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

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Chapter 2. Attribution based on effective control over the harmful conduct of international military forces

Under the basic principles of international responsibility, a State or international organization incurs responsibility for the conduct of a soldier if the conduct violates the international obligations of the State or international organization and is attributed to it.¹ The ascertainment of whether a given conduct violates an applicable primary rule would require an in-depth analysis of rules and facts, and is not the focus of this thesis.² Rather, the element of attribution, which is one of the main stumbling blocks to the allocation of responsibility amongst multiple parties, lies at the core of the thesis.

This Chapter focuses on the attribution of harmful conduct committed by contributed soldiers, that is ‘wrongs committed by individual soldiers, not government wrongs ordered by higher policy makers’.³ Indeed, while the attribution of a wrongful air strike for instance raises complex issues to be dealt with here, the attribution of conduct committed at a governmental level, such as the failure to prosecute the perpetrator of a harmful conduct, is in itself straightforward.

When a given harmful conduct is attributed to one or more entities, other participants could bear a share of responsibility, not arising from the attribution of the conduct itself, but for a different wrongful act. The

¹ ARS, *op cit*, Article 2; ARIO, *op cit*, Article 4.

² See *supra*, Intro §1.1.2.

³ AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*, at 298.

issue of responsibility ‘in connection with’ a harmful conduct will be developed in the third Chapter. In these situations, it will be demonstrated that the indirect control of a State or international organization over a harmful conduct can lead to a separate wrongful conduct.⁴

Essentially, the present Chapter argues that the conduct of international forces should be attributed on the basis of the causally relevant form of control exercised by participants amongst which different elements of command and control are shared. It proposes to take full account of the respective relevance of various elements of military control with regards to various types of harmful conduct. In this interpretation, each conduct should be attributed to the entity actually exercising the form of control causally linked to the conduct.

The first Section engages in an analysis of established rules of attribution in collaborative military operations and practice pertaining to it (§1). The second Section develops the core arguments of the Chapter, namely that, based on a conceptual reinterpretation of rules of attribution in the context of shared military control, attribution of the conduct of international forces should depend on the respective forms of control exercised over a harmful conduct (§2). The concluding Section summarizes these arguments into a *modus operandi* following which harmful conduct can be attributed (§3).

1. Established rules and interpretations on attribution in collaborative military operations

A number of relatively settled rules of attribution, together with their mainstream interpretation, can be identified with regards to collaborative military operations. The first part of this Chapter provides a descriptive overview of existing principles and interpretations regarding the grounds upon which the conduct of international forces is attributed to States and organizations.⁵ In operations conducted under the aegis of an international organization, extensive debates have revolved around the test of effective control (§1.1). In coalition operations, a number of traditional grounds for attribution have been advanced as relevant to allocate the conduct of military forces (§1.2).

⁴ See *infra*, Chap 3.

⁵ See *supra*, Intro §2.2.1.

1.1. Effective control over the conduct of soldiers placed at the disposal of an international organization

In relation to the topic of responsibility in collaborative military operations, the attribution of the acts of soldiers put at the disposal of an international organization is probably the question that received the most attention. A rich body of literature and practice identified and settled to some extent the problems associated with the attribution of the acts of forces placed at the disposal of an international organization,⁶ and

⁶ B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976), *op cit*; C Aoi, C de Coning, and R Thakur (eds), *Unintended Consequences of Peacekeeping Operations* (United Nations University Press, 2007); R Arnold, *Law Enforcement Within the Framework of Peace Support Operations* (Martinus Nijhoff, 2008); CA Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision' (2010) 42 NYU Journal of International Law and Politics 501; J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001), *op cit*; L Condorelli, 'Le Statut des Forces de L'ONU et le Droit International Humanitaire' (1995), *op cit*; 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*; T Dannenbaum, 'Killings at Srebrenica, Effective Control and the Power to Prevent Unlawful Conduct' (2012) 61(03) International and Comparative Law Quarterly 713; ÖF Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the "Effective Control" Standard' (2014) 61(1) Netherlands International Law Review 1; C Eagleton, 'The Responsibility of the United Nations: Responsibility Derives From Control' (1950), *op cit*; AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*; T Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)' (2001) 12(3) European Journal of International Law 391; T Gazzini, 'NATO's Role in the Collective Security System' (2003), *op cit*; TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), *op cit*; M Halling and B Bookey, 'Peacekeeping in Name Alone: Accountability for the United Nations in Haiti' (2008), *op cit*; U Häußler (ed), *Ensuring and Enforcing Human Security: The Practice of International Peace Missions* (Wolf Legal Publishers, 2007); M Kamto, 'Le Cadre Juridique des Operations de Maintien de la Paix des Nations Unies' (2001) 3 International Law FORUM du Droit International 95; P Klein, 'Responsabilité pour les Faits Commis dans le Cadre des Opérations de Paix et Étendue du Pouvoir de Contrôle de la Cour Européenne des Droits de L'Homme: Quelques Considérations Critiques sur L'Arrêt *Behrami* et *Saramati*' (2007) 53 Annuaire Français de Droit International 43; B Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' in TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 515-534; P Lagrange, 'Responsabilité des États pour Actes Accomplis en Application du Chapitre VII de la Charte des Nations Unies: Observations à Propos de la Décision de la Cour Européenne des Droits de L'Homme (Grande Chambre) sur la Recevabilité des Requêtes *Behrami* et *Behrami c France* et *Saramati c Allemagne*, France et Norvège, 31

Mai 2007' (2008) 112 *Revue Generale de Droit International Public* 85; KM Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008) 19(3) *European Journal of International Law* 509; KM Larsen, 'Neither Effective Control nor Ultimate Authority and Control: Attribution of Conduct in Al-Jedda' (2011) 50 *Military Law and Law of War Review*; KM Larsen, 'The Argument of Non-applicability *Ratione Personae*' in *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012), 85–164; C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009), *op cit*; MC Lopez, 'Towards Dual or Multiple Attribution: The Strasbourg Court and the Liability of Contracting Parties' Troops Contributed to the United Nations' (2014) 10(1) *International Organizations Law Review* 193; SR Luder, 'Responsibility of States and International Organisations in Respect to United Nations Peace-Keeping Missions' (2008) 12 *International Peacekeeping: The Yearbook of International Peace Operations* (Brill) 83; H McCoubrey and ND White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth, 1996); F Messineo, 'Things Could Only Get Better: *Al-Jedda* Beyond *Behrami*' (2011) 50 *Military Law and Law of War Review* 321; F Mégret, 'The Vicarious Responsibility of the United Nations' (2007), *op cit*; M Milanovic and T Papic, 'As Bad as It Gets: The European Court of Human Rights' *Behrami* and *Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267; A Momirov, 'Dutch Courts and Srebrenica: Ascribing Responsibilities and Defining Legally Relevant Relationships' (2012) 43 *Netherlands Yearbook of International Law* 233; F Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' (2013), *op cit*; M Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010), *op cit*; A Pellet, 'L'Imputabilité d'Éventuels Actes Illicites: Responsabilité de L'OTAN ou des Etats Membres' in C Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International, 2002), 193–202; P Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000), *op cit*; C Ryngaert, 'Apportioning Responsibility Between the UN and Member States in UN Peace-Support Operations: An Inquiry Into the Application of the 'Effective Control' Standard After *Behrami*' (2012) 45(1) *Israel Law Review* 151; A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8(1) *Human Rights Law Review* 151; A Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012), *op cit*; A Sari and RA Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' (2013), *op cit*; D Sarooshi, 'Responsibility for the Acts of a Force Carrying Out UN Authorized Military Enforcement Action' in *The United Nations and the Development of Collective Security* (Oxford University Press, 1999), 163–165; F Seyersted, 'United Nations Forces – Some Legal Problems' (1961), *op cit*; D Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000), *op cit*; RCR Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (1991), *op cit*; R Simmonds, *Legal Problems Arising From the United Nations Military Operations in the Congo* (Martinus Nijhoff, 1968); J-M Sorel, 'La Responsabilité des Nations Unies dans les Opérations de Maintien de la Paix' (2001) 3 *International Law FORUM du Droit International* 127; O Spijkers, 'The Netherlands' and the United Nations' Legal Responsibility for Srebrenica Before the Dutch Courts' (2011) 50 *Military Law and Law of War Review*; S Starmer, 'Responsibility for Troops Abroad: UN-Mandated Forces and Issues of Human Rights Accountability' (2008), *op cit*; T Stein, 'The

a number of relatively established interpretations can be identified. First, effective control entails ‘factual control that is exercised over the specific conduct’⁷ (§1.1.1). Second, the test of effective control is applicable to attribute the conduct of soldiers placed at the disposal of an international organization (§1.1.2). Third, it is possible for more than one subject to have effective control over a conduct, resulting in multiple attribution (§1.1.3). Yet, the application of these accepted interpretations to concrete situations occurring in military operations reveals that some of the detailed modalities of the test remain to be addressed.⁸

Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?’ (2002), *op cit*; A Thibault, ‘La Responsabilité de L’OTAN dans les Conflits Armés’ (2014), *op cit*; G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), *op cit*; 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*; RA Wessel, ‘Division of International Responsibility Between the EU and its Member States in the Area of Foreign Policy, Security and Defence Policy’ (2011) 3(3) Amsterdam Law Forum; RA Wessel and L den Hertog, ‘EU Foreign, Security and Defence Policy: A Competence/Responsibility Gap?’ in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing, 2013), 339–358; C Wickremasinghe and G Verdirame, ‘Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations’ in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Hart, 2001), 465–489; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*; M Zwanenburg, ‘Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations’ (2006) 11(3) *Journal of Conflict and Security Law* 483; M Zwanenburg, ‘UN Peace Operations Between Independence and Accountability’ (2008) 5(1) *International Organizations Law Review* 23; Arbitral Tribunal, *Earnshaw and Others (Great Britain) v United States* (30 November 1925), Report of International Arbitral Awards, vol VI, 160–165 (‘Zafiro case’); Arbitral Tribunal, *Caire* (1929), *op cit*; UK, House of Lords, *Attorney General v Nissan*, (1969), *op cit*; ECtHR, *Bankovic et al v Belgium et al*, (2001), *op cit*; UK, High Court of Justice, *Bici and Bici v Ministry of Defence*, (2004), *op cit*; ECtHR, *Behrami and Saramati* (2007), *op cit*; Belgium, Court of First Instance of Brussels, *ETO case* (2010), *op cit*; ECtHR, *Al-Jedda v United Kingdom*, (2011), *op cit*; ECtHR, *Al-Skeini and others v the United Kingdom*, (2011), *op cit*; UK, Supreme Court, *Secretary of State for Foreign and Commonwealth Affairs and Another (Respondents) v Yunus Rahmatullah (Appellant)* (31 October 2012), [2012] UKSC 48, ILDC 1947 (UK 2012); ECtHR (Grand Chamber), *El-Masri v the Former Yugoslav Republic of Macedonia*, Judgment (12 December 2012), App no 39630/09; Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*; Netherlands, Supreme Court, *Mustafic* (2013), *op cit*; UK, High Court of Justice (Queen’s Bench Division), *Serdar Mohammed v Ministry of Defence* (2 May 2014), [2014] EWHC 1369 (QB); Netherlands, District Court of The Hague, *Ten Claimants and Mothers of Srebrenica Association v the Netherlands and the UN* (16 July 2014), C/09/295247 / HA ZA 07-2973; ECLI:NL:RBDHA:2014:8748; ECtHR, *Jaloud v the Netherlands*, (2014), *op cit*.

⁷ ARIO com, *op cit*, commentary to Article 7, para 4.

⁸ See *infra*, Chap 2 §2.2.

1.1.1. Content of the test of ‘effective control’ for attributing the conduct of soldiers placed at the disposal of an international organization

The test of effective control for attributing the conduct of delegated organs developed progressively from practice. In the ILC Articles it is enshrined in Article 7 ARIO, which prescribes that the conduct of an organ put at the disposal of an international organization ‘shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.’⁹ As formulated by the ILC in the ARIO and accepted in the literature, effective control is assessed under three conditions. It must be ‘factual’¹⁰ (§1.1.1.a) exercised in respect of the ‘specific conduct’¹¹ taken by a soldier (§1.1.1.b), and assessed by taking account of the ‘full factual circumstances and particular context in which international organizations and their members operated’¹² (§1.1.1.c). In short, the test of effective control entails the determination of which entity was really controlling a given harmful conduct.

Preliminarily, it must be noted that effective control as formulated in Article 7 has an autonomous meaning, which differs from other uses of the term effective control in international law. The term is also used in relation to the extraterritorial application of the ECHR,¹³ and to attribute to States the conduct of non-State actors.¹⁴ The specificity of effective control in the sense of Article 7 is that it must be assessed *over a*

⁹ Article 7 ARIO. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

¹⁰ ARIO com, *op cit*, commentary to Article 7, para 4.

¹¹ *Ibid*, commentary to Article 7, para 4.

¹² ILC, ‘Eighth Report on Responsibility of International Organizations, by Giorgio Gaja, Special Rapporteur’ (2011) UN Doc A/CN.4/640 (‘Eighth Gaja Report’), para 34. See also: ARIO com, *op cit*, commentary to Article 7, para 4.

¹³ ECtHR, *Loizidou v Turkey*, (1995), *op cit*, para 62.

¹⁴ 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 400; ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits (27 June 1986), ICJ Reports 1986, 14 (‘*Nicaragua, Merits*’), para 115.

conduct,¹⁵ whereas other tests look at control over a territory or over individuals. It is true that effective control over a specific conduct (Article 7 ARIO) and over a specific individual (Article 8 ARS) have a similar meaning, but ‘control plays a different role’¹⁶ and has a higher threshold when deciding ‘whether a certain conduct is attributable at all’¹⁷ in the context of non-State actors.¹⁸ Therefore, established interpretations of the term in other contexts do not necessarily apply to attribution in the context of international organizations.

a) Factual control

First, the factual element requires determining whether control was *concretely* and *actually* exercised, beyond the formal delegation of operational authority.¹⁹ In this sense, factual control should not be understood by opposition to formal control. Indeed, the test of effective control does not completely discard formal aspects, but rather attempts to verify whether the formal delegation of control by the State to the international organization was genuine or whether control was actually retained by the State.²⁰ It consists in comparing how control is formally distributed to how it is actually exercised.²¹ The formal distribution of

¹⁵ ARIO com, *op cit*, commentary to Article 7, para 4.

¹⁶ *Ibid*, commentary to Article 7, para 5.

¹⁷ *Ibid*, commentary to Article 7, para 5.

¹⁸ 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 155; F Messineo, ‘Attribution of Conduct’ in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 60–97, at 87.

¹⁹ ARIO com, *op cit*, commentary to Article 7, para 4; 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 155 @at 151; KM Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’ (2008), *op cit*, at 516; F Messineo, ‘Attribution of Conduct’ (2014), *op cit*, at 92.

²⁰ F Messineo, ‘Attribution of Conduct’ (2014), *op cit*, at 90. See also: C Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ (2011) 8(2) *International Organizations Law Review* 397, at 457: the test of Article 7 ARIO is ‘merging organic control with factual control’.

²¹ C Ryngaert, ‘Apportioning Responsibility Between the UN and Member States in UN Peace-Support Operations: An Inquiry Into the Application of the ‘Effective Control’ Standard After Behrami’ (2012), *op cit*, at 158: ‘Formal arrangements may provide guidance but are not necessarily conclusive. Ultimately, the reality of operational command and control on the ground should be decisive’; M Zwanenburg, ‘Shared

control is still relevant, as it is against this background, and not *ex nihilo*, that factual control is assessed.

The requirement of actual control can be illustrated by the cases of *Nuhanovic, Mustafic*,²² and a subsequent case,²³ where relatives of victims of the genocide of Srebrenica brought domestic claims against the Netherlands, arguing the State was responsible for the death of individuals which had been forcefully removed from a compound where the Dutch contingent to UNPROFOR was located and where victims had sought refuge. The operation was formally under the control of the UN, however the Court found that the act of Dutch troops evicting individuals was within the control of the Netherlands. Indeed, the State had factually resumed control over its troops at the time of the conduct, and therefore actually had control over it.²⁴ Another example of factual control by the State can be found in the practice of UNOSOM II, where several States maintained direct control over their contingents despite having delegated operational control to the UN.²⁵

Responsibility in NATO-led Operations', forthcoming in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016).

