive Operations Planning Directive’ (17 December 2010) COPD V1.0, at 3-56; US Department of Defense, ‘Kosovo/Operation Allied Force: After-action Report’ (31 January 2000) Unclassified Report to Congress, at 24: ‘For selected categories of targets — for example, targets in downtown Belgrade, in Montenegro, or targets likely to involve high collateral damage — NATO reserved approval for higher political authorities. NATO leaders used this mechanism to ensure that member nations were fully cognizant of particularly sensitive military operations, and, thereby, to help sustain the unity of the alliance’.

¹⁰⁴ See *infra*, Chap 3 §2.2.3.a).

¹⁰⁵ ILC, ‘Responsibility of International Organizations, Comments and Observations Received From International Organizations’ (2011) UN Doc. A/CN.4/637/Add.1, General comments, North Atlantic Treaty Organization, para 2.’ NATO is an international organization within the meaning of draft article 2(a) of the draft articles, and as such a subject of international law. It possesses international legal personality as well as treaty-making power’.

1.2.3. EU-led operations

The European Union, initially designed as a ‘purely civilian power’,¹⁰⁶ only began to engage in military operations in 2003. Following the adoption of the EU Security and Defense Policy, the EU engaged in a limited number of military missions,¹⁰⁷ while undertaking a much more significant load of civilian operations, which fall out of the scope of this study. It undertook so far seven military operations: the operations Concordia (former Yugoslav Republic of Macedonia, 2003), Artemis (DRC, 2003), and Althea (Bosnia, since 2004), the EUFOR DR Congo (2006), the EUFOR Tchad/RCA (2008-2009), the European Naval Force – Operation Atalanta (Somalia, since 2008) and the European Union Training Mission in Somalia (since 2009).¹⁰⁸

Having later become an actor in the field of military operations, the EU developed command arrangements drawn from NATO’s and UN’s experiences, and resorted to a comparable integrated multinational command structure. The Political and Security Committee provides overall political direction,¹⁰⁹ while the European Union Military Committee delivers military strategic command.¹¹⁰ For each mission, local headquarters are established, where a Force Commander is endowed with operational control and can delegate tactical control to sub-regional commanders.¹¹¹ In its operations, the EU occasionally

¹⁰⁶ S Graf von Kielmansegg, ‘The European Union’s Competences in Defence Policy - Scope and Limits’ (2007) 32(2) *European Law Review* 213, at 215.

¹⁰⁷ A Sari, ‘Status of Forces and Status of Mission Agreements Under the ESDP: The EU’s Evolving Practice’ (2008) 19(1) *European Journal of International Law* 67, at 70.

¹⁰⁸ An overview of EU missions is available at <www.consilium.europa.eu/eeas/security-defence/eu-operations>.

¹⁰⁹ EU Council of the European Union, ‘Decision of 22 January 2001 Setting Up the Political and Security Committee’ (2001) 2001/78/CFSP, Official Journal of the European Communities L 27/1, Annex, para 1(j).

¹¹⁰ EU Council of the European Union, ‘Decision of 10 May 2005 Amending Decision 2001/80/CFSP on the Establishment of the Military Staff of the European Union’ (2005) 2005/395/CFSP, Official Journal of the European Union L 132/17, Annex, para 3; EU Council of the European Union, ‘Decision of 22 January 2001 Setting Up the Military Committee of the European Union’ (2001) 2001/79/CFSP, Official Journal of the European Communities L 27/4, Annex, para 3.

¹¹¹ EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, para 14.

makes use of NATO's assets and expertise, but retains full authority over its missions.¹¹²

The legal status of EU forces is similar to the status of UN or NATO forces. Control over the troops is shared between the EU and States at different levels, so that they can alternatively be under the control of either or both the EU and their State. Unlike other organs put at the disposal of the EU, such as custom officers, States necessarily exercise, during the time of the delegation, some control over their military organs.¹¹³

1.2.4. Coalition operations

Coalition warfare was historically the first way of conducting military operations in cooperation amongst several States.¹¹⁴ By joining forces within an ad hoc coalition or a formalized alliance, States enjoyed 'increased military power'¹¹⁵ allowing them to successfully accomplish larger military campaigns.¹¹⁶ It is in this context that military practices enabling several national armed forces to conduct international missions together first developed. At present, the use of force is constricted by the UN Charter¹¹⁷ and most military operations of States' coalitions occur

¹¹² NATO, 'The NATO-EU Strategic Partnership' (2004) Istanbul Summit Media Guide; L Simón, 'Command and Control? Planning for EU Military Operations' (2010) European Union Institute for Security Studies Occasional Paper 81, at 17.

¹¹³ Contra: A Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9(1) International Organizations Law Review 77, at 79.

¹¹⁴ RR Baxter, 'Constitutional Forms and Some Legal Problems of International Military Command' (1952), *op cit*, at 325: 'alliances are probably as old as war itself. For a historical overview of military operations by coalitions of States, see: RS Rush and WW Epley (eds), *Multinational Operations, Alliances, and International Military Cooperation: Past and Future (Proceedings of the Fifth Workshop of the Partnership for Peace Consortium's Military History Working Group, Vienna, Austria 4-8 April 2005)* (CMH Pub 70-101-1, US Army Center of Military History, 2006). and BA Elleman and SCM Paine (eds), *Naval Coalition Warfare: From the Napoleonic War to Operation Iraqi Freedom* (Routledge, 2008).

¹¹⁵ B Cathcart, 'Command and Control in Military Operations' (2010), *op cit*, at 236.

¹¹⁶ S Ross, 'Caging the Eagle: Napoleonic War Coalitions' in BA Elleman and SCM Paine (eds), *Naval Coalition Warfare: From the Napoleonic War to Operation Iraqi Freedom* (Routledge, 2008), at 28: 'Fighting Napoleon required a great power coalition with adequate forces, plus a unified command structure and a political objective adhered to by all of the coalition members'.

¹¹⁷ Charter of the United Nations (adopted 26 June 1945, San Francisco) 3 Bevans 1153; 59 Stat 1031; TS No 993 ('UN Charter'), Articles 2(4), 39-51.

within its limits, whether pursuant to a UN authorization, or in instances of the exercise of a collective right to self-defence.¹¹⁸

In the framework of collective security, coalitions are a quickly available tool¹¹⁹ and are often resorted to for succinct missions preceding more comprehensive operations.¹²⁰ For instance, INTERFET was deployed in 1999 within 5 days of its authorization,¹²¹ expressly ‘until replaced as soon as possible by a United Nations peacekeeping operation’,¹²² and NATO took over the 2011 operation in Libya following a week of air strikes carried out by a States’ coalition.¹²³ In other occasions, coalitions have undertaken entire operations under UN mandate. For example, the first operations authorized by the UN Security Council in 1950 took the form of a US-led coalition, entrusted with the task of fighting off North Korean attacks against South Korea.¹²⁴

Coalitions are an ad hoc form of military collaboration, whereby several States undertake collective action without acting through an organization endowed with legal personality. By definition, coalitions do not have pre-defined command structures, and their functioning is negotiated in each case by participating entities. Nonetheless, three main

¹¹⁸ Y Dinstein, *War, Aggression and Self-Defence* (2011), *op cit*; WK Lietzau and JA Rutigliano Jr, ‘History and Development of the International Law of Military Operations’ in TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 11–31, at 14–20.

¹¹⁹ N Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’ (2000) 11(3) *European Journal of International Law* 541; A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002) 9(1) *International Peacekeeping* (Routledge) 23; M Tondini, ‘Shared Responsibility in Coalitions of the Willing’, forthcoming in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility* (Cambridge University Press, 2016); G Wilson, ‘UN Authorized Enforcement: Regional Organizations Versus Coalitions of the Willing’ (2003) 10(2) *International Peacekeeping* (Routledge) 89; G Wilson, ‘The Legal, Military and Political Consequences of the ‘Coalitions of the Willing’ Approach to UN Military Enforcement Action’ (2007) 12(2) *Journal of Conflict and Security Law* 295.

¹²⁰ US, ‘The Army in Multinational Operations’, *op cit*, para 2.11.

¹²¹ A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002), *op cit*, at 23.

¹²² UN Security Council, ‘Resolution 1264’ (15 September 1999) UN Doc S/RES/1264, para 10.

¹²³ B Boutin, ‘What Responsibility for States Participating to a Lesser Extent to the NATO Operation in Libya?’ (1 June 2011) SHARES Blog; ‘NATO takes command in Libya air operations’ (NATO News, 31 March 2011).

¹²⁴ UN Security Council, ‘Resolution 84’ (7 July 1950) UN Doc S/RES/84.

patterns can be identified from practice: multinational integrated command, multinational command with a dominant State, and national command.¹²⁵

First, *multinational integrated command* designates a type of command structure where all troops are put under the operational control of a multinational Force Commander under the joint authority of all States. In coalitions under this type of structure, the Force Commander – who is in practice a military officer from one of the coalition States – acts on the behalf of all States.¹²⁶ Such Force Commander qualifies as a common organ of the participating States which jointly direct the operation.¹²⁷ Participating States are integrated at all levels of the chain of command, so that no State dominates the command structure.¹²⁸ The structure of a fully integrated coalition is thus similar to the one of IO-led operations.¹²⁹ For instance, the Allied Powers in World War II had adopted a unified multinational structure with authority vested in a Supreme Commander.¹³⁰

The African Union/United Nations Hybrid operation in Darfur (UNAMID), a peace operation jointly conducted by two international organizations,¹³¹ presents characteristics comparable to States' coalitions and can be seen as a coalition of international organizations. Indeed, the command structure of UNAMID is similar to the command structure of States' coalitions under multinational integrated command. UNAMID forces are placed under the operational control of a 'jointly appointed'

¹²⁵ US, 'Multinational Operations', *op cit*, at II-4.

