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

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Chapter 3. Derived responsibility based on indirect control over the conduct of other participants

Allocation of international responsibility between participants to a military operation occurs at two levels. First, conduct perpetrated by soldiers is attributed to one or more participant(s). The previous Chapter addressed the attribution of soldiers' conduct amongst entities sharing military control. It demonstrated that the conduct of international forces must be attributed to the entity (or entities) which exercised elements of military control causally linked to the conduct of a soldier. The essential question was whether the given conduct of an individual could be attached to a State or international organization.¹

At a second level of allocation of responsibility, an entity can be implicated in a conduct that it did not commit in the sense that the conduct is not attributed to it. In situations where the influence exercised by an entity over the occurrence of a harmful conduct does not amount to effective control, that entity can bear responsibility not for the conduct itself but for its implication in that conduct. The present Chapter addresses these scenarios of responsibility in connection with the conduct of another, and reveals the significance of control for this purpose.

The first part of this Chapter clarifies the notion of responsibility in connection with the conduct of others, before presenting and analysing established grounds of derived responsibility. It confronts these grounds of responsibility in relation with the complex collaborative scenarios that

¹ See *supra*, Chap 2.

can lead to wrongful acts in international military operations, and reveals that existing rules do not permit to coherently grasp various scenarios of military cooperation in terms of derived responsibility (§1).

In order to address difficulties triggered by the application of the rules identified in this first part of this Chapter to complex scenarios of military collaboration, the second part of this Chapter engages into a reinterpretation of derived responsibility in collaborative military operations. Grounded in a conceptual analysis of derived responsibility in the context of military operations, it proposes to analyse derived responsibility through the lens of indirect control over the conduct of another participant. It argues that the overarching notion of indirect control causing the conduct of another constitutes an overarching concept on the basis of responsibility in connection with the acts of others can be allocated. Control for determining derived responsibility is ‘indirect’ in the sense that it is exercised over another State or organization to which a conduct is attributed, rather than directly over the conduct of a soldier.² Such a criterion adequately addresses situations of derived responsibility, either mentioned in the ILC or stemming from primary obligations (§2).

1. Established rules and interpretations on derived responsibility in collaborative military operations

This Section describes existing rules and dominant interpretations on the topic of derived responsibility in collaborative military operations. In the ILC Articles, a number of general secondary grounds of derived responsibility are identified (§1.2). Besides, certain specific obligations prescribing to control conduct of another can be seen as primary grounds of derived responsibility (§1.3). As a preliminary section to this third Chapter, it is necessary to clarify the terminology (§1.1).

1.1. Definition and terminology

a) Notion of responsibility in connection with the acts of another

The notion of ‘responsibility in connection with the acts of another’³ has been devised to cover situations where a State or international

² See *infra*, Chap 3 §2.1.2.b).

³ ARS, *op cit*, Chap IV of Part I, at 64; ARIO, *op cit*, Chap IV of Part II, at 100, and Part V, at 155.

organization 'B' bears responsibility in relation to a conduct that is attributed to another subject 'A'. The State or international organization B bears responsibility on the basis of its implication in the internationally wrongful act committed by A, while the State or international organization A is responsible for the commission of the main wrongful act itself.

Traditionally, a State or international organization bears responsibility if it aids or assists,⁴ directs and control,⁵ or coerces⁶ another State or international organization to commit a wrongful conduct. Additionally, provisions specifically addressing collaboration within international organizations have been included in the ARIO, whereby a member State is responsible in connection with the acts of an international organization when it circumvents its own primary obligations by acting through the organization, and vice versa.⁷ Besides, as recognized by the ILC in the introduction of Chapter IV of Part One, responsibility can arise in connection with the conduct of another pursuant to certain primary rules, for instance when State B breaches its obligation to prevent a certain conduct by State A.⁸ Therefore, rules of derived responsibility found in primary sources and applicable in the military context will be addressed in this Chapter.⁹

Situations of responsibility in connection with the acts of another are less focused on issues of attribution of conduct than scenarios presented in the previous Chapter. The respective conduct of A and B still needs to be attributed, but this operation is often relatively straightforward. Indeed, States and international organizations often act through their own organs when implicating themselves in the commission of a breach. In cases of complex collaborative scenarios where the attribution of the main wrongful conduct or the implicated conduct poses difficulties, the principle of effective control as interpreted in Chapter 2 applies to the question of attribution. For instance, if it is alleged that a UN-led mission facilitated the commission of a breach by a parallel mission under

⁴ ARS, *op cit*, Article 16; ARIO, *op cit*, Articles 14 and 58; See *infra*, Chap 3 § 1.2.1.

⁵ ARS, *op cit*, Article 17; ARIO, *op cit*, Articles 15 and 59; See *infra*, Chap 3 § 1.2.2.

⁶ ARS, *op cit*, Article 18; ARIO, *op cit*, Articles 16 and 60; See *infra*, Chap 3 § 1.2.2.

⁷ ARIO, *op cit*, Articles 17, 61; See *infra*, Chap 3 § 1.2.3.

⁸ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 4: 'a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct'.

⁹ See *infra*, Chap 3 § 1.3.

distinct command, it must first be determined whether the conduct of peacekeepers was attributed to the UN and/or to their national State, before asking whether the entity or entities to which the peacekeepers' conduct is attributed can be held responsible for wrongful aid or assistance. Principles of derived responsibility analysed in the present Chapter operate after attribution, that is after it has been determined whether a particular conduct must be considered the act of a particular State or international organization. In this Chapter, the main issue is to identify the circumstances under which the implication of B in the occurrence of the wrongful conduct attributed to A warrants some responsibility on the side of B.

b) Unsettled terminology

A varied range of terms has been used to refer to the aforementioned notion of responsibility in relation with the acts of others.

The ILC, in its final Articles, uses the term 'responsibility in connection with the act of another' State or international organization.¹⁰ The expression is lengthy but clear, and constitutes the most orthodox way to refer to the situations where the responsibility of B for its own conduct is connected with a conduct attributed to A.¹¹ Ago had adopted a similar term, referring to the 'implication of a State in the internationally wrongful act of another State'.¹²

The term 'indirect responsibility', which is neither used in the ILC Articles nor in their commentaries, is commonly used by scholars to allude to the notion of responsibility in connection with acts of others. Anzilotti conceptualized the notion of indirect international

¹⁰ ARS, *op cit*, Chap IV of Part I, at 64; ARIO, *op cit*, Chap IV of Part II, at 100, and Part V, at 155.

¹¹ C Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011), *op cit*, at 436; B Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' (2010), *op cit*, at 523; PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 11; O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011) 8(2) *International Organizations Law Review* 291, at 293; N Nedeski and A Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"' (2012) 9(1) *International Organizations Law Review* 33.

¹² ILC, 'Seventh Report on State Responsibility by Mr Roberto Ago, Special Rapporteur' (1978) A/CN.4/307 and Add.1 & 2 and Corr.1 & 2; *Yearbook of the International Law Commission*, vol II(1), at 52. See also: J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 396; C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' (2010), *op cit*, at 284.

responsibility in order to address the case of protectorates, considering that a State representing another on the international scene should be indirectly responsible for the acts of the represented State, on the basis of the relationship of dependence between the two States.¹³ Ago adopted Anzilotti's views, and specified that the term indirect responsibility covered situations of coercion and direction and control, but not participation.¹⁴ A number of authors use the terms 'indirect responsibility' or 'responsibility for the acts of others' in the strict sense defined by Ago.¹⁵ However, for other authors, 'indirect responsibility' is considered as a synonym of 'responsibility in connection with the acts of others' and simply constitutes a shorthand for the lengthy title of Chapter IV ASR, thus including also participation.¹⁶ Besides, the term indirect responsibility has also been used in scholarship to refer to the responsibility of States for their breach of a primary obligation to prevent the injurious conduct of private individuals.¹⁷ With all these

¹³ D Anzilotti, 'La Responsabilité Internationale des États à Raison des Dommages Soufferts Par des Étrangers (2)' (1906), *op cit*, at 301–302.

¹⁴ ILC, 'Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur' (1979) UN Doc A/CN.4/318; Yearbook of the International Law Commission, vol II(1), at 4.

¹⁵ J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 328; C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' (2010), *op cit*, at 285; N Nedeski and A Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"' (2012), *op cit*, at 38.

¹⁶ JD Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611, at 615; JD Fry, 'Attribution of Responsibility' 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 104, fn 26; F Messineo, 'Attribution of Conduct' (2014), *op cit*, at 64; N Voulgaris, 'Rethinking Indirect Responsibility: A Study on Article 17 of the Draft Articles on the Responsibility of International Organizations' (2013), forthcoming in *International Organizations Law Review*, at 7.

¹⁷ C Eagleton, *International Organization and the Law of Responsibility* (1950), *op cit*, at 393: 'the « indirect responsibility » which might be claimed against [the United Nations] because of the acts of others [...] refers to acts for which, though initiated by individuals, a state — or the United Nations — might be held responsible because of some act or omission of its own, such as lack of due diligence or denial of justice'; JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2003), *op cit*, at 268; KM Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), *op cit*, at 125–127; C Scott, 'Introduction to Torture as Tort: From Sudan to Canada to Somalia' in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Oxford University Press, 2001), 3–44, at 21.

varied acceptations, the term ‘indirect responsibility’ can be ambiguous and therefore will be avoided.¹⁸

Another commonly used term is ‘attribution of responsibility’ (or ‘attributed responsibility’).¹⁹ Ago used this term as a synonym of indirect responsibility.²⁰ It translates the idea that the conduct is attributed to A but the responsibility for it is transferred to B. In drafting the ARIO, Gaja availed himself of the term to address issues of allocation of responsibility between international organizations and their member States, for conduct attributed to one or the other.²¹ In the scholarship, the term is now mostly used in the context of international organizations. One of the drawbacks of using this term is that it is not conceptually linked to the fundamental notion of attribution (of conduct).²² The wrongful act is by definition already attributed to A and the question is how B can bear responsibility for its implication in it. Besides, the term can imply the idea that responsibility is transferred from A to B, which is not necessarily the case, as A remains responsible for its own conduct.

c) Derived responsibility

In the ILC work and occasionally in the scholarship, the notion is also referred to as ‘derived responsibility’²³ (or ‘derivative responsibility’²⁴).

¹⁸ J d’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’ (2012), *op cit*, at 24: finding the term unconvincing.

¹⁹ CA Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision’ (2010), *op cit*, at 517; J d’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’ (2012), *op cit*; JD Fry, ‘Attribution of Responsibility’ (2014), *op cit*; PJ Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010), *op cit*.

²⁰ ILC, ‘Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur’, *op cit*, at 5: indirect responsibility refers to ‘cases in which international responsibility is attributed to a state for an internationally wrongful act committed by another’.

²¹ ARIO com, *op cit*, introductory commentary to Chapter II, para 3; ILC, ‘Second Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur’, *op cit*, para 11.

²² See *supra*, Chap 2 § 2.2.1.

²³ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, paras 4, 8, 9, commentary to Art 16, para 2, commentary to Art 17, para 1, commentary to Art 18, para 1; M den Heijer, ‘Shared Responsibility Before the European Court of Human Rights’ (2013) 60(3) *Netherlands International Law Review* 411, at 421; A Reinisch, ‘Aid or Assistance and Direction and Control Between States and International Organizations in

This term accurately reflects the idea that in these situations, the responsibility of B derives from the conduct of A, and not only from its own conduct. In other words, the responsibility of B depends on the commission of a certain conduct by A,²⁵ and would not arise if it was not for the actions of another. It is used throughout this Chapter to designate situations of responsibility in relation to conduct attributed to another.

The defining feature of derived responsibility is that the responsibility of B for its own wrongful conduct arises in connection with a harmful conduct of A. The notion is understood as covering all rules where the responsibility B derives from the conduct of A, either found in the ILC Articles, or in certain primary norms.

d) The primary/secondary distinction

Terminologically, rules of derived responsibility found in the ILC Articles are usually referred to as secondary rules, yet ‘they do not sit comfortably within the dichotomy between primary and secondary rules.’²⁶ Conceptually, the terms are used to distinguish between rules of responsibility which do not prohibit or impose any conduct,²⁷ but prescribe the general conditions for and legal consequences of engaging in a conduct prohibited by a substantive norm on the one hand,²⁸ and substantive rules which prescribe the content of specific international obligations on the other hand.²⁹ A number of rules of international law fit into this distinction. For instance, the right to life is a clear substantive

the Commission of Internationally Wrongful Acts’ (2010) 7(1) International Organizations Law Review 63, at 76. See also: Arbitral Tribunal, *Affaire des Biens Britanniques Au Maroc Espagnol (Espagne Contre Royaume-Uni)* (1 May 1925), Reports of International Arbitral Awards, vol II, 615–742, at 648.

²⁴ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 7 (used a synonym of derived); J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 339; G Nolte and HP Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’ (2009) 58(1) International and Comparative Law Quarterly 1, at 5; A Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (Oxford University Press, 2011), at 45; G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), *op cit*, at 127.

²⁵ M den Heijer, ‘Shared Responsibility Before the European Court of Human Rights’ (2013), *op cit*, at 421.

²⁶ J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 339.

²⁷ N Bobbio, ‘Nouvelles Réflexions sur les Normes Primaires et Secondaires’ in C Perelman (ed), *La Règle de Droit* (Bruylant, 1971), at 109: ‘contrairement aux normes primaires, elles ne créent aucune obligation’.

²⁸ ARS com, *op cit*, General commentary, para 2.

²⁹ *Ibid*, General commentary, paras 1–4.

primary rules, and rules on attribution of conduct of organs are unequivocally secondary rules of responsibility. However, many rules of international law are difficult to categorize for they incorporate both primary and secondary elements. For instance, substantive rules occasionally include additional conditions for responsibility such as knowledge. Particularly when confronted to the notion of derived responsibility, the distinction is difficult to maintain. Indeed, rules of derived responsibility regularly combine conditions for responsibility with substantive stipulations.