²² Netherlands, Court of Appeal in the Hague, *Hasan Nuhanovic v the Netherlands* (5 July 2011), 200.020.174/01; LJN BR5388; ECLI:NL:GHSGR:2011:BR5388; Netherlands, District Court of the Hague (Civil Law Section), *H N v the Netherlands* (10 September 2008), LJN: BF0181; 265615/HA ZA 06-1671; ILDC 1092 (NL 2008); Netherlands, Court of Appeal in the Hague, *Mehida Mustafic-Mujic, Damir Mustafic, Alma Mustafic V the Netherlands* (5 July 2011), 200.020.173/01; LJN BR5386; ECLI:NL:GHSGR:2011:BR5386; Netherlands, District Court of the Hague (Civil Law Section), *M M-M, D M and A M v the Netherlands* (10 September 2008), LJN: BF0182; 265618/HA ZA 06-1672; Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*; Netherlands, Supreme Court, *Mustafic* (2013), *op cit*.

²³ Netherlands, District Court of The Hague, *Ten claimants and Mothers of Srebrenica Association v the Netherlands and the UN*, (2014), *op cit*.

²⁴ Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*, para 3.12.2: 'the Dutch government in The Hague had control over Dutchbat and also actually exercised this in practice'.

²⁵ ARIO com, *op cit*, commentary to Article 7, para 8; UN, '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', *op cit*, para 244: 'Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations'.

b) Over the conduct alleged as wrongful

Second, what matters is control over the conduct alleged as wrongful, rather than control over the mission in general. This condition reinforces the requirement that control must be exercised in the concrete situation at hand. The control of the lead organization over the whole mission is not determinative for attribution, as control over a given conduct can be — formally and pursuant to command arrangements — exercised by another entity.

For instance, a State can transfer some operational control to the international organization leading the operation while retaining operational control over some specific missions. This occurred in the case of *Serdar Mohammed*, which concerned the attribution of the wrongful detention of an individual by British forces part of the NATO-led ISAF.²⁶ Although ISAF was in general under the operational control of NATO, detentions operations by the UK were, pursuant to formal arrangements, carried out under the direct control of the UK and not NATO.²⁷ Therefore, the UK had effective control over the specific conduct.

This requirement of specificity does not mean that every claim of responsibility must always be broken down in series of indivisible acts. Rather, the scope of the conduct to be attributed depends on the scope of the primary rule alleged as breached within a series of events.²⁸ For instance in situations where international forces fail to protect civilians from abuses by armed groups, a number of claims can be envisaged. The general claim that troops failed to prevent genocide requires assessing effective control over that general failure, while the claim that a specific contingent forcibly evicted civilians in danger demands to demonstrate effective control over the specific conduct of evicting.

c) Taking account of the particular circumstances and factual context

Finally, effective control must be assessed by taking full account of the particular circumstances and factual context. In the context of military operations, this requirement is two-fold. First, it indicates that military aspects must to a certain extent be engaged with in order to apply the test of effective control. Accordingly, it is necessary to understand how control over the troops is shared and exercised in each operation, and

²⁶ UK, High Court of Justice, *Serdar Mohammed v Ministry of Defence*, (2014), *op cit*.

²⁷ *Ibid*, para 180.

²⁸ ARS com, *op cit*, commentary to Article 1, para 1.

subtleties in the command structure, such as NATO's procedures for sensitive targets, should be taken into account.²⁹

Besides, the factual context in which a harmful conduct occurred must be taken into account. Harmful conduct occurs in a variety of factual scenarios each involving particularities.³⁰ It can occur during combat activities or consist in individual misconduct, be isolated or recurrent. Harmful conduct can be the implementation of the order of a UN Commander, or be the result of unclear instructions or poor training. These circumstances should be taken into account in assessing where effective control lies in relation to a given conduct.³¹

1.1.2. Applicability of the test in operations led by an international organization

It has been demonstrated in the literature that, because troops operating under international command are formally under the authority of both an international organization and their national State, their conduct is attributed on the basis of effective control (§1.1.2.a). Since the incorporation of the test in Article 7 ARIO, a number of courts have recognized its applicability in peace operations (§1.1.2.b), while international organizations have more or less reluctantly agreed to its relevance (§§1.1.2.c).

a) Rationale for applicability: shared control over partially delegated military organs

In scholarship, it is relatively broadly accepted that effective control is the applicable test to attribute the acts of soldiers operating under the aegis of an international organization.³² The rationale behind the

²⁹ A Pellet, 'L'Imputabilité d'Éventuels Actes Illicites: Responsabilité de L'OTAN ou des Etats Membres' (2002), *op cit*; T Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?' (2002), *op cit*.

³⁰ See *supra*, Chap 1 §2.

³¹ See *infra*, Chap 2 §2.2.

³² Notably: ARIO com, *op cit*, commentary to Article 7, para 8 and accompanying references; International Law Association, 'Accountability of International Organisations' (August 2004) Report of the Seventy-First Conference, held in Berlin, 71 ILA Reports of Conferences 164–241, at 200; CA Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision' (2010), *op cit*, at 524; 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 140; ÖF Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the "Effective Control"

application of this test to international forces is that, since command and control over military organs is necessarily shared between the international organization and the national State,³³ formal relationships of authority are not determinative to attribute a given conduct.³⁴ The test of effective control is required to determine which of the subject had control over a given conduct. Amongst the first authors to have analysed attribution in the context of peace operations, de Visscher expressed the

Standard' (2014), *op cit*, 7; P Klein, 'Responsabilité pour les Faits Commis dans le Cadre des Opérations de Paix et Étendue du Pouvoir de Contrôle de la Cour Européenne des Droits de L'Homme: Quelques Considérations Critiques sur L'Arrêt *Behrami et Saramati*' (2007), *op cit*, at 52; B Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' (2010), *op cit*, at 520; KM Larsen, 'Neither Effective Control nor Ultimate Authority and Control: Attribution of Conduct in AL-Jedda' (2011), *op cit*, at 350; C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009), *op cit*, at 348; SR Luder, 'Responsibility of States and International Organisations in Respect to United Nations Peace-Keeping Missions' (2008), *op cit*, at 88; F Messineo, 'Things Could Only Get Better: *Al-Jedda* Beyond *Behrami*' (2011), *op cit*, at 339; M Milanovic and T Papic, 'As Bad as It Gets: The European Court of Human Rights' *Behrami* and *Saramati* Decision and General International Law' (2009), *op cit*, at 282; C Ryngaert, 'Apportioning Responsibility Between the UN and Member States in UN Peace-Support Operations: An Inquiry Into the Application of the 'Effective Control' Standard After *Behrami*' (2012), *op cit*, at 152; A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008), *op cit*, at 164; K Schmalenbach, 'Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations' (2005) 10 *International Peacekeeping: The Yearbook of International Peace Operations* (Brill) 33, at 37; J-M Sorel, 'La Responsabilité des Nations Unies dans les Opérations de Maintien de la Paix' (2001), *op cit*, at 129; A Thibault, 'La Responsabilité de L'OTAN dans les Conflits Armés' (2014), *op cit*, at 238; N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 249; 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; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 126. Contra: D Sarooshi, *The United Nations and the Development of Collective Security* (1999), *op cit*, at 163: 'The more important enquiry is who exercises overall authority and control over the forces'.

³³ See *supra*, Chap 1 §1.2.

³⁴ 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; C Ryngaert, 'Apportioning Responsibility Between the UN and Member States in UN Peace-Support Operations: An Inquiry Into the Application of the 'Effective Control' Standard After *Behrami*' (2012), *op cit*, at 153; K Schmalenbach, 'Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations' (2005), *op cit*, at 35; A Thibault, 'La Responsabilité de L'OTAN dans les Conflits Armés' (2014), *op cit*, at 235.

view that, because peacekeepers were not fully integrated international forces but were placed at the disposal of the UN while the States retained some control, effective control (*'la maîtrise effective'*) over contingents was relevant to determine responsibility.³⁵ Similarly, Amrallah considered that the 'real'³⁶ and 'actual'³⁷ control exercised over a force could be used to determine responsibility for the conduct of peacekeepers.

The key factor is that participating States transfer some elements of authority over their military organs (typically, operational control) while always retaining organic disciplinary authority, so that 'the umbilical cord between those troops and the state is not fully cut'.³⁸ It is because elements of authority over contributed troops are distributed amongst several entities that a factual and concrete approach to attribution is better suited to assess which entity was in control. Based on these considerations, the conduct of military organs put at the disposal of an organization is attributed on the basis of the control concretely exercised over a specific conduct, as expressed in the notion of effective control.

The ILC similarly justifies Article 7 ARIO, which as a matter of fact was based on peacekeeping practice and explicitly tailored by the ILC for attribution in military operations led by an international organization.³⁹ It explained that peacekeepers are put at the disposal of another entity by the transfer of operational command, but can never be 'fully seconded',⁴⁰ as it is simply impossible for a State to delegate its inherent organic

³⁵ 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 136–137: '[E]n fait, sinon en droit, l'effectivité de la soumission des contingents nationaux à l'autorité de l'Organisation est loin d'être parfaite. [...] Aussi longtemps que les forces de l'O.N.U. seront formées de contingents « nationaux », placés « volontairement » à la disposition du Secrétaire général par des États souverains et ne constitueront pas une véritable force supranationale, il faudra admettre la possibilité de mettre en cause la responsabilité propre de ces États concurremment avec celle de l'Organisation. [...] [L]es États membres qui placent des contingents à la disposition du Secrétaire général sont des sujets de l'ordre juridique international et ce fait doit être pris en considération dans la solution du problème qui nous occupe ici, dans la mesure précisément où ces États ont conservé une certaine maîtrise de leurs contingents. Pour éclaircir ce problème du concours des responsabilités, il conviendrait, au préalable, que l'Assemblée générale règle avec précision la question de la maîtrise effective des contingents'.

³⁶ B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976), *op cit*, at 65.

³⁷ *Ibid*, at 66.

³⁸ M Zwanenburg, 'Shared Responsibility in NATO-led Operations', *op cit*.

³⁹ ARIO com, *op cit*, commentary to Article 7, para 1.

⁴⁰ *Ibid*, commentary to Article 7, para 1.

command over its armed forces.⁴¹ Since both entities are simultaneously vested with different forms of authority over military organs, ‘the seconded organ or agent still acts to a certain extent as organ of the seconding State’,⁴² and therefore attribution requires to determine ‘who has effective control over the conduct in question’.⁴³

b) Judicial practice

A number of claims alleging the responsibility of States and/or international organizations involved in military operations have been brought before international and domestic courts. Many cases never pass the admissibility stage, yet courts occasionally discuss matters of attribution when assessing their jurisdiction in respect of States or international organizations. In a number of cases, international and domestic courts have recognised the applicability of the test of effective control.

The case law of the ECtHR on responsibility for the conduct of international forces has been equivocal and remains partially unsettled. Besides, issues of attribution must carefully be distinguished from questions of extraterritorial applicability of the ECHR. Effective control for the purpose of assessing jurisdiction under Article 1 ECHR is a notion different in nature and function from the notion of effective control for the purpose of attribution here discussed.⁴⁴

In *Behrami and Saramati*, victims had brought claims against several States, arguing that the conduct of UN-led UNMIK and NATO-led KFOR was attributed to contributing States.⁴⁵ The Court expressly referred to the ARIO and held that the test of ‘effective control’ was applicable.⁴⁶ Yet, questionably, it found the conduct of KFOR to be attributed to UN on the ground that it ‘retained ultimate authority and control’.⁴⁷ The ARIO commentaries later commented that ‘when

⁴¹ See *supra*, Chap 1 §1.1.2.d).

⁴² ARIO com, *op cit*, commentary to Article 7, para 1.

⁴³ *Ibid*, commentary to Article 7, para 8.

⁴⁴ ECtHR, *Jaloud v the Netherlands*, (2014), *op cit*, para 154: ‘the test for establishing the existence of “jurisdiction” under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law’; M Milanovic, *Al-Skeini and Al-Jedda in Strasbourg* (2012), *op cit*, at 122.

⁴⁵ ECtHR, *Behrami and Saramati* (2007), *op cit*, para 77.

⁴⁶ *Ibid*, paras 30–31.

⁴⁷ *Ibid*, paras 140–141.

applying the criterion of effective control, “operational” control would seem more significant than “ultimate” control, since the latter hardly implies a role in the act in question,⁴⁸ In scholarship, the ‘ultimate authority and control’ test has been heavily criticized, for it could have led to deem the UN directly responsible for every wrongful act committed during an operation it either led or authorized, even for instance in Iraq.⁴⁹ More fundamentally, broad-ranging tests do not give proper consideration to the distribution of control, which determines on behalf of whom a soldier acted, and thereby undermines the principle according to which an entity is only responsible for its own conduct.⁵⁰ When the UK argued in *Al-Jedda* that the conduct of British forces in Iraq was attributable to the UN pursuant to *Behrami*, the Court rejected the argument, as the UN ‘did not [...] assume any degree of control’.⁵¹ Although its case law is convoluted, the ECtHR seems to have accepted

⁴⁸ ARIO com, *op cit*, commentary to Article 7, para 10.

⁴⁹ CA Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision’ (2010), *op cit*; P Bodeau-Livinec et al, ‘Note on *Behrami* and *Saramati*’ (2008) 102 *American Journal of International Law* 323; P Klein, ‘Responsabilité pour les Faits Commis dans le Cadre des Opérations de Paix et Étendue du Pouvoir de Contrôle de la Cour Européenne des Droits de L’Homme: Quelques Considérations Critiques sur L’Arrêt *Behrami* et *Saramati*’ (2007) 53 *Annuaire Français de Droit International* 43; KM Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’ (2008), *op cit*; F Messineo, ‘Things Could Only Get Better: *Al-Jedda* Beyond *Behrami*’ (2011), *op cit*, at 323; M Milanovic and T Papic, ‘As Bad as It Gets: The European Court of Human Right’s *Behrami* and *Saramati* Decision and General International Law’ (2009), *op cit*; A Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’ (2008), *op cit*; S Starmer, ‘Responsibility for Troops Abroad: UN-Mandated Forces and Issues of Human Rights Accountability’ in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008), 264–283, at 270; N Tsagourias, ‘The Responsibility of International Organisations for Military Missions’ (2011), *op cit*, at 251.

⁵⁰ See a similar reasoning, concerning the attribution of the acts of non-State actors: 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*, at 406: ‘It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. [...] In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility’.

⁵¹ ECtHR, *Al-Jedda v United Kingdom*, (2011), *op cit*, para 80. See also: UK, House of Lords, *Al-Jedda v Secretary of State* (12 December 2007), [2007] UKHL 58, para 23: ‘It cannot realistically be said that US and UK forces were under the effective command and control of the UN’.

that the test effective control as interpreted by the ILC is applicable to the attribution of the conduct of military organs placed at the disposal of an international organization.⁵²

At the domestic level, not all courts venture in the complexities of the question of attribution in international law when faced with situations that could give rise to international responsibility, and most adjudicate claims under domestic torts law. Yet, such decisions can constitute implicit findings of international responsibility,⁵³ and help understanding the functioning of rules of responsibility when applied to concrete scenarios. Further, domestic courts have increasingly engaged in discussions of international responsibility principles.

In the Netherlands, several cases have been brought claiming responsibility in relation to the genocide of Srebrenica. In *Mothers of Srebrenica*, the Supreme Court of the Netherlands rejected the claim brought against the UN on the ground of the immunity from jurisdiction of the UN, and did not directly address whether the alleged failure of UNPROFOR to prevent the genocide was attributable to the UN or to the Dutch State whose contingent was stationed in the area.⁵⁴ In the cases of *Nuhanovic* and *Mustafic*, the Supreme Court of the Netherlands, which significantly relied on the ILC articles and commentaries, found the conduct attributable to the contributing State on the basis of effective control.

In Belgium, a Court addressed a case with facts similar to the *Nuhanovic* case. Belgian soldiers of the UNAMIR were stationed in a building where civilians had taken refuge. The contingent was evacuated following a decision of the Belgium government and left the refugees abandoned. The Belgian Court applied domestic law and did not rely expressly on the ILC articles, yet it attributed the conduct of Belgian forces to Belgium, on the basis of the control of the State over the evacuation.⁵⁵

⁵² ECtHR, *Jaloud v the Netherlands*, (2014), *op cit*, para 154; F Messineo, 'Things Could Only Get Better: *Al-Jedda* Beyond *Behrami*' (2011), *op cit*, at 337.

⁵³ A Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101(4) *American Journal of International Law* 760, at 768.

⁵⁴ Netherlands, Supreme Court (First Division), *Mothers of Srebrenica Association and ors v the Netherlands and the UN* (12 April 2012), ECLI:NL:HR:2012:BW1999.

⁵⁵ Belgium, Court of First Instance of Brussels, *ETO case* (2010), *op cit*, par 38: 'la décision d'évacuer l'ETO est une décision prise sous l'égide de la Belgique et non de la MINUAR'.