¹²⁶ RR Baxter, 'Constitutional Forms and Some Legal Problems of International Military Command' (1952), *op cit*, at 356: a coalition Force Commander acts 'as a representative of several states'.

¹²⁷ See *infra*, Chap 2 §1.2.2.

¹²⁸ US, 'Multinational Operations', *op cit*, at II-4: 'The key factors in an integrated command are: (a) A designated single commander. (b) A staff composed of representatives from all member nations. (c) Subordinate commands and staffs integrated into the lowest echelon necessary to accomplish the mission'.

¹²⁹ *Ibid*, at xi: 'A good example of an integrated command structure is found in NATO where a strategic commander is designated from a member nation, but the strategic command staff and the commanders and staffs of subordinate commands are of multinational makeup'.

¹³⁰ GA Harrison, *United States Army in World War II* (CMH Pub 7-4, US Army Center of Military History, 1951), at 105.

¹³¹ UN Security Council, 'Resolution 1769' (31 July 2007) UN Doc S/RES/1769.

commander,¹³² who acts on behalf of both organizations. Another illustration of such coalition occurred in 1993, where NATO and the WEU conducted a joint naval operation in the Adriatic Sea. In this 3-year mission, maritime forces in charge of enforcing compliance with the arms embargo and economic sanctions against former Yugoslavia were under the common authority of the two organizations.¹³³

Second, *multinational command with a dominant State* (also referred to as ‘framework nation’ model¹³⁴ or ‘lead nation’ model¹³⁵) refers to a type of command structure where the operation is conducted under a multinational command but with one of the coalition States dominating the command structure.¹³⁶ Unlike fully integrated coalitions where representatives of all participating States are integrated at the highest levels of the command structure, the operation is organized and conducted using the framework of one State’s military doctrine and apparatus.¹³⁷ Typically, the framework State provides the largest contingent, the Force Commander, other top officers, and a large part of the facilities and equipment.¹³⁸ The command structure is still multinational, in the sense that several States are involved in the command structure, but it is not fully integrated, as one of the States

¹³² UN, ‘Policy Directive on Authority, Command and Control in United Nations Peacekeeping Operations’, *op cit*, para 107.

¹³³ NATO Factsheet, ‘NATO/WEU Operation Sharp Guard’ (2 October 1996).

¹³⁴ US, ‘The Army in Multinational Operations’, *op cit*, at 2-2: ‘Some nations use the term framework nation for lead’; EU, ‘EU Military C2 Concept (Partial Declassification)’, *op cit*, at 10; L Simón, ‘Command and Control? Planning for EU Military Operations’ (2010) European Union Institute for Security Studies Occasional Paper 81, at 15.

¹³⁵ US, ‘The Army in Multinational Operations’, *op cit*, at 2-3; Australia, ‘Australian Defence Doctrine Publication: Multinational Operations’, *op cit*, at 4-3; A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002), *op cit*.

¹³⁶ SR Lescoutre, *Command Structure for Coalition Operations: A Template for Future Force Commanders* (2003), at 8; T Durell-Young, ‘Command in Coalition Operations’ (1997), *op cit*, at 38; A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002), *op cit*, at 32.

¹³⁷ Australia, ‘Australian Defence Doctrine Publication: Command and Control’, *op cit*, Glossary, at 3: ‘The lead nation is that nation with the will and capability, competence, and influence to provide the essential elements of political consultation and military leadership to coordinate the planning, mounting, and execution of a coalition military operation’.

¹³⁸ US, ‘The Army in Multinational Operations’, *op cit*, at 2-3; US, ‘Multinational Operations’, *op cit*, at II-5.

formally has a preponderant role in the chain of command.¹³⁹ Other States can be more or less integrated in the structure and have more or less influence over operational decisions,¹⁴⁰ but integration usually does not go so far as to say that the Force Commander acts on behalf of all coalition States. Critically, contributing States transfer some operational authority over their forces to the Force Commander but often retain a degree of operational and/or tactical control over their contingents, allowing them to independently approve and conduct sub-missions.¹⁴¹ By contrast, in fully integrated missions, operational control including tactical control is transferred to the lead entity, and national contingents act on its behalf. In coalitions with a dominant State, operational control over the conduct of forces is shared between the dominant State and the national State.

For instance, the coalition of States forming the INTERFET mission in East Timor operated under a multinational command dominated by Australia.¹⁴² Operational control over the troops was vested in an Australian Force Commander, with high officials from other coalition States being involved in operational decisions. Contingents received tasks from the Force Commander, but implemented these tasks under the tactical command of their national contingent commander.¹⁴³ In this operation, operational control over the force was partly exercised by Australia and partly by the national State at the same time.

The multinational force in Iraq operated under this type of arrangement, with the US formally dominating a partially integrated multinational command structure.¹⁴⁴ Coalition States contingents were placed under the overall authority of a US Commander, but ‘national chains of command remained strong’.¹⁴⁵ The Force Commander only exercised

¹³⁹ US, ‘The Army in Multinational Operations’, *op cit*, at 2-12: ‘The lead nation concept recognizes that one nation has the lead role and its command and control dominates’.

¹⁴⁰ SR Lescoutre, *Command Structure for Coalition Operations: A Template for Future Force Commanders* (2003), *op cit*, at 9; US, ‘Multinational Operations’, *op cit*, at II-6.

¹⁴¹ A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002), *op cit*, at 31.

¹⁴² UN, ‘Resolution 1264’, *op cit*, para 3: authorizes ‘the establishment of a multinational force under a unified command structure’.

¹⁴³ A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002), *op cit*, at 31.

¹⁴⁴ UN Security Council, ‘Resolution 1511’ (16 October 2003) UN Doc S/RES/1511, para 13: authorizes a ‘multinational force under unified command’.

¹⁴⁵ Carney, *Allied Participation in Operation Iraqi Freedom* (CMH Pub 59-3-1, US Army Center of Military History, 2011), at 6.

'limited operational control'¹⁴⁶ over the different contingents, and national States remained intermediaries between the orders received and their implementation.¹⁴⁷ The force was organized on the premise of a division of tasks and areas, whereby certain contingents were assigned specific missions in specific areas, which they carried out with relative autonomy.¹⁴⁸

Besides the US, a number of States had significant roles in the command structure. The UK was the second largest contributing country, in charge of the Southeast area, and Poland was in charge of the South-Centre area.¹⁴⁹ Unlike in operations under a fully integrated command, States in charge of a regional area were directly controlling the operations in their area of responsibility, in coordination with the US.¹⁵⁰ Regional lead States received some degree of operational control over the forces of other States in the area,¹⁵¹ with national States retaining

¹⁴⁶ *Ibid*, at 13.

¹⁴⁷ Australia, 'Australian Defence Doctrine Publication: Command and Control', *op cit*, 3-6: 'For the commitment to Iraq, MINDEF Senator Robert Hill stated, "the commander of Australian troops is Australian. Australian commanders command Australian troops and a coalition of the willing led by the United States of America (USA) would in effect be managed by the USA. So in terms of the management of the total coalition, that would be USA leadership with Australia in the loop. But decisions relating to commitment of our forces, targeting by our forces, their rules of engagement are all Australian decisions".'

¹⁴⁸ Carney, *Allied Participation in Operation Iraqi Freedom* (2011), *op cit*, at 20.

¹⁴⁹ *Ibid*, at 15, 20 and 23.

¹⁵⁰ Memorandum of Understanding Between the Republic of Latvia, the Ministry of Defence of the Republic of Bulgaria, the Ministry of Defence of the Kingdom of Denmark, the Secretary of the Armed Forces of the Dominican Republic, the Department of National Defence of the Philippine,s the Secretary of Defence of the Republic of Honduras, the Ministry of Defence of the Republic of Hungary the Ministry of Defence of the Republic of Kazakhstan the Ministry of National Defence of the Republic of Lithuania, the Ministry of Defence of Mongolia, the Minister of Defence of the Kingdom of the Netherlands, the Ministry of Defence of the Republic of Nicaragua, the Ministry of Defence of the Kingdom of Norway, the Ministry of National Defence of Romania, the Ministry of Defence of the Republic of El Salvador, the Ministry of Defence of the Slovak Republic, the Ministry of Defence of the Kingdom of Spain, the Ministry of Defence of the Kingdom of Thailand, the Ministry of Defence of Ukraine, and the Minister of National Defence of the Republic of Poland, Concerning Command Arrangements and Related Matters for the Multinational Division (Central South) (MND C-S) Within the Stabilisation Force in Iraq (adopted 28 August 2003), Arlietu ministrijas 14.03.2005 informacija nr. 41/427-2139/LV, 63 (3221), 21.04.2005 ('Memorandum of Understanding for the Multinational Division (Central South) within the Stabilisation Force in Iraq'), paras 5.1 and 5.8.

¹⁵¹ *Ibid*, para 5.2: 'Operational Control of all National Contingents contributed to MND(C-S) will be assigned to a superior Commander'.

tactical control.¹⁵² Besides, detention operations were conducted by a limited number of coalition partners each independently.¹⁵³ The division of military authority amongst coalition partners in Iraq did not follow a clear-cut pattern. It appears that the US, the potential regional lead State, and the contributing State shared operational control over each contingent, with some tasks such as detentions being carried independently under national command.