As adopted by the ILC and used in practice, the distinction between primary and secondary rules is rather pragmatic,³⁰ and refers more to the source and generality of a rule than to its nature. Any rule that is included in the ILC Articles is referred to as a secondary rule, while any rule that is found in treaties on particular areas of law such as human rights or humanitarian law is called a primary norm. Based on how it has been applied in practice, the distinction between primary and secondary norms can be used to differentiate between general rules found in the ILC Articles and particular rules found in specific areas treaties.³¹ This practical categorization between general grounds found in secondary rules and particular grounds found in primary rules is adopted in this thesis. Yet, it can be useful to conceptually distinguish between rules which prescribe rights and duties, and rules which determine the conditions and consequences for responsibility. When needing to distinguish at a conceptual level, the analysis refers to ‘substantive rules’ and ‘rules of responsibility’.³²

The following Sections first review general rules of derived responsibility found in the ILC Articles (§1.2) before addressing particular primary grounds of derived responsibility found in substantive international law (§1.3).

³⁰ A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013), *op cit*, at 410: ‘the dichotomy between primary and secondary rules was adopted for essentially pragmatic reasons rather than conceptual ones’.

³¹ *Ibid*, at 410–411.

³² See *infra*, Chap 3 § 2.1.1.a), discussing the nature of rules of derived responsibility.

1.2. General grounds for derived responsibility in military operations found in secondary rules

This section presents established secondary grounds on which a State or international organization can be held responsible in relation to the conduct of another in the context of military operations. First, States and international organizations engaged in a military operation can be responsible for aiding or assisting others to commit wrongful acts (§1.2.1). Second, relationships of direction and control between participants can lead to findings of derived responsibility (§1.2.2). Finally, in the framework of international organizations, control respectively exercised by member States and international organizations at the institutional level constitute a ground for derived responsibility (§1.2.3).

1.2.1. Aid or assistance to another participant

Under customary international law, responsibility can be grounded in the participation of one subject in a wrongful conduct attributed to another.³³ In the rule formulated by the ILC, a State or an international organization which ‘provides aid or assistance to another [State or international organization] with a view to facilitating the commission of an internationally wrongful act by the latter’ incurs responsibility.³⁴

³³ HP Aust, ‘Complicity in Violations of International Humanitarian Law’ (2011), SSRN, forthcoming in H Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons From the African Great Lakes’ Region* (Cambridge University Press, 2015), at 6; 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 420; V Lanovoy, ‘Complicity in an Internationally Wrongful Act’ in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014), 134–168, at 135.

³⁴ Article 16 ARS. Aid or assistance in the commission of an internationally wrongful act
A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

Article 14 ARIO. Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization’

Responsibility for aid or assistance is subject to strict conditions. First, the aiding State or international organization must have ‘knowledge of the circumstances of the internationally wrongful act’,³⁵ which means it must be aware of that the aided entity intends to use the assistance received to commit a wrong.³⁶ Second, it must provide the aid or assistance with the intention to support or facilitate the commission of a wrongful act.³⁷ Finally, the conduct of the aided entity must constitute a breach of the substantive obligations of the aiding entity.³⁸

The rule on aid or assistance as formulated by the ILC has been criticized in some respects in the scholarship. Notably, the subjective element of intent can be seen as too narrow, as it requires demonstrating that the aid was given with the clear purpose of assisting in the commission of the main wrongful act.³⁹ Besides, the requirement that the obligation breached by the conduct of the aided entity must also be binding on the aiding entity narrows further the scope of responsibility.⁴⁰

In the context of military operations, aid or assistance can take various forms. First, assistance can take a material form. Many illustrations provided by the ILC and in the scholarship concern various degrees of

Article 58(1) ARIIO. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

³⁵ Articles 16(a) ARS, 14(a) ARIIO and 58(1)(a) ARIIO.

³⁶ ARS com, *op cit*, commentary to Article 16, para 4; B Graefrath, ‘Complicity in the Law of International Responsibility’ (1996) 2 *Revue Belge de Droit International* 371, at 375.

³⁷ ARS com, *op cit*, commentary to Article 16, para 5.

³⁸ Articles 16(b) ARS, 14(b) ARIIO and 58(1)(b) ARIIO

³⁹ HP Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011), at 83; B Graefrath, ‘Complicity in the Law of International Responsibility’ (1996), *op cit*, at 375: ‘even the supply of weapons, cannot be considered as complicity [...] if it cannot be established that the arms have been supplied for the purpose of assisting the other State in committing its wrongful act. It seems highly questionable that such a narrow interpretation of the intent as a decisive criterion for complicity is really useful’; V Lanovoy, ‘Complicity in an Internationally Wrongful Act’ (2014), *op cit*, at 152: ‘In most cases, it is difficult, if not impossible, to establish that a state did not only know that its assistance would be used for a violation of an international obligation of another state, but that it had been providing assistance for that purpose’.

⁴⁰ V Lanovoy, ‘Complicity in an Internationally Wrongful Act’ (2014), *op cit*, at 159.

military support,⁴¹ such as providing weapons and equipment⁴² or granting over-flights rights.⁴³ By definition, participants collaborating will find themselves providing material support to each other. However, difficulties arise when applying the rule as laid down in the military context.⁴⁴

Besides, aid or assistance can take the form of financial support⁴⁵ to a military operation by States or international organizations not engaged on the ground. For instance, the EU has been providing significant financial support to AU-led operations.⁴⁶ Due to the ‘fungible nature of financial assistance’,⁴⁷ it can be more difficult to assess knowledge, yet scholars have demonstrated that financial support by an international organization can qualify as wrongful aid or assistance if the organization provides funds for a particular purpose and subject to certain conditions.⁴⁸

In practice, the UN recognized the possibility to bear responsibility for aid and assistance to governmental forces to which a peacekeeping

⁴¹ ARS com, *op cit*, commentary to Article 16, para 7; I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), *op cit*, at 191; J Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ (1987) 57(1) *British Yearbook of International Law* 77, at 90.

⁴² I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), *op cit*, at 191; B Graefrath, ‘Complicity in the Law of International Responsibility’ (1996), *op cit*, at 375; P Klein and O Corten, ‘The Limits of Complicity as a Ground for Responsibility: Lessons Learned From the Corfu Channel Case’ in K Bannelier et al (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge, 2012), 315–334, at 326.

⁴³ O Corten, ‘La Complicité dans le Droit de la Responsabilité Internationale: Un Concept Inutile?’ (2011) 57 *Annuaire Français de Droit International* 57, at 62; G Nolte and HP Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’ (2009), *op cit*, at 4.

⁴⁴ See *infra*, Chap 3 §2.2.1.

⁴⁵ ARS com, *op cit*, commentary to Article 16, para 7.

⁴⁶ EU Commission, ‘African Peace Facility Annual Report’ (2012), 19.

⁴⁷ A Reinisch, ‘Aid or Assistance and Direction and Control Between States and International Organizations in the Commission of Internationally Wrongful Acts’ (2010), *op cit*, at 68.

⁴⁸ *Ibid*, at 69; G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), *op cit*, at 136: proposes to presume knowledge if funds are used for a purpose different than the one agreed on.

mission provides support.⁴⁹ In 2009, reports emerged that Congolese forces combatting armed groups with the support of MONUC were committing large-scale killings and sexual abuses.⁵⁰ MONUC had the mandate to support governmental forces in disarming armed groups,⁵¹ and provided logistical and operational support in the form of transport, food, fuel, helicopter lift, medical evacuation and fire support.⁵² It also provided strategic support in the planning of operations,⁵³ and the missions during which abuses were committed involved ‘significant joint planning’.⁵⁴ Recognizing the possibility of engaging its responsibility for aiding and assisting governmental forces in committing abuses,⁵⁵ the UN developed a policy of conditionality, according to which UN support is to be withdrawn if it is believed that governmental forces are committing grave violations of international law.⁵⁶ In this practice of the UN, knowledge is the key condition and specific intent is not required.⁵⁷

⁴⁹ ARIIO com, *op cit*, commentary to Article 14, para 6; ILC, ‘Responsibility of International Organizations, Comments and Observations Received From the United Nations’, *op cit*, comments to Draft Article 13, para 1.

⁵⁰ T Burke, ‘UN cuts aid to Congo army brigade’ (CNN, 2 November 2009); J Gettleman, ‘UN Told Not to Join Congo Army in Operation’ (New York Times, 9 December 2009); ‘Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions – Mission to the Democratic Republic of the Congo’ (OHCHR, 15 October 2009).

⁵¹ UN Security Council, ‘Resolution 1794’ (21 December 2007) UN Doc S/RES/1794, para 5.

⁵² Human Rights Council, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston – Addendum: Mission to the Democratic Republic of the Congo’ (14 June 2010) UN Doc A/HRC/14/24/Add.3, paras 9; UN, ‘Thirtieth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo’ (4 December 2009) UN Doc S/2009/623, para 5.

⁵³ UN, ‘Resolution 1794’, *op cit*, para 7.

⁵⁴ UN, ‘Twenty-eighth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo’ (30 June 2009) UN Doc S/2009/335, para 11.

⁵⁵ On whether MONUC support constituted aid or assistance: SP Sheeran, ‘A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo’ (2011) 8(1) International Organizations Law Review 55.

⁵⁶ UN Security Council, ‘Resolution 1906’ (23 December 2009) UN Doc S/RES/1906, para 22. See: HP Aust, ‘The UN Human Rights Due Diligence Policy: An Effective Mechanism Against Complicity of Peacekeeping Forces?’ (2014) Journal of Conflict and Security Law 1.

⁵⁷ HP Aust, ‘The UN Human Rights Due Diligence Policy: An Effective Mechanism Against Complicity of Peacekeeping Forces?’ (2014), *op cit*, at 11.

1.2.2. Direction and control over another State

Provisions on responsibility for direction and control over the commission of a wrongful act address situations ‘where one State exercises the power to direct and control the activities of another State’.⁵⁸ The criterion of direction and control are defined in Article 17 ASR⁵⁹ with a high threshold. Direction refers to ‘actual direction of an operative kind’⁶⁰ and excludes ‘mere influence’, ‘oversight’⁶¹ or ‘incitement’.⁶² Control is defined as ‘domination over the commission of wrongful conduct’⁶³ which ‘compromise a state’s freedom to decide’.⁶⁴ A State is responsible if it ‘actually directs and controls conduct’,⁶⁵ not merely if it had the power to do so, and ‘[b]oth direction and control must be exercised over the wrongful conduct’.⁶⁶ Besides, responsibility for direction and control is subject to the two typical conditions for derived responsibility, namely knowledge of the circumstances and wrongfulness of the conduct of the directed State for the directing entity.⁶⁷

In the context of collaborative military operations, such operative direction and actual domination between participants can occur. Authors have recognised the relevance of direction and control ‘especially insofar as the two entities work together in a more or less hierarchical relationship in the framework of peacekeeping missions’.⁶⁸ Notably, in coalitions operating under a multinational command that is not fully integrated, participants agree for some States to have a prevailing

⁵⁸ ARS com, *op cit*, commentary to Article 17, para 5.

⁵⁹ Article 17 ARS. Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

⁶⁰ ARS com, *op cit*, commentary to Article 17, para 7.

⁶¹ *Ibid*, commentary to Article 17, para 7.

⁶² *Ibid*, introductory commentary to Chapter IV of Part I, para 9.

⁶³ *Ibid*, commentary to Article 17, para 7.

⁶⁴ J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 399.

⁶⁵ ARS com, *op cit*, commentary to Article 17, para 6.

⁶⁶ *Ibid*, commentary to Article 17, para 7.

⁶⁷ *Ibid*, commentary to Article 17, para 8.

⁶⁸ PJ Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010), *op cit*, at 24.

influence over the chain of command.⁶⁹ In this setting, the dominating State can incur derived responsibility in relation to the conduct of other coalition partners.⁷⁰ Direction and control as a ground for derived responsibility differs from effective control as a ground for attribution in that direction and control concerns control exercised by one participant over another which itself exercise control over the conduct of soldiers, while effective control concerns control exercised by participants directly over the conduct of soldiers.⁷¹

Coercion can be seen as an extreme degree of direction and control. Its definition is akin to force majeure, inasmuch as the coercing entity must exercise constraint to such an extent that the coerced entity is forced to obey.⁷² Under the ILC Articles, a State or international organization incurs responsibility if it coerces another State or international organization to commit an act that breaches the obligations of the coerced entity.⁷³ Practice regarding coercion is limited,⁷⁴ and these scenarios are sometimes referred to as theoretical.⁷⁵ In the context of participants willing to act together in a collaborative military operation, it is relatively unlikely that coercion would occur.

1.2.3. Institutional control in the framework of international organizations

Military collaboration between international organizations and their member States can generate situations which 'do not seem to fall squarely into any of the three categories covered by articles 16 to 18 on

⁶⁹ See *supra*, Chap 1 §1.2.4.

⁷⁰ See *infra*, Chap 3 §2.2.2.

⁷¹ *Ibid*, Chap 3 §2.1.2.b).

⁷² ARS com, *op cit*, commentary to Article 18, para 2.

⁷³ Article 18 ARS. Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) the coercing State does so with knowledge of the circumstances of the act.

⁷⁴ C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' (2010), *op cit*, at 288; JD Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007), *op cit*, at 621.

⁷⁵ PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 25.

State responsibility',⁷⁶ as Member States and international organizations can influence the conduct of each other in unique ways.⁷⁷ For instance, a conduct attributed to a contributing State can have been carried out pursuant to a UN decision, or conversely a member State could take advantage of the fact that the UN has limited primary obligations to circumvent its own obligations by engaging in military activities through the international organization. A number of provisions have thus been devised in the ARIO and elsewhere to address responsibility for acts performed in the framework of an international organization, although practice is scarce.⁷⁸ These rules address both situations where international organizations exercise control over their member States (§1.2.3.a), and scenarios of control by member States over the organization (§1.2.3.b).

a) Institutional control of international organizations acting through member States

International organizations can exercise institutional control over their member States through normative acts, such as binding decisions and authorizations.⁷⁹ The ILC devised Article 17 ARIO to address these situations. It provides that an international organization incurs responsibility if a conduct attributed to a member State was committed pursuant to a binding decision or because of an authorization of the organization, and constitutes a breach of the organization's obligations.⁸⁰

⁷⁶ ILC, 'Third Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur' (2005) UN Doc A/CN.4/553, at 29.