In some countries, courts often reject on admissibility grounds claims of responsibility for acts during military operations brought against their State.⁵⁶

c) Position of international organizations

– United Nations

Since the first peacekeeping operations, the UN has stated that, in principle, it bears responsibility for wrongful acts of UN peacekeepers,⁵⁷ but the precise basis and extent of its liability is relatively unclear.⁵⁸ While a large number of scholars argue that Article 7 ARIO applies to the attribution of the conduct of UN peacekeepers, the UN maintains that the basis of its responsibility for the conduct of peacekeepers is that troops over which operational command is delegated to the UN qualify as subsidiary organs of the organization, whose acts are attributed to it under Article 6 ARIO.⁵⁹

⁵⁶ For instance, in the US: AS Deeks, 'Litigating How We Fight' (2011), *op cit*; or in Italy: M Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Markovic Case' (2003) 1 *Journal of International Criminal Justice* 406.

⁵⁷ UN Secretary-General, 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters' (20 September 1996) UN Doc A/51/389, para 7: 'In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties'; UN Secretary-General, 'Letter Dated 6 August 1965 From the Secretary-General Addressed to the Acting Permanent Representative of the USSR' (1965) UN Doc S/6597, at 1: 'It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable'.

⁵⁸ J-M Sorel, 'La Responsabilité des Nations Unies dans les Opérations de Maintien de la Paix' (2001), *op cit*, at 128; J-M Sorel, 'The Concept of 'Soft Responsibility'?' in J Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press, 2010), 165–171, at 171: 'the UN has constructed, in a pragmatic way, a self-assessment of harms caused in an original and uncategorized system'; 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 135.

⁵⁹ UN, 'Interoffice Memorandum to the Director of the Codification Division, Office of Legal Affairs, and Secretary of the International Law Commission Regarding the Topic Responsibility of International Organizations' (2004) *United Nations Juridical Yearbook*, 352–355, para 7: 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization'; ILC, 'Responsibility of International Organizations, Comments and Observations Received From the United Nations', *op cit*, comments on Draft Article 6, para 3: 'It has been the long-established position of the

It appears that the UN maintains this position for two reasons. First, in the aftermath of *Behrami*,⁶⁰ the UN was keen to insist that it does not bear responsibility for the conduct of forces in authorized missions, which are not under the operational command of the UN. While the conclusion that the conduct of troops in authorized operations is not attributable to the UN is in line with prevailing views in the scholarship, the reliance of the UN on the qualification of soldiers as UN organs is misleading. Rather than the organic status of peacekeepers, the decisive criterion for the UN seems to lie in the *formal transfer of operational command*.⁶¹ Indeed, in UN-led operations, troops qualify as UN organs owing to the fact that contributing States transferred operational command to the UN. It is because ‘responsibility is entailed where command and control is vested’⁶² that the UN bears responsibility for the conduct of forces under its operational command but not for conduct of authorized troops under regional or national command. The idea that attribution depends on control thus underlies the position of the UN. Second, the UN does not formally admit that forces in the field can be outside of its effective control.⁶³ It prefers to adopt a clear-cut standard ‘vis-à-vis third parties’⁶⁴ and therefore refers to the organic status of troops, although it is common knowledge that some peacekeeping missions were in reality ‘totally outside the command and control’⁶⁵ of the UN. For instance, in 1993 in Somalia, the ‘Force Commander of

United Nations, however, that forces placed at the disposal of the United Nations are “transformed” into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ’ (footnote omitted).

⁶⁰ ECtHR, *Behrami and Saramati* (2007), *op cit*.

⁶¹ UN, ‘Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters’, *op cit*, para 18: ‘international responsibility for the conduct of the troops lies where operational command and control is vested’; ILC, ‘Responsibility of International Organizations, Comments and Observations Received From the United Nations’, *op cit*, comments on Draft Article 5, para 3: In determining the attributability of an act or an omission of members of a military operation to the United Nations, the Organization has been guided by the principle of “command and control” over the operation or the action in question..

⁶² ILC, ‘Responsibility of International Organizations, Comments and Observations Received From the United Nations’, *op cit*, comments on Draft Article 5, para 8.

⁶³ *Ibid*, comments on Draft Article 6, para 6.

⁶⁴ *Ibid*, comments on Draft Article 6, para 6.

⁶⁵ UN, ‘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’, *op cit*, para 244.

UNOSOM II was not in effective control of several national contingents'.⁶⁶ The UN also considers that the organic control formally retained by States has no bearing on the occurrence of misconduct, and claim to exercise 'exclusive command and control'⁶⁷ over the troops. It is however not possible for the UN to exercise such exclusive control since States retain organic command over their contingents and sometimes interfere in the chain-of-command.⁶⁸

On some occasions, the UN admitted the relevance of the test of effective control. In situations where a UN force operates in parallel with another mission under separate command,⁶⁹ the UN falls back to the criterion of effective control. For instance, in an operation conducted jointly by a UN mission and a QRF operating in support of the UN, the organization referred to the 'degree of effective control exercised by either party'.⁷⁰ Also when another organization is progressively taking over a UN mission, the UN expressed the view that the 'international responsibility of the United Nations [was] limited to the extent of its effective operational control.'⁷¹ In any complex situation comporting some special circumstances, the test of effective control is thus recognised as applicable by the United Nations.

It has been questioned⁷² whether rules found in agreements between contributing States and the UN constitute a *lex specialis* derogating from the general rules of attribution of the ARIIO pursuant to Article 64 ARIIO.⁷³ For instance, in its contribution agreements with States, the UN

⁶⁶ *Ibid*, para 243.

⁶⁷ UN, 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters', *op cit*, para 17.

⁶⁸ See *supra*, Chap 1 §1.2.1.

⁶⁹ *Ibid*, Chap 1 §1.2.5.a).

⁷⁰ UN, 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters', *op cit*, para 18.

⁷¹ UN Secretary-General, 'Report on the United Nations Interim Administration Mission in Kosovo' (12 June 2008) UN Doc S/2008/354, para 16.

⁷² SHARES, 'Responsibility in Multinational Military Operations: A Review of Recent Practice' (2011) Report from the Expert Seminar held in Amsterdam, 16 December 2010, at 12.

⁷³ ARIIO, *op cit*, Article 64: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by

agrees that it is 'responsible for dealing with any claims by third parties', but that the contributing State is 'liable' in case the damage 'arose from gross negligence or wilful misconduct' of a member of its contingent.⁷⁴ It appears that this provision seemingly addressing issues of responsibility has a limited impact on attribution. As pointed out by the ILC, it constitutes a provision on reparation rather than attribution, and it has no effect on third parties, which can always bring a claim against the UN or a contributing State under the general rules of responsibility.⁷⁵ Indeed, this provision is only binding bilaterally the UN and each contributing States with whom it signed a MoU for the purpose of a given operation. It cannot be imposed to third parties who are not party to the MoU, such as the host State.

– NATO

In its comments to the ILC, NATO did not express any specific view on rules of attribution of conduct in the context of military operations and notably on Article 7 ARIO. However, it expressed a 'general concern'⁷⁶ that the structure of the Articles might not be adapted to NATO given the specific position of its member States, which 'retain virtually all decision-making authority and participate on a daily basis in the governance and functioning of the organization.'⁷⁷ NATO agrees that it has international legal personality,⁷⁸ but does not consider this to be a decisive factor for attributing conduct that is decided by States on the basis of consensus. In the view of NATO, '[e]ach member State retains full responsibility for its decisions'⁷⁹ because these decisions express the

special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'.

⁷⁴ UN Model MoU, *op cit*, Article 9.

⁷⁵ ARIO com, *op cit*, commentary to Article 7, para 3: 'The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules'.

⁷⁶ ILC, 'Responsibility of International Organizations, Comments and Observations Received From International Organizations', *op cit*, General comments, North Atlantic Treaty Organization, para 1.

⁷⁷ *Ibid*, General comments, North Atlantic Treaty Organization, para 1.

⁷⁸ *Ibid*, General comments, North Atlantic Treaty Organization, para 2.

⁷⁹ *Ibid*, General comments, North Atlantic Treaty Organization, para 4.

‘will of the sovereign member States’.⁸⁰ In other words, NATO considers that conduct in the context of the organization should be attributed to member States on the basis of their participation in the decision-making process.⁸¹ In this understanding, decisions are not attributed to NATO because member States are considered to act as sovereign States rather than as NATO’s agents.

These arguments have been put forward in judicial proceedings tentatively brought against NATO’s member States in relation to the 1999 bombing campaign in FRY (Operation Allied Force). In the *Legality of the Use of Force* cases, the FRY brought parallel claims before the ICJ against ten NATO member States, arguing that the allegedly wrongful bombings were conducted ‘as a joint enterprise’ and therefore ‘attributable jointly and severally to the member States’.⁸² Some states responded that ‘the actions of the NATO command structure [were] not imputable to individual member States’.⁸³ In *Bankovic*, victims likewise submitted to the ECtHR that, due to the decision-making procedure necessitating approval of each State, NATO bombings were attributed to each of the seventeen respondent State,⁸⁴ while States maintained that the bombing was attributable to NATO.⁸⁵ Both affairs were dismissed on admissibility grounds. Authors supporting the view that conduct within NATO should be attributed to the State insist on the impact of the consensus procedures,⁸⁶ but also on the specific nature of NATO, which considers itself first and foremost to be a military alliance before being an international organization.⁸⁷

⁸⁰ *Ibid*, General comments, North Atlantic Treaty Organization, para 4; NATO, ‘NATO Handbook’, *op cit*, at 33.

⁸¹ M Zwanenburg, ‘Shared Responsibility in NATO-led Operations’, *op cit*.

⁸² ICJ, *Public Sitting Held on 12 May 1999 in the Cases Concerning Legality of Use of Force, Verbatim Record* (1999), CR 1999/25, at 16.

⁸³ *Ibid*, at 15.

⁸⁴ ECtHR, *Bankovic et al v Belgium et al*, (2001), *op cit*, para 30; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 121.

⁸⁵ ECtHR, *Bankovic et al v Belgium et al*, (2001), *op cit*, para 32.

⁸⁶ T Stein, ‘The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?’ (2002), *op cit*, at 191: ‘all NATO Member States are responsible for the decision to use force against Yugoslavia; it was a unanimous decision of all member States’.

⁸⁷ *Ibid*, at 192: ‘NATO is not an organization that has been created “to do business” with third States [...]. NATO is not the International Tin Council’.

– European Union

Even more than NATO, the EU has long advocated that the law of international responsibility needed to ‘allow sufficient room for the specificities of the European Union’.⁸⁸ On account of the transfer of some competences to the organization by member States, and of the fact that the EU is party to a number of treaties, the EU insists that there are ‘significant differences’⁸⁹ between regional economic integration organizations such as itself and other international organizations.⁹⁰

As far as attribution of conduct in military operations is concerned, the EU expressed doubts as to whether Article 7 ARIO expressed a customary rule, considering that ‘this remains a controversial area of international law’⁹¹ in which unequivocal practice was lacking.⁹² The organization did not explicitly put forward an alternative view, but expressed the opinion that Article 7 ARIO was aimed at preventing international organizations from escaping their responsibility when acting through the organs of its member States. Stressing that EU member States can bring internal claims against the EU, the organization seems to imply that the conduct of soldiers should be attributed to their national State. This statement can be related to the position of the EU in other fields, whereby it insists that the conduct of State organs through which the EU acts, such as custom officers, remains attributable to member States. A provision to that effect was inserted in the Draft agreement on the accession of the EU to the ECHR.⁹³ The reason why the EU claims that member States remain

⁸⁸ ILC, ‘Responsibility of International Organizations, Comments and Observations Received From International Organizations’, *op cit*, General comments, European Commission, para 1.

⁸⁹ *Ibid*, General comments, European Commission, para 1.

⁹⁰ See generally: P Gasparon, ‘The Transposition of the Principle of Member State Liability Into the Context of External Relations’ (1999) 10(3) *European Journal of International Law* 605; E Paasivirta and PJ Kuijper, ‘Does One Size Fit All?: The European Community and Responsibility of International Organizations’ (2005) 36 *Netherlands Yearbook of International Law* 169; S Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’ in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005).

⁹¹ ILC, ‘Responsibility of International Organizations, Comments and Observations Received From International Organizations’, *op cit*, comments on Draft Article 6, European Commission, para 2.

⁹² *Ibid*.

⁹³ Council of Europe, ‘Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’ (10

responsible for the conduct of State organs implementing EU decisions is probably that, in other fields than military operations, it has been argued that the normative control of the EU when exercising exclusive competences constitutes a ground for attribution to the EU of wrongful conduct when State organs implement EU law.⁹⁴

Within the EU, there does not seem to be an agreement on the question whether the conduct of soldiers in EU military operations should be attributed to the States or to the organization.⁹⁵

1.1.3. Multiple attribution under the effective control test

Given the numerous situations involving multiple parties studied in this thesis, it is worth questioning whether multiple attribution can arise under the test of effective control. In principle, multiple attribution of the same internationally wrongful act is possible under the ILC scheme of independent and non-exclusive determination of responsibility. The principle of independent responsibility prescribes that the responsibility of a State is to be determined individually, according to its own acts and obligations.⁹⁶ The circumstances of a plurality of States involved in a conduct does not change the principle, and in ‘cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility’.⁹⁷ For each claim, the question is whether the alleged conduct is attributed to the respondent under one of the ground for attribution, irrespective of other

June 2003) 47+1(2013)008rev2, Appendix 1, Article 1(4): ‘For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union’.

⁹⁴ S Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’ (2005), *op cit*, at 414.

⁹⁵ E Cannizzaro, ‘Postscript to Chapter 12’ in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing, 2013), 359–360, at 359: In the negotiations of the Draft agreement on the accession of the EU to the ECHR, a ‘provision, providing that conduct performed in order to implement EU acts in the field of the Common Foreign and Security Policy (CFSP) should also be attributed to Member States, was not agreed on (see doc 47+1(2013)001, of 14 January 2013)’.

⁹⁶ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 1; A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013), *op cit*, at 381.

⁹⁷ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 5.

circumstances surrounding the conduct.⁹⁸ In this framework however, nothing prevents the same conduct to be simultaneously attributed to another entity. Because attribution operates individually, parallel attribution of a given conduct can arise if grounds for attribution are found for each entity. Accordingly, the possibility of attributing the same wrongful act to more than one entity in the ILC framework has been recognized by several authors.⁹⁹

That being said, given the requirements of the test of effective control, some authors have questioned whether actual control over the same specific conduct can possibly be exercised *at the same time* by two entities.¹⁰⁰ Notably, Messineo argued that the criterion of effective control was precisely devised ‘to avoid dual attribution’,¹⁰¹ Besides, the ILC commentaries suggest that attribution under Article 7 ARIO operates as an alternative, whereby the conduct is attributed *either* to the organization *or* to the State.¹⁰² Nonetheless, the factual scenarios to which effective control apply in the military context can be very complex, and the hypothesis that several entities could simultaneously exercise effective control over the same conduct has recently gained consideration. Special Rapporteur Gaja had suggested in relation to the attribution of the conduct of organs placed at the disposal of an

⁹⁸ T Dannenbaum, ‘Killings at Srebrenica, Effective Control and the Power to Prevent Unlawful Conduct’ (2012), *op cit*, at 725: ‘the fact that the conduct may be attributable to one entity is irrelevant to its potential attribution to the other’.

⁹⁹ Notably: S Besson, ‘La Pluralité d’États Responsables: Vers une Solidarité Internationale?’ (2007) 17 *Revue Suisse de Droit International et de Droit Européen* 13, at 21; J Crawford, ‘Responsibility in Cases of Joint or Collective Conduct’ in *State Responsibility: The General Part* (Cambridge University Press, 2013); C Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’ in J Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press, 2010), at 381; KM Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’ (2008), *op cit*, at 517; A Orakhelashvili, ‘Division of Reparation Between Responsible Entities’ in J Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press, 2010), 647–665, at 654.

¹⁰⁰ ÖF Direk, ‘Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the “Effective Control” Standard’ (2014), *op cit*, 14; C Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009), *op cit*, at 363; F Messineo, ‘Attribution of Conduct’ (2014), *op cit*, at 91; A Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’ (2011) 9(5) *Journal of International Criminal Justice* 1143, at 1153.

¹⁰¹ F Messineo, ‘Attribution of Conduct’ (2014), *op cit*, at 91.