In terms of legal characteristics, both the integrated and the dominant models share a main feature, which is that the collective of subjects acting does not have international legal personality. Unlike in operations led by an international organization, where operational control is exercised by an entity vested with legal personality, authority in coalitions is vested to a Force Commander lacking personality and acting on behalf of several States.

The third type of command structure found in coalitions is that of *national command*. It designates a command structure where operational control is exercised by a lead State alone and in its own name.¹⁵⁴ In practice there are a few operations where contributed troops were formally placed under the operational control of one State. For example, in 1950, the UN mandated an enforcement operation in Korea and expressly called for the coalition forces to be placed under US national command.¹⁵⁵ Forces from various States were contributed to the operation, yet strategic and operational command was exercised solely by the US.¹⁵⁶ In 1992, the United Nations Interim Task Force (UNITAF) in Somalia also operated under US operational command.¹⁵⁷ Multinational operations under national command are relatively rare but present some relevance for the study, as they allow to differentiate and

¹⁵² *Ibid*, para 5.3: 'Participants are responsible for planning and execution of movements of their forces'.

¹⁵³ BJ Bill, 'Detention Operations in Iraq: A View From the Ground' in RA Pedrozo (ed), *The War in Iraq: A Legal Analysis* (International Law Studies, vol 86, Naval War College, 2010), 411–455, at 417; Australia Department of Defence, 'Iraq Detainee Fact-Finding Team Report' (11 June 2004).

¹⁵⁴ NATO, 'Glossary of Terms and Definitions', *op cit*, at 2-N-1: National command is defined as a 'command that is organized by, and functions under the authority of, a specific nation'.

¹⁵⁵ UN, 'Resolution 84', *op cit*, para 3, solicited Member States to contribute 'forces and other assistance available to a unified command under the United States'.

¹⁵⁶ JW Houck, 'The Command and Control of United Nations Forces in the Era of Peace Enforcement' (1993), *op cit*, at 13.

¹⁵⁷ *Ibid*, at 34.

thereby to confirm the relationship between command and control and responsibility.

1.2.5. Other forms of cooperation

a) Parallel non-unified command

The occurrences of a single multinational operation being conducted under non-unified command are relatively scarce given the ample difficulties of operating together while preserving independent chains of commands. A well-known example of non-unified command is the ‘dual command structure’¹⁵⁸ adopted in the 1991 Gulf War coalition, whereby troops contributed to the coalition were separated in two parallel multinational forces headed respectively by an American and a Saudi commander.¹⁵⁹ Although limited information is available at the time of writing, the military intervention against the Islamic State of Iraq and the Levant, started in 2014, seems to have been conducted under separate national command structures. The US served as a coordinator,¹⁶⁰ but each participating State organized its own operation and retained full command and control over the conduct of air strikes by its forces operating under national command.¹⁶¹

On the other hand, circumstances where distinct operations are simultaneously present in the same area commonly occur. They remain under separate command structures, but will occasionally decide to collaborate to conduct punctual missions together. For instance, from 1992 to 1995, forces of UNPROFOR were operating on the ground under UN command, while NATO forces conducted air strikes under NATO authority. The so-called ‘dual-key procedure’ adopted during these operations, whereby NATO’s airstrikes required UN approval¹⁶²

¹⁵⁸ *Ibid*, at 18.

¹⁵⁹ AR Febraro, ‘Leadership and Command’ in AR Febraro et al (eds), *Multinational Military Operations and Intercultural Factors* (RTO-TR-HFM-120, NATO Science and Technology Organization, 2008), para 3.4.2.2.

¹⁶⁰ D Lamothe, ‘New US military command established for Iraq and Syria operations’ (The Washington Post, 5 December 2014).

¹⁶¹ Each State conducted its own operation: Operation Inherent Resolve for the US, Operation Okra for Australia, Operation Shader for the UK, Operation Impact for Canada, and Operation Chammal for France.

¹⁶² ‘Decisions taken at meeting of the North Atlantic Council on 9th August 1993’ (NATO, Press release 052, 1993).

did not amount to a unified command over the two forces.¹⁶³ Another significant example is provided by the US-led Operation Enduring Freedom (OEF), which operates in Afghanistan in parallel from ISAF since 2001.¹⁶⁴

Another typical situation is when a UN mission requires the support of other forces positioned in the area for the purpose of accomplishing a delicate mission. Support forces usually take the form of a Quick Reaction Force (QRF) under national command, and remain under the operational authority of their State even during occasional joint operations.¹⁶⁵ For instance, the UNOCI mission in Ivory Coast and available units part of the French operation Licorne conducted joint attacks in 2011.¹⁶⁶

b) Logistical support

In certain operations, some States provide support without getting directly involved in combat operations. There are different degrees of participation in a military operation, and some partners chose to participate to a limited extent by providing assistance but not contributing combat troops. In complex and offensive operations, logistical support is needed to ensure the efficient deployment and functioning of the force.¹⁶⁷ Besides, States can decide to opt for a participation limited to logistical support as military interventions abroad come at a cost in terms of lives and budget.¹⁶⁸ States balance their national interests against the interests of the international community in

¹⁶³ N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 254.

¹⁶⁴ RJ Barber, 'The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan' (2010) 15(3) *Journal of Conflict and Security Law* 467, at 470.

¹⁶⁵ Usually, the QRF Commander delegates tactical control to the UN Commander: DS Alberts and RE Hayes, *Command Arrangements for Peace Operations* (1995), *op cit*, at 36.

¹⁶⁶ B Boutin, 'An "unlikely Scenario" That Occurred in Ivory Coast... and a Case for Shared Responsibility Between the UN and France' (10 April 2011) SHARES Blog.

¹⁶⁷ G Starosta, 'Mission to Mali' (Air Force Magazine, November 2013).

¹⁶⁸ C Gray, 'Peacekeeping After the Brahimi Report: Is There a Crisis of Credibility for the UN?' (2001) 6(2) *Journal of Conflict and Security Law* 267, at 280; ND White, 'Commentary on the Report of the Panel on United Nations Peace Operations (The Brahimi Report)' (2001) 6(1) *Journal of Conflict and Security Law* 127, at 135.

deciding whether to send ‘boots on the ground’ in support of a given operation.¹⁶⁹

In military terms, logistics is defined as the ‘science of planning and carrying out the movement and maintenance of forces’.¹⁷⁰ It includes the acquisition, transport and/or maintenance of equipment (eg. tanks, ammunitions), personnel, facilities, and services (eg. medical). Logistical support designates assistance to the logistics of a given mission.

Logistical support can take various forms, such as the transport of troops and equipment (airlift), aerial refuelling, aerial or naval surveillance, allowing the use of bases or of air space, providing medical facilities and services or food rations, lending assets, and financing. For instance, to be able to promptly deploy a force following a UN authorization, States engaged in military operations have received support in transporting troops and equipment to the area of operations from States outside of the command structure. When a State or international organization provides logistical support to a mission without engaging in combat operations, it is not integrated in the command structure of the mission it supports, and operates under its own command structure. The supporting entity coordinates with the supported operation, but acts through its own command structure and organs.

After clarifying the military context of the study in the first Section, the following Section presents its factual context.

2. Factual context: Harmful conduct occurring in military operations

International responsibility is not determined in the abstract, and an enquiry into responsibility always starts from a harmful conduct alleged as internationally wrongful, that is, attributed to a State or international organization and in breach of one or more of its obligations. The present section isolates the most commonly occurring types of harmful conduct, ascertained by reference to existing data on the most common claims of international responsibility in collaborative military operations. The study does not have the ambition to exhaustively address all possible harmful acts in military operations, but submits that a selection can be

¹⁶⁹ L Mackenzie, ‘We can help in Mali without putting ‘boots on the ground’ (The Globe and Mail, 23 January 2013); US, ‘Multinational Operations’, *op cit*, xii: ‘nations weigh their national interests and then determine if, when, and where they will expend their nation’s resources’.

¹⁷⁰ NATO, ‘Glossary of Terms and Definitions’, *op cit*, at 2-L-5.

made by identifying incidents recurrently referred to in reports and academic literature.

The terms ‘harmful act’, ‘harmful conduct’ or ‘wrong’ are used as descriptive terms of the factual occurrence of a conduct causing harm. By contrast the terms ‘internationally wrongful act’ or ‘wrongful act’ denote the legal qualification of a conduct as engaging international responsibility. In order to constitute an internationally wrongful act, each type of harmful conduct must be found in breach of an applicable primary obligation. Although they will not be analysed in detail, it is important to identify and address to some extent the substance of these primary rules, notably because the obligation allegedly breached determine the scope of the conduct to be attributed. This section thus briefly presents a number of primary rules breached by wrongful conduct occurring in military operations. Since the thesis focuses on international responsibility, the types of conduct addressed are those possibly constituting a breach of applicable international obligations.¹⁷¹ Accordingly, damages caused by international forces without any breach of international norms and which can give rise to ‘claims of a private-law character’¹⁷² are excluded.¹⁷³

Types of harmful conduct in military operations can be grouped under two categories, depending whether they constitute individual misconduct by soldiers (§2.1) or whether they result from combat-related activities (§2.2). For each category, the following sections provide illustrations of harmful acts and the context in which they have occurred and indicate in which respect these acts can constitute violations of international obligations.

2.1. Individual misconduct

The term individual misconduct is used in this study to designate certain harmful conduct committed by soldiers without direct link to the conduct of hostilities and often constituting crimes in domestic systems.¹⁷⁴ In peace operations, sexual abuse and exploitation has been

¹⁷¹ See *supra*, Intro § 1.1.

¹⁷² D Shraga, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’ (2000) 94(2) *American Journal of International Law* 406, at 409.