⁷⁷ PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 26 'There are certain forms of exercising authority or influence over a State or an international organization, however, that are specifically available only to Member States in relation to an international organization or to an international organization vis-à-vis its Member States'.

⁷⁸ ILC, 'Third Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur', *op cit*, para 28.

⁷⁹ N Blokker, 'Abuse of the Members: Questions Concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' (2010) 7(1) International Organizations Law Review 35, at 39.

⁸⁰ Article 17 ARIO. Circumvention of an international obligation through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

The first paragraph addresses binding decisions of international organizations requiring member States to adopt a conduct that is in breach of the organization's obligations, without leaving them any margin of discretion in the conduct to be adopted.⁸¹ It is relatively unlikely that such a binding decision could be imposed in military matters, which mostly remain the prerogative of States. More interesting for the topic is the second paragraph, which provides that an international organization incurs responsibility if it authorizes a member State or organization to commit a conduct that violates an obligation of the authorizing international organization. This scenario could arise in the context of operations authorized by the UN and undertaken by others.

To engage its responsibility, the organization must have intended to avoid complying with its obligations by influencing the conduct of its members.⁸² As with aid or assistance, this requirement of intent will be difficult to demonstrate. Moreover, there must be a 'direct, causal relationship between the non-binding decision and the implementation by the member(s)'.⁸³ Therefore, responsibility for authorization only covers the conduct specifically authorized, and not 'any other breach that the member State or international organization to which the authorization is addressed might commit'⁸⁴ thereafter.

In the case of the authorization to conduct a military operation given by the Security Council to member States, responsibility under Article 17 ARIO therefore does not extend to every wrongful conduct during the

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

⁸¹ ARIO com, *op cit*, commentary to Article 17, para 7; N Blokker, 'Abuse of the Members: Questions Concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' (2010), *op cit*, at 41.

⁸² ARIO com, *op cit*, commentary to Article 17, para 4: intent is implied in the term circumvention.

⁸³ ARIO com, *op cit*, commentary to Article 17, para 11; N Blokker, 'Abuse of the Members: Questions Concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' (2010), *op cit*, at 44.

⁸⁴ ARIO com, *op cit*, commentary to Article 17, para 13.

operation.⁸⁵ There must be a causal link between the authorization and the specific wrongful act. Arguably, a conduct specifically authorized by a UNSC resolution, such as security detentions, could engage the derived responsibility of the organization.

b) Institutional control of member States acting through an international organization

Conversely, States can bear responsibility on the ground of the control they exercise over the organisation through which they conduct a military operation. States can exercise institutional control over international organizations in two respects. First, they have control over the scope of the competences and obligations of the organization. Second they can exercise control at the decision-making level.

– Member States control over the competences and obligations of the organization

States vest the organizations they create with certain competences, such as the authority to conduct military operations, but these international organizations are usually bound by much less substantive obligations than States.⁸⁶ As a result, international organizations can engage in conduct that violates the obligations of their member States.

The conditions and extent to which member States should bear responsibility in relation to acts attributed to international organizations are heavily debated.⁸⁷ The ILC adopted a relatively restricted standard

⁸⁵ *Ibid*, commentary to Article 17, para 13.

⁸⁶ 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), *op cit*, at 52: 'Any international organization starts from a 'clean slate', it has no history, whereas its Member States carry a whole history of treaty relations with them when joining the organization'.

⁸⁷ Notably: C Ahlborn, 'To Share or Not to Share? The Allocation of Responsibility Between International Organizations and Their Member States' (2013), *op cit*; I Brownlie, 'The Responsibility of States for the Acts of International Organizations' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005), 355–362; J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4(1) *International Organizations Law Review* 91; PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*; T Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010), *op cit*; O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*; E Paasivirta, 'Responsibility of a Member State

formulated in Article 61 ARIO,⁸⁸ whereby a member State incurs responsibility only if it intentionally avoided complying with its obligations⁸⁹ by having the organization rather than itself adopting a certain conduct that breaches the State's obligations. Circumvention occurs when a member State has transferred some of its competences to an organization,⁹⁰ while primary obligations relating to the exercise of these competences are binding the State only.⁹¹

Both normative and operational acts of international organizations induced by member States appear to be covered by Article 61. Either a wrongful decision of the UNSC or the NAC, or the conduct of a soldier attributed to an international organization on the basis of effective control, could engage the derived responsibility of member States. For instance, in a maritime military mission led by an international organization – such as EU's operation Atalanta⁹² – member States could take advantage of the limited refugee law and human rights obligations

of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations' (2010), *op cit*; C Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60(4) International and Comparative Law Quarterly 997; O de Schutter, 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility' (2009) CRIDHO Working Paper 2010/4; RA Wessel, 'Division of International Responsibility Between the EU and its Member States in the Area of Foreign Policy, Security and Defence Policy' (2011), *op cit*; 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*.

⁸⁸ Article 61 ARIO. Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

⁸⁹ ARIO com, *op cit*, commentary to Article 61, para 2: 'the existence of an intention to avoid compliance is implied in the use of the term "circumvention"'.

⁹⁰ *Ibid*, commentary to Article 61, para 6.

⁹¹ *Ibid*, commentary to Article 61, para 8.

⁹² EU Council of the European Union, 'Joint Action of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery Off the Somali Coast' (2008) 2008/851/CFSP, Official Journal of the European Communities L 301/33.

of the organization to circumvent their own obligation of protection and non-refoulement.⁹³

The inclusion by the ILC of this provision was inspired by the case law developed by the ECtHR concerning the responsibility of States parties to the ECHR when acting in the framework of international organizations.⁹⁴ The Court developed a principle under which a State party to the Convention cannot evade its responsibility under the ECHR by transferring competence to act to an international organization.⁹⁵ It held that States parties to the Convention have the obligation to ensure that the international organizations through which they act protect human rights in a way equivalent as guaranteed under the ECHR.⁹⁶ Under this case law, States which are party to the ECHR and which subsequently engage in a military operation led by an international organization can incur responsibility in relation to the conduct of troops attributed to the organization and in breach of the Convention. The principle of equivalent protection appears broader than Article 61 ARIO,

⁹³ RA Wessel and L den Hertog, 'EU Foreign, Security and Defence Policy: A Competence/Responsibility Gap?' (2013), *op cit*, at 353–354. The operation's regulations provide that captured individuals should only be transferred to third States 'in a manner consistent with relevant international law, notably international law on human rights' (EU, 'Joint Action of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery Off the Somali Coast', *op cit*, Article 12(2).)

⁹⁴ ARIO com, *op cit*, commentary to Article 61, paras 3–5; J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007), *op cit*, at 102.

⁹⁵ ECtHR, *Waite and Kennedy v Germany*, Judgment (18 February 1999), App no 26083/94, para 67: 'Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution'. See generally: P de Hert and F Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 *German Law Journal* 874; T Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010), *op cit*.

⁹⁶ ECtHR, *Gasparini v Italy and Belgium*, Judgment (12 May 2009), App no 10750/03, at 6: 'les Etats membres ont l'obligation, au moment où ils transfèrent une partie de leurs pouvoirs souverains à une organisation internationale à laquelle ils adhèrent, de veiller à ce que les droits garantis par la Convention reçoivent au sein de cette organisation une « protection équivalente » à celle assurée par le mécanisme de la Convention'.

as it includes not only an obligation not to induce the organization to commit a wrongful conduct, but also an obligation to ensure that the organization complies with human rights.

– Control over the decision-making

Some authors have argued that member States should incur responsibility for their participation in the decision-making leading to the wrongful conduct of an organization, when they abuse their voting rights and exercise overwhelming control over the decision-making process.⁹⁷ This argument is grounded in the general principle that obligations must be performed in good faith.⁹⁸ Applied to decision-making processes in international organizations, the doctrine of abuse of rights prescribes that member States must exercise their voting rights in a manner compatible with the purpose of the organization and with their other obligations.⁹⁹ The ICJ alluded to the idea that participation in decision-making could qualify as conduct of a State and would constitute a wrongful act if in breach of that State's obligations.¹⁰⁰

Accordingly, it can be argued that States should be responsible for abuse of rights 'where the voting of members is constructed to give states the

⁹⁷ J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007), *op cit*; PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 29; O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*.

⁹⁸ ARIO com, *op cit*, commentary to Article 61, para 2: Article 61 notably covers 'cases in which the member State may be said to be abusing its rights'; Institut de Droit International, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of Their Obligations Toward Third Parties' (1 September 1995) Resolution adopted at the Lisbon session, Article 5: 'members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as [...] the abuse of rights'; O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*, at 301.

⁹⁹ O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*, at 331–335.

¹⁰⁰ ICJ, *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v Greece)*, Judgment (5 December 2011), ICJ Reports 2011, 644, para 70. In the case at hand, Greece breached its obligation not to object FYROM's membership to NATO notably though its participation in NATO's decision-making. See V Lanovoy, 'Complicity in an Internationally Wrongful Act' (2014), *op cit*, at 149.

power to direct or thwart the action of the organization',¹⁰¹ so that 'one or more states continue to wield considerable power over the organization'.¹⁰² In this view, States exercising 'overwhelming control'¹⁰³ over the decision-making process of an organization should bear responsibility in relation to their conduct. Applied to the conduct of military operations, it leads to the argument that wrongful airstrikes approved by the NAC and attributed to NATO could engage the derived responsibility of NATO member States.¹⁰⁴

1.3. Specific grounds for derived responsibility in military operations found in primary rules

Grounds for derived responsibility — in the sense of responsibility in connection with a conduct attributed to another — can also be found in particular primary norms. A number of rules of international law prescribe obligations in relation to acts performed by other subjects. For instance, a norm can require States to take steps to prevent certain conduct, or to ensure respect for certain norms by others. Their common feature is that they require the State or international organization bound by them to exercise some control over the conduct of others.

Since the thesis focuses on allocation of responsibility amongst participants to collaborative military operations, only the obligations to control the conduct of another subject of international law engaged in a military operation are analysed in this Section. Responsibility for the failure to prevent certain types of conduct by insurgents or local forces is not analysed here.

This Section addresses grounds for derived responsibility found in primary rules that can be relevant in the military context. It does not exhaustively address all possible grounds of derived responsibility found in primary rules, but proposes to identify three main grounds for derived responsibility that are arguably the most relevant in the context of collaborative military operations. First, it addresses the obligation to

¹⁰¹ O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*, at 336.

¹⁰² *Ibid*, at 347.

¹⁰³ J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007), *op cit*, at 108.

¹⁰⁴ T Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?' (2002), *op cit*, at 191. See also: M Zwanenburg, 'Shared Responsibility in NATO-led Operations', *op cit*.

ensure respect for humanitarian law by other participants to an operation (§1.3.1), second, obligations to prevent human rights violations by other participants (§1.3.2), and finally, obligations to protect prisoners transferred between participants (§1.3.3).

1.3.1. Obligation to ensure respect for humanitarian law by other participants

Under international humanitarian law, States and international organizations have the obligation not only to respect, but also to ‘ensure respect’ for, the Geneva Conventions.¹⁰⁵ The obligation to ensure respect of humanitarian law in all circumstances enshrined in common Article 1 is considered to be a general principle of law,¹⁰⁶ therefore binding all subjects.

According to the ICRC Commentary, Article 1 prescribes an obligation for States to ‘do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.’¹⁰⁷ This obligation first means that States must ensure respect by its own organs. What is more, it has been argued that Article 1 imposes a positive obligation to ensure that other States (or international organizations) respect the Conventions.¹⁰⁸

The obligation to ensure respect for humanitarian law by other subjects is two fold. First, it can be interpreted as ‘at least’¹⁰⁹ an obligation not to

¹⁰⁵ First Geneva Convention, *op cit*; Second Geneva Convention, *op cit*; Third Geneva Convention, *op cit*; Fourth Geneva Convention, *op cit*, common Article 1: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’.

¹⁰⁶ ICJ, *Nicaragua, Merits* (1986), *op cit*, para 220: The obligation to ensure respect ‘does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression’.

¹⁰⁷ JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume IV* (1958), *op cit*, at 16.

¹⁰⁸ L Condorelli and L Boisson de Chazournes, ‘Quelques Remarques à Propos de L’Obligation des États de “Respecter et Faire Respecter” le Droit International Humanitaire “en Toutes Circonstances”’ in C Swinarski (ed), *Etudes et Essais sur le Droit International Humanitaire et sur les Principes de la Croix-Rouge en L’honneur de Jean Pictet* (Martinus Nijhoff, 1984), 17–35, at 26; ICJ, *Wall Opinion* (2004), *op cit*, para 158: ‘every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with’.

¹⁰⁹ HP Aust, ‘Complicity in Violations of International Humanitarian Law’ (2011), *op cit*, at 13.

encourage or assist in violations of humanitarian law by others.¹¹⁰ Accordingly, each participant has the obligation not to provide assistance to violations of humanitarian law committed by the other participants. The interpretation of common Article 1 as an obligation of non-assistance allows capturing responsibility for complicity with lower requirements than under the ILC Articles.¹¹¹ When applied to scenarios of aid or assistance, demonstrating knowledge would be enough to constitute the subjective element.