¹⁰² ARIO com, *op cit*, commentary to Article 7, para 4: ‘attribution of conduct either to the contributing State or organization or to the receiving organization’.

organization that ‘what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but *the extent of effective control*’,¹⁰³ and added that this criterion would ‘leave the way open for dual attribution of certain conducts.’¹⁰⁴ In *Nuhanovic* and *Mustafic*, Dutch courts also pointed out that the conduct of troops put at the disposal of an international organization could be possibly attributed to both the organization and the contributing State.¹⁰⁵

By analysing the drafting history of Article 7, it can be argued that multiple attribution can occur when effective control is applied in the context of collaborative military operations. The test of effective control formulated in the ARIO was inspired from the test used to attribute the conduct of organs placed at the disposal of another State, as articulated in Article 6 ARS.¹⁰⁶ When drafting the ARS provision, one the main concern of the ILC was to ensure that the conduct of lent organs is only attributed to the receiving State when the transfer is genuine, that is when organs are not only formally transferred but also ‘actually under the authority of the State at whose disposal they have been placed’.¹⁰⁷ Accordingly, the commentary to Article 6 ARS insist that the lent organs must be ‘effectively put at the disposal’¹⁰⁸ of the receiving entity, and that the control of the receiving State must be ‘exclusive’.¹⁰⁹ This could suggest that dual attribution cannot arise under this provision, and that the conduct of a lent organ is attributed either to the receiving entity alone if it has exclusive control over the organ, or to the lending entity alone in any other situation.

¹⁰³ ILC, ‘Second Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur’ (2004) UN Doc A/CN.4/541, para 48 (emphasis added).

¹⁰⁴ *Ibid.*

¹⁰⁵ Netherlands, Court of Appeal in the Hague, *Hasan Nuhanovic v the Netherlands*, (2011), *op cit*, para 5.9; Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*, para 3.9.4; Netherlands, District Court of The Hague, *Ten claimants and Mothers of Srebrenica Association v the Netherlands and the UN*, (2014), *op cit*, para 4.45.

¹⁰⁶ ARIO com, *op cit*, commentary to Article 7, para 4: Article 6 ARS ‘takes a similar approach [than Article 7 ARIO], although it is differently worded’; F Messineo, ‘Attribution of Conduct’ (2014), *op cit*, at 90.

¹⁰⁷ ILC, ‘Third Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur, the Internationally Wrongful Act of the State, Source of International Responsibility’ (1971) UN Doc A/CN.4/246 and Add.1-3; Yearbook of the International Law Commission 1971, vol II(1) (‘Third Ago Report’), at 274 (Draft Article 9).

¹⁰⁸ ARS com, *op cit*, commentary to Article 6, para 1.

¹⁰⁹ *Ibid.*, commentary to Article 6, para 2.

However, the requirement of exclusivity was also originally introduced to ensure that States were not merely pretending to transfer organs while still maintaining control over them.¹¹⁰ Nowadays, the binary scenario according to which control over an organ could not be shared sits uncomfortably with the complex scenarios analysed in this thesis. Indeed, in collaborative military operations, a transfer of authority can be perfectly genuine even if the national State retains some elements of control. It is precisely the characteristic of collaborative military operations that control over soldiers is partially but effectively transferred for the purpose of conducting a mission. Accordingly, in the context of military operations, effective control cannot be equated to exclusive control.

Further, the requirement of exclusivity can be interpreted differently in relation to dual attribution. The ILC Commentaries state that, when a lent organ acts 'exclusively for the purposes of'¹¹¹ the receiving State, 'its conduct is attributed to the latter State alone'.¹¹² Interpreted a contrario, it can mean that the conduct of an organ over which control is shared by both the lending and the receiving State can be attributed to these two States.¹¹³ This view was expressed by Special Rapporteur Crawford, who considered that dual attribution under Article 6 ARS was possible if the lent organ was not acting exclusively under the control of the receiving State.¹¹⁴ Accordingly, several authors have argued that the application of the test of effective control to military operations could lead to multiple attribution.¹¹⁵ In these interpretations, control over a conduct can be

¹¹⁰ F Messineo, 'Attribution of Conduct' (2014), *op cit*, at 284–85; Third Ago Report, *op cit*, at 268, para 202.

¹¹¹ ARS com, *op cit*, commentary to Article 6, para 1.

¹¹² *Ibid*, commentary to Article 6, para 1.

¹¹³ The commentary explicitly excludes from the purview of Article 6 organs acting for 'shared purposes', but only when lent organs 'retain their own autonomy and status' and cites diplomatic missions as an example (*Ibid*, commentary to Article 6, para 4.).

¹¹⁴ ILC, 'Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum' (2000) UN Doc A/CN.4/507/Add.2 ('Third Crawford Report, Add.'). para 267, point 1: 'Where the organ is under the control of the receiving State and acts in the exercise of that State's separate authority, the receiving State is responsible for its acts. The implication is that in any other circumstance the sending State (or possibly both States) will be responsible'. See also: I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Clarendon Press, 1983), at 191.

¹¹⁵ Notably: B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces' (1976), *op cit*, at 66; CA Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision' (2010), *op cit*, at 519; E Cannizzaro, 'Beyond the Either/OR: Dual

conceptualized in terms of degree for the purpose of attribution. When drafting the ARIO, Gaja proposed to attribute the conduct of lent organs on the basis of the extent of control exercised.¹¹⁶ Eagleton considered that ‘responsibility is measured by the actual degree of control’¹¹⁷ and explained that responsibility should depend on the ‘extent of control possessed’.¹¹⁸ Applying the same reasoning to the context of peacekeeping operations, Amrallah submitted that the degree of control exercised over the forces should be the criterion to determine responsibility amongst participating entities.¹¹⁹ In an often-quoted passage, the UN acknowledged that — at least in operations where the command structure is unclear — the ‘degree of effective control’ was an

Attribution to the European Union and to the Member State for Breach of the ECHR’ in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing, 2013), 295–312; C Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009), *op cit*, at 361; MC Lopez, ‘Towards Dual or Multiple Attribution: The Strasbourg Court and the Liability of Contracting Parties’ Troops Contributed to the United Nations’ (2014), *op cit*, at 215; O Spijkers, ‘The Netherlands’ and the United Nations’ Legal Responsibility for Srebrenica Before the Dutch Courts’ (2011), *op cit*, at 525; A Thibault, ‘La Responsabilité de L’OTAN dans les Conflits Armés’ (2014), *op cit*, at 238; N Tsagourias, ‘The Responsibility of International Organisations for Military Missions’ (2011), *op cit*, at 253; 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; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 103.

¹¹⁶ ILC, ‘Second Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur’, *op cit*, para 50.

¹¹⁷ C Eagleton, *International Organization and the Law of Responsibility* (1950), *op cit*, at 386: ‘The responsibility of a state in international law rests largely upon a territorial basis, but behind this territorial basis lies the broader concept of control. [...] Wherever such control is exercised, in or out of the territorial area, responsibility is measured by the actual degree of control. That degree of control, and in general legal capacity, varies with every state, with every legal person. A state, or other international legal person, may be held responsible only to the extent that it has rights and duties which it is free to exercise; and some have more than others. Since the extent of control possessed by the United Nations is much smaller than that of the average state, its range of possible responsibility would be smaller than that of a state. Its opportunity to do damage to others is less, and claims against it would appear less often’.

¹¹⁸ *Ibid.*

¹¹⁹ B Amrallah, ‘The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces’ (1976), *op cit*, at 66: ‘The responsibility of a state in international law is measured by the actual degree of control which it may exercise within or out of its territory. [...] The « amount of operational control or authority » which is exercised over the U.N. force can be a useful criterion to determine the responsibility of the various parties involved in the peacekeeping operation other than the U.N. such as the participating state and the host state’.

appropriate criterion for attribution.¹²⁰ Recently, authors have argued that attribution of the conduct of international forces ‘depends on the degree of effective control over the relevant conduct’.¹²¹

1.2. Grounds for attribution in coalition operations

In contrast to questions of attribution of conduct in military operations led by an international organization, grounds for attribution in coalitions are less established and much less discussed in scholarship. The scarce literature on the topic of attribution in coalitions under multinational command does not address the issue of attribution in much detail, and no clear views from States on their responsibility in coalitions under multinational command are available. In the context of coalitions, attribution in has alternatively been grounded in the transfer of soldiers to another State (§1.2.1), the status of common organ of a multinational Force Commander (§1.2.2), or the qualification of a conduct as a joint act (§1.2.3).

1.2.1. Control over the conduct of soldiers placed at the disposal of a lead State

In coalitions established under national unified command, participating States transfer operational command over their troops, not to an international organization, but to the State leading the operation.¹²² In legal terms, military organs are placed at the disposal of the leading State. Article 6 ARS addresses this situation and provides that ‘[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.’ This test operates in the same fashion as Article 7 ARIO.¹²³ The attribution of the acts of

¹²⁰ UN, ‘Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters’, *op cit*, para 18: ‘In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation’.

¹²¹ O Spijkers, ‘The Netherlands’ and the United Nations’ Legal Responsibility for Srebrenica Before the Dutch Courts’ (2011), *op cit*, at 525. See also M Milanovic and T Papić, ‘As Bad as It Gets: The European Court of Human Rights’ *Behrami* and *Saramati* Decision and General International Law’ (2009), *op cit*, at 282.

¹²² See *supra*, Chap 1 §1.2.4.

¹²³ ARIO com, *op cit*, commentary to Article 7, para 4.

military organs lent to another State in the context of a coalition under national command thus requires an analysis of the actual control exercised over a given conduct.

In practice, the principle that the lead State exercising operational control over a unified force under national command is responsible for the operational conduct of the troops is relatively accepted. For instance, as the lead State in both the 1950 operation in Korea, and UNITAF in Somalia, the US accepted to settle claims and provided compensation for damages caused by the forces.¹²⁴ This is line with how attribution operates in military operations led by an international organization.

1.2.2. Common organ status of a multinational Force Commander

In coalitions under multinational command, operational authority is vested in a body lacking international personality, such as a multinational Force Commander. Because it acts for the purpose and on behalf of several States forming a coalition, the prevailing view is that the head of a multinational coalition qualifies as a common organ of all coalition States.¹²⁵ It can be a newly set-up organ,¹²⁶ but more often the Force Commander is an existing State organ 'acting on behalf of other States as well as on its own behalf.'¹²⁷ Unlike in coalitions under national command where operational control is vested in a Force Commander acting on behalf of the leading State alone, States engaged in a coalition under multinational command pool their troops and the authority over

¹²⁴ ILC, 'Responsibility of International Organizations, Comments and Observations Received From the United Nations', *op cit*, comments on Draft Article 5, para 5; ILC, 'Second Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur', *op cit*, paras 32–33 and accompanying references.

¹²⁵ C Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008), 161–183, at 174–176; P d'Argent, *Les Réparations de Guerre en Droit International Public: La Responsabilité Internationale des Etats à L'épreuve de la Guerre* (Bruylant, LGDJ, 2002), at 529; H Kelsen, *Recent Trends in the Law of the United Nations: A Supplement to 'The Law of the United Nations'* (Stevens & Sons, 1951), at 940: 'the commander of the unified forces is the common organ of these Members'; S Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart, 2008), 185–230, at 203.

¹²⁶ Such as the Administering Authority set up by Australia, New Zealand and the United Kingdom in Nauru, see: ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections (26 June 1992), ICJ Reports 1992, 240 ('Nauru'), paras 45–47.

¹²⁷ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 3.

them together. For instance, the US Force Commander of the Allied Powers in Japan was considered as acting on behalf of each and every Allied Powers.¹²⁸ The Kommandatura established to administer Berlin was also a joint organ of the Allied Powers.¹²⁹ Administrative structures jointly set up by States, such as the Coalition Provisional Authority in Iraq, can also qualify as common organs.¹³⁰

A common organ qualifies as the organ of each of the States on behalf of which it acts, therefore its conduct is simultaneously attributed to each of these States.¹³¹ Indeed, under Article 4 ARS, ‘the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is.’¹³² In coalitions under unified multinational command, each participant ‘acts on the joint instructions’¹³³ of all coalition States through the Force Commander. Therefore, the conduct of soldiers attributed to each and every coalition State acting through the Commander. By analogy, the Force Commander of the UNAMID, who acts on behalf of the UN and the AU,¹³⁴ can be qualified a common organ of these two organizations, so that the conduct of UNAMID troops is attributed to both.

¹²⁸ US, United States Court of Claims, *Anglo-Chinese Shipping Company Ltd v United States*, (1955), *op cit*, 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’.

¹²⁹ European Commission of Human Rights, *Hess v United Kingdom* (28 May 1975), App no 6231/73, at 73–74: ‘The supreme authority over the prison was vested in the Allied Kommandatura. The executive authority consists of four governors acting by unanimous decisions’, and ‘the United Kingdom acts only as a partner in the joint responsibility which it shares with the three other Powers’.

¹³⁰ S Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’ (2008), *op cit*, at 198.

¹³¹ R Bernhardt (ed), *Encyclopedia of Public International Law - Instalment 10: States, Responsibility of States, International Law and Municipal Law* (Elsevier Science Publishers BV; published under the auspices of the Max Planck Institute for Comparative Public Law and International Law, 1987), at 358; J Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), at 340; C Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’ (2010), *op cit*, at 283.

¹³² ILC, ‘Report of the International Law Commission on the Work of its Thirtieth Session, 8 May to 28 July 1978’ (1978) UN GAOR 33rd Session Suppl no 10 (A/33/10), chap III, pp 74–106, commentary to Article 27 (as adopted on first reading), para 2.

¹³³ ARS com, *op cit*, commentary to Article 6, para 3.

¹³⁴ See *supra*, Chap 1 §1.2.4.

1.2.3. Joint conduct of coalition partners

In the context of a coalition of States, participants act in certain circumstances jointly. A conduct qualifies as joint when the organs of several entities 'combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation'.¹³⁵ The act must be 'committed in concert, or sometimes even simultaneously, by two or more States, each acting through its own organs'.¹³⁶ A joint act is attributed under Article 4 ARS or Article 5 ARIO to each State or international organization, which, acting through its organs, co-authored the wrongful act.¹³⁷

For instance, an armed attack conducted together by several States, such as the military action conducted in 2003 by the US, the UK and other States against Iraq, could qualify as a joint act. The air strikes conducted in Libya in 2011 by the US, the UK, France and Canada acting in concert and through their own organs before NATO took command of the operations could also be considered as joint actions of each State.¹³⁸ In the same line, the bombings by American and British ships in Samoa in 1899 was also found to engage the responsibility of the two States.¹³⁹

Whether conduct of international forces qualifies as a joint act also depends on the command structure of a given operation. It is only when several entities exercise operational control through separate command that their conduct can be seen as joint. In that sense, the conduct of two parallel military missions under distinct command structures carrying a joint operation can qualify as a joint act attributed to the entity leading each mission. For instance, the helicopter attacks conducted together by the French QRF Operation Licorne and UNOCI against governmental forces qualifies as a joint conduct.¹⁴⁰

¹³⁵ ARS com, *op cit*, commentary to Article 47, para 2.

¹³⁶ Third Crawford Report, Add., *op cit*, para 267, point 3.

¹³⁷ ARS com, *op cit*, commentary to Article 47, para 1.

¹³⁸ B Boutin, 'The First Days of the Implementation of Resolution 1973: An Unclear Coalition and Unclear Responsibilities' (22 March 2011) SHARES Blog.

¹³⁹ Arbitral Tribunal, *Samoan Claims (Germany, Great Britain, United States)* (14 October 1902), Reports of International Arbitral Awards, vol IX, 15-27, at 27.

¹⁴⁰ A Aboa, 'La résidence de Gbagbo attaquée par des hélicoptères' (Le Point, 10 April 2011); B Boutin, 'An "unlikely Scenario" That Occurred in Ivory Coast... and a Case for Shared Responsibility Between the UN and France' (10 April 2011), *op cit*.

The main difficulty when it comes to qualifying a joint act concerns the level of generality of the conduct to take into account. Indeed, when several States jointly undertake a military operation, not every harmful conduct during the operation is itself jointly undertaken. In the *Oil Platforms case*, Judge Simma considered that the general breach of ‘bringing about a negative environment’ could be attributed to both Iran and Iraq. Similarly, Crawford mentioned that ‘[w]here two persons jointly engage in a common adventure, [...] the victim should not be required to prove which particular elements of damage were attributable to each of them’.¹⁴¹ Yet, the proposition that each detailed conduct is jointly attributable to each participant in a joint military operation should be taken carefully. For the purpose of the ILC Articles, an entire military operation is only considered as one single conduct if this exact conduct is alleged to constitute a breach of international obligations. As with any claim of attribution, the key element to start from is the norm allegedly breached. Indeed, the level of specificity of the act to be taken into account depends on the content of the primary obligation allegedly breached. If an allegation is made that a coalition of States violated the prohibition to use force, the conduct to take into account is the armed attack, which qualifies as joint. On the other side, if a claim is limited to a specific air-strike within the operation, the joint character of the conduct would have to be demonstrated beyond the initial joint attack. This can be illustrated by the case of *Saddam Hussein*, which was declared inadmissible by the ECtHR because the claim was not specific enough.¹⁴² Saddam Hussein had brought a claim against 21 European States which took part in coalition operations in Iraq, alleging that his arrest, detention and transfer violated human rights. The conduct alleged as wrongful being the arrest and detention, the Court required the claimant to demonstrate ‘which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover’.¹⁴³ Accordingly, ‘general assertions of joint action’¹⁴⁴ do not allow allocating responsibility in coalitions.