¹⁷³ These damages claims are usually settled in internal claims commission under a rule of limited liability (See *infra*, Chap 4 §1.2.).

¹⁷⁴ M Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’ (2010), *op cit*, at 357: ‘Many of the crimes considered are often associated

an endemic problem raising public concern (§2.1.1), with other types of abuses occasionally occurring (§2.1.2). As it could be argued that individual misconduct constitute non-attributable private conduct, the preliminary issue of whether sexual and other abuses by soldiers are attributable at all to States or international organizations is addressed (§2.1.3).

2.1.1. Sexual exploitation and abuse

Sexual exploitation and abuses in international military operations are ‘profoundly disturbing’¹⁷⁵ in the context of missions mandated by the UN to protect local populations, and have raised concern as to the lack of accountability for them.¹⁷⁶ Sexual abuse can be defined as ‘the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions’,¹⁷⁷ while sexual exploitation designates ‘any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another’.¹⁷⁸ In many collaborative military operations, international forces have been accused of using their relative position of

with forms of sexual abuse and criminal misbehaviour, and not with the conduct of hostilities or the accomplishment of the mission’s mandate’; P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 170: Soldiers occasionally ‘commit a crime in much the same way as they would if they were not engaged on military operations’.

¹⁷⁵ UN, ‘A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations’ (24 March 2005) UN Doc A/59/10 (‘Zeid Report’), para 6.

¹⁷⁶ F Adaka, ‘The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines’ (2008) 47 *Military Law and Law of War Review* 254; G Caplan, ‘Peacekeepers gone wild: How much more abuse will the UN ignore in Congo?’ (The Globe and Mail, 3 August 2012); EF Defeïs, ‘UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity’ (2008), *op cit*; C Lynch, ‘UN Faces More Accusations of Sexual Misconduct’ (Washington Post, 13 March 2005); AJ Miller, ‘Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations’ (2006) 39 *Cornell International Law Journal* 71; M Ndulo, ‘The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions’ (2009) 27(1) *Berkeley Journal of International Law* 127; M Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’ (2010), *op cit*; G Simm, ‘International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers’ (2011), *op cit*; CE Sweetser, ‘Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel’ (2008), *op cit*.

¹⁷⁷ UN Secretary-General, ‘Bulletin on Special Measures for Protection From Sexual Exploitation and Sexual Abuse’ (2003) UN Doc ST/SGB/2003/13, Section 1.

¹⁷⁸ *Ibid.*

domination to coerce individuals to engage in 'sex-for-food' or for small amounts of money.¹⁷⁹

Reports of sexual abuses in UN-led operations dates back to early 1990s, where prostitution scandals emerged with regards to UNTAC troops in Cambodia¹⁸⁰ and other missions.¹⁸¹ In NATO-led operations as well, troops have been accused of sexually exploiting vulnerable populations.¹⁸² To date, reports of abuses still regularly emerge. Since the implementation of the so-called zero-tolerance policy,¹⁸³ MONUC troops have been accused of recurrent and widespread abuses in DRC,¹⁸⁴

¹⁷⁹ Zeid Report, *op cit*, para 6; VL Kent, 'Peacekeepers as Perpetrators of Abuse' (2005) 14(2) African Security Review 85, at 87; M Moore, 'Refugees "forced to offer sex for food"' (The Telegraph, 28 February 2002); 'The UN sex-for-food scandal' (The Washington Times, 9 May 2006); E Wax, 'Congo's Desperate "One-Dollar U.N. Girls"' (Washington Post, 21 March 2005).

¹⁸⁰ S Koyama and H Myrntinen, 'Unintended Consequences of Peace Operations on Timor Leste From a Gender Perspective' in C Aoi et al (eds), *Unintended Consequences of Peacekeeping Operations* (United Nations University Press, 2007), at 32–33. In 1992–1993, UNTAC troops were criticized for resorting to prostitution 'regularly and in a highly visible manner', with some contingents running their own brothels. Reports had found a correlation between the presence of UN troops and the surge of prostitution in the country. Besides, some troops were accused of engaging with minors.

¹⁸¹ UN, 'Impact of Armed Conflict on Children; Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157' (26 August 1996) UN Doc A/51/306 ('Machel Report'), para 98; S Martin, *Must Boys Be Boys? Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions* (Refugees International, 2005), at 4; J Peck, 'The UN and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?' (1995), *op cit*, at 179.

¹⁸² Amnesty International, 'Kosovo (Serbia and Montenegro): "So Does It Mean That We Have the Rights?" - Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo' (5 May 2004) EUR 70/010/2004, at 44; I Traynor, 'NATO force "feeds Kosovo sex trade"' (The Guardian, 7 May 2004).

¹⁸³ UN Secretary-General, 'Letter Dated 9 February 2005 From the Secretary-General Addressed to the President of the Security Council' (2005) UN Doc S/2005/79.

¹⁸⁴ UN Office of Internal Oversight Services, 'Investigation Into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo' (5 April 2007) UN Doc A/61/841; UN Office of Internal Oversight Services, 'Investigation Into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo' (5 January 2005) UN Doc A/59/661; M Lacey, 'In Congo War, Even Peacekeepers Add to Horror' (The New York Times, 18 December 2004); UN Secretary-General, 'Special Measures for Protection From Sexual Exploitation and Sexual Abuse (Reports of Sexual Exploitation and Abuse in 2006)' (17 February 2007) UN Doc A/61/957, at 17: Half of the allegations of sexual abuses by peacekeepers received by the UN in 2006 were concerning MONUC troops; E Wax, 'Congo's Desperate "One-Dollar U.N. Girls"' (Washington Post, 2005), *op cit*.

soldiers of the MINUSTAH have been accused of rapes in Haiti,¹⁸⁵ and some contingents of the UNOCI were accused of sexual exploitation in Ivory Coast.¹⁸⁶ In 2013, incidents were reported in the UN mission in Mali (MINUSMA),¹⁸⁷ and in 2014, forces of the AU-led AMISOM were accused of recurrent sexual abuses.¹⁸⁸

In terms of wrongfulness, sexual abuses by soldiers can constitute violations of the international obligations of States and/or international organizations. In view of recurrent reports of widespread abuses,¹⁸⁹ a number of steps have been taken by international organizations and States to ensure that perpetrators of abuses were prosecuted,¹⁹⁰ and to foster prevention and monitoring of abuses.¹⁹¹ As part of the zero-tolerance policy, the UN issued regulations,¹⁹² but it is only through the TCS and with its consent that new obligations can be imposed to it.¹⁹³

¹⁸⁵ M Halling and B Bookey, 'Peacekeeping in Name Alone: Accountability for the United Nations in Haiti' (2008), *op cit*, at 467; 'UN troops face child abuse claims' (BBC News, 30 November 2006).

¹⁸⁶ M Ndulo, 'The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions' (2009), *op cit*, at 143.

¹⁸⁷ 'Serious misconduct, sexual abuse alleged against UN peacekeepers in Mali' (UN News Centre, 23 September 2013).

¹⁸⁸ K Migiro, 'Peacekeepers in Somalia use aid to rape women and buy sex for \$5: HRW' (Reuters, 8 September 2014).

¹⁸⁹ UN, 'Investigation Into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo', *op cit*, para 26: 'OIOS observations suggest a pattern of peacekeepers having sexual relations with prostitutes, including child prostitutes'; UN Office of Internal Oversight Services, 'Investigation Into Sexual Exploitation of Refugees by Aid Workers in West Africa' (11 October 2002) UN Doc A/57/465; UNHCR and Save the Children-UK, 'Note for Implementing and Operational Partners on Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia, and Sierra Leone' (February 2002) ('UNHCR/SCUK Report').

¹⁹⁰ EF Defeis, 'UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008), *op cit*, at 192.

¹⁹¹ G Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers' (2011), *op cit*.

¹⁹² UN, 'Bulletin on Special Measures for Protection From Sexual Exploitation and Sexual Abuse', *op cit*; UN Department of Peacekeeping Operations, 'Directives for Disciplinary Matters Involving Military Members of National Contingents' (2003) UN Doc DPKO/MD/03/00993.

¹⁹³ P Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5(1) *Journal of Conflict and Security Law* 45, at 53 (making the argument with regards to the 1999 Bulletin on international humanitarian law).

Provisions have thus been incorporated into the UN model agreement with contributing States,¹⁹⁴ thereby becoming binding on troop-contributing States, each of which agrees to the Memorandum of Understanding prior to deploying a contingent.¹⁹⁵ In addition, sexual abuses can constitute violations of international humanitarian law and human rights law¹⁹⁶ as breaches of the right to life¹⁹⁷ and the prohibition of inhuman or degrading treatment.¹⁹⁸

2.1.2. Other types of individual misconduct

Other types of individual misconduct have occurred more sporadically in collaborative military operations, yet concern egregious abuses for which responsibility must be determined.¹⁹⁹

¹⁹⁴ UN Special Committee on Peacekeeping Operations and its Working Group, 'Revised Draft Model Memorandum of Understanding Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]' (2007) UN Doc A/61/19/Rev.1, Annex II, Articles 7 bis to 7 quinquies. See: Z Deen-Racsmay, 'The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?' (2011) 16(2) *Journal of Conflict and Security Law* 321, at 335–337.

¹⁹⁵ Zeid Report, *op cit*, para 25; M Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010), *op cit*, at 353.

¹⁹⁶ Zeid Report, *op cit*, para 10: 'instances of sexual exploitation and abuse may constitute violations of international humanitarian law, international human rights law or both'; J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, vol 1: Rules, Cambridge University Press, 2005), Rule 93.