Further, common Article 1 can be seen as imposing on States an obligation to 'exert their influence, to the degree possible'¹¹² to ensure that no violation is committed. Applied in the context of collaborative operations, where military authority is distributed amongst participants, common Article 1 prescribes obligations of control between participating States and international organizations. Indeed, when collaborating in undertaking a common military mission, subjects have the capacity to influence each other. Accordingly, it imposes an obligation to take active steps to ensure respect for humanitarian law by States and international organizations over which they have control.¹¹³ The extent to which participants which are vested with some elements of control over the

¹¹⁰ HP Aust, 'Complicity in Violations of International Humanitarian Law' (2011), *op cit*, at 13: 'the concrete content of Common Article 1 could, in this respect, be understood as at least requiring States not to render aid or assistance to violations of the Geneva Conventions'; ICJ, *Nicaragua, Merits* (1986), *op cit*, para 220: Common Article 1 provides for 'an obligation not to encourage persons or groups engaged in the conflict' to act in violation of humanitarian law.; O Corten, 'La Complicité dans le Droit de la Responsabilité Internationale: Un Concept Inutile ?' (2011), *op cit*, at 64; J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (2005), *op cit*, at 509, Rule 144: 'States may not encourage violations of international humanitarian law by parties to an armed conflict'; J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987), *op cit*, at 91.

¹¹¹ HP Aust, 'Complicity in Violations of International Humanitarian Law' (2011), *op cit*, at 13: 'For those cases in which assistance to violations of international humanitarian law is at stake, it is very well possible to construe Article 16 ASR as the *lex generalis* and Common Article 1 as *lex specialis*. The strict criteria embodied in Article 16 ASR, especially with respect to the requisite degree of intent, may then be attenuated once complicity enters the scope of applicability of Common Article 1' (footnotes omitted).

¹¹² J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (2005), *op cit*, at 509, Rule 144.

¹¹³ T Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *American Journal of International Law* 348, at 355: 'each state must exert efforts to ensure that no violations of the applicable provisions of humanitarian law ("to ensure respect") are committed, at the very least by third parties controlled by that state. '.

organs of another are under an obligation to exercise control will be further analysed in the second part of this Chapter.¹¹⁴

1.3.2. Obligation to prevent human rights violations by other participants

A similar obligation can be found in human rights law, where States have a duty to protect individuals within their jurisdiction from human rights violations by third parties.¹¹⁵ It is traditionally established that human rights obligations entail not only the negative obligation to abstain from violations, but also the positive obligation to protect human rights of individuals within the State's jurisdiction and possibly extra-territorially, which itself includes the duties to prevent and punish violations by others.¹¹⁶

Discussions often focus on the States' obligations to prevent violations by private individuals. Nevertheless, the obligation to ensure respect for human rights within a State's jurisdiction can also apply with regards to the conduct of others subjects of international law over which the State can exercise influence.¹¹⁷ For instance, the case law of the ECtHR on responsibility in relation to extradited individuals facing death penalty¹¹⁸ implements responsibility of States for their failure to ensure human rights protection in relation to the conduct of another State. At least in the context of the ECHR, the positive obligation to protect human rights includes 'a duty to make use of material opportunities to prevent or

¹¹⁴ See *infra*, Chap 3 §2.2.4 and §2.3.2.

¹¹⁵ ECHR, *op cit*, Article 1; International Covenant on Civil and Political Rights, *op cit*, Article 2.

¹¹⁶ O Corten, 'La Complicité dans le Droit de la Responsabilité Internationale: Un Concept Inutile ?' (2011), *op cit*, at 64; M Hakimi, 'State Bystander Responsibility' (2010) 21(2) *European Journal of International Law* 341, at 347; BG Ramcharan, 'The Concept of Protection in the International Law of Human Rights' (1989), *op cit*; *Arbitral Tribunal, Walter A Noyes (United States) v Panama* (22 May 1933), *Reports of International Arbitral Awards*, vol VI, 308-312, at 311.

¹¹⁷ HP Aust, *Complicity and the Law of State Responsibility* (2011), *op cit*, at 415; M den Heijer, 'Shared Responsibility Before the European Court of Human Rights' (2013), *op cit*, at 422: 'It does not appear that the [ECtHR] entertains a fundamental distinction in this respect between situations where the injury stems from the conduct of a private party or where it concerns the conduct of another state'.

¹¹⁸ ECtHR, *Soering v the United Kingdom*, Judgment (7 July 1989), App no 14038/88.

redress conduct by another state which contravenes the standards of the ECHR.’¹¹⁹

Applied to collaborative military operations, where the distribution of military authority allows certain participants to exercise influence over the conduct of others, human rights prescribe, similarly to humanitarian law, an obligation to make use of available means to control the conduct of others in order to protect human rights.¹²⁰

1.3.3. Obligation to protect prisoners transferred between participants

Specific obligations to prevent violations by other participants exist in relation to the transfer of prisoners. Under the Geneva Conventions, an entity which transfers a detainee that it captured has the obligation to ensure that the entity to which the detainee is transferred is willing and able to abide by the Conventions.¹²¹ If the receiving entity nonetheless fails to respect the humanitarian law, the transferring State has the subsidiary obligation¹²² to take steps to correct the situation and to request the return of the detainee.¹²³ The ICRC commentary explains the significance of this obligation when States engage in collaborative military operations,¹²⁴ considering ‘there must be no possibility for a group of States which are fighting together to agree to hand over to one

¹¹⁹ M den Heijer, ‘Shared Responsibility Before the European Court of Human Rights’ (2013), *op cit*, at 422.

¹²⁰ See *infra*, Chap 3 §2.1.4 and §2.3.2.

¹²¹ Third Geneva Convention, *op cit*, Article 12(2): ‘Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody’. A similar provision applies to other protected persons (Fourth Geneva Convention, *op cit*, Article 45.).

¹²² JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume III* (1960), *op cit*, at 137.

¹²³ Third Geneva Convention, *op cit*, Article 12(3): ‘Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with’.

¹²⁴ JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume III* (1960), *op cit*, at 132: ‘the significance of this question has deepened with the establishment of military organizations for collective defence such as the North Atlantic Treaty Organization and the Warsaw Pact, which place the armed forces of several Powers under a unified command in case of conflict’.

of their members not a party to the Convention all or some of the prisoners whom they have captured jointly, thus evading the application of the Convention'.¹²⁵

The obligation to protect transferred prisoners applies to the capturing entity, which definition under the Geneva Convention is in line with attribution rules. Indeed, the 'detaining power' is the entity 'to which "the individuals or military units who have captured [detainees]" are responsible',¹²⁶ which means the entity exercising military authority over the capturing soldiers.

Under the provisions devised in humanitarian law, responsibility for the treatment of transferred detainees is shared between the transferring and receiving entities on the basis of distinct acts. The receiving State remains responsible for its own breach in the treatment of detainee,¹²⁷ while the transferring State bears responsibility derived from the conduct of the receiving entity. In the words of the ICRC, this constitutes a 'compromise, which fell between the principle of joint responsibility and that of sole responsibility',¹²⁸ as the transferring State is not responsible as such for the violations by others but can bear a share of responsibility in connection to them.

Similar provisions can be found in human rights law whereby one State must ensure that an individual transferred to the jurisdiction of another State will not face human rights violations.¹²⁹ For instance, the Convention against Torture prohibits the transfer of an individual to a 'State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.¹³⁰

In practice, derived responsibility for violations of the duty to protect the rights of transferred individuals has been upheld in a number of cases.

¹²⁵ *Ibid*, at 136.

¹²⁶ *Ibid*, at 133.

¹²⁷ *Ibid*, at 137: the 'duties of the receiving Power in regard to prisoners follow directly from the Convention' and the 'obligation for the receiving Power is independent of the transferring Power'.

¹²⁸ *Ibid*, at 131.

¹²⁹ J Horowitz, 'Transferring Wartime Detainees and a State's Responsibility to Prevent Torture' (2012) 2(2) National Security Law Brief 43, at 52; B Malkani, 'The Obligation to Refrain From Assisting the Use of the Death Penalty' (2013) 62(3) International and Comparative Law Quarterly 523.

¹³⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *op cit*, Article 3.

The case of *Ramhatullah* concerned an individual who had been captured by the UK in Iraq, and subsequently handed over to the US, which transferred him to Afghanistan where he remained unlawfully detained by the US.¹³¹ Ramhatullah brought his case before British courts arguing that the UK was responsible for a breach of its humanitarian law obligation to ensure the protection of transferred individuals. The UK Supreme Court held that the UK had ‘reasonable prospect of being able to exert control’¹³² over the detention of Ramhatullah and should have requested its return.¹³³ It found the UK responsible for its failure to ensure the protection of transferred detainees according to its obligations under the Geneva Conventions and the agreement on the transfer of detainees it concluded with the US.¹³⁴

In *Al-Saadoon*, two Iraqi nationals who had been captured by the UK in Iraq and subsequently transferred to Iraqi custody successfully argued before the ECtHR that the UK was responsible for having transferred them despite being aware of a real risk that they would face death penalty,¹³⁵ and without attempting to obtain assurances that detainees transferred by the UK would not face death penalty.¹³⁶ The case of *El-Masri* concerned an individual who had been arrested by the FYROM, and handed over to the US, which transferred him to Afghanistan, ill-treated him, and released him after they realized they ‘had detained the wrong person’.¹³⁷ After his claims against the US were dismissed in American courts,¹³⁸ he brought a claim before the ECtHR against the FYROM for its implication in the rendition by the US.¹³⁹ The ECtHR held the FYROM responsible in connection with the mistreatment of El-

¹³¹ UK, Supreme Court, *Rahmatullah* (2012), *op cit*; UK, Court of Appeal, *Rahmatullah* (2011), *op cit*.

¹³² UK, Supreme Court, *Rahmatullah* (2012), *op cit*, para 45.

¹³³ *Ibid*, para 76.

¹³⁴ An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees Between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia (adopted 25 March 2003, Doha) released 26 October 2012 by Wikileaks (‘US-UK-Australia Memorandum of Understanding for the transfer of prisoners’).

¹³⁵ ECtHR, *Al-Saadoon and Mufdhi v the United Kingdom*, (2010), *op cit*, paras 133–135.

¹³⁶ *Ibid*, paras 141–143.

¹³⁷ US, Court of Appeals (Fourth Circuit), *El-Masri v United States* (2 March 2007), 479 F.3d 296 (4th Cir 2007), at 300.

¹³⁸ AS Deeks, ‘Litigating How We Fight’ (2011), *op cit*, at 438; US, Court of Appeals, *El-Masri v United States*, (2007), *op cit*.

¹³⁹ ECtHR, *El-Masri v The Former Yugoslav Republic of Macedonia*, (2012), *op cit*, at 149.

Masri on relatively unclear grounds.¹⁴⁰ It considered that the transfer of El-Masri exposing him to ill treatment constituted a breach of Article 3 of the ECHR,¹⁴¹ but also that Macedonia was responsible for a breach of Article 5 ‘during the entire period of his captivity,’¹⁴² thereby suggesting that the FYROM was as such responsible for conduct of the US.

To secure compliance with their international obligations, partners in military operations occasionally conclude agreements regarding the transfer of individuals, revealing that States accept the possibility to be responsible in connection with the treatment of detainees by partners. For instance, the US, the UK and Australia concluded an agreement on the transfer of detainees in the context of their military operations in Iraq.¹⁴³ In order to ensure that States were to abide by their obligations under the Geneva Conventions,¹⁴⁴ the agreement provided that a transferring State retained the right to access and to request the return of a detainee.¹⁴⁵ In its 2013 operation in Mali, France included a specific provision in the SOFA it concluded with Mali, in order to safeguard the respect of France’s obligations when transferring detainees to Malian authorities.¹⁴⁶ Accordingly, Mali undertook to not subject transferred detainees to torture or death penalty, and these detainees could not be handed over to third parties without the consent of France.

¹⁴⁰ A Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’ (24 December 2012) SHARES Blog / EJIL: Talk!.

¹⁴¹ ECtHR, *El-Masri v The Former Yugoslav Republic of Macedonia*, (2012), *op cit*, para 223.

¹⁴² *Ibid*, para 241.

¹⁴³ US-UK-Australia Memorandum of Understanding for the transfer of prisoners, *op cit*.

¹⁴⁴ *Ibid*, clause 1.

¹⁴⁵ *Ibid*, clauses 4 and 6.

¹⁴⁶ Accord sous forme d’Échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », *op cit*, Article 10: ‘Compte tenu des engagements conventionnels et constitutionnels de la France, la Partie malienne s’engage à ce que, dans le cas où la peine de mort ou une peine constitutive d’un traitement cruel, inhumain ou dégradant serait encourue, elle ne soit ni requise ni prononcée à l’égard d’une personne remise, et à ce que, dans l’hypothèse où de telles peines auraient été prononcées, elles ne soient pas exécutées. (...) Aucune personne remise aux autorités maliennes en application du présent article ne peut être transférée à une tierce partie sans accord préalable des autorités françaises’.

2. Reinterpreting principles of derived responsibility in the context of military operations

Various scenarios of implication in the conduct of others can arise in the context of military collaboration, yet established rules do not provide clear answers regarding the consequences of military collaboration for derived responsibility. The first part of this Chapter (§1) showed that, overall, practice and scholarship regarding responsibility in military operations have focused on attribution, and that derived responsibility rarely comes into the discussion. In traditional intergovernmental matters such as military operations, States and international organizations have tended to rely on attribution of conduct to allocate responsibility.¹⁴⁷ International organizations involved in military operations occasionally accept responsibility for conduct attributed to them, but reject any derived responsibility in relation to the conduct of others. As for States, they are often very reluctant to bear a share of responsibility in relation to acts attributed to the international organizations of which they are members. They 'have been decidedly wary to accept even partial responsibility for acts that those States preferred to ascribe entirely to international organizations.'¹⁴⁸ In practice, courts are rarely asked to hold an entity B responsible in connection with the conduct of A when it is possible to hold A itself responsible, and derived responsibility arises more often when procedural hurdles – such as lack of jurisdiction or immunities – prevent reaching the responsibility of A.¹⁴⁹ This in turn echoes in scholarship, where derived responsibility in military operations has been significantly less researched than attribution. As a result, the conditions and modalities under which States and international organizations could be held responsible for their acts and omissions in connection with the conduct of another participant pursuant to various rules found in the ILC Articles or in specific areas of international law range from unclear to indeterminate.

¹⁴⁷ PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 21: noting different approaches of international organizations in economic matters.