¹⁴¹ Third Crawford Report, Add., *op cit*, para 276(c).

¹⁴² ECtHR, *Saddam Hussein v Albania et al*, Admissibility decision (14 March 2006), App no 23276/04 .

¹⁴³ *Ibid.*, at 3–4: ‘The applicant did not address each respondent State’s role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US and non-US forces except to refer to the overall Commander of coalition forces who was at all relevant times a US General. Finally, and importantly, he did not indicate which

2. Reinterpreting principles of attribution in the context of military operations

The first part of this Chapter (§1) presented how principles of attribution of the conduct of international military forces have developed and been interpreted. It was shown that control over the conduct of military organs is often relied on for attribution in collaborative military operations. In operations led by an international organization, it is established that effective control as enshrined in Article 7 ARIO determines to which entity a conduct must be attributed. Yet, it remains difficult to ascertain the precise meaning of effective control in various concrete situations and for each type of harmful conduct. One of the shortfalls of mainstream interpretations of effective control is that they difficultly address situations where no order was given. In the context of coalitions, various tests can be alternatively put forward but they have not been articulated in a coherent framework for attribution. Overall, confronting established principles and interpretations to the realities of military operations reveals that they do not permit addressing all factual scenarios.

In order to formulate a more coherent and comprehensive basis for attribution of the conduct of international forces, the second part of this Chapter (§2) engages in a reinterpretation of principles of attribution in collaborative military operations, grounded in a conceptual analysis of attribution in the context of military operations. First, it engages in a conceptual analysis of the notion of attribution and its relation with control and causation. By enquiring into the function of and rationale for attribution of conduct, the analysis identifies causal control as the key ground to attribute the conduct of international forces (§2.1).

Second, it develops a reinterpretation of attribution and effective control in the context of military operations through the lens of causal control. Applying the analysis of attribution in terms of causal control to the context of collaborative military operations, it proposes to interpret effective control as meaning a form of military control causally relevant with regards to the given conduct of a soldier. This interpretation takes full account of the different forms of military control shared amongst

respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover’.

¹⁴⁴ C Chinkin, ‘The Continuing Occupation? Issues of Joint and Several Liability and Effective Control’ (2008), *op cit*, at 173: noting that ‘it appears that the European Court would not be satisfied with general assertions of joint action’.

participants, and identifies how different forms of military control relate to effective control. Further, interpreting effective control in terms of causal control will allow grasping situations of effective control by omission, thereby addressing some of the problematic issues of established interpretations when confronted to military realities (§2.2).

Based on these considerations, the Section concludes that attribution of the conduct of international forces should be grounded in the different forms of military control shared amongst participants, which can each constitute effective control when causally linked to a given harmful conduct. The application of the interpretation developed thereby allows attributing different types of harmful conduct in different types of collaborative military operations (§2.3).

2.1. Conceptual analysis of attribution of conduct

This Section first identifies the function of attribution in international law, which is to attach the conduct of individuals to a collective entity, and analyses the operation of attribution in terms of causal control (§2.1.1). To attach concrete instances of harmful conduct to States or international organizations, principles of attribution explicitly or implicitly rely on certain fundamental concepts. The notion of control is particularly adapted to determine whether a conduct must be attached to a State or international organization (§2.1.2). Behind the notion of control by a subject over the conduct of an individual lies an element of causation, which determines whether the control was sufficient to attribute the conduct (§2.1.3).

2.1.1. Function of attribution

The function of the concept of attribution is to attach the acts and omissions of individuals to States and international organizations. For a State or international organization to be responsible under international law, a conduct performed by an individual must be attributed to it. Yet, it is an ‘elementary fact that the State cannot act of itself. An “act of the State” must involve some action or omission by a human being or group’.¹⁴⁵ Attribution allows establishing the link between international subjects on the one hand, and acts and omissions that are concretely perpetrated by individuals or other sub-legal entities on the other

¹⁴⁵ ARS com, *op cit*, commentary to Article 2, para 5. See also R Ago, *Le Délit International* (Collected Courses / Recueil des Cours, vol 68, Hague Academy of International Law, 1939), at 463.

hand.¹⁴⁶ Attribution of conduct to international subjects present similarities with the domestic principle of agency, which is notably used to determine when an individual was acting on behalf of an organized corporate entity and thus engaged the responsibility of the principal.¹⁴⁷ The function of attribution is to determine which international subject is to be considered the author of a given conduct,¹⁴⁸ by identifying ‘which persons should be considered as acting on behalf of the State, i.e. what constitutes an “act of the State” for the purposes of State responsibility.’¹⁴⁹ Once attributed, a conduct that breaches the international obligations of the relevant subject becomes an internationally wrongful act of that subject.

In military operations, the individual conduct to be attributed is committed by soldiers in the field. Rules of attribution must determine whether ‘the link between the act causing the damage and official authorization or direction is close enough and precise enough to establish the quality of the act as a governmental act.’¹⁵⁰ Fundamentally, attribution assesses the link between the conduct of a soldier and a State or international organization.

2.1.2. Central role of control for attribution

The concept of control has long been considered to be central to attribution, as the notion is particularly adapted to apprehend the link between a subject of international law and an individual conduct that is required for attribution. Indeed, a conduct can be linked to a State by determining that the State had control over the occurrence of the conduct perpetrated by an individual. A number of authors have

¹⁴⁶ A Nollkaemper, ‘Power and Responsibility’ (2014), *op cit*, at 6: ‘State responsibility in international law by definition presumes a relationship between a state and an actual author of an act, which necessarily is a natural person’.

¹⁴⁷ S Wilmot, ‘Corporate Moral Responsibility: What Can We Infer From Our Understanding of Organisations?’ (2001) 30(2) *Journal of Business Ethics* 161, at 164.

¹⁴⁸ R Ago, *Le Délit International* (1939), *op cit*, at 36: l’imputation ‘permet seule de dire qu’un sujet déterminé est, du point de vue du droit, l’auteur d’une infraction’; J Combacau and S Sur, *Droit International Public* (8th edn, Montchrestien, 2008), at 358: ‘dire d’un fait qu’il est imputable à un sujet de droit signifie qu’aux fins de la responsabilité celui-ci est réputé en être l’auteur’.

¹⁴⁹ ARS com, *op cit*, commentary to Article 2, para 5.

¹⁵⁰ AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*, at 310. See also: N Tsagourias, ‘The Responsibility of International Organisations for Military Missions’ (2011), *op cit*, at 264: Rules of attribution are aimed at ‘locating the direct perpetrator of the act’.

identified the fundamental role that control plays for attribution in international law. Writing on international responsibility for military activities, Hyde considered that ‘[c]ontrol breeds responsibility’,¹⁵¹ and Amrallah submitted that ‘[t]he responsibility of a state in international law is measured by the actual degree of control which it may exercise’.¹⁵² Addressing the basis for responsibility of the United Nations, Eagleton affirmed that ‘[r]esponsibility derives from control’.¹⁵³

Conceptually, it is because one subject controlled the conduct of an individual that the conduct deserves to be attached to that State or organization and to engage its responsibility. As defined in the Introduction of this study, control designates the influence exercised over the conduct of another.¹⁵⁴ Grounded in this notion, attribution ensures that the entity held responsible for a conduct is the one which had influence over the occurrence of that conduct.¹⁵⁵ When relying on the notion of control, the responsibility of a subject can be engaged for all conduct over which it had control, while limiting international responsibility to conduct closely enough related to a State or international organization to be considered its own act, thereby fulfilling the function of attribution identified in the previous Section. In this interpretation, control can be a ground for attribution both when influence is actively exercised to direct individual conduct, and when control should have been exercised to prevent individual conduct.

The development of the law of State responsibility has been grounded in notions of control exercised by States over persons or territory,¹⁵⁶ which are found throughout the ILC Articles. The principle that the conduct of

¹⁵¹ CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1947), *op cit*, at 922.

¹⁵² B Amrallah, ‘The International Responsibility of the United Nations for Activities Carried Out by UN Peacekeeping Forces’ (1976), *op cit*, 66.

¹⁵³ C Eagleton, *International Organization and the Law of Responsibility* (1950), *op cit*, at 385.

¹⁵⁴ See *supra*, Intro §1.1.1.d).

¹⁵⁵ G Simm, ‘International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers’ (2011), *op cit*, at 476: ‘The purpose of holding international organizations and states responsible is to make them influence the behaviour of individuals and other entities within their control’.

¹⁵⁶ C Eagleton, *International Organization and the Law of Responsibility* (1950), *op cit*, at 386; JA Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2003) 36 NYU Journal of International Law and Politics 265, at 287; CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1947), *op cit*, at 885.

organs and quasi-organs is attributed to their States¹⁵⁷ can be explained by considering that States exercise normative control over their organs.¹⁵⁸ When a conduct cannot be attributed on the basis of the organic status of the individual perpetrator, the extent of the control of the State determines whether the conduct qualifies as an act of the State. For instance, the acts of private individuals are attributed to States on the basis of the direction and control they exercise over them.¹⁵⁹ Prominently, attribution of the acts of soldiers put at the disposal of an international organization operates on the basis of effective control.¹⁶⁰

In essence, the control exercised by States and international organizations over the conduct of soldiers will be at the heart of every determination of responsibility in collaborative military operations. In these collaborative operations, control over the soldiers is exercised through different elements of military authority shared amongst participants.¹⁶¹ In order to determine which form of control can be a ground for attribution, the causal link between forms of control and the conduct of soldiers must be analysed.

2.1.3. Causal dimension

The analysis of the function of attribution and of the underlying notion of control reveals that attribution of conduct based on control has a causal dimension. Attribution, which attaches the acts of individuals to States and international organizations, can be seen as a causal operation determining whether the control exercised by subjects of international law results in wrongs by individuals.

In law, causation is typically used in the field of responsibility, where having caused harm is often a condition to hold someone responsible for the harm.¹⁶² The ILC has not favoured the concept of causation, and is said to have removed it as much as possible from the framework of determination of responsibility. Indeed, under the influence of Roberto Ago, the ILC devised a system of objective responsibility arising

¹⁵⁷ ARS, *op cit*, Articles 4 and 5.

¹⁵⁸ C Ahlborn, 'To Share or Not to Share? The Allocation of Responsibility Between International Organizations and Their Member States' (2013) 88 *Die Friedens-Warte / Journal of International Peace and Organization* 45, at 49.

¹⁵⁹ ARS, *op cit*, Article 8.

¹⁶⁰ See *supra*, Chap 2 §1.1.

¹⁶¹ *Ibid*, Chap 1 §1.

¹⁶² T Honoré, 'Causation in the Law' (2010), *op cit*, Sections 1 and 2.

automatically from breach of international obligations, where the existence of damage and a causal link with the conduct are not necessarily part of the conditions for responsibility.¹⁶³ Yet, the concept of causation is relevant for international responsibility at two levels.¹⁶⁴ At the stage of the determination of the legal consequences of a wrongful act, it is well established that a causal link must be established between the injury and the conduct.¹⁶⁵ The few authors who addressed causation in international responsibility have focused on this type causation, and the modalities under which a causal link is established for the purpose of reparation.¹⁶⁶

What is more, causation can be seen as relevant at another stage, namely for attribution of conduct. Indeed, although not explicit, the determination of a link between an international subject and a concrete conduct for the purpose of attribution relies on the causal link between the control of the subject and the occurrence of the conduct. In essence, individual conduct is attributed to an entity if it was caused by the control of that entity.¹⁶⁷ When analysing responsibility in terms of attribution, control can be seen as ‘an essential ingredient of cause’¹⁶⁸ with regards to the conduct of the individual. In military operations,

¹⁶³ Third Ago Report, *op cit*, para 73. See: A Pellet, ‘The Definition of Responsibility in International Law’ in J Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press, 2010), at 9.

¹⁶⁴ J d’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’ (2012) 9(1) *International Organizations Law Review* 15, at 6–7: ‘causation plays a role both at the level of the determination of responsibility and with respect to the consequences of the international wrongful act. Indeed, the causal link between the conduct and the violation is very instrumental in the determination of responsibility, while the causal link between the violation and the damage operates as determinative of the scope of one of the main consequences of responsibility, namely reparation’.

¹⁶⁵ ARS, *op cit*, Article 31; See *infra*, Chap 4 §1.1.

¹⁶⁶ F Rigaux, ‘International Responsibility and the Principle of Causality’ in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005), 81–91; M Straus, ‘Causation as an Element of State Responsibility’ (1984) 16 *Law and Policy in International Business* (Georgetown Journal of International Law) 893.

¹⁶⁷ A Nollkaemper, ‘Power and Responsibility’ (2014), *op cit*, at 7: ‘Through the exercise of power, an actor can cause another person to act in a particular way. It is precisely that causal relationship that underlies much of the law of responsibility, even though nowadays causation has mostly been incorporated into the normative notion of attribution’.

¹⁶⁸ KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991), at 75.

attribution can be seen as grounded on control of States and international organizations causing the harmful conduct of the soldier.

A few authors have taken the view that attribution of conduct was rooted in causal concepts. Most prominently, Anzilotti understood attribution ‘as a mere causation link between the wrongful act and the State’.¹⁶⁹ He considered the notion of attribution to be an expression of the concept of causation. In his view, an individual conduct is attributed to a State if there is a causal link between this individual conduct and the activities of the State.¹⁷⁰ Similarly, Quadri argued that the operation of attribution was a matter of causation. He explained that an event can only be considered an act of the State if there is a causal link between the event and the State.¹⁷¹ In these interpretations, attribution is, ‘in effect, a causal connection between the corporate entity of the state and the harm done.’¹⁷²

More recently, authors addressing contemporary problems of responsibility have developed causal interpretations of attribution. D’Aspremont took the view that ‘attribution of conduct can be seen as another expression of — factual as well as normative — causality in the law of international responsibility, for it connects a human conduct with a violation of an international standard’,¹⁷³ and that attribution aims at identifying ‘the causal link between the conduct and the violation’.¹⁷⁴ In the context of State responsibility for terrorism, Becker analysed attribution based on control in causal terms, explaining that the control of a subject of international law over an individual acting on its behalf

¹⁶⁹ R Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, at 15.

¹⁷⁰ D Anzilotti, ‘La Responsabilité Internationale des États à Raison des Dommages Soufferts Par des Étrangers (2)’ (1906) 13(3) *Revue Générale de Droit International Public* 285, at 286-287: ‘le seul rapport de causalité entre l’activité d’un État et le fait contraire au droit international est [...] suffisant pour que l’acte soit imputable à cet État’.

¹⁷¹ R Quadri, ‘Responsabilité et Garantie’ in *Cours Général de Droit International Public* (Collected Courses / Recueil des Cours, vol 113, Hague Academy of International Law, 1964), 453-477, at 459: ‘l’Etat répond de ses propres activités d’après le critère de la causalité. Si, au contraire, l’Etat devait répondre des dommages causés par des activités étrangères, n’étant absolument pas les siennes du point de vue causal, dans ce cas parler d’imputation de ces actes à l’Etat serait un non-sens.’.

¹⁷² J Crawford, *Brownlie’s Principles of Public International Law* (2012), *op cit*, at 543.

¹⁷³ J d’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’ (2012), *op cit*, at 21.

¹⁷⁴ *Ibid.*

can be seen as the cause of the conduct. He wrote: ‘the responsibility of the principal is engaged because his or her conduct has brought about the agent’s actions. The principal has created a relationship of authority and control over the agent to such an extent that the latter’s action may be viewed, in legal terms, as the product of the principal’s direction.’¹⁷⁵ In the context of military operations, Orakhelashvili related responsibility to causal control by considering that ‘control over the contingent or the relevant situation allows for identifying a link of cause-and-effect between the entity and the wrongful act.’¹⁷⁶

This thesis takes the view that the notion of causation is intrinsically part of the operation of attribution based on control, and explicitly formulating it clarifies the determinative question to be answered to attribute the conduct of soldiers. In this interpretation, harmful conduct is attributed to an entity if the control exercised by it caused the conduct to occur. Acknowledging the causal dimension of attribution is not aimed at discarding the legal nature of tests of attribution, but is useful to attribute conduct in complex situations, for instance where the State or international organization failed to exercise control.¹⁷⁷

The argument that attribution has a causal dimension contends that rules of attribution embody normative standards of causation.¹⁷⁸ It does not assert, against the ILC views, that the normative operation of attribution should be based ‘on the mere recognition of a link of factual causality’.¹⁷⁹ Rather, principles of attribution are seen as providing the legal standard according to which a sufficient causal link between a State or international organization and the occurrence of an individual conduct is established.¹⁸⁰ Amongst the numerous factual causes of a conduct, rules of attribution can be seen as determining in each situation which causes are to be considered legally relevant.