¹⁹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols (adopted 4 November 1950, Rome) 213 UNTS 222; 312 ETS 5 ('ECHR'), Article 2(1); International Covenant on Civil and Political Rights (adopted 19 December 1966) 999 UNTS 171, Article 6(1); Universal Declaration of Human Rights (adopted 10 December 1948) UN Doc A/RES/3/217 A, Article 3.

¹⁹⁸ ECHR, *op cit*, Article 3; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949) 75 UNTS 35 ('First Geneva Convention'); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949) 75 UNTS 81 ('Second Geneva Convention'); Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949) 75 UNTS 135 ('Third Geneva Convention'); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 ('Fourth Geneva Convention'), common Article 3; Universal Declaration of Human Rights, *op cit*, Article 5.

¹⁹⁹ F Adaka, 'The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines' (2008), *op cit*, at 259.

Notably, incidents of murder and physical abuse of civilians by international forces have been reported. For instance, in 1993, Canadian soldiers deployed in Somalia as part of UNITAF were accused of beating to death a Somali teenager²⁰⁰ and of shooting in the back two unarmed individuals.²⁰¹ In Kosovo, US soldiers have reportedly beaten and abused civilians,²⁰² three members of the British contingent were charged with the murder of two Albanians,²⁰³ and a US soldier was found guilty of the murder of a child.²⁰⁴ In Afghanistan, several ISAF contingents members were investigated on charges of murder. In particular, a Canadian soldier was accused of killing an unarmed insurgent,²⁰⁵ a member of the US forces was prosecuted for the murder of 16 civilians,²⁰⁶ and a British soldier who killed a badly wounded insurgent was found guilty of murder.²⁰⁷ In Iraq, US forces part of the MNF-I killed 24 Iraqi civilians in their home as reprisals following the death of a US soldier in a roadside bombing.²⁰⁸ Physical abuses and murders by soldiers can constitute violations of various international obligations, including the

²⁰⁰ CH Farnsworth, 'Torture by Army Peacekeepers in Somalia Shocks Canada' (The New York Times, 27 November 1994); Canada, 'Report of the Somalia Commission of Inquiry' (1997), <<http://qspace.library.queensu.ca/handle/1974/6881>>, vol 1, 'The Somalia Mission: In Theatre 2'; J Terry, 'Taking *Filártiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad' in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Hart, 2001), 109–134, at 131; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 285.

²⁰¹ Canada, 'Report of the Somalia Commission of Inquiry' (1997), *op cit*, 'The Somalia Mission: In Theatre 1'.

²⁰² D Campbell, 'US troops abused civilians in Kosovo' (The Guardian, 19 September 2000).

²⁰³ N Wood, 'Kosovo's love affair with Nato keeps tempers down' (The Guardian, 4 December 2000).

²⁰⁴ R Cohen, 'U.S. Sergeant Gets Life in Murder of Kosovo Girl' (The New York Times, 2 August 2000).

²⁰⁵ S Chase, 'Robert Semrau: On the ground in Afghanistan' (Pembroke Daily Observer, 9 November 2012).

²⁰⁶ K Johnson, 'Pretrial Hearing Starts for Soldier Accused of Murdering 16 Afghan Civilians' (The New York Times, 5 November 2012).

²⁰⁷ 'Marine jailed for Afghan murder' (BBC News, 6 December 2013); UK, Bulford Military Court, *R v Sergeant Alexander Wayne Blackman ('Marine A')*, Sentencing remarks of HHJ Jeff Blackett, Judge Advocate General (6 December 2013).

²⁰⁸ M Asser, 'What happened at Haditha?' (BBC News, 10 March 2008); US, Navy-Marines Corps Court of Criminal Appeals, *United States of America v Jeffrey Chessani* (17 March 2009) ('*Haditha case*').

right to life,²⁰⁹ and common Article 1 to the Geneva Conventions which prohibits ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.’²¹⁰

Illegal smuggling and bribery are amongst the other examples of individual misconduct in which multinational troops have occasionally been found to engage.²¹¹ For instance, in 2005, members of the Pakistani contingent of the MONUC have been accused of illegally exploiting gold mines, and of providing arms to local militia in exchange for gold.²¹² Such type of harmful conduct in breach of the domestic law of the host State²¹³ can constitute a wrongful act under international law as it breaches the obligation to respect local laws usually incorporated in SOFAs.²¹⁴

²⁰⁹ ECHR, *op cit*, Article 2(1); International Covenant on Civil and Political Rights, *op cit*, Article 6(1): ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’; Universal Declaration of Human Rights, *op cit*, Article 3.

²¹⁰ First Geneva Convention, *op cit*; Second Geneva Convention, *op cit*; Third Geneva Convention, *op cit*; Fourth Geneva Convention, *op cit*, common Article 3: ‘Persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely [...]. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: [...] violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’.

²¹¹ UN, ‘Directives for Disciplinary Matters Involving Military Members of National Contingents’, *op cit*, para 4; AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*, at 269.

²¹² UN Office of Internal Oversight Services, ‘Investigation Into Allegations That United Nations Peacekeepers Engaged in the Exploitation of Natural Resources and the Trafficking of Weapons in the Mongbwalu Region in the Democratic Republic of the Congo’ (2 July 2007) ID Case No. 0151-06, released 12 January 2009 by Wikileaks; M Plaut, ‘UN troops “traded gold for guns”’ (BBC News, 23 May 2007).

²¹³ UN Office of Internal Oversight Services, ‘Investigation Into Allegations That United Nations Peacekeepers Engaged in the Exploitation of Natural Resources and the Trafficking of Weapons in the Mongbwalu Region in the Democratic Republic of the Congo’, *op cit*, para 10.

²¹⁴ UNAMID SOFA, *op cit*, Article 5: ‘UNAMID and its members shall respect relevant rules and principles of international law as well as all local laws and regulations’; ISAF SOFA, *op cit*, Article 2: ‘All ISAF and supporting personnel, including associated liaison personnel, enjoying privileges and immunities under this Arrangement will respect the laws of Afghanistan’; EU, ‘Draft Model Agreement on the Status of the European Union-led Forces Between the European Union and a Host State’, *op cit*, Article 2(1): ‘EUFOR and EUFOR personnel shall respect the laws and regulations of the Host State and shall refrain from any action or activity incompatible with the objectives of the operation’; UN Model SOFA, *op cit*, Section IV(6): ‘The United Nations peace-keeping operation and its members shall respect all local laws and regulations’; Accord sous forme d’Échange de

2.1.3. Preliminary question: attributability of individual misconduct

While this study on allocation focuses on *which* of the participant bears responsibility for harmful conduct, a preliminary question arises with regards to individual misconduct, namely to demonstrate *whether* the conduct is attributable²¹⁵ at all. Indeed, individual misconduct committed by soldiers could be seen as off-duty private conduct of States organs, which is ‘not as such attributable’²¹⁶ to a State or international organization. Before addressing in Chapter 2 the criterion under which individual misconduct can be attributed, this section preliminarily argues that acts of individual misconduct committed by soldiers during missions are not private conduct but rather official acts, albeit ultra vires, and therefore can in principle be attributed to one or more of the participants.

The argument against attributability of individual misconduct of international forces rests on the idea that crimes such as sexual abuses are never performed in official capacity or linked with official functions, and are ‘so removed from the scope of their official functions’²¹⁷ that they must be considered private rather than ultra vires.²¹⁸ However, the distinction official and private conduct is rarely so clear-cut when of soldiers are deployed in an operation, and ‘what is a strictly off-duty act

lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », *op cit*, Article 1: ‘Pendant la durée de son déploiement, le personnel du détachement français se conforme aux lois et usages en vigueur en République du Mali’.

²¹⁵ The terms ‘attributable’ and ‘attributability’ are used to refer to the question of whether a conduct can at all be attributed to a State or international organization, rather than to the more general question of attribution of conduct (ie. to whom is a conduct attributed) addressed in Chapter 2.

²¹⁶ ILC, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) 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 77, at 30–143 (‘ARS com’), introductory commentary to Chapter II of Part I, para 3.

²¹⁷ *Ibid*, commentary to Article 7, para 7.

²¹⁸ R Burke, ‘Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets’ (2012) 16 Journal of International Peacekeeping (Brill) 1, at 38; AJ Miller, ‘Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations’ (2006), *op cit*, at 92; ILC, ‘Responsibility of International Organizations, Comments and Observations Received From the United Nations’ (2011) UN Doc. A/CN.4/637/Add.1, comments to draft Article 7, para 4.

may sometimes be difficult to define.²¹⁹ In situations where a State or international organization ‘made it possible for its agent to commit’²²⁰ a harmful conduct, it can be argued that the conduct is attributable. As held by an Arbitral Tribunal in a case concerning Mexican soldiers who abducted an individual and attempted to obtain a sum of money before killing him, individual misconduct can be attributed when soldiers used powers or means inherent to their official functions.²²¹ The same reasoning can be applied in situations of murders by international forces, which would not be committed without military weapons, and in cases of sexual exploitation, where, by definition,²²² troops take advantage of the relative power associated with their military status to abuse populations. Accordingly, most individual misconduct committed by soldiers while deployed in international military operations qualify as *ultra vires* rather than private conduct, and therefore can possibly be attributed to one or more participant.

Moreover, as far as States are concerned, a secondary rule found in international humanitarian law renders ‘all acts committed by persons forming part of its armed forces’²²³ attributable to a State during armed conflicts. Unlike what is suggested in the ILC commentary,²²⁴ this rule does not confirm Article 7 ARS on *ultra vires* conduct but rather derogates to it. Under this *lex specialis* provision of humanitarian law,

²¹⁹ F Mégret, ‘The Vicarious Responsibility of the United Nations’ in C Aoi et al (eds), *Unintended Consequences of Peacekeeping Operations* (2007), 250–267, at 258.