¹⁴⁸ *Ibid*, at 20. See also: O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*, at 304–306.

¹⁴⁹ ILC, 'Third Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur', *op cit*, para 33.

The following Section (§2) proposes an interpretation of how the various scenarios of implication in the conduct of another during military operations can be apprehended in terms of derived responsibility. First, it engages in a conceptual analysis of derived responsibility, and submits that *indirect causal control* can be seen as an overarching ground, which allows allocating derived responsibility amongst participants to a military operation. In this interpretation, grounds for derived responsibility are seen as obligations to exercise or refrain from exercising control over the conduct of another, which are breached when the control or lacked thereof is causally lined to the conduct of the other (§2.1). Second, it develops this analysis by applying it to the context of collaborative military operations, in order to formulate solutions to allocate derived responsibility in the specific scenarios of collaboration occurring in military operations (§2.2). Finally, it brings together the argument by clarifying which forms of control in the military context can be a ground for derived responsibility (§2.3).

2.1. Conceptual analysis of derived responsibility

The analysis first examines the nature of general and specific rules of derived responsibility (§2.1.1). Next, it engages in the core argument of the Chapter, which consists in a reinterpretation of rules of derived responsibility framed around the notion of indirect causal control, both in terms of actions and omissions (§2.1.2). Finally, it suggests using the criterion of indirect causal control as an overarching test to allocate derived responsibility in collaborative military operations (§2.1.3).

2.1.1. Nature of rules of derived responsibility

There are contrasting views in the scholarship regarding the nature of rules of derived responsibility. Some authors as well as the ILC consider that B bears responsibility for the wrongful act of A as such rather than for its own conduct,¹⁵⁰ while others submit that rules of derived responsibility qualify as substantive rules which breach results in a separate wrongful act.¹⁵¹ This study takes the view that rules of derived

¹⁵⁰ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 5; JD Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007), *op cit*, at 615.

¹⁵¹ J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 399; B Graefrath, 'Complicity in the Law of International Responsibility' (1996), *op cit*, at 372; PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 22; V Lanovoy, 'Complicity in an Internationally Wrongful Act' (2014), *op cit*, at 139; V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Kokusaiho Gaiko Zasshi*

responsibility found either in secondary or in primary norms have a substantive nature in that they prescribe certain conduct as wrongful (§2.1.1.a). Therefore, in situations of derived responsibility, B is responsible for its own distinct wrongful act and not for the conduct of A as such (§2.1.1.b).

a) Rules of derived responsibility as substantive rules

As mentioned before, general grounds for derived responsibility found in the ILC Articles difficultly fit in the conceptual distinction between substantive norms and rules of responsibility.¹⁵² Indeed, rules of derived responsibility included in the ARS and ARIIO effectively prohibit the act of assisting or directing another subject to breach its obligations and can be interpreted as being, at least in part, of a substantive nature.¹⁵³ The ILC itself admitted that Chapter IV of Part One of the ARS is particular in that it ‘specifies certain conduct as internationally wrongful’.¹⁵⁴

This thesis takes the view that the rules identified by ILC in its codification and development work, according to which States and international organizations have an obligation not to assist or direct another subject to commit a wrongful act, have a substantive nature. Secondary grounds of derived responsibility analysed in §1.2 of this Chapter ‘are all different ways of expressing a primary norm that a State cannot help, push or force another State to commit an act that is wrongful for the latter State’,¹⁵⁵ and in that sense are akin to specific grounds of derived responsibility found in primary rules analysed in §1.3.

(*Journal of International Law and Diplomacy*) 1, at 4; O Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’ (2011), *op cit*, at 301.

¹⁵² See *supra*, Chap 3 §1.1.d).

¹⁵³ PJ Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010), *op cit*, at 22; N Nedeski and A Nollkaemper, ‘Responsibility of International Organizations “in Connection with Acts of States”’ (2012), *op cit*, at 44: The idea that rules of derived responsibility are primary norms ‘may be argued for all four of the provisions on IO responsibility in connection with the acts of States’; A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013), *op cit*, at 409.

¹⁵⁴ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 7. See also: J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 339.

¹⁵⁵ PJ Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010), *op cit*, at 22.

Regarding aid or assistance, it is relatively well admitted that Article 16 ARS and its ARIO counterparts qualify as substantive rules providing that deliberate participation by a State or international organization in the conduct of another constitutes a separate wrong.¹⁵⁶ In the words of the ILC, Article 16 constitutes an ‘obligation not to facilitate the commission of an internationally wrongful act by another State’.¹⁵⁷ Rules on responsibility for direction and control can be construed in the same way. The main wrongful conduct committed by the directed State or international organization A is attributed to that entity, while the separate act of directing and controlling is attributed to the directing State or international organization B. Similarly, Article 17 ARIO can be interpreted as a substantive rule prescribing that international organizations have the obligation not to impose or authorize the commission of a conduct that breaches their own obligations,¹⁵⁸ and Article 61 ARIO as a substantive rule prescribing that States cannot

¹⁵⁶ J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 399: Article 16 ‘treats as wrongful any aid or assistance rendered for the commission of an internationally wrongful act’; JD Fry, ‘Attribution of Responsibility’ (2014), *op cit*, at 116: ‘aid or assistance is formulated to provide for a separate wrong itself, rather than responsibility in connection with the conduct of the assisted party’; B Graefrath, ‘Complicity in the Law of International Responsibility’ (1996), *op cit*, at 372: ‘Treating complicity as an autonomous wrongful act necessarily brings up the question whether that would not mean dealing with a primary norm’; PJ Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010), *op cit*, at 23: ‘The primary rule behind the article on aid and assistance, therefore, is that an international person may not facilitate the commission of an internationally wrongful act by another international person’; V Lanovoy, ‘Complicity in an Internationally Wrongful Act’ (2014), *op cit*, at 139: ‘the ordinary meaning of the terms used in Article 16 of the ARSIWA and its sister provisions in the ARIO implies recognition of the general rule not to aid or assist in the wrongful act of another state’; V Lowe, ‘Responsibility for the Conduct of Other States’ (2002), *op cit*, at 4: the aiding State ‘carries responsibility, not for the whole conduct of the assisted State, but for its own conduct in assisting the wrongful act’.

¹⁵⁷ ARS com, *op cit*, commentary to Article 16, para 9.

¹⁵⁸ PJ Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’ (2010), *op cit*, at 22: Articles 17 and 61 ARIO ‘create a primary norm that is peculiar to the relationship between international organizations and the Member States of that organization’; N Nedeski and A Nollkaemper, ‘Responsibility of International Organizations “in Connection with Acts of States”’ (2012), *op cit*, at 43–44: the authors consider it a ‘possible construction’ but do not adopt it because ‘the ILC itself did not construe it in this way’..

abuse international organizations to commit breaches of their obligations.¹⁵⁹

Secondary rules of derived responsibility are not exclusively substantive rules either, as they include elements pertaining to the determination of responsibility. The secondary dimension of rules of derived responsibility lies precisely in their derivative character. They only come to play after a breach of a substantive norm by A. The responsibility of B stems from the breach of its own obligation (not to assist or direct another, or circumvent its obligations), but the breach of that obligation depends on the adoption of a certain conduct by A.¹⁶⁰ In this construction, the internationally wrongful act of B is 'contingent upon'¹⁶¹ the commission of an internationally wrongful act by A. It is because the responsibility of B is triggered by the main internationally wrongful act of A that the inclusion of these grey rules in the ILC Articles can be justified.¹⁶²

The analysis holds as well with regards to specific grounds of derived responsibility found in primary norms. Indeed, in the scenarios addressed by these rules, the responsibility of B also arises in connection with a conduct of A. The difference with these types of rules lies in the fact that, unlike general rules of derived responsibility found in the ILC, obligations to prevent or control can be breached by B without A breaching its own obligations.¹⁶³ The breach of a substantive obligation to control the conduct of another also derives from some act or omission

¹⁵⁹ PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010), *op cit*, at 22: Articles 17 and 61 ARIO 'create a primary norm that is peculiar to the relationship between international organizations and the Member States of that organization'; O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011), *op cit*, at 301: 'it is not clear that Draft Article 61 as formulated by the Commission belongs in a set of secondary rules'.

¹⁶⁰ See also: V Lowe, 'Responsibility for the Conduct of Other States' (2002), *op cit*, at 5: 'Responsibility under Article 16, then, arises when another State commits a wrongful act, but it arises from the conduct of the assisting State alone'.

¹⁶¹ M den Heijer, 'Shared Responsibility Before the European Court of Human Rights' (2013), *op cit*, at 422.

¹⁶² ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 7: The inclusion of rules of derived responsibility 'may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility. It is justified on the basis that responsibility under chapter IV is in a sense derivative' (footnotes omitted); J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 339: 'their inclusion is justified by the derivative character'.

¹⁶³ M den Heijer, 'Shared Responsibility Before the European Court of Human Rights' (2013), *op cit*, at 422–423.

of another entity, but that act or omission will not necessarily be wrongful for that other entity. For instance, the responsibility of a State party to the ECHR for failing to take steps to ensure that another State respects human rights derives from the harmful conduct of this other State. Similarly, the breach by a participant of its obligation to ensure that other participants abide by humanitarian law arises in connection with the conduct of others.

b) Shared responsibility for distinct but connected acts

The implication of adopting the view that general secondary rules of derived responsibility have a substantive nature is that A and B each bear responsibility for distinct albeit connected wrongful acts. A commits a breach of its own substantive obligations, while the conduct of B constitutes a breach of its separate obligation not to aid or direct or circumvent.

The ILC considers the rules of derived responsibility to be ‘exceptions to the principle of independent responsibility’¹⁶⁴ which define the ‘cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another’.¹⁶⁵ The notion of responsibility ‘for the acts of others’ can appear at odds with the principle of independent responsibility, according to which a State or international organization is only ‘responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State’¹⁶⁶ or international organization. However, when considering that grounds for derived responsibility found in secondary norms constitute substantive rules, B is not as such responsible for the conduct of A, but for its own separate act of aiding or directing or circumventing, attributed to it pursuant to principles examined in Chapter 2,¹⁶⁷ and distinct from the main wrongful conduct which remains attributed to A.¹⁶⁸ The acts and omissions of A

¹⁶⁴ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 8.

¹⁶⁵ *Ibid*, introductory commentary to Chapter IV of Part I, para 5.

¹⁶⁶ *Ibid*, introductory commentary to Chapter IV of Part I, para 1.

¹⁶⁷ Contra: JD Fry, ‘Coercion, Causation, and the Fictional Elements of Indirect State Responsibility’ (2007), *op cit*, at 615: The implicated State is ‘not to be held responsible for the assistance, direction, or coercion itself, but rather for the act that flowed from the assistance, direction, or coercion’.

¹⁶⁸ ARS, *op cit*, Article 19; ARIO, *op cit*, Articles 19 and 63: Rules of derived responsibility operate ‘without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization’. See also: ARIO com, *op cit*, introductory commentary to Chapter IV of Part

and B contributed to the same injury but can themselves be distinguished.

In situations of derived responsibility, States and international organizations can therefore be responsible for two distinct internationally wrongful acts. This form of shared responsibility differs from situations of multiple attribution of conduct, where two subjects are responsible for the same wrongful act.¹⁶⁹ In the abstract, the responsibility of each for its own conduct could be determined separately, and the aiding or directing or circumventing State or international organization ‘will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.’¹⁷⁰ However, the two acts are connected, and bring about a common harmful outcome.¹⁷¹ While it is possible to isolate the distinct conduct of the aiding or directing or circumventing entity, it can be more difficult to distinguish the respective contribution of each to the harm caused together. In some cases, the injury caused by two wrongful acts is plainly indivisible, raising difficulties to apportion responsibility between the two entities. Similar issues of allocation are raised in cases of a breach of a primary obligation to control certain acts of other subjects of international law. If this other subject does commit a wrongful act, two States or international organizations can be responsible for two distinct acts, in relation to a single harmful outcome.¹⁷²

In conclusion, rules of derived responsibility function as substantive norms prescribing certain forms of implication in the conduct of another as wrongful. They regulate collaboration between subjects by determining thresholds where implication — or lack thereof — into the conduct of another engages responsibility. The fundamental grounds on

II, para 2: ‘aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under the direction or control, or under coercion’; F Messineo, ‘Multiple Attribution of Conduct’ (2012) SHARES Research Paper 11, at 7: ‘From the point of view of rules on attribution of conduct, the wrongful conduct remains attributed to the aided, assisted, directed and controlled, or coerced state/IO, and it is not attributed ‘directly’ to the aiding, assisting, directing and controlling, or coercing state or IO’.

¹⁶⁹ See *supra*, Chap 2 §1.1.3. and §2.3.4.

¹⁷⁰ ARS com, *op cit*, commentary to Article 16, para 1. See also: ARIO com, *op cit*, introductory commentary to Chapter IV of Part II, para 2.

¹⁷¹ A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013), *op cit*, at 367.

¹⁷² See *infra*, Chap 4 §2.1.2

the basis of which implication in the conduct of another is assessed are analysed in the following Section.

2.1.2. Derived responsibility based on indirect causal control

This Section argues that derived responsibility can be conceptualized as grounded in the *control* exercised by a State or international organization over another. Based on the above interpretation of rules of derived responsibility as substantive,¹⁷³ these rules can be seen as prescribing obligations to control or refrain from controlling the conduct of another State or international organization. In this construction, derived responsibility arises when a participant controlled or failed to control a harmful conduct attributed to another participant. (§2.1.2.a). Further, this Section argues that control for the purpose of derived responsibility can be qualified of *indirect*, because control is exercised not directly over the harmful conduct but rather over the State or international organization to which this conduct is attributed on the ground of effective control (§2.1.2.b). As in the previous Chapter, control can be conceptualized in *causal* terms: it is on account of a causal link between the control of B and the conduct of A that derived responsibility can be upheld (§2.1.2.c). If the control of B cannot be causally linked to the conduct of A, it can constitute an independent wrong by B and lead to a situation of concurrent responsibility (§2.1.2.d).

a) Control over the conduct of another

This Section submits that the notion of control, understood as the exercise of influence over the conduct of another,¹⁷⁴ underlies rules of derived responsibility presented in §1 of this Chapter. It is invariably on account of the influence exercised (or lack thereof) by an entity which contributed to the conduct of another that derived responsibility can be upheld. Derived responsibility arises when a State or international organization ‘in certain circumstances, exerts control over the actions of another’¹⁷⁵ State or international organization.