¹⁷⁵ T Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart, 2006), at 286.

¹⁷⁶ A Orakhelashvili, ‘Division of Reparation Between Responsible Entities’ (2010), *op cit*, at 654.

¹⁷⁷ See *infra*, Chap 2 §2.2.1.c).

¹⁷⁸ A Nollkaemper, ‘Power and Responsibility’ (2014), *op cit*, at 7: ‘nowadays causation has mostly been incorporated into the normative notion of attribution’.

¹⁷⁹ ARS com, *op cit*, introductory commentary to Chapter II of Part I, para 4.

¹⁸⁰ See *supra*, Intro §1.1.1.d).

2.2. Effective control in military operations through the lens of causal control

The next step in the analysis is to reinterpret principles of attribution applied in the context of collaborative military operations through the lens of this analysis of attribution in terms of causal control. More specifically, the following Section undertakes to reinterpret the criterion of effective control so as to refine established views regarding its meaning and modalities when applied to collaborative military operations. First, it develops an interpretation of the criterion of effective control through the lens of causal control, arguing that effective control means a form of control causally linked to the harmful conduct. Applied to the context of military operations, this interpretation permits to clarify how forms of military control shared amongst participants can serve as grounds for attribution (§2.1.1). Further, this Section argues that effective control as interpreted can constitute a determinative test to attribute the conduct of forces in all types of collaborative military operations. (§2.2.2).

2.2.1. Effective control as causally proximate form of control over a given conduct

The following Section develops a reinterpretation of the test of effective control. Under the proposed analysis, the ultimate question to ask for attribution in collaborative military operations is: which participant(s) actually exercised a form of control that was causally proximate to the harmful conduct? The Section first applies the conceptual analysis of attribution in terms of causal control to the criterion of effective control, and suggests that effective control should be understood as causally proximate control (§ 2.2.1.a). Second, it analyses the implications of this interpretation of effective control when applied to the military context, where various forms of control are shared (§ 2.2.1.b). Finally, it explains how the causal analysis allows grasping situations of effective control by omission (§ 2.2.1.c).

a) Effective control as causally proximate control

Under established interpretations presented in the first part of this Chapter, the test of effective control ascertains actual control exercised over a given conduct,¹⁸¹ yet what controlling a conduct means can be interpreted in various ways. Based on the conceptualisation of attribution

¹⁸¹ *Ibid*, Chap 2 §1.1.1.

in terms of causal control, this thesis proposes to define effective control as *control which caused the conduct to occur*.

In a context where various forms of control exercised by States and international organizations can influence different types of conduct, this interpretation proposes to identify the causally relevant form of control over a given conduct. Overall, harmful conduct should be attributed to the entity or entities which actually exercised the causally relevant element of control, because acts and omissions in the exercise of control by this entity brought about the conduct of the individual.

More precisely, this thesis submits that elements of control which are proximate causes of the conduct constitute the ground on which the conduct should be attributed. Considering that rules of attribution can be seen as embodying standards of causation, the thesis argues that the standard of effective control as formulated in Article 7 ARIO incorporate the legal standard of causation delimiting which forms or degrees of control qualify as causes for the purpose of attribution.

In causal terms, a factual cause qualifies as a 'proximate cause' when it is closely or directly related to an event.¹⁸² By requiring actual control over a specific conduct, the standard of effective control seems to express that *proximate control* would qualify as legal cause of individual conduct and thus be a ground for attribution. In other words, attribution under the test of effective control requires identifying which form of control was a proximate cause of the conduct of the individual.

b) Effective control and forms of military control

Applied to collaborative military operations, this interpretation of effective control means that a conduct will be attributed to the *entity which exercised a form of military control causally linked to the occurrence of the conduct*. This formulation of effective control goes beyond established interpretations by taking full account of the military context. It reveals the relevance of the different forms of military control for attributing the conduct of soldiers, showing that — unlike what a number of authors consider — effective control cannot be equated to operational control.

Indeed, it is frequently argued that operational control is decisive for the attribution of conduct of international forces under the test of effective

¹⁸² T Honoré, 'Causation in the Law' (2010), *op cit*, Section 3.2; See *supra*, Intro §1.1.1.d).

control.¹⁸³ Operational control is defined as the authority to direct operations in the field, and is usually transferred by States when putting their soldiers at the disposal of an international organization.¹⁸⁴ For a large number of authors, this form of authority provides the international organization to which it is vested with the most relevant authority to control the conduct of military troops. Typically, mainstream scholarship deems that effective control rests where operational control is vested, unless a State actually exercises operational control over its troops despite the formal delegation.¹⁸⁵ In other words, the element of 'control' in Article 7 ARIO is equated to 'operational control', so that conduct is attributed to the entity exercising 'effective operational control'.¹⁸⁶ In this construction, only the operational level of command can provide effective control and other forms of command and control are deemed irrelevant.¹⁸⁷ By the same token, a number of authors advocate for a presumption of attribution to the entity formally vested

¹⁸³ International Law Association, 'Accountability of International Organisations', *op cit*, at 202; CA Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision' (2010), *op cit*, at 529: 'operational command is the most appropriate criterion by which to determine attribution'; B Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' (2010), *op cit*, at 521; PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7(1) *International Organizations Law Review* 9, 17; ILC, 'Responsibility of International Organizations, Comments and Observations Received From Governments' (2011) UN Doc A/CN.4/636, Comments to Draft Article 6, Mexico, para 2: 'effective control over conduct should be understood as [...] operational control over the specific conduct in question'; ILC, 'Responsibility of International Organizations, Comments and Observations Received From the United Nations', *op cit*, comments to draft Article 6, para 1; F Seyersted, 'United Nations Forces – Some Legal Problems' (1961), *op cit*, at 410; N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 253; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 126.

¹⁸⁴ See *supra*, Chap 1 §1.

¹⁸⁵ KM Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008), *op cit*, at 523; N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 249; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 126.

¹⁸⁶ KM Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008), *op cit*, at 523; M Milanovic and T Papić, 'As Bad as It Gets: The European Court of Human Rights *Behrami* and *Saramati* Decision and General International Law' (2009), *op cit*, at 289. See also: UN, 'Report on the United Nations Interim Administration Mission in Kosovo', *op cit*, para 16.

¹⁸⁷ N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 255: 'jurisdiction over criminal or disciplinary matters does not establish any kind of control over the wrongful conduct'.

with operational command, which can be rebutted if operational command was in fact exercised by a State.¹⁸⁸

This prevailing view, according to which effective control rests where operational control is vested unless a State exercises undue influence at the operational level presents shortcomings. A few authors have rightly considered that views equating effective and operational control do not fully appreciate military realities. Leck argued that, taking full account of the complexities of UN command structures, the degree of operational control transferred to the UN is in many cases not sufficient to actually give it effective control of peacekeepers.¹⁸⁹ Considering the relevance of States' disciplinary authority, Dannenbaum construed a framework in which responsibility can be grounded in non-operational forms of control.¹⁹⁰

In military operations, control over the conduct of troops can be shared between the lead entity vested with operational control, the contributing States retaining organic command, and the entity providing strategic direction. Besides, States occasionally retain some elements of operational command, or make use of powers that they formally delegated. In this context, assessing effective control requires looking further than operational control. Indeed, each element of authority can be linked to particular harmful acts, while being unrelated to the occurrence of other types of conduct. Notably, the ILC's statement that '[a]ttribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect'¹⁹¹ implies that the organic command of States can be causally linked to the occurrence of disciplinary offences. Applying effective control to concrete

¹⁸⁸ TD Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011), *op cit*, at 55; A Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012), *op cit*, at 83; N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 249; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 102.

¹⁸⁹ C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 *Melbourne Journal of International Law* 346, at 359.

¹⁹⁰ 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 160–163.

¹⁹¹ ARIO com, *op cit*, commentary to Article 7, para 7.

situations requires identifying which element of authority could actually control a given conduct.

Analysing effective control in military operations through the lens of causal control, this thesis argues that — while it is true that operational command is often relevant to attribute conduct — equating it with effective control unwarrantedly denies the possible relevance of other elements of control, and does not take sufficient account of the full military context. Certain types of conduct, such as individual misconduct, are outside of the reach of operational control. When a conduct cannot be causally linked to operational control, it should not be attributed on the basis of this form of authority. For these types of conduct, ‘there is nothing the United Nations can do about it and it would not seem reasonable to hold the United Nations responsible’.¹⁹² Accordingly, this thesis proposes to attribute harmful conduct that are out of the ambit of operational control on the ground of other forms of control, namely organic command or strategic control. By taking into consideration the full scope of forms of control that are specifically employed by each party in relation to a given conduct, the actual degree of control exercised over that conduct by each party can be ascertained. Pursuant to this analysis, forms of military control exercised over international forces can be translated into legal control for the purpose of attribution.

Considering that different types of conduct can be causally linked to different elements of military control, this thesis submits that the conduct of soldiers should be attributed to the State or/and international organization which exercised a *causally proximate element of control over the soldier’s conduct*. In this interpretation, effective control can be located by assessing the causal link between the different forms of military control exercised by States and international organizations, and the conduct of soldiers to be attributed. For each particular conduct, the form of military control that could actually influence the conduct can be identified amongst the various elements of command and control.¹⁹³

c) Effective control by omission

Importantly, understanding effective control in causal terms explains what effective control entails when no positive act of control over the conduct was carried by a State or international organization. Indeed, the

¹⁹² C Eagleton, *International Organization and the Law of Responsibility* (1950), *op cit*, at 397.

¹⁹³ See *infra*, Chap 2 §2.3.

failure of an entity to use its authority can also be causally linked to the occurrence of harmful conduct, as the failure of a participant to exercise control can result in a harmful conduct by a soldier. When a lack of control causes the conduct of a soldier conduct, effective control lies where the causally relevant element of control is vested.

Under mainstream interpretations, it is rather difficult to assess where effective control lies when no positive act of control was taken. It used to be considered that only direct instructions contradicting UN orders could give a State effective control over troops it contributed.¹⁹⁴ In these views, a State is considered to exercise effective control only if it expressly ordered its contingent 'to ignore UN orders or to go against them'.¹⁹⁵ This understanding of effective control as limited to direct orders can be traced back to the ICJ's interpretation of the rule codified in Article 8 ARS,¹⁹⁶ which, as already mentioned,¹⁹⁷ concerns the different issue of the attribution of the acts of private individuals or groups. This criterion of direct orders is problematic when applied to Article 7 ARIIO, as it does not always permit to determine who had control over the conduct of military forces, which are 'hardly ever instructed to commit wrongful acts'¹⁹⁸ and often commit abuses that are not linked to any order.¹⁹⁹ Effective control interpreted as limited to direct instructions constitutes an excessively strict standard and it is increasingly recognized that, in the context of collaborative military operations, a State or international organization can exercise effective control over an act it did not directly ordered.²⁰⁰

¹⁹⁴ 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 153154; M Milanovic and T Papic, 'As Bad as It Gets: The European Court of Human Right's *Behrami* and *Saramati* Decision and General International Law' (2009), *op cit*, at 282.

¹⁹⁵ Netherlands, District Court of the Hague, *Nuhanovic* (2008), *op cit*, para 4.14.1; Netherlands, District Court of the Hague, *M M-M, D M and A M v the Netherlands*, (2008), *op cit*, para 4.16.1.

¹⁹⁶ ICJ, *Nicaragua, Merits* (1986), *op cit*, para 115: Unless 'the United States directed or enforced the perpetration of the acts' of the contras, it had no 'effective control'.

¹⁹⁷ See *supra*, Chap 2 §1.1.1.

¹⁹⁸ AV Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1955), *op cit*, at 290.

¹⁹⁹ See *supra*, Chap 1 §2.

²⁰⁰ T Dannenbaum, 'Translating the Standard of Effective Control Into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human

Yet, the criterion to determine effective control over wrongs committed by soldiers without instructions remains unsettled. How can a State or international organization be said to exercise control when it ‘did nothing’ and that this failure to act resulted in the commission of a harmful conduct by soldiers? To answer this question, Dannenbaum proposed an analysis according to which “‘effective control’ must be understood to mean “control most likely to be effective in preventing the wrong in question.”²⁰¹ Under this test, a conduct that was not ordered should be attributed to the entity which ‘was positioned to have acted differently in a way that would have prevented the impugned conduct’.²⁰² Relating effective control to the ability to prevent a harmful conduct presents merits but needs to be refined to constitute a clear criterion.

Applying the interpretation developed of effective control as causal control, the present study proposes to rely on the causal link between the lack of control and harmful conduct. When no order to commit a harmful act was given, conduct should be attributed to the entity which, by misusing or failing to use the elements of control it possessed, caused the conduct to occur. The causal analysis allows identifying how different forms of military control relate to effective control and understanding how conduct can be attributed in case of control by omission: if the individual conduct was caused by the failure of a State or international organization to exercise its authority, the conduct will be attributed to the entity which — by omission — brought about the conduct. The holdings of the Court of Appeal in the *Nuhanovic* and *Mustafic* cases can be interpreted in that sense. By considering that if the State had exercised control the wrongful conduct would not have occurred,²⁰³ the Court implied that the conduct of the contingent was causally related to

Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ (2010), *op cit*, at 156; Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*, para 3.11.3.

²⁰¹ 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 114.

²⁰² *Ibid.*, at 157.

²⁰³ Netherlands, Court of Appeal in the Hague, *Hasan Nuhanovic v the Netherlands*, (2011), *op cit*, para 5.18: the State ‘would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time. The facts do not leave room for any other conclusion than that, in case the Dutch Government would have given the instruction to Dutchbat not to allow Nuhanovic (as well as his father Ibro Nuhanovic) to leave the compound or to take him along respectively, such an instruction would have been executed’; Netherlands, Court of Appeal in the Hague, *Mehida Mustafic-Mujic, Damir Mustafic, Alma Mustafic V The Netherlands*, (2011), *op cit*, para 5.18.

the failure of the State to exercise the operational control it had retrieved during the contingent's withdrawal.²⁰⁴ In all situations where a harmful conduct is not causally linked to a positive exercise of control, effective control can be assessed by identifying the form of military control which lack of exercise caused the harmful conduct.

2.2.2. Effective control as a determinative test in all forms of collaborative operations

This Section argues that the test of effective control as formulated should apply to all situations where troops function in an international context, as it allows attaching the conduct of organs over which control is shared in various collaborative scenarios and with regards to different types of harmful conduct. Effective control as interpreted is a determinative test for attribution of conduct in operations led by an international organization (§2.2.2.a), and in coalition operations (§2.2.2.b).

a) Effective control in operations led by an international organization

While it is relatively established in scholarship that effective control is the proper test to attribute conduct in military operations led by an international organization,²⁰⁵ international organizations themselves occasionally put forward different arguments. This thesis submits that the test of effective control as interpreted should apply to the question of attribution in all military operations conducted under the lead of an international organization, because it permits to attribute conduct of organs over which control is shared.

In UN-led operations, the UN has affirmed that the status of subsidiary organs of UN peacekeepers was the proper ground for attribution. This position is deficient, because, as considered by many authors, organic links of soldiers put at the disposal of an international organization are not conclusive to attribute the conduct of partially delegated organs.²⁰⁶ If the UN's interpretation was followed, the conduct of peacekeepers could also always be attributed to contributing States, since peacekeepers still

²⁰⁴ B Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanovic and Mustafic: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping' (2012) 25(2) *Leiden Journal of International Law* 521, at 531.

²⁰⁵ See *supra*, Chap 2 §1.1.2.a).