²²⁰ AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*, at 291.

²²¹ Arbitral Tribunal, *Caire* (1929), *op cit*, at 530. Original reads: ‘en agissant, ils aient usé de pouvoirs ou de moyens propres à leur qualité officielle’.

²²² Sexual exploitation is defined as an ‘abuse of a position of vulnerability, differential power, or trust’ (UN, ‘Bulletin on Special Measures for Protection From Sexual Exploitation and Sexual Abuse’, *op cit*).

²²³ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, The Hague) (‘Hague Convention IV’), Article 3: ‘A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 3 (‘GC Protocol I’), Article 91: ‘Responsibility — A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’.

²²⁴ ARS com, *op cit*, commentary to Article 7, para 8.

private conduct of armed forces during conflict can be attributed to the State.²²⁵ This traditional provision, which dates back to 1907,²²⁶ is justified by the high level of disciplinary control that must be maintained within armed forces, combined with the specific context of State organs being deployed in war (as compared to regular public administration).²²⁷ First, when engaged in military operations, ‘particularly in a hostile context, there is little off-duty time’,²²⁸ so that an encompassing attributability test allowing to overcome the blurred distinction between private and ultra vires conduct is better suited. Second, it is ‘in the nature of armed forces that they are a disciplined body’,²²⁹ over which States exercise disciplinary control at all times.

Based on these two arguments, this thesis argues that individual misconduct can possibly be attributed to one or more participant. Given the broader authority and obligations of States in relation to their military forces, the thesis advocates for a broad attributability of individual misconduct to States.²³⁰ Accordingly, individual misconduct such as murders and sexual abuses is in principle attributable to the State, and more limited scope of individual misconduct is attributable to the UN and other international organizations, which lack full control over contributed troops.²³¹

²²⁵ M Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 401, at 406; G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, 2011), at 96; R Wolfrum and D Fleck, ‘Enforcement of International Humanitarian Law’ in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008), 237–323, at 707; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 105.

²²⁶ Hague Convention IV, *op cit*, Article 3.

²²⁷ J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press, 2012), at 546.

²²⁸ F Mégret, ‘The Vicarious Responsibility of the United Nations’ (2007), *op cit*, at 258.

²²⁹ P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 166.

²³⁰ See also: 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), *op cit*, at 600, arguing that, because of the limited powers of international organizations, ultra vires acts of soldiers should only be attributed to States.

²³¹ M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 106.

2.2. Combat-related harmful acts

Whereas individual misconduct presented above relate to individual misbehaviour that can be committed outside of a military context, the following section addresses wrongful acts of a relatively different nature, that are directly linked with the conduct of military operations.²³² Harmful conduct occurs during land and air combat operations (§2.2.1), during detentions (§2.2.2), and in relation to the protection of civilians (§2.2.3).

2.2.1. Injuries to civilians during land and air operations

Civilians finding themselves in the midst of an armed conflict are regularly victims of injuries to their persons and properties. Collaborative military operations are predominantly undertaken within the framework of UN's collective security, with the aim of restoring peace and ensuring the security of local populations. Yet, a number of incidents involving international forces indiscriminately targeting civilians have been reported.

First, incidents have occurred during land operations. In 1993, peacekeepers of UNOSOM II were accused of opening fire at a crowd of protestors without justification, causing the death of six civilians.²³³ In 1999, three British soldiers of KFOR wrongfully shot at a vehicle, killing two civilians and injuring another two.²³⁴ Numerous accounts of disproportionate use of force and excessive damage to civilian persons and objects have been reported with regards to the MINUSTAH. Its forces have been accused of conducting several large-scale raids in densely populated area, resulting in several dozens of civilian deaths.²³⁵ Other allegations concerned shootings by UN forces towards unarmed civilians, including children and elderly,²³⁶ and firing at peaceful crowds.

²³² P Rowe, 'Military Misconduct During International Armed Operations: 'Bad Apples' or Systemic Failure?' (2008), *op cit*, at 171.

²³³ J Peck, 'The UN and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?' (1995), *op cit*, at 283.

²³⁴ UK, High Court of Justice (Queen's Bench Division), *Bici and Bici v Ministry of Defence* (7 April 2004), [2004] EWHC 786 (QB), para 27. The civil liability of the United Kingdom for this incident was upheld (para 112).

²³⁵ M Halling and B Bookey, 'Peacekeeping in Name Alone: Accountability for the United Nations in Haiti' (2008), *op cit*, at 464.

²³⁶ Inter-American Commission on Human Rights, *Lionel Jean-Baptiste v Brazil*, Petition (2005), paras 13-14.

²³⁷ Similar incidents involving British soldiers in Iraq were examined in the *Al-Skenni* case, where the troops were accused of having shot dead civilians during patrols or raids.²³⁸ In 2015, it was reported that troops from MINUSMA killed civilians while attempting to disperse a crowd.²³⁹

Second, harmful acts have occurred in the conduct of aerial operations. With the aim of minimizing their casualties, international forces rely on air power in the conduct of certain operations. Some bombing campaigns are carried exclusively by air forces and involve ‘no boots on the ground’, considerably reducing the amount of casualties for participating States.²⁴⁰ In many missions, air forces are used to support ground operations, by conducting air strikes ahead of the arrival of land forces in a given area.²⁴¹ Although air targeting is increasingly precise, incidents inevitably occur. For instance, during the 1991 Gulf War, the US-led coalition targeted public buildings having primarily a civilian purpose.²⁴² The air campaign conducted by NATO over Bosnia in 1999 (Operation Allied Force) is alleged to have caused around 500 civilians deaths.²⁴³ Amongst the possibly wrongful incidents are the facts at hand in the *Bankovic* case,²⁴⁴ where NATO forces targeted the State radio and television station, causing sixteen civilians deaths and injuring an equal number.²⁴⁵ Further, the targeting of military objects situated in highly populated areas has raised questions of proportionality. Civilians deaths are regularly reported as the result of the frequent air strikes conducted by ISAF or OEF forces in Afghanistan.²⁴⁶ For instance, around 90

²³⁷ *Ibid*, para 10.

²³⁸ ECtHR (Grand Chamber), *Al-Skeini and Others v the United Kingdom*, Judgment (7 July 2011), App no 55721/07, paras 34–54.

²³⁹ A Diarra and T Diallo, ‘At least three killed after U.N. troops in Mali fire at protest’ (Reuters, 27 January 2015).

²⁴⁰ Human Rights Watch, ‘Civilian Deaths in the NATO Air Campaign’ (2000) Report.

²⁴¹ RJ Barber, ‘The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan’ (2010), *op cit*, at 472.

²⁴² J Quigley, ‘The New World Order and the Rule of Law’ (1992) 18 *Syracuse Journal of International Law and Commerce* 75, at 93.

²⁴³ Human Rights Watch, ‘Civilian Deaths in the NATO Air Campaign’ (2000) Report, at 5.

²⁴⁴ ECtHR (Grand Chamber), *Bankovic et al v Belgium et al*, Admissibility decision (12 December 2001), App No. 52207/99. The claim brought by the victims’ relatives was rejected on jurisdiction grounds.

²⁴⁵ *Ibid*, paras 9–11.

²⁴⁶ ‘Afghan children “killed by Nato air strike in Shigal”’ (BBC News, 7 April 2013); ‘Nato investigates air strike that killed Afghan child’ (The Guardian, 29 November 2013); AJ

civilians were allegedly killed during an OEF attack aimed at insurgents in August 2008.²⁴⁷ In Kosovo, NATO was accused of having ‘caused excessive civilian casualties in disregard of the rule of proportionality by trying to fight a “zero casualty” war for their own side’.²⁴⁸

Such harmful acts occurring during combat can constitute violations of international humanitarian law, which basic principles require distinguishing between civilians and other individuals so as not to direct attacks towards civilians.²⁴⁹ Further, parties must refer to a standard of proportionality when attacking military objects, that is, not to ‘cause loss of civilian life or damage to civilian property which would be excessive in relation to the anticipated military advantage’.²⁵⁰ Humanitarian law only comes to play in situations reaching the threshold of armed conflict, for instance when international forces conduct enforcement operations with an offensive use of force, but does not apply in consensual peacekeeping operations with low levels of hostilities.²⁵¹

In addition, human rights standards are increasingly seen as applicable in the conduct of military operations.²⁵² Human rights obligations are

Rubin, ‘Commander Apologizes for Afghan Airstrike’ (New York Times, 8 June 2012); A Waheed Wafa and JF Burns, ‘U.S. Airstrike Reported to Hit Afghan Wedding’ (New York Times, 5 November 2008).

²⁴⁷ RJ Barber, ‘The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan’ (2010), *op cit*, at 485.

²⁴⁸ ICTY, ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’ (2000), para 2.

²⁴⁹ GC Protocol I, *op cit*, Article 48: ‘In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’.

²⁵⁰ F Adaka, ‘The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines’ (2008), *op cit*, at 486; C Byron, ‘International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage’ (2010) 13 Yearbook of International Humanitarian Law 175; GC Protocol I, *op cit*, Article 51(5)(b): ‘An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ is ‘considered as indiscriminate’.

²⁵¹ T Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’ (2013), *op cit*; BD Tittmore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’ (1997) 33 Stanford Journal of International Law 61, at 109.