Rules of derived responsibility integrate this notion of control in both actions and omissions: some negative obligations prohibit the exercise of

¹⁷³ See *supra*, Chap 2 §2.1.1.

¹⁷⁴ *Ibid*, Intro §1.1.1.d).

¹⁷⁵ ICJ, *Separate Opinion of Judge Ago in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits (27 June 1986), ICJ Reports 1986, 181, at 189, fn 1.

control to foster breaches of international law, while other positive obligations prescribe to exercise control over others to prevent such breaches.¹⁷⁶ These two types of obligations are the two sides of the same coin that illustrate a public dimension of the international legal order, aiming at overall respect for certain norms of international law by the international community.

– Undue control (act in breach of a negative obligation not to influence the conduct of another)

Rules of derived responsibility found in the ILC Articles are grounded in notions of control,¹⁷⁷ and can be interpreted as formulating obligations not to actively influence another to breach international obligations. When an entity has the power or authority to influence the conduct of another State or international organization, rules of derived responsibility prohibit it to use its power or authority in order to foster violations of international law.

Almost since the inception of the notion of responsibility of a State for its implication in the conduct of another, control exercised by one State over another was considered to be the fundamental ground of derived responsibility.¹⁷⁸ Authors writing in the early twentieth century ‘agreed in substance that it was the interference or control attributed to one State in or over the external or internal activity of another State that gave rise to indirect responsibility on the part of the former State’.¹⁷⁹ The obligations not to direct and control or coerce another to commit wrongs clearly rest on the idea that a State which is in position to control the conduct of another should not abuse this position to have the controlled State breach international obligations. Concerning aid or assistance, a State providing support to another’s conduct has influence over the occurrence of this conduct, and in that sense has some control over the commission of wrongful acts by the aided State. Responsibility of international organizations and their member States in relation to each

¹⁷⁶ 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 432: ‘while complicity results from commission, violation of the obligation to prevent results from omission’.

¹⁷⁷ JD Fry, ‘Attribution of Responsibility ’ (2014), *op cit*, at 108: ‘The control theory provides the rationale for Chapter IV of the ARSIWA’.

¹⁷⁸ ILC, ‘Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur’, *op cit*, para 17.

¹⁷⁹ *Ibid*, para 19.

other's conduct is also justified on the basis of control exercised at the institutional level.

Fundamentally, all these rules reflect a 'doctrine of "undue influence"',¹⁸⁰ under which certain uses and abuses of a position of control are prohibited. The rationale for holding States and international organizations responsible in relation to the conduct of another is that an entity able to influence another should not unduly control the latter to commit breaches of the former's international obligations.

– Failure to control (omission in breach of a positive obligation to influence the conduct of another)

Inversely, other grounds for derived responsibility found notably in humanitarian and human rights law prescribe the opposite obligation of making use of an eventual capacity to influence the conduct of another in order to prevent international law violations. They are also based on control over others, but concern omissions, namely failures to exercise control to prevent certain violations or to ensure respect for certain norms.

The duty to ensure respect for humanitarian law amongst participants in a military operation relies on the capacity of States to control the conduct of others.¹⁸¹ In human rights law, obligations to prevent apply within the jurisdiction of a State, that is when it has the capacity to exercise control over the occurrence of violations.¹⁸² Applied to the context of military operations, obligations to control can be interpreted as breached when a State or international organization was in position to exercise influence due to the sharing of military authority but failed to act to ensure compliance with international law.¹⁸³

Obligations to control the conduct of others prohibit *laissez-faire* approaches and loose exercise of control by States and international organizations which are in a position to exert influence. They address situations where 'a government acts by omission through its loose reins or failure to control',¹⁸⁴ and prescribe that States and international

¹⁸⁰ G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011), *op cit*, at 128.

¹⁸¹ See *supra*, Chap 3 §1.3.1.

¹⁸² *Ibid*, Chap 3 §1.3.2.

¹⁸³ See *infra*, Chap 3 §2.2.4.

¹⁸⁴ GA Christenson, 'Attributing Acts of Omission to the State' (1991) 12 Michigan Journal of International Law 312, at 313.

organizations can no longer turn a blind eye on harmful conduct that they could influence.¹⁸⁵

b) Indirect control

Control for the purpose of derived responsibility is indirect in the sense that it concerns the capacity of a State or international organization to influence a conduct attributed to another State or international organization. In situations of derived responsibility, the implicated entity is not directly controlling the conduct committed by an organ or agent, but rather the *intermediate State or international organization* to which that conduct is attributed on the basis of effective control. For the purpose of derived responsibility, control is assessed 'between states rather than between the state and the conduct'.¹⁸⁶

By contrast, for the purpose of attribution, control relates to the capacity of a State or international organization to directly influence the conduct of an individual through its powers and authority.¹⁸⁷ Whereas attribution is grounded in the control of a State or international organization over an individual, derived responsibility is based on the control of States and international organizations over each other.

c) Causal dimension

Analysing indirect control in causal terms, rules of derived responsibility can be interpreted as prescribing that a State or international organization which has indirect control over the conduct of another should not cause this other entity to commit a wrongful conduct. Derived responsibility arises when the undue control or failure to control of a State or international organization caused the other State or international organization to commit a harmful act.

The requirement of a causal link between the acts and omissions of B and the conduct of A has been acknowledged in situations of derived responsibility.¹⁸⁸ In case of undue control, it is always 'necessary to

¹⁸⁵ HP Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism Against Complicity of Peacekeeping Forces?' (2014), *op cit*, at 10.

¹⁸⁶ JD Fry, 'Attribution of Responsibility' (2014), *op cit*, at 108.

¹⁸⁷ See *supra*, Chap 2 §2.1.

¹⁸⁸ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 8: There must always be a 'specific causal link between [the conduct of A] and the conduct of the assisting, directing or coercing State'; N Nedeski and A Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"' (2012), *op cit*, at 46: 'All situations covered by the heading "responsibility in connection with the acts of States" are firmly based on a requirement of causation'.

establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other'.¹⁸⁹ In case of a failure to control as well, 'the issue of causality is particularly relevant when the state is held responsible for a breach of a duty to prevent'.¹⁹⁰ In both cases, it is on account of having *caused the conduct of another* that a State or international organization bears derived responsibility. Each determination of derived responsibility 'requires a contextual analysis of the role that the [conduct of B] actually plays in determining the conduct of [A]'.¹⁹¹

In relation to indirect control, the causal analysis is used to determine the existence of a *breach*.¹⁹² Indirect control, whether in its positive or negative form, is wrongful only if it caused the wrongful conduct of another. Thereby, the requirement of a causal link between the undue control or failure to control of B and the wrongful conduct of A delimits the scope of responsibility on the ground of indirect control.

Since the causal dimension of wrongfulness in relation to indirect control has not been systematically acknowledged, the causal test to be applied in this context is not established.¹⁹³

For aid or assistance, under the ILC rules, the conduct of the aiding State must have 'contributed significantly'¹⁹⁴ to the conduct of the aided State, but does not need to be 'essential'. By contrast, the ILC also considers that the aiding State can bear responsibility even when the conduct of the aided State 'would clearly have occurred in any event'.¹⁹⁵ However, a condition that is not necessary is simply not a cause in factual terms,¹⁹⁶ so that assistance which is not a but-for condition would not be causally connected to the subsequent wrongful act. Similarly, Article 61 ARIO

¹⁸⁹ ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 8.

¹⁹⁰ A Gattini, 'Breach of International Obligations' 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), 25–59, at 29.

¹⁹¹ ARIO com, *op cit*, commentary to Article 17, para 11.

¹⁹² A Gattini, 'Breach of International Obligations' (2014), *op cit*, at 28.

¹⁹³ *Ibid*, at 29.

¹⁹⁴ ARS com, *op cit*, commentary to Article 16, para 5.

¹⁹⁵ *Ibid*, commentary to Article 16, para 1. In that case, 'the responsibility of the assisting State will not extend to compensating for the act itself'.

¹⁹⁶ T Honoré, 'Causation in the Law' (2010), *op cit*, Section 3.1; See *infra*, Intro §1.1.1.d).

requires a 'significant link'¹⁹⁷ between the conduct of a member State avoiding compliance with its obligations and the wrongful act of the organization, and Article 17 ARIO requires the wrongful conduct of member States to be committed 'because of'¹⁹⁸ the authorization of the organization. These terms usually reflect the idea of *factual causation* determined pursuant to a but-for test.¹⁹⁹ Accordingly, aid or assistance or circumvention is wrongful if it is a *necessary cause* of the conduct of A.

Provisions on direction and control and coercion expressly require the act of the controlling entity to be a necessary (or but-for) cause of the wrongful conduct of the controlled entity. Direction and control over the conduct of another is wrongful in cases of domination, when the freedom of action of the directed entity is limited, while coercion arises when the coerced entity has 'no effective choice but to comply with the wishes of the coercing State'.²⁰⁰ These rules thus are breached when the wrongful conduct of A would not have occurred but for the control exercised by B.

Specific primary obligations to control other's conduct also require a causal link between the failure to control and the commission of a wrongful act by another. If a participant had knowledge of wrongs and failed to take steps to prevent them, this failure to control will engaged the responsibility of that participant if it is causally linked to the occurrence of the wrong, that is if the wrong could have been prevented had the participant used its control. Again, a test of factual causation is used to determine whether a failure to control was the necessary cause of another's conduct.

It can be noted that, conversely, the occurrence of a conduct by A is a necessary cause of the wrongful indirect control of B, for derived responsibility by definition arises in connection with the conduct of another. Being mutually necessary causes to produce a harmful outcome, it will be seen that distinct conduct in the framework of derived responsibility can lead to solidary liability.²⁰¹

Overall, it appears that a test of factual causation could be applicable in most enquiries of derived responsibility. In this interpretation, indirect control by B constitutes a wrongful act engaging in its derived

¹⁹⁷ ARIO com, *op cit*, commentary to Article 61, para 7.

¹⁹⁸ *Ibid*, commentary to Article 17, para 11.

¹⁹⁹ T Honoré, 'Causation in the Law' (2010), *op cit*, Section 3.1; See *supra*, Intro §1.1.1.d).

²⁰⁰ ARS com, *op cit*, commentary to Article 18, para 2.

²⁰¹ See *infra*, Chap 4 §2.1.2.

responsibility when it is a necessary (or but-for) cause of the wrongful act of A.

d) Concurrent responsibility for causally independent acts

If indirect control is not a necessary cause of a wrongful conduct, it can nonetheless lead to responsibility if it constitutes an *independent wrong*, for which responsibility does not derive from the conduct of the other. Primary obligations of conduct²⁰² prescribing to take specific steps for instance in monitoring the conduct of others can be violated without causing the wrongful conduct of another. In this situation, responsibility is concurrent rather than derived, as the respective wrongs of each participant occurred without being causally connected. Although not causally connected to each other, they are both causally connected to the resulting harmful outcome.²⁰³

2.1.3. Indirect causal control over the conduct of another as an overarching ground for derived responsibility

The analysis of rules of derived responsibility and their underlying concepts reveals that *indirect control causally contributing to the conduct of another* subject constitutes the fundamental ground for holding States and international organizations responsible in connection with the acts of others.

In this interpretation, indirect control constitutes an overarching concept through which the various secondary and primary grounds of responsibility analysed in §1.2 and §1.3 of the present Chapter can be read and interpreted. Control is indirect in that the implicated entity can influence another subject but does not control directly its organs. Indirect control — either in the form of acts or omissions — engages responsibility when it can be considered a factual, or in other words necessary, cause of the wrongful conduct of another.

The overarching criterion of indirect control allows understanding how the different modalities of military collaboration impact the determination of derived responsibility. Indeed, the analysis in terms of forms of indirect control identifies the significance of the distribution of military authority amongst participants for assessing responsibility in

²⁰² In the sense of Ago (ILC, 'Sixth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur' (1977) UN Doc A/CN.4/302 and Add.1–3; Yearbook of the International Law Commission, vol II(1), para 12.)

²⁰³ See *infra*, Chap 4 §2.1.3.

connection with the conduct of another pursuant to secondary or primary grounds. Whether indirect control is sufficient to engage responsibility depends on the causal link between the control exercised by B and the harmful conduct of A. In the context of military operations, whether the influence of a participant can cause the conduct of others depends on the formal distribution and factual exercise of military control, and on the degree of involvement in the operation. This reinterpretation of the existing legal framework permits to apprehend derived responsibility in collaborative military operations in systematic terms.

The different ways in which participants can support, direct, or fail to prevent the conduct of each other's correspond to different forms of indirect control and degrees of causal contribution. In the military context, indirect control can be exercised at different levels of authority. Depending on the type of command arrangement adopted by an operation and the distribution of military control, certain participants can exercise indirect control causally linked to the conduct of others.

2.2. Derived responsibility in the context of military operations through the lens of indirect control

The analysis of derived responsibility in the context of military operations reveals that participants to collaborative military operations can exercise influence over each other in varied forms, yet existing rules do not always provide clear answers.²⁰⁴ The following Section examines various scenarios of derived responsibility arising in the context of military operations through the lens of indirect control, in order to formulate interpretations allowing addressing these situations of collaboration. It identifies four stumbling points in this regard: the significance of various forms of military assistance in terms of derived responsibility (§2.2.1), the application of derived responsibility to the various command structures found in coalitions (§2.2.2), the relevance of institutional control in connection with harmful conduct occurring in the field (§2.2.3), and the impact of command arrangements on the obligations to ensure respect for international law by other participants (§2.2.4).