²⁰⁶ *Ibid*, Chap 2 §1.1.2.a).

qualify as organs of their States during a peacekeeping mission. It seems that, underlying, the decisive criterion for the UN is whether *operational* command was *formally* vested in the organization. The UN insists on formal aspects of command distribution and discards the relevance of non-operational elements of authority retained by States.²⁰⁷ However, as demonstrated above, other forms of military control can be relevant and should be taken into account for attribution depending on the type of harmful conduct considered.²⁰⁸

Regarding NATO, it has been argued that the adoption of NATO's decisions by consensus could result in attributing conduct to member States.²⁰⁹ While it is true that decision-making by consensus is a key characteristic of NATO that may have some impact on responsibility,²¹⁰ there is no compelling argument to stretch the responsibility of NATO's member States so far as to attribute all of NATO decisions to its member States. First, particular voting procedures are not sufficient to displace the consideration that the conduct of the NAC, an organ of NATO, should be attributed to NATO on account of its international legal personality.²¹¹ Second, an international organization should not be able to escape responsibility by pretending to form a thin and transparent veil in front of its member States,²¹² the same way that a State should not be able to evade its responsibility by acting through an international organization. Engaging the responsibility of member States for the decisions of NATO is conceivable, but should remain within the limited situations where an international organization is used 'as a sort of agency

²⁰⁷ ILC, 'Responsibility of International Organizations, Comments and Observations Received From the United Nations', *op cit*, comments on Draft Article 6, para 4.

²⁰⁸ See *supra*, Chap 2 §2.2.1.b).

²⁰⁹ *Ibid*, Chap 2 §1.1.2.c).

²¹⁰ See *infra*, Chap 3 §2.2.3.a).

²¹¹ A Pellet, 'L'Imputabilité d'Éventuels Actes Illicites: Responsabilité de L'OTAN ou des Etats Membres' (2002), *op cit*, at 200; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 122. Contra: S Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005), 435–454, at 442: 'respecting the international personality is one thing; allowing such personality to remove the responsibility of States members is quite another'.

²¹² A Pellet, 'L'Imputabilité d'Éventuels Actes Illicites: Responsabilité de L'OTAN ou des Etats Membres' (2002), *op cit*, at 201: 'le caractère interétatique de l'OTAN n'autorise nullement à rechercher "à travers elle", comme si elle n'existait pas, la responsabilité de ses Etats membres. [...] Pas plus que les États, les organisations internationales ne sont "transparentes".'

or instrument of its States members'.²¹³ Third, addressing the responsibility of NATO member States on account of membership or participation in decision-making alone fails to tackle the fact that not all member States are actively engaged in every NATO operation, while non member States — which are not formally taking part in the decision-making — regularly take part in NATO operations.²¹⁴ Given these considerations, the suggestion made by an author that the 'only reasonable solution seems to be that all NATO Member States are responsible for possible internationally wrongful acts'²¹⁵ is not convincing. In the same way that asking 'did the State, or the organization, give the orders?' presents shortcomings,²¹⁶ inquiring 'did the State, or the organization, take the decision?' does not allow allocating responsibility for all types of harmful conduct. In any event, NATO's views can only be put forward for conduct approved by consensus by the NAC, which, apart from the decision to engage in an operation, are limited to the choice of some sensitive types of targets.²¹⁷ The argument cannot extend to the conduct of integrated organs, such as the Force Commander of a mission, whose operational decisions are not subject to approval by the NAC.

Finally, in the EU, there have been debates regarding the attribution of the conduct of State organs acting in implementation of EU's decisions.²¹⁸ There is however a fundamental difference between scenarios where a member State controls its organs to adopt a certain conduct pursuant to EU legislation leaving no margin of discretion, and situations analysed in this study where the EU directly controls a State

²¹³ S Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership' (2005), *op cit*, at 453. See also: E Paasivirta, 'Responsibility of a Member State of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations' (2010) 7(1) *International Organizations Law Review* 49, at 60.

²¹⁴ NATO, 'NATO Handbook', *op cit*, at 199; NATO, 'Political-Military Framework for NATO-led PIP Operations', *op cit*, para 17; NATO, 'Political Military Framework for Partner Involvement in NATO-Led Operations', *op cit*, paras 8–13; See *supra*, Chap 1 §1.2.2).

²¹⁵ T Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?' (2002), *op cit*, at 191.

²¹⁶ See *supra*, Chap 2 §2.2.1.c).

²¹⁷ *Ibid*, Chap 1 §1.2.2.

²¹⁸ *Ibid*, Chap 2 §1.1.2.c).

organ over which authority has been partially transferred.²¹⁹ Organs implementing EU law over which States retain full authority are not put at the disposal of the EU. In terms of attribution, ‘the fact that the State organ implements an obligation under [...] EU law does not affect the attribution of conduct to that State’.²²⁰ The situation differs, however, in the case of partially delegated military organs that the EU directly controls together with the State, and it can be argued effective control applies in EU-led military operations.²²¹

In view of these considerations, this thesis suggests that the test of effective control as interpreted should apply to all military operations led by an international organization. In each type of operation, effective control as interpreted appears better suited to answer the question of attribution, as it allows determining whether the organisation or/and the contributing State actually caused a given conduct to occur.

b) Effective control in coalitions

In coalition operations, tests put forward in the literature difficultly grasp the nuances of command distribution and the respective influence of each coalition partners. Further, as with operations led by an international organization, grounds for attribution need to be able to address harmful conduct that was not directly ordered or not linked with operational authority.

The reliance on the status of common organ of a multinational Force Commander to attribute the conduct of coalition forces presents shortcomings. Indeed, as in other forms of military cooperation, only operational control is transferred, while certain types of wrongful conduct are linked to other forms of military authority. Furthermore, the effect of unwarranted exercise of power by one of the State over its troops on attribution should be taken into account. Simplified views considering that responsibility for every conduct of a soldier flows from the formal delegation of operational control pose the same shortcomings as equating effective control to operational control.²²² Besides, the

²¹⁹ *Ibid*, Chap 1 §1.2.3.

²²⁰ G Gaja, ‘The “Co-respondent Mechanisms” According to the Draft Agreement for the Accession of the EU to the ECHR’ (2013) 2(1) ESIL Reflections, para 2.

²²¹ F Naert, ‘The International Responsibility of the Union in the Context of its CSDP Operations’ (2013), *op cit*, at 335; A Sari and RA Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’ (2013), *op cit*, at 2.

²²² See *supra*, Chap 2 §2.2.1.b).

nuances of the command structure according to which a commander exercises operational control should not be ignored. For instance, in Iraq, the Force Commander is vested with some degree of operational control but national States retain significant control at the operational level.²²³ Applied to military cooperation in the form of coalitions, the status of common organ does not fully answer the question of attribution.

Similarly, the qualification of a conduct performed in a coalition as a joint act is of limited help to allocate responsibility for wrongful acts in coalitions, as it does not take into account the actual division of power between States. Notably, it would go too far to attribute an act to a State which had only a limited role in the joint conduct. For instance, given the predominant role of the US in Iraq, the participation of UK in a specific conduct would not always reach the threshold of joint act. In the context of military coalitions, both the notions of common organ and of joint act apprehend a limited range of scenarios.

Yet, the rationale for applying the test of effective control to operations led by an international organization²²⁴ also holds in coalition operations. Indeed, in both scenarios, national contingents are contributed to a collaborative operation, and military control over them is shared between the contributing State and the lead entity. Multinational coalitions rely on military organs from a plurality of States, and elements of command and control over soldiers are shared between participating States. The precise distribution of authority varies amongst coalitions, but it is always the case that certain elements of authority are transferred to the entity leading the coalition, while participating States retain other elements of control.²²⁵ Since military control is shared by participants in coalition operations, the test of effective control is appropriate to identify which element of military control was relevant with regards to a harmful conduct. Accordingly, this thesis argues that, also in coalitions, a conduct should be attributed to the State(s) actually exercising control over it.²²⁶

²²³ *Ibid*, Chap 1 §1.2.4.

²²⁴ *Ibid*, Chap 2 §1.1.2.a).

²²⁵ *Ibid*, Chap 1 §1.2.4.

²²⁶ See also: M Tondini, 'Shared Responsibility in Coalitions of the Willing', *op cit*, at 8; N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 264.

For instance, in coalitions under fully integrated command such as UNAMID²²⁷ where the Force Commander can qualify as a common organ,²²⁸ it should be assessed whether the operational control vested in the Force Commander is effective. In Iraq, where operational control were exercised by the US and/or participating States depending on the tasks and circumstances,²²⁹ attribution must locate which State(s) controlled which conduct. For instance, in *Jaloud*, the ECtHR referred to command arrangements and analysing the exact division of authority over the Dutch troops in Iraq in order to attribute the conduct of the Dutch contingent.²³⁰

For these reasons, the test of effective control is an appropriate test for attribution in all types of collaborative military operations, either led by an international organization or taking the form of a coalition. Effective control as interpreted permits to locate the State(s) and/or international organization(s) to which a given conduct can be attached in every types of collaborative operation.

2.3. Forms of effective control and types of harmful conduct

Applying the above analysis to factual scenarios of harmful conduct, this Section analyses how each form of military control defined in §1.1.2 of the first Chapter causally relates to the different types of harmful conduct described in §2.1 of the same Chapter. Pursuant to the proposed interpretation of attribution in collaborative military operations, a form of military control is causally relevant and thus effective if it *can actually influence the occurrence of a certain type of harmful conduct*. In this understanding, different elements of control can cause different types of conduct, and ‘areas of effective control respectively pertaining’²³¹ to the lead entity and the contributing State can be identified.

One of the main implications of this interpretation is that, in all situations, it is important to enquire whether the harmful conduct was

²²⁷ See *supra*, Chap 1 §1.2.4.

²²⁸ *Ibid*, Chap 2 §1.2.2.

²²⁹ *Ibid*, Chap 1 §1.2.4.

²³⁰ ECtHR, *Jaloud v the Netherlands*, (2014), *op cit*, para 149. The Court arguably reached a wrong conclusion however as it implied from the fact that the Netherlands retained ‘full command’ that the State did not delegated operational control over its troops (paras 159–161).

²³¹ ARIO com, *op cit*, commentary to Article 7, para 9.

causally linked to authority at the operational level, or whether other forms of military control were causally relevant. Indeed, applied to a variety of types of harmful conduct, effective control cannot be equated with operational control. In order to attribute conduct to the subject(s) actually in control, all elements of military control must be taken into account. This differs from mainstream interpretations, which usually grant little relevance to elements of control other than operational, and cannot always grasp particular circumstances such as a lack of orders.²³²

Many types of harmful conduct are causally connected to the exercise of operational control (§2.3.1). Further, the exercise by States of elements of organic command can have a significant influence and can qualify as a proximate cause for a number of types of harmful conduct (§2.3.2). Finally, certain harmful acts can be causally linked to the exercise of strategic command (§2.3.3). In some situations, more than one participant will exercise a degree of control over the given conduct of a soldier, resulting in multiple attribution of the conduct (§2.3.4).

2.3.1. Effective operational control

Operational control is the most direct form of authority over a number of harmful conduct committed by soldiers. Conduct causally linked to operational control includes many of the wrongful acts occurring during missions in the field, such as wrongful targeting or wrongful detention. These violations of international law are to be attributed to the entity which can actually influence them because it is exercising operational control. Exercise of operational control constitutes the proximate cause of most (but not all) combat-related misconduct, and thus usually amounts to effective control over such type of conduct for the purpose of attribution.

Where the direction of the forces on the ground by a Force Commander leads to the commission of a wrongful act, operational control is the relevant form of control. In the most straightforward situation, a commander can explicitly order its forces to carry a conduct that is internationally wrongful. Acts and omissions of international forces resulting from an order of the Force Commander are attached to the State or organization vested with operational control. For instance, the order to conduct an air strike against a civilian object will be wrongful.

²³² See *supra*, Chap 2 §2.2.1.

As noted earlier, however, most wrongful acts are not directly ordered.²³³

Often, wrongful conduct in the field results from *unclear orders* rather than direct orders to commit a wrong.²³⁴ Unclear operational control, manifested notably in unclear orders or rules of engagement of the mission, leads to situations where troops do not know ‘whether to act or not to act’,²³⁵ and thus can also constitute the cause of wrongful acts or omissions by soldiers, such as misuse of firearms or failures to protect. For instance, wrongful shootings during patrols often ‘occurred because of the ambiguous nature of the superior’s order’.²³⁶ An example of unclear order is found in Somalia in 1993 where Canadian troops fatally fired at an individual after receiving the instruction to ‘Get him’.²³⁷

Finally, a number of wrongful courses of conduct occur because of a *lack of operational orders* with regard to a specific situation, such as a threat to civilians. This occurs particularly in the context of obligations of due diligence. If an entity vested with operational control has knowledge of abuses and the means and mandate to react but fails to do so, failure to exercise operational control will be the cause of the contingent’s failure to protect.

In operations where contributing States *formally retain* some elements of operational command, it can constitute a ground for attribution. Notably, in coalitions under a multinational command with a dominant State, participating States retain a certain degree of operational control over their forces. For instance, in Iraq, operational orders were implemented by national commanders with relative autonomy. Wrongs were thus under the effective control of both the national State and the US. Another example of operational control retained by a State is given by the detentions operations conducted by the UK in Afghanistan²³⁸ and

²³³ *Ibid*, Chap 2 §2.2.1.c).

²³⁴ P Rowe, ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’ (2000), *op cit*, at 59.

²³⁵ *Ibid*, at 48.

²³⁶ P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 177.

²³⁷ Canada, ‘Report of the Somalia Commission of Inquiry’ (1997), *op cit*, vol 5, The Circumstances of the Shooting by Detachment 64A.

²³⁸ UK, High Court of Justice, *Serdar Mohammed v Ministry of Defence*, (2014), *op cit*, para 180.

Iraq.²³⁹ In both missions, the UK independently conducted its detention operations therefore exercised effective operational control over harmful conduct by British forces in the context of detentions.

In other situations, States have retained the operational authority to refuse to implement specific orders by having a national commander in the field able to oppose a red card.²⁴⁰ When operational decisions require approval of the State, both the lead entity and the contributing State exercise effective operational control. By contrast, the approval of sensitive targets by the NAC in NATO-led operations, which constitute an exercise of operational authority, does not amount to member States exercising operational control, for the decision of NAC remains attributed to NATO. In this respect, member States can bear derived responsibility on the basis of the institutional control they exercise over NATO.²⁴¹

If a State *factually exercises* operational control over its contingent, the control of that State will be the proximate cause of ensuing conduct. Notably, if a State bypasses formal agreements and directly influences the conduct of its troops through contradictory orders, it exercises effective control over their conduct. Besides, in transitional periods during the withdrawal of their contingents, States usually resume part or all of operational command over their contingents. In Rwanda in 1994 and in Srebrenica in 1995, Belgium and the Netherlands respectively resumed command over their troops after deciding to withdraw, and thereby exercised effective control over the failure of their contingents to protect individuals under their care.²⁴² In the case of *Nuhanovic*, the Court explained that the Dutch government was directly involved in the operations when the Dutch contingent and refugees were being evacuated and exercised control over its troops.²⁴³ The conduct of Dutchbat was thus attributed to the Dutch State, which was the entity having effective operational control over the evacuation of the compound.

²³⁹ BJ Bill, 'Detention Operations in Iraq: A View From the Ground' (2010), *op cit*, at 417; Australia, 'Iraq Detainee Fact-Finding Team Report', *op cit*.

²⁴⁰ See *supra*, Chap 1 §1.2.

²⁴¹ See *infra*, Chap 3 §2.2.3.a).

²⁴² Belgium, Court of First Instance of Brussels, *ETO case* (2010), *op cit*, para 26; Netherlands, Supreme Court, *Nuhanovic* (2013), *op cit*, para 3.12.2.

²⁴³ *Ibid*, para 3.12.2.

In all these situations, deficiencies at the level of operational control can be linked to the occurrence of wrongs.

2.3.2. Effective organic control

By contrast, acts of individual misconduct are not related to the exercise of operational control over the force. Rather, ‘acts of insubordination or disorderly conduct [...] fall clearly within the normal remit of national military discipline.’²⁴⁴ Indeed, enquiries into individual misconduct often highlight deficiencies of contributing States in terms of personnel selection and screening, training, that are directly linked to the occurrence of individual misconduct.²⁴⁵ As explained in Chapter 1, in military terms, discipline designates much more than the authority to prosecute soldiers, and includes all means through which a State ensures the *training and obedience* of its armed forces.²⁴⁶ In that sense, ‘military discipline [...] must be capable of controlling the soldier’s actions’²⁴⁷ From the perspective of control, authority over individual misconduct such as sexual abuses or murders therefore always lies within the contributing States, which retain organic command over their troops.²⁴⁸ When soldiers commit abuses because they are not adequately disciplined, the State failed to properly exercise organic control over its troops.²⁴⁹

In the UN’s view, as long as the level of control retained by the State ‘does not interfere with the United Nations operational control, it is of no relevance for the purpose of attribution.’²⁵⁰ In the view of others, the elements of control retained by a State which delegated operational

²⁴⁴ H McCoubrey and ND White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996), *op cit*, at 178.