²⁵² H-J Heintze, ‘On the Relationship Between Human Rights Law Protection and International Humanitarian Law’ (2004) 86(856) International Review of the Red Cross

particularly relevant in those collaborative military operations which do not raise to the level of an armed conflict, although the extent of their extraterritorial applicability has been lengthily debated.²⁵³ When operating out of its territory, whether a State has jurisdiction and therefore bound to secure human rights²⁵⁴ is usually determined on the basis of a criterion of control, over either a territory or individuals.²⁵⁵ Under the territorial model formulated by the ECtHR in *Loizidou*, ‘the responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory.’²⁵⁶ Furthermore, human rights obligations can be applied through the provision usually contained in SOFAs that forces must respect local

789; UN Office of the High Commissioner for Human Rights, ‘International Legal Protection of Human Rights in Armed Conflict’ (2011) HR/PUB/11/01, at 55; JK Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’ in TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 51–77; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), ICJ Reports 2004, 136 (*‘Wall Opinion’*), para 106: ‘the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict’.

²⁵³ H King, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9(4) Human Rights Law Review 521; T Lock, ‘Beyond *Bosphorus*: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights’ (2010) 10(3) Human Rights Law Review 529; T Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995) 89 American Journal of International Law 78; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); Wilde, ‘The “Legal Space” or “Espace Juridique” of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?’ (2005) 10 European Human Rights Law Review 115.

²⁵⁴ ECHR, *op cit*, Article 1: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’; International Covenant on Civil and Political Rights, *op cit*, Article 2(1): ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

²⁵⁵ ECtHR, *Al-Skeini and others v the United Kingdom*, (2011), *op cit*, paras 130–139; M Milanovic, *Al-Skeini and Al-Jedda in Strasbourg* (2012) 23(1) European Journal of International Law 121, at 122; N Quéniévet, ‘Human Rights Law and Peacekeeping Operations’ in M Odello and R Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff, 2011), 99–143, at 107.

²⁵⁶ ECtHR (Grand Chamber), *Loizidou v Turkey*, Judgment (Preliminary Objections) (23 March 1995), App no 15318/89, para 62; M Milanovic, *Al-Skeini and Al-Jedda in Strasbourg* (2012), *op cit*, at 130.

laws,²⁵⁷ which can be interpreted as including the human rights obligations of the host State.²⁵⁸ Accordingly, harmful acts of international forces during land or air operations can be seen as breaches of the right to life and other human rights.²⁵⁹

The extent to which humanitarian law and/or human rights obligations apply to international organization is unclear. Unlike States, which are bound by their treaty engagements and customary law, international organizations are not party to any humanitarian law or human rights law treaty.²⁶⁰ Yet, arguments have been developed in the scholarship to demonstrate that international organizations can be bound by primary rules. It can notably be argued that international organizations are bound by customary international law, to the extent of their legal personality, that is, when they exercise functions in a particular area of law. Accordingly, when participating in an armed conflict, international organizations are bound by the core rules of humanitarian law, which have a customary nature,²⁶¹ and when they exercise State-like function, they are bound by fundamental human rights obligations.²⁶² Further, the applicability of international norms can be based on the unilateral

²⁵⁷ UNAMID SOFA, *op cit*, Article 5: 'UNAMID and its members shall respect relevant rules and principles of international law as well as all local laws and regulations'; ISAF SOFA, *op cit*, Article 2: 'All ISAF and supporting personnel, including associated liaison personnel, enjoying privileges and immunities under this Arrangement will respect the laws of Afghanistan'; EU, 'Draft Model Agreement on the Status of the European Union-led Forces Between the European Union and a Host State', *op cit*, Article 2(1): 'EUFOR and EUFOR personnel shall respect the laws and regulations of the Host State and shall refrain from any action or activity incompatible with the objectives of the operation'; UN Model SOFA, *op cit*, Section IV(6): 'The United Nations peace-keeping operation and its members shall respect all local laws and regulations'; Accord sous forme d'Échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », *op cit*, Article 1: 'Pendant la durée de son déploiement, le personnel du détachement français se conforme aux lois et usages en vigueur en République du Mali'.

²⁵⁸ 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), *op cit*, at 138.

²⁵⁹ UN, 'International Legal Protection of Human Rights in Armed Conflict', *op cit*.

²⁶⁰ Save for the future EU accession to the ECHR.

²⁶¹ BF Klappe, 'International Peace Operations' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008), 635–673, at 647; BD Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations' (1997), *op cit*, at 103.

²⁶² N Quénivet, 'Human Rights Law and Peacekeeping Operations' (2011), *op cit*, at 121.

consent of the organization to be bound, and the UN has declared in several instances that it considered itself bound by ‘the principles and spirit’ of humanitarian law.²⁶³ As it does not focus on substantive legality, the thesis proceeds on assuming the applicability of customary obligations to international organizations.

2.2.2. Mistreatment of detainees

Accusations of wrongful conduct in the handling of detainees have emerged in many military operations and have given rise to a number of cases before domestic and human rights courts. As stated by an author in the context of collaborative military operations, ‘[t]he most common form of misconduct is likely to be the ill-treatment of those detained by the armed forces in some form of military custody.’²⁶⁴

First, troops engaged in collaborative military operations have been accused of arbitrarily detaining individuals. For instance, the UNITAF and UNOSOM forces allegedly imprisoned hundreds of criminal offenders in Somalia for extended periods of time, occasionally without charges.²⁶⁵ KFOR was also accused of a number of unlawful detentions, notably in the case of *Saramati*, in which the applicant claimed that his 6-months extra-judicial detention was in breach of Article 5 ECHR.²⁶⁶ The bulk of recent litigation challenging the lawfulness of detentions occurred in relation to the operations in Afghanistan and Iraq. The ensuing case law revealed a sharp ‘transatlantic divide’²⁶⁷ in the courts approach to claims by detainees, with European courts relatively more willing to review the legality of internments. In Afghanistan, hundreds of individuals have been detained for years and without due process at

²⁶³ UN Secretary-General, ‘Bulletin on Observance by United Nations Forces of International Humanitarian Law’ (1999) UN Doc ST/SGB/1999/13; UN Secretary-General, ‘Regulations for the United Nations Emergency Force’ (20 February 1957) UN Doc ST/SGB/UNEF/1, Article 44: ‘The Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel’.

²⁶⁴ P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 169.

²⁶⁵ BD Tittmore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’ (1997), *op cit*, at 89; G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), *op cit*, at 219.

²⁶⁶ ECtHR, *Behrami and Saramati* (2007), *op cit*, at 62.

²⁶⁷ AS Deeks, ‘Litigating How We Fight’ in RA Pedrozo and DP Wollschlaeger (eds), *International Law and the Changing Character of War* (International Law Studies, vol 87, Naval War College, 2011), at 427: arguing, from the US point of view, that judicial review of detentions impairs the conduct of military operations.

the Bagram detention facilities, which was run by the US.²⁶⁸ In *Al-Maqaleh*, three claimants detained there since 2003 attempted to submit a writ for habeas corpus before US courts.²⁶⁹ The coalition in Iraq also detained thousands of individuals in challengeable conditions. In 2004, a Secretary-General report noted that ‘[o]ne of the major human rights challenges remains the detention of thousands of persons without due process.’²⁷⁰ In *Al-Jedda*, the applicant was detained in Iraq for more than three years without charges.²⁷¹ In the case of *Al-Saadoon*, the two applicants were placed in security detention for more than five years,²⁷² and then transferred to Iraqi authorities for trial without assurance that they would not face death penalty.²⁷³

Arbitrary deprivation of liberty can be wrongful under either humanitarian law or human rights law, which both prohibit the detention of individuals without charges and without being presented to a judge.²⁷⁴ In Afghanistan and Iraq, the US has argued that detainees qualified neither as prisoners of war nor as protected persons and benefited from no protection, yet arguments have been made that humanitarian law applies to them.²⁷⁵

Second, cases of torture and other abusive treatments of detainees have been reported. In Afghanistan, the Bagram prison was the theatre of

²⁶⁸ MC Waxman, ‘The Law of Armed Conflict and Detention Operations in Afghanistan’ in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (International Law Studies, vol 85, Naval War College, 2009), 343–356, at 344.

²⁶⁹ US, United States Court of Appeals (District of Columbia Circuit), *Al Maqaleh et al v Gates* (21 May 2010), 605 F.3d 84, D.C. Cir. 2010, 84–99. Their claims were rejected.

²⁷⁰ UN Secretary-General, ‘Report Pursuant to Paragraph 30 of Resolution 1546 (2004)’ (7 June 2005) UN Doc S/2005/373, para 72.

²⁷¹ ECtHR (Grand Chamber), *Al-Jedda v United Kingdom*, Judgment (7 July 2011), App no 27021/08, para 10.

²⁷² ECtHR, *Al-Saadoon and Mufdhi v the United Kingdom*, Judgment (2 March 2010), App no 61498/08, para 41.

²⁷³ *Ibid*, para 143.

²⁷⁴ MC Bassiouni, ‘The Institutionalization of Torture Under the Bush Administration’ (2005) 37 *Case Western Reserve Journal of International Law* 389, at 392; ECHR, *op cit*, Article 5; First Geneva Convention, *op cit*; Second Geneva Convention, *op cit*; Third Geneva Convention, *op cit*; Fourth Geneva Convention, *op cit*, common Article 3; J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (2005), *op cit*, at 344, Rule 99: ‘Arbitrary deprivation of liberty is prohibited’; International Covenant on Civil and Political Rights, *op cit*, Article 9; Universal Declaration of Human Rights, *op cit*, Article 3.