²⁰⁴ See *supra*, Chap 3 §1.

2.2.1. Indirect control through military support

The provision of various forms of military assistance and support is part of the routine of collaborative military operations. When providing support to another, a participant can exercise influence over the conduct of the other. Under the proposed interpretation, military support qualifies as undue control and engages the derived responsibility of the aiding entity when it is causally linked to the wrongful conduct of the aided entity. This Section analyses how two main forms of military support, namely operational support and logistical support, can be addressed in terms of indirect causal control.

a) Operational support

Military support can first take the form of operational assistance, that is, operational support in the conduct of missions in the field. This occurs when several operations under distinct command structures operate in the same area and collaborate in the accomplishment of one-off missions.²⁰⁵ For instance, in Afghanistan, the US-led force OEF has been carrying out air strikes called to support of ISAF forces on the ground in difficulty.²⁰⁶ Similarly, Quick Reaction Forces under national command present in a theatre of operation occasionally provide support to UN operations in the accomplishment of difficult enforcement actions. For example, in Ivory Coast, French troops under national command have been undertaking targeted missions at the request and in support of the UNOCI.²⁰⁷ Such support missions included taking control of an airport and carrying out helicopters attacks.²⁰⁸

The ILC provisions on aid and assistance could to some extent address scenarios of operational support. Indeed, if an entity provides assistance in the accomplishment of specific operational mission, it necessarily knows the circumstances of that mission and intends to support its goals. One of the difficulties raised by the scenario of operational support is that the fine line between support and co-authorship can be difficult to draw in operational military matters. In situations where the support reaches a level such as ‘the supply of combat units [...] and personnel, for the

²⁰⁵ *Ibid*, Chap 1 §1.2.5.a).

²⁰⁶ RJ Barber, ‘The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan’ (2010), *op cit*, at 490.

²⁰⁷ UN Security Council, ‘Resolution 1528’ (27 February 2004) UN Doc S/RES/1528, para 16.

²⁰⁸ ‘Ivory Coast: French take control of Abidjan airport’ (Telegraph, 3 April 2011); ‘UN and French helicopters fire on Gbagbo residence’ (France 24, 11 April 2011).

specific purpose of assisting'²⁰⁹ another, Brownlie argued that the aiding and the aided States could be considered as having acted together. Conversely, a seemingly joint conduct can fall into the category of participation if the role of one State was actually marginal.

Analysed through the lens of indirect causal control, the different levels of intensity of operational support can be appreciated through the intensity of the causal link between the support of B and the conduct of A. The provision of operational support constitutes wrongful assistance when the support qualifies as a factual cause of the conduct of the aided entity. In situations where the support provided reaches higher levels of intensity, the provision of assistance can qualify as a proximate cause of the conduct of A, which will have consequences in terms of reparation.²¹⁰

b) Logistical support

Second, military assistance can take the form of logistical support. Support at the logistical level consists in providing help in planning and carrying out the acquisition, movement, or maintenance of the personnel, equipment or facilities of an international force.²¹¹ Logistical support can be provided in the theatre of operation or from a distance. The French-led operation 'Serval' in Mali in 2013 was for instance conducted with logistical support from the US and other States. Notably, the US substantially helped in transporting French troops and equipment to the region, provided aerial refuelling, and supplied intelligence during the mission.²¹² Similarly, the NATO-led 2011 bombing campaign over Libya was carried out with the logistical support of some States, which provided intelligence or aerial refuelling but did not wish to engage directly in air-to-ground operations.²¹³ The assistance provided by some States to the 2003 attack against Iraq can also qualify as logistical support. A number of States not willing to take part in the attack provided various forms of support to the operation by granting over-flight and landing rights, allowing the use of military bases in their

²⁰⁹ I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), *op cit*, at 191.

²¹⁰ See *infra*, Chap 4 §2.2.2.

²¹¹ See *supra*, Chap 1, § 1.2.5.b).

²¹² G Starosta, 'Mission to Mali' (Air Force Magazine, 2013), *op cit*.

²¹³ B Boutin, 'What Responsibility for States Participating to a Lesser Extent to the NATO Operation in Libya?' (1 June 2011), *op cit*; Royal Aeronautical Society Air Power Group, 'Lessons Offered From the Libya Air Campaign' (July 2012) Paper based on the RAeS — IISS seminar on Operation Unified Protector held in London on 22 February 2012.

territory, or escorting ships.²¹⁴ In addition, ‘potentially complicit actors can also be states which are situated far away from the conflict region’,²¹⁵ notably those lending assets or providing financial support. For instance, EU-led missions are sometimes conducted using some of NATO’s assets,²¹⁶ and AU-led missions often receive substantial financial support from the EU.²¹⁷

The main difficulty in applying ILC provisions on aid or assistance to logistical support is to show that the aiding entity actually intended to facilitate the commission of a wrongful act. Indeed, ‘even the supply of weapons, cannot be considered as complicity if the State which delivered the arms did not know that they would be used to commit an international delict.’²¹⁸ Arguably, the more remotely a State is involved in combat operations, the less likely it will have intended to support a wrongful act. Alternatively, responsibility for assisting another to commit a wrongful act can be grounded in international humanitarian law.²¹⁹ The obligation not to assist others in violations of humanitarian law does not require demonstrating a specific intent to facilitate a breach.²²⁰ The subjective element in common Article 1 of the Geneva

²¹⁴ Carney, *Allied Participation in Operation Iraqi Freedom* (2011), *op cit*, at 1, 4: Twenty States provided logistical support; G Nolte and HP Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’ (2009), *op cit*, at 2–3: ‘While certain allies refused to contribute fighting troops and expressed political objections against this attack, they mostly acceded to US requests for support on a technical level’; N Ronzitti, ‘Italy’s Non-belligerency During the Iraqi War’ in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005), 197–207, at 201: Italy decided that ‘no Italian soldiers would participate in warlike operations’ but that ‘bases could be used for transit, refuelling and maintenance of means of transport and authorization would be given to overfly the national air space’.

²¹⁵ HP Aust, ‘Complicity in Violations of International Humanitarian Law’ (2011), *op cit*, at 4.

²¹⁶ F Naert, ‘Shared Responsibility in the Framework of the EU’s CSDP Operations’, forthcoming in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016); NATO, ‘The NATO-EU Strategic Partnership’, *op cit*.

²¹⁷ EU, ‘African Peace Facility Annual Report’, *op cit*.

²¹⁸ B Graefrath, ‘Complicity in the Law of International Responsibility’ (1996), *op cit*, at 375.

²¹⁹ See *supra*, Chap 3 §1.3.1).

²²⁰ HP Aust, ‘Complicity in Violations of International Humanitarian Law’ (2011), *op cit*, at 13; M Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 401, at 413.

Conventions appears to reside in a mere requirement of knowledge.²²¹ Accordingly, if an entity providing logistical support becomes aware of the commission of violations of humanitarian law by forces international the field, it has the obligation to refrain from supporting these activities.²²²

Analysed in terms of indirect causal control, logistical support is seen as a form of undue influence which can be causally linked to the occurrence of wrongs by the supported entity. Indeed, limited involvement in the form of logistical support can be crucial for the working of an international force.²²³ Accordingly, States opting for a limited participation excluding combat operations but actively enabling the commission of wrongful acts by participants engaged in hostilities should not be sheltered be from responsibility. For instance, fast generation and deployment of a new mission can often only be achieved with help in transporting troops and equipment,²²⁴ and a sustained bombing campaign requires aerial refuelling support.²²⁵ When the support provided by B ‘contributed significantly’²²⁶ to a wrongful conduct attributed to A, responsibility could be engaged for the provision of logistical support. In this perspective, the requirement of knowledge can be also addressed in causal terms. Indeed, the causal link between the support provided and subsequent wrongs could be seen as tighter in situations were the supporting entity knows that that supported entity committed wrongs. Remote forms of logistical support can also constitute wrongful support if they are linked to the commission

²²¹ M Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002), *op cit*, at 413: ‘once the violations are known, ongoing assistance is necessarily given with a view to facilitating further violations. Such a strict standard may not be that of the ILC in its Commentary, but it is supported by the special obligation, under international humanitarian law’.

²²² J Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ (1987), *op cit*, at 90: ‘States have recognized a duty not to facilitate violation by other States of the humanitarian law of war. [...] Donor States have cut off supply of such materials upon learning of the wrongful use’.

²²³ A Ryan, ‘The Strong Lead-nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ (2002), *op cit*, at 33: ‘participation in a peace operation can take alternative forms at least as significant as the presence of “boots on the ground”’.

²²⁴ H Dijkstra, ‘The Military Operation of the EU in Chad and the Central African Republic: Good Policy, Bad Politics’ (2010) 17(3) *International Peacekeeping* (Routledge) 395, at 400.

²²⁵ JA Tirpak, ‘Lessons from Libya’ (Air Force Magazine, December 2011).

²²⁶ ARS com, *op cit*, commentary to Article 16, para 5.

a wrongful act,²²⁷ but the legal consequences for the aiding entity are then limited.²²⁸

2.2.2. Indirect control over the conduct of coalition partners

In coalitions, States share strategic and operational elements of control on an ad hoc basis. A multinational unified command is usually adopted, but with various possible degrees of integration.²²⁹ In operations under a fully integrated command structure, States are formally equal participants in the operation, yet factual realities do not always match formal distribution of control, and some States could in fact exercise a predominant control over the operation. In operations under a less integrated command structure, one State formally has ‘domination of the command and control’²³⁰ over the operation. Depending on the degree of integration of other coalition forces in the command structure, the position of the dominant State will be more or less strong. If other coalition States are genuinely involved at every level of the operation, the dominant State will not be imposing strategic or operational decisions to the other contributing States. However, when the dominant State maintains a strong position by assuming the direction of the operation on its own, it is in a position to direct other coalition States to commit a wrongful conduct.

For instance, the operations in Iraq in 2003–2011 were in a large part predominantly directed by the US. At the strategic level, policies and goals were developed nationally by the US, with very limited consultations with other coalition States.²³¹ At the operational level, the organization of the forces and decisions regarding the respective missions and tasks of each contingent were initiated to a large extent by the US.²³² The UK held a particular position in that regard. On the one hand, it provided the second largest contingent²³³ and presented itself as

²²⁷ *Ibid*, commentary to Article 16, para 5.

²²⁸ *Ibid*, commentary to Article 16, para 10.

²²⁹ See *supra*, Chap 1 §1.2.4.

²³⁰ SR Lescoutre, *Command Structure for Coalition Operations: A Template for Future Force Commanders* (2003), *op cit*, at 9.

²³¹ Carney, *Allied Participation in Operation Iraqi Freedom* (2011), *op cit*, at 3: The US President ‘announced that Iraqi President Saddam Hussein must disarm or face the consequences at the hands of a United States-led “coalition of the willing.”’.

²³² *Ibid*, at 22.

²³³ *Ibid*, at 121: ‘the United Kingdom consistently contributed more resources and troops to the Iraq mission than any other coalition partner’.

a main partner in the coalition along with the US.²³⁴ On the other hand, it appears that the actual involvement of the UK in strategic and operational decisions over Iraq was quite limited, as it often was simply informed of decisions taken unilaterally by the US.²³⁵ Other coalition partners were even less involved and had very few to say on the orientation and modalities of the missions.

As explained in the previous Chapter, the conduct of coalition forces is attributed to the contributing State or/and the US or/and to the coalition partners collectively, depending on which entity effectively exercised the relevant form of control over a given conduct.²³⁶ In addition, the derived responsibility of the US could be sought for its distinct breach of the obligation not to direct and control others to commit wrongful acts. Derived responsibility for direction and control relies on a more diffuse level of control than attribution of conduct. It can be engaged when a State directs the proceedings of operations in the field without controlling every specific event. Control is exercised by the dominant State vis-à-vis other States rather than directly towards their troops.²³⁷

Analysed through the angle of indirect causal control, direction and control by a State dominating the command structure engages the responsibility of that State when it is causally linked to the harmful conduct of other coalition partners. Undue control at the strategic level consists in having a dominant influence in imposing the goals, means, and policies of a mission. At the operational level undue control is exercised when one State authoritatively induces another to commit a wrong. In Iraq, the case can be made that – by dominating the command structure – the US exercised significant control over most of the operations conducted by other coalition forces, and therefore can bear derived responsibility in relation to the conduct of other coalition States.

2.2.3. Institutional control and harmful conduct in the field

This thesis submits that, although it is not exercised in the field, control at the institutional level in the context of military operations can

²³⁴ 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 193. The UK was recognised as one of the occupying powers by the UNSC resolutions.

²³⁵ *Ibid.*, at 194.

²³⁶ See *supra*, Chap 2 §2.3.

²³⁷ *Ibid.*, Chap 3 §1.2.2.

influence the occurrence of harmful conduct and therefore be a ground for derived responsibility.

a) Institutional control by member States

First, institutional control exercised by member States can be a ground for responsibility in connection with conduct attributed to an international organization. For instance, in NATO-led operations, member States have notable influence over the organization's decision-making.²³⁸ At the political and strategic levels, decisions are taken unanimously within the NAC and the Military Committee. At the operational level, States are involved in the targeting process of NATO operations. Since NATO member States possess a significant degree of institutional control over the adoption of certain conduct by the organization, it would be justified for member States to bear responsibility in relation to a wrongful conduct of NATO following a unanimous decision. Indeed, the exercise of institutional control by member States can be seen as the necessary cause of the subsequent conduct of NATO. Accordingly, Member States directing NATO to carry out an air strike that violates their obligations can thus incur derived responsibility.