²⁴⁵ D Campbell, ‘US troops abused civilians in Kosovo’ (The Guardian, 2000), *op cit*; Canada, ‘Report of the Somalia Commission of Inquiry’ (1997), *op cit*, Executive Summary, ‘Recommendations’.

²⁴⁶ See *supra*, Chap 1 §1.1.2.d).

²⁴⁷ P Rowe, ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’ (2000), *op cit*, at 166.

²⁴⁸ See *supra*, Chap 1 §1.1.2.d).

²⁴⁹ P Rowe, ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’ (2000), *op cit*, at 172–175. See also: H McCoubrey and ND White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996), *op cit*, at 178; M Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’ (2010), *op cit*, at 358.

²⁵⁰ ILC, ‘Responsibility of International Organizations, Comments and Observations Received From the United Nations’, *op cit*, comments on Draft Article 6, para 4.

command are irrelevant to the exercise of effective control, but their misuse by states can give rise to a distinct ground of responsibility.²⁵¹ While this may be true with regards to the failure to criminally prosecute the perpetrators of offences which constitute a wrongful act in breach of the obligation to prosecute violations, the relevance of organic control extends beyond criminal jurisdiction.

This thesis takes the position that organic command, which includes training and disciplinary authority, is a way by which the State can exercise strong influence on the occurrence of individual misconduct,²⁵² while an entity vested only with operational control 'is powerless in this realm'.²⁵³ First, disciplinary and training authority is particularly relevant to *individual misconduct*,²⁵⁴ as this form of control allows influencing the occurrence of such acts. Military scholars have explained that misconduct such as sexual and physical abuses is causally linked to the failure of the State to adequately train and discipline its troops, rather than by failures at the operational level.²⁵⁵ Organic command allows the State to select, train and prosecute forces so as to ensure that they do not commit abuses. Therefore, 'the government [is] responsible for all criminal acts of its soldiers, on the theory that as military discipline [gives] it complete control over their conduct, it [is] responsible for crimes resulting from relaxation of that control'.²⁵⁶ In other words, individual crimes are caused by failures of a State to exercise disciplinary control over its troops. Along the same lines, the UN requires contributing States to reimburse damages resulting from

²⁵¹ N Tsagourias, 'The Responsibility of International Organisations for Military Missions' (2011), *op cit*, at 255: 'jurisdiction over criminal or disciplinary matters does not establish any kind of control over the wrongful conduct which is what is required for attribution purposes'.

²⁵² 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 164: 'the capacity of troop-contributing states to have an influence on *ultra vires* human rights violations is manifold [...]', states can exert considerable effective control over this class of human rights violations..

²⁵³ *Ibid*, at 161.

²⁵⁴ See *supra*, Chap 1 §2.1.

²⁵⁵ F Adaka, 'The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines' (2008), *op cit*; P Rowe, 'Military Misconduct During International Armed Operations: 'Bad Apples' or Systemic Failure?' (2008), *op cit*.

²⁵⁶ US, 'American Military Government of Occupied Germany (1918-1920), Report of the Officer in Charge of Civil Affairs, Third Army, and American Forces in Germany' (1943), at 227.

‘wilful misconduct’²⁵⁷ of a soldier. Since the inadequate exercise of organic command by States is the cause of individual misconduct by soldiers, such conduct is under the effectively control of the national State and thus should be attributed to it.

Organic command can also be relevant to certain combat-related wrongs committed on duty. Notably, the inappropriate reaction of soldiers to an *equivocal order* can be linked not only to a failure of the operational command, but also to a lack of adequate discipline in the contingent. Proper training should for instance ensure that a soldier knows ‘the circumstances in which he can open fire or how he should treat civilian detainees’.²⁵⁸ Indeed, orders are not given in a void, and the level of discipline of a contingent influences the way it implements instructions.²⁵⁹ Accordingly, when wrongs occur because an ambiguous order, both operational control and organic command can be causally linked to the harmful conduct. As both elements of control are concurrent proximate causes of the conduct, the conduct is attributed to both entities. In the absence of orders, an *inappropriate reaction* of soldiers can also be linked to their inadequate training. In such situations, the ‘[u]ncertainty over the most appropriate response by a soldier to a perceived threat’²⁶⁰ to themselves or to civilians can result in either excessive response or inaction. For instance, the various abuses committed by the Canadian contingent to UNOSOM I during patrolling and detentions have been unquestionably linked to an inadequate exercise of disciplinary control by Canada.²⁶¹ Such incidents reveal ‘a failure of the system under which discipline is maintained.’²⁶²

Finally, the conduct of soldiers *disobeying orders* is causally linked to disciplinary failures. On occasions, States have contributed ill-disciplined

²⁵⁷ UN Model MoU, *op cit*, Article 9.

²⁵⁸ P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 177.

²⁵⁹ *Ibid*, at 177.

²⁶⁰ *Ibid*, at 175.

²⁶¹ 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 161; Canada, ‘Report of the Somalia Commission of Inquiry’ (1997), *op cit*, vol 5.

²⁶² P Rowe, ‘Military Misconduct During International Armed Operations: ‘Bad Apples’ or Systemic Failure?’ (2008), *op cit*, at 178.

or ‘grossly unqualified’²⁶³ troops to international military missions. For instance, the Bulgarian contingent to UNTAC was particularly untrained and undisciplined.²⁶⁴ In such situations, the proximate cause of the misconduct of a disobeying soldier lies in a failure of their national State to exercise disciplinary control rather than in operational control.

Because disciplinary authority provide States with a high degree of control over individual misconduct and combat-related acts that were not ordered, these types of conduct should be attributed to States on the basis of effective control.

2.3.3. Effective strategic control

To a limited extent, strategic control, which includes the authority to define the goals and means of an operation,²⁶⁵ can also enable a participant to directly influence certain types of conduct and therefore can constitute effective control for the purpose of attribution. Indeed, some wrongful conduct occurs because the design of the operation, its mandate, resources and objectives were inadequately laid down, without link to operational or disciplinary failures.

First, inadequate mandates decided at the strategic level can cause wrongful actions in the field. In all Chapter VII operations, political direction is exercised by the UN which authorizes military operations in order to accomplish particular goals defined in the mandate. In UN-led operations, the UN also decides on the strategic planning of the mission: it designates specific objectives and must plan and gather the force. Objectives mentioned in UNSC Resolutions are occasionally ambitious, such as the protection of civilians in conflicted areas, and can only be accomplished with corresponding means in terms of troops, assets and right to use force:²⁶⁶ ‘[n]either the best mandate, nor the best-led

²⁶³ 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 163.

²⁶⁴ *Ibid*, at 163.

²⁶⁵ See *supra*, Chap 1 §1.1.2.a).

²⁶⁶ BF Klappe, ‘International Peace Operations’ (2008), *op cit*, at 650: ‘There is a clear need for realistic objectives and a reasonable degree of specificity in order to provide a precise legal framework for the mission’.

mission, is likely to succeed if the operation is not designed and resourced to support its objectives.’²⁶⁷

By inadequately determining the mandate and means of the operation, decisions of the UN at the political and strategic level can significantly and directly be linked to the failure of troops to prevent human rights violations and protect civilians. Some combat-related wrongful conduct occurs neither because of a wrongful order nor due to a lack of discipline, but are caused by inadequate decisions at the strategic and political level. For instance, the Dutch troops stationed in Srebrenica lacked the operational means to protect the area that the UN had strategically declared as ‘safe’.²⁶⁸ In the hypothesis that the conduct of Dutchbat would constitute a breach of the duty to prevent genocide, it can be argued that the UN’s decision to declare Srebrenica a safe-area without providing the means to fulfil this mandate caused the failure of the soldiers in the field to protect civilians from massacres. In this scenario, the most direct cause of the harmful conduct alleged as wrongful lies in the exercise of strategic control. Similarly, in DRC, MONUC did not intervene when aware of assaults by rebels because they were ‘not equipped, trained or configured to intervene rapidly to assist those in need of protection.’²⁶⁹ This thesis submits that wrongful conduct of peacekeepers caused by failures at the strategic level should be attributed to the UN on the ground of it exercising effective strategic control.

Second, States retain the strategic authority to place limits on the permitted actions by its contingent, in the form of caveats²⁷⁰ laying ‘restrictions on how and where their units will deploy and what tasks will not be supported by them.’²⁷¹ Caveats are sometimes formulated to ensure that a contingent acts in line with the international obligations of its State, in which case they would not result in a wrongful conduct, for

²⁶⁷ V Holt et al, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (2009), *op cit*, at 89.

²⁶⁸ 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’, *op cit*, para 263: ‘Dutchbat soldiers did not have the capacity to control the situation and prevent advances into the enclave’.

²⁶⁹ UN, ‘Eleventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo’ (5 June 2002) UN Doc S/2002/621, at 71–72.

²⁷⁰ See *supra*, Chap 1 §1.2.

²⁷¹ BF Klappe, ‘International Peace Operations’ (2008), *op cit*, at 650.

want of breach. However, on other occasions, caveats reflect national policies or aim at reducing risks for armed forces of the State. Sometimes, States place excessive caveats on their troops, ‘restricting them from fulfilling the roles assigned to them’.²⁷² In this scenario, the authority enjoyed by the Force Commander vested with operational control is restricted with regards to certain contingents. If a contingent is unable to undertake an operational order due to national caveats that do not reflect international obligations, then operational control cannot be the cause of the hypothetically wrongful failure of this contingent to act. Therefore, the conduct of a contingent unable to undertake an operational mission due to caveats should be attributed to the State on the ground of its effective strategic control, and not to the entity vested with operational control.

Finally, national policies adopted at the strategic level and recommending certain actions in the field can be the proximate cause of some harmful conduct. For instance, abuses during detentions can constitute individual misconduct linked with disciplinary control,²⁷³ but are also sometimes the result of decisions at the political and strategic level. In Afghanistan and in Iraq, US soldiers perpetrating torture were following State policies relating to interrogation methods. The US drafted various legal memoranda and documents explicitly recommending the use of harsh interrogating technics, as well as the non-application of the Geneva Conventions and other international instruments,²⁷⁴ and senior officials of various institutions were involved in ‘contributing to the spread of illegal and improper interrogation techniques used by some U.S. personnel on detainees in several theatres.’²⁷⁵ Given this *institutionalization of the recourse to torture* by the State during interrogations by US soldiers, international responsibility for this type of harmful conduct would not rest on the same ground than for more isolated acts of mistreatment. Abuses and torture by US soldiers were directly caused by strategic decisions supporting the use of

²⁷² V Holt et al, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (2009), *op cit*, at 203.

²⁷³ See *supra*, Chap 2 §2.3.2.

²⁷⁴ The various documents were declassified by the Obama administration. A comprehensive review is offered by The New York Times: ‘A Guide to the Memos on Torture’ (The New York Times, 2009).

²⁷⁵ The Constitution Project, ‘Report of the Constitution Project’s Task Force on Detainee Treatment’ (2013), <<http://detainee-taskforce.org/report/>>, at 379.

torture against detainees,²⁷⁶ and it is on this ground that their conduct should be attributed to the US.

2.3.4. Degrees of effective control and multiple attribution

Under the above interpretation taking full account of the relevance of the different forms of control exercised, a conduct can be attached to several subjects each exercising some degree of effective control. In a number of situations, failures at different levels combine to produce the harmful conduct of soldiers. For instance, an unclear order can combine with a lack of training, resulting in a soldier indiscriminately shooting at civilians. In other cases, several entities can exercise the same relevant element of control, such as in Iraq where operational authority is shared between the US and contributing States. A conduct is attributed to each and every State or international organization exercising an element of control which was a proximate cause of the conduct, resulting in possible multiple attribution.

Interpreting effective control in terms of causal control reveals that it is possible for several entities to exercise some degree of control over the same conduct. At the level of attribution, identifying degrees of control does not mean that only part of the conduct would be attributed to each of the controlling party. Rather, in the situation where several entities each exercise different forms or degrees of control over a conduct, the conduct is attributed in its entirety to each of them. This has to do with the function of attribution, which is to determine whether a given human conduct can be attached to a subject or not. Attribution is an either/or operation, in the sense that the conduct of the individual is attributed or it is not. The conduct as such is not divisible, and it cannot be attributed in part to one and in part to the other. The respective degrees of control over the conduct constitute the internal causal structure of the wrongful act,²⁷⁷ which cannot be opposed to third parties in order to diffuse responsibility at the stage of attribution. It will later be seen how the relative degree of control possessed by multiple responsible parties will

²⁷⁶ MC Bassiouni, 'The Institutionalization of Torture Under the Bush Administration' (2005), *op cit*, at 396.

²⁷⁷ P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 208–250, at 239.

be relevant to the internal apportionment of responsibility amongst them.²⁷⁸

3. Conclusion: Framework for attribution based on effective causal control

To conclude the analysis developed in this Chapter, this Section presents a systematic method to attribute conduct in collaborative military operations. In five steps, the entity (or entities) to which a given conduct must be attributed is identified.

1) Type of command arrangement. To assess attribution in a collaborative military operation, the first step is to identify the pattern according to which elements of control are formally shared, that is, the command structure of the operation. As it was demonstrated that all forms of military control must be taken into account, it is important to assess which participant is vested with which element of authority. The majority of international operations are conducted in a multinational integrated unified command, where the lead entity is vested with operational control. Other possible settings are a multinational command with a dominant State (as the coalition in Iraq), a national unified command, or distinct commands. Nuances in the command arrangements, such as the independent conduct of detentions operations by some States, must be taken into account.²⁷⁹

2) Type of harmful conduct. Since different elements of control are causally related to different types of conduct, it is useful as a second step to identify the type of harmful conduct alleged as internationally wrongful. Amongst the main categories of harmful conduct occurring in military operations are individual misconduct (such as sexual or physical abuses), detention-related wrongs (arbitrary detention, mistreatment, torture), misuse of firearms, wrongful air strikes, and failures to protect. The scope of the primary rule alleged as breach determines the scope of the harmful conduct to be considered.²⁸⁰

3) Particular context. To refine the analysis, the third step is to enquire in the particular context by identifying circumstances surrounding the occurrence of the conduct. A number of factors can impact on the distribution or relevance of forms of control.

²⁷⁸ See *infra*, Chap 4.

²⁷⁹ See *supra*, Chap 1 §1.

²⁸⁰ *Ibid*, Chap 1 §2.

First, particular circumstances can reveal that the way control is actually exercised does not match the formal command arrangements. Military control is intrinsically a prerogative of the State, which is partially delegated to other entities during the collaborative military operations but can always be repossessed by the State in fact. Where a contributing State factually exercises a form of control that is formally vested in another participant such as the lead entity, the actual distribution and exercise of control must be taken into account. This occurs for instance when contributing States interfere with the UN chain of command, or in situations of withdrawal, where States resume operational control over their troops.²⁸¹

Second, circumstances have an impact on the relative relevance of each forms of control, in the sense that the form of control generically considered as the cause of a harmful conduct might be overridden by the causal relevance of another element of authority. For instance, when the context of the conduct reveals a practice of systematic or institutionalized abuses, or an inadequate combination of means and mandate, the exercise of strategic control becomes causally linked to the occurrence of wrongs in the field.²⁸²

4) Causally relevant form of control. Once identified the type of harmful conduct and the particular context, the element(s) of control constituting the proximate cause of the given conduct can be ascertained. In this fourth step, a causal analysis determinative of attribution is conducted, to ascertain which element of authority was a proximate cause, in view of the specific conduct and context.²⁸³

Operational control is usually linked to combat-related wrongs, while individual crimes are in the ambit of disciplinary control. In some situations, strategic control can be directly related to the occurrence of harmful conduct. Depending on the particularities of each operation, the relevant form of control over a given type of misconduct can shift to different levels.

5) Entity exercising effective control. In the final step, the entity exercising the causally relevant form of control, and therefore effective control can be identified.

²⁸¹ *Ibid*, Chap 2 §2.2.

²⁸² *Ibid*, Chap 2 §2.2.1.b).

²⁸³ *Ibid*, Chap 2 §2.3.

Unless circumstances show that in fact military control was not exercised pursuant to formal arrangements, this is determined by looking at the command arrangements of the operation.²⁸⁴ If a State factually exercises elements of control in contravention to command arrangements, this actual exercise of power will be taken into account.

*

Once a conduct is attributed, questions of responsibility are not settled. In the context of States and international organization collaborating in different ways and at different levels, more connected responsibilities arise, as conduct attributed to one subject can trigger a separate wrong in relation with the conduct of another.

²⁸⁴ *Ibid*, Chap 1 §1.2.