²⁷⁵ J Long, ‘What Remedy for Abused Iraqi Detainees’ (2006), *op cit*.

gruesome and repeated abuses by US forces. For example, an allegedly innocent taxi driver was tortured to death during interrogations.²⁷⁶ The US stated that abuses were mere isolated acts of a few soldiers, yet other reports found there was a widespread pattern of abuse in Afghanistan. This pattern was reiterated in the Abu Ghraib prison in Iraq,²⁷⁷ where more allegations of torture and degrading or inhumane treatments emerged. For instance, in 2003, an Iraqi man was killed during his interrogation at the prison.²⁷⁸ The report of an army investigation into abuses in Iraq found that ‘numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees’,²⁷⁹ and confirmed that soldiers had physically and sexually abused detainees.²⁸⁰ While UK troops did not engage in widespread torture they were involved in a few incidents. Notably, one of the applicants in *Al-Skeini* was allegedly tortured and died after 36 hours in UK custody.²⁸¹

The prohibition of such acts of torture and other abusive treatments towards detainees is well established in human rights law, humanitarian law and other instruments.²⁸²

²⁷⁶ T Golden, ‘In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths’ (New York Times, 20 May 2005).

²⁷⁷ *Ibid.*; GD Solis, ‘Obedience to Orders: History and Abuses at Abu Ghraib Prison’ (2004) 2 Journal of International Criminal Justice 988.

²⁷⁸ J McChesney, ‘The Death of an Iraqi Prisoner’ (NPR, 27 October 2005).

²⁷⁹ US, ‘Article 15-6 Investigation of the 800th Military Police Brigade’ (‘Taguba Report’), at 16.

²⁸⁰ Amongst others, the following actions were reported: ‘Punching, slapping, and kicking detainees; [...] Forcibly arranging detainees in various sexually explicit positions for photographing; [...] Using military working dogs (without muzzles) to intimidate and frighten detainees’ (*Ibid.*, at 16–17).

²⁸¹ ECtHR, *Al-Skeini and others v the United Kingdom*, (2011), *op cit*, paras 63–66; T Harding and J Bingham, ‘Baha Mousa inquiry: MoD’s guilt for death of Army’s Iraqi prisoner’ (Telegraph, 8 September 2011).

²⁸² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85; ECHR, *op cit*, Article 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’; First Geneva Convention, *op cit*; Second Geneva Convention, *op cit*; Third Geneva Convention, *op cit*; Fourth Geneva Convention, *op cit*, common Article 3: ‘Persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely [...]. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: [...] violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’; J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (2005), *op cit*, Rule 90; Universal Declaration of Human Rights, *op cit*, Article 5: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

2.2.3. Failure to protect individuals

The last type of wrongful conduct concerns situations where international forces, while not directly committing injurious acts, fail to protect individuals from the wrongful acts of other actors. In such cases of wrongful omissions, a State or international organization can be responsible when it should and could have acted but failed to do so. There is no general obligation to protect civilians, but a number of due diligence obligations can be found in specific primary rules.

Two main categories of failures to protect can be distinguished, depending on whether a given participant fails to protect individuals from the conduct of an entity with which it collaborates, or against which it fights. Issues raised by latter category concern the attribution of omissions to prevent, while the former category also raises questions of derived responsibility in connection to the conduct of other participants.²⁸³

International military forces are usually deployed in war torn countries where civilians are victims of exactions committed by rebel or governmental forces. The protection of civilians from such abuses is often one of the overall goals of operations within the UN framework, but the capacity is sometimes lacking. In May 2002, a rebel faction in DRC massacred over 100 civilians in the town of Kisangani.²⁸⁴ MONUC forces were present in the area, and aware of the events, but they lacked the military capacity to protect civilians from the rebels assault. In Haiti, MINUSTAH troops have been accused of witnessing human rights violations by Haitian police forces, and letting them happen without attempting to intervene.²⁸⁵ In the worst-case scenarios, international troops have been accused failing to prevent genocide in Rwanda and Srebrenica. In 1994, the UNAMIR was present in Rwanda when hundreds of thousands of civilians were decimated. The insufficiency of the resources but also the inappropriateness of the mandate were pointed out.²⁸⁶ In 1995, in Srebrenica, civilians who had taken refuge in what the

²⁸³ See *infra*, Chap 3 §1.3.

²⁸⁴ V Holt et al, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (United Nations, Office for the Coordination of Humanitarian Affairs, 2009), at 248.

²⁸⁵ M Halling and B Bookey, 'Peacekeeping in Name Alone: Accountability for the United Nations in Haiti' (2008), *op cit*, at 468.

²⁸⁶ UN, 'Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda' (15 December 1999) UN Doc S/1999/1257, at 3: 'The fundamental failure was the lack of resources', and 22: 'the mandate contained in

UN had declared a 'safe-area' were massacred under the eyes of UNPROFOR troops. The actual resources of UNPROFOR, however, were not as strong as its mandate.²⁸⁷

Failures to protect civilians are internationally wrongful in limited circumstances. Mandates calling for the protection of civilians do not constitute binding obligations, and the standard of protection required obligations of due diligence found in international law differ depending on the capacity to provide such protection.²⁸⁸ For instance, violations of the obligation to prevent genocide are assessed by reference to the 'capacity to influence'²⁸⁹ of a subject and only arise in case of manifest failure. Under human rights law, the obligation to secure the human rights of individuals within a participant's jurisdiction includes the duty to take step to prevent abuses.²⁹⁰ When civilians fleeing abuses take refuge with international forces, the standard of protection becomes allegedly higher as the forces are more likely have the capacity to protect civilians that are under their care.²⁹¹

Besides, under humanitarian law, each participant must exercise due diligence vis-à-vis its partners, to ensure that they do not commit wrongful acts.²⁹² Under this category of wrongs can notably be placed

resolution 912 (1994) did not give UNAMIR the power to take effective action to halt the massacres'.

²⁸⁷ Y Akashi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt From the Safe Area Mandate' (1995) 19(2) *Fordham International Law Journal* 312; UN, 'Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica' (15 November 1999) UN Doc A/54/549, para 263: 'Dutchbat soldiers did not have the capacity to control the situation and prevent advances into the enclave'.

²⁸⁸ BG Ramcharan, 'The Concept of Protection in the International Law of Human Rights' in Y Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, 1989), 593–621.

²⁸⁹ ICJ, *Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina v Serbia And Montenegro)*, (2007), *op cit*, para 430.

²⁹⁰ ECHR, *op cit*, Article 1; International Covenant on Civil and Political Rights, *op cit*, Article 2.

²⁹¹ Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*, para 3.17.3.

²⁹² First Geneva Convention, *op cit*; Second Geneva Convention, *op cit*; Third Geneva Convention, *op cit*; Fourth Geneva Convention, *op cit*, common Article 1: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'; See *infra*, Chap 3 §1.3.1; JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume IV* (International Committee of the Red Cross, 1958), at 16.

the failures to prevent mistreatment by others when transferring detainees. When one of the participating States captures an individual and subsequently hands him over to another participant, it must ensure the detainee will not be mistreated.²⁹³ In Iraq, the UK allegedly had knowledge of the systemic abuses committed by the US, therefore it would breach its obligations if it blindly transferred detainees to the US.²⁹⁴

3. Conclusion: Understanding the military context

This thesis submits that it is important to apprehend with some detail military aspects of international forces, for understanding these aspects allows to appreciate how they impact on issues of responsibility. This Chapter thus provided a necessary understanding of the modalities and subtleties of military cooperation, in order to frame the legal analysis of responsibility. It aimed at providing a clear and detailed understanding of military notions and realities as well as their legal significance. Further it identified the main types of harmful conduct committed by international forces and presented the factual and legal context in which they occur.

The main conclusion drawn from this descriptive Chapter is that, in all types of collaborative military operations, control is shared amongst participants. The first section demonstrated that in all operations, formal authority in the form of elements of command and control is distributed between the lead entity and the contributing States. Command structures vary amongst operations, but in all collaborative operations the contributing States transfer some elements of authority over their soldiers while formally retaining others. In operations led by an international organization, States typically transfer operational control as well as some strategic authority to the lead organization while they retain organic command including disciplinary control and the authority to withdraw troops. In coalitions as well participating States retain organic command and delegate only some degree of operational control. Besides, States occasionally exercise in fact elements of control that were delegated. The consequences of this sharing of control between

²⁹³ Third Geneva Convention, *op cit*, Article 12; Fourth Geneva Convention, *op cit*, Article 45; See *infra*, Chap 3 §1.3.3; JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume III* (1960), *op cit*, at 137.

²⁹⁴ UK, Court of Appeal (Civil Division), *Yunus Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* (14 December 2011), [2011] EWCA Civ 1540, para 26.

subjects for allocating responsibility will be addresses in the following Chapters.

The second conclusion of this Chapter concerns the relative complexity of the military and factual context in which harmful conduct occurs. The precise distribution and exercise of command and control varies amongst operations, with some coalitions operating under intricate divisions of control. Further complexity in the collaboration settings is added when missions under separate command cooperate. Moreover, the factual circumstances in which various types of harmful conduct occur can be complex. These complex realities cannot be overlooked in the analysis carried in further Chapters.

The following Chapters analyse how the sharing of control at various levels impacts on the allocation of international responsibility in collaborative military operations. First, Chapter 2 enquires into the attribution of the conduct of soldiers given the sharing of elements of authority over soldiers and the variety of types of harmful conduct. Further, taking account of the complex collaboration settings at different levels, Chapter 3 analyses in which circumstances a participant can bear responsibility in connection with the conduct of another. Finally, Chapter 4 examines the modalities according to which the content of international responsibility can be distributed amongst responsible entities.