Besides, failures of States to exercise control by ensuring that international organizations to which they delegate competences protect human rights can be a ground for derived responsibility. Notably, under the ECHR, States can be responsible if they fail to ensure that the international organization through which they act and to which a violation is attributed provides human rights protection.²³⁹ In the context of collaborative military operations, it means that States participating in operations led by an international organization must ensure that the operation is conducted in line with the States' human rights obligations. In terms of indirect causal control, equivalent protection can be formulated as engaging responsibility in situations where, but for the failure of member States to ensure that the organization provides human rights protection, human rights protection would have been provided. Accordingly, States parties to the ECHR which engage in military operations in the framework of the UN, NATO or the EU can bear a share of responsibility in relation to human rights

²³⁸ P. Gallis, 'NATO's Decision-making Procedure' (2003) CRS Report for Congress RS21510, at 3–4; US, 'Kosovo/Operation Allied Force: After-action Report', *op cit*, at 24; See *supra*, Chap 1 §1.2.2.

²³⁹ See *supra*, Chap 3 §1.2.3.b).

violations by forces attributed to the organization if they fail to ensure that the organization prevents or punishes these violations.

b) Institutional control by international organizations

Conversely, a similar argument can be made when an international organization acts through others, such as when the UN authorizes another organization or a coalition of States to undertake a military operation. The enforcement of collective security is primarily the competence of the UNSC,²⁴⁰ thus it should not give blind checks when authorizing others to use force. When the practice of authorized missions developed after the end of the Cold War, a number of States voiced concerns as to the lack of sufficient control by the UN over the way in which these missions use force.²⁴¹ In scholarship, it has been argued that the UN has the duty to closely monitor the activities of authorized missions when it delegates its Chapter VII powers. Notably, Sarooshi argued that, because the UNSC retains ‘overall authority and control over the exercise of its delegated powers’,²⁴² it has an ‘obligation to undertake supervision’²⁴³ of the activities of authorized forces. Article 54 of the UN Charter, which prescribes that authorized missions must report on their activities to the UNSC,²⁴⁴ supports the argument that the UN has an obligation to monitor the implementation of collective security by international organizations or coalitions. The case of *Behrami*²⁴⁵ somehow attempted to reach the responsibility of the UN when delegating its Chapter VII powers, but it did so on frail grounds. The ECtHR seemed to accept the idea that the UN could bear some responsibility in relation to the conduct of authorized forces, but it relied on attribution of conduct rather than derived responsibility to find the UN responsible. As explained in Chapter 2, the conduct of authorized

²⁴⁰ UN Charter, *op cit*, Article 24(1): UN member States ‘confer on the Security Council primary responsibility for the maintenance of international peace and security’.

²⁴¹ N Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’ (2000), *op cit*, at 555-556.

²⁴² D Sarooshi, *The United Nations and the Development of Collective Security* (1999), *op cit*, at 159.

²⁴³ *Ibid*, at 159.

²⁴⁴ ‘The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security’, in conjunction with Article 53(1): ‘The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority’ (UN Charter, *op cit*.)

²⁴⁵ ECtHR, *Behrami and Saramati* (2007), *op cit*.

forces should be attributed to the entity or entities directly linked to the commission of harmful conduct, that is having effective control over it.²⁴⁶ Yet, the UN could bear derived responsibility in relation to the conduct of authorized forces. In practice, the UN has not always conducted adequate supervision of authorized missions. In early-authorized missions, such as the 1990s operation in Kuwait, the UN merely received some very short and undetailed reports.²⁴⁷ More recent missions were requested to send more extensively reports,²⁴⁸ but the oversight of the UN once it delegates its powers remains relatively limited, as the UN maintains that when authorizing a mission ‘the Security Council does not control any aspect of the operation, nor does it monitor it for its duration’.²⁴⁹ This thesis submits that in such scenarios where the UN fails to exercise control so as to monitor whether the force operate in accordance with applicable international obligations, the UN could bear derived responsibility in relation to wrongs committed by authorized forces.

Finally, institutional control exercised by international organizations at the strategic level can be a ground for derived responsibility. Notably, the political direction and strategic command of the UN, which consist in the determination of the overall political and military objectives, and mandate and resources of a mission, can to some degree contribute to the occurrence of violations of obligations (especially to protect) by participants in the field. This thesis primarily argues that failure to prevent that is tightly linked to a strategic failure from the UN can be attributed to the organization.²⁵⁰ In the alternative, it additionally submits that the UN could bear derived responsibility in all situations where inadequate mandates or resources have contributed to a failure to protect civilians. Indeed, inadequate mandates or insufficient means decided by the UN can in a sense enable breaches. The UN, by inadequately exercising its political and strategic authority, can be said to have influenced breaches of obligations of protection. Whichever these

²⁴⁶ See *supra*, Chap 2 §2.

²⁴⁷ N Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing” (2000), *op cit*, at 564: ‘member states sent extremely short reports (one or a few pages) to the Council, essentially containing the message that the operation was going smoothly and was under (their) control’.

²⁴⁸ *Ibid*, at 564–565.

²⁴⁹ ILC, ‘Responsibility of International Organizations, Comments and Observations Received From the United Nations’, *op cit*, comments on Draft Article 5, para 2.

²⁵⁰ See *supra*, Chap 2 §2.3.3.

violations in the field are attributed to on the basis of effective control, the UN could bear derived responsibility for contributing to their occurrence. When a causal link can be demonstrated between the UN's decisions at the strategic level and the occurrence of wrongful acts in the field, such degree of participation should warrant some responsibility.

2.2.4. Division of military authority and failures to control

Obligations to ensure respect for international law and prevent violations by others have a particular significance in the context of military cooperation where States and international organizations can possess elements of control allowing them to exert influence on the conduct of another. Interpreted in terms of indirect causal control, obligations to ensure respect by others are breached when a participant could exercise control over the conduct of another and failed to do so thereby contributed to occurrence of harmful conduct of the other participant. Under this analysis, the ability to exercise influence over another can be assessed in causal terms: the more a participant has the ability to influence the conduct of another, the more its failure to exercise control can be causally linked to the conduct of the other.

The humanitarian law obligation 'to intervene with States over which they might have some influence to stop the violations'²⁵¹ applies to States in all circumstances, namely whether or not they are involved in the theatre operation. Yet, the obligation is arguably more demanding amongst those States that are directly involved in a collaborative operation.²⁵² Indeed, the distribution of authority amongst partners in an operation significantly increases the ability of participants to influence each other's conduct, and knowledge can more easily be demonstrated amongst partners aiming at common goals. Similarly, the human rights obligation to secure human rights of individuals will apply differently to States having enough control over the conduct of partners.

As a result, for every operational wrong attributed to one of the participants, other States can bear derived responsibility for their failure to do what they could have done to prevent violations of which they were

²⁵¹ ICRC Expert Seminars, 'Improving Compliance with International Humanitarian Law' (October 2003) Report, at 5.

²⁵² *Ibid.*, at 5, fn 8: 'there may be a higher level of obligation for States to intervene when their allies or partners in a coalition are violating international humanitarian law'; C Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' (2008), *op cit.*, at 165: considering it possible for the obligation to be 'higher where the states are acting together in armed conflict'.

aware. Notably, when some degree of operational control is exercised by contributing States, either formally as in NATO-led operations, or factually as has happened in UN-led operations, contributing States can, and therefore must, ensure that the international organization respects humanitarian and human rights law. For instance, if some States exercise influence on the ground despite having delegated operational control to the UN, they will be in a position to impede possible violations of humanitarian and human rights law by the UN. Conversely, the UN can bear derived responsibility if it turns a blind eye and does not attempt to address recurring sexual abuses during its missions.

When parallel operations are conducted under distinct command structures,²⁵³ they must mutually ensure that no breach of international law is committed. Especially, if parallel operations undertake particular missions in collaboration, their participants will be able to take steps to prevent the commission of wrongful acts. The obligation to ensure respect for international obligations also applies to States providing logistical support while not engaged in combat, depending on their knowledge of violations committed by other participants and to the extent of their capacity to influence their conduct. For instance, States providing aerial refuelling in support of a bombing campaign can attempt to prevent wrongful acts by forces engaged in combat and bear derived responsibility if they failed to do so.

Command arrangements also influence the application of specific obligations to protect individuals transferred by one participant to another²⁵⁴ can be violated. Transfers of individuals between participants occur when States run their detention operations separately, or between parallel missions. In operations under a fully integrated unified structure, the capture of detainees and their transfer between contributed troops would both be attributed to the lead entity, and thus would not lead to a sharing of responsibility between the capturing and the transferring entity. By contrast, in Iraq, detention centres were operated only by the US and the UK, and each followed its own policies.²⁵⁵ Other States which contributed troops can face derived responsibility for the treatment of individuals they captured and transferred to the custody of the US or the UK.²⁵⁶ Besides, the US and the UK bear responsibility in relation to the

²⁵³ See *supra*, Chap 1 §1.2.5.a).

²⁵⁴ *Ibid*, Chap 3 §1.3.3.

²⁵⁵ BJ Bill, 'Detention Operations in Iraq: A View From the Ground' (2010), *op cit*, at 417.

²⁵⁶ M Oliver, 'Poland denies troop abuse claims' (The Guardian, 28 February 2004).

treatment of detainees transferred between each others. As illustrated by the case of *Ramhatullah*, States engaged in a coalition have means to exert control over the treatment of detainees handed over to a partner — including requesting their return — and can therefore bear responsibility in relation to the subsequent mistreatment of transferred individuals.²⁵⁷ In Afghanistan, the US and the UK did not follow the ISAF detention policy edited by NATO²⁵⁸ and instead adopted their own policies.²⁵⁹ Other contingents operating within ISAF had to ensure that individuals possibly transferred to the US or the UK would not be mistreated. Being aware of possible abuses committed in US detentions facilities and lacking bilateral agreements on the treatment of transferred individuals, some States opted to simply not engage in detentions operations in Afghanistan.²⁶⁰ Yet, choosing not to actively contribute to abuses of which one is aware does not shield from responsibility, as turning a blind eye breaches the duty to seek to prevent violations of international law by other participants.

2.3. Forms of indirect control and types of command arrangement

This Section sums up how the proposed interpretation of derived responsibility applies in various scenarios of military collaboration. It formulates how varied modalities of military cooperation translate in terms of indirect control, and identifies which types of control can amount to derived responsibility. First, it analyses scenarios of undue control, where one participant wrongfully exercises influence over the conduct of another (§2.3.1). Second, it turns to failures to control, where a participant contributes to a harmful conduct by not exercising influence on the conduct of others (§2.3.2). In each case, indirect control

²⁵⁷ UK, Supreme Court, *Rahmatullah* (2012), *op cit*, para 60: ‘there were sufficient grounds for believing that the UK Government had the means of obtaining control over the custody of Mr Rahmatullah’; and para 75: ‘the UK government could expect that, if it asked for it, Mr Rahmatullah’s return by US forces would occur’; See *supra*, Chap 3 §1.3.3.

²⁵⁸ The NATO policy limited detentions to 96 hours before transfer to Afghan authorities

²⁵⁹ The UK opted out of the ISAF policy (UK, High Court of Justice, *Serdar Mohammed v Ministry of Defence*, (2014), *op cit*, para 180.), and the US conducted detentions within its own mission Operation Enduring Freedom (MC Waxman, ‘The Law of Armed Conflict and Detention Operations in Afghanistan’ (2009), *op cit*, at 344.).

²⁶⁰ Eg. France: B Lavaux, ‘Le Commandement Militaire Face au Droit des Conflits Armés: Retour d’Éxpérience d’Afghanistan’ in K Bannelier and C Pison (eds), *Le Recours à la Force Autorisé Par le Conseil de Sécurité - Droit et Responsabilité* (Pédone, 2014), 184–187, at 185.

can be exercised at the operational level, but also at the institutional level.

2.3.1. Indirect undue control

The first category of indirect control concerns situations where one participant unduly influences the conduct of another by supporting or directing that conduct. When undertaking military operations, States and international organizations agree to exercise certain forms of control over each other's. Under the interpretation of derived responsibility based on indirect causal control developed in §2.1.2 of this Chapter, derived responsibility is engaged when the form of control exercised by a participant over another causally contributed to the wrongful act of this other participant.

a) Operational level

Under the analysis proposed in this Chapter, the provision of military support analysed in causal terms can qualify as undue control engaging derived responsibility.²⁶¹ First, indirect control can take the form of operational support.²⁶² This occurs when a military operation provides support such as air strikes to another operation conducted under distinct command. For instance, in Afghanistan, the US-led mission OEF conducted air strikes in support of the NATO-led mission ISAF.²⁶³ In causal terms, support at the operational level is likely to significantly facilitate and contribute to the conduct it supports and therefore often qualifies as a factual cause of this conduct. If support was provided but cannot be causally linked to the wrongful conduct of the supported entity, it can constitute an independent breach leading to independent responsibility.²⁶⁴

Second, States and international organizations providing logistical support without engaging in combat operations can exercise indirect control over the conduct of participants engaged in combat.²⁶⁵ States operate under distinct national command when providing support, and do not have direct control over the conduct of soldiers engaged in combat,²⁶⁶ yet can have influence over the conduct of the entity they are

²⁶¹ See *supra*, Chap 3 §2.2.1.

²⁶² *Ibid*, Chap 3 §2.2.1.a).

²⁶³ *Ibid*, Chap 1 §1.2.5.a).

²⁶⁴ *Ibid*, Chap 3 §2.1.2.d).

²⁶⁵ *Ibid*, Chap 3 §2.2.1.b).

²⁶⁶ *Ibid*, Chap 1 §1.2.5.b).

supporting. Although not directly involved in combat, States and international organizations choosing to provide support at the logistical level can bear responsibility in connection with wrongful activities in the field. For instance, in Libya, a number of States not engaged in combat provided logistical support in the form of surveillance, aerial refuelling, or transport of equipment. Whether logistical support constitutes a necessary cause of the conduct of the aided entity depends on the form of support provided. For instance, the transport of equipment can difficultly be seen as a factual cause of subsequent airstrikes, as the airstrikes could have occurred but for the support provided. By contrast, logistical support in the form of surveillance, where the supporting State provides information on possible targets to the States engaged in combat, could arguably qualify as a necessary cause of subsequent airstrikes.

Finally, indirect control at the operational level can engage responsibility in coalitions with a dominant State.²⁶⁷ In view of the command arrangements adopted by certain coalition operations, some participants may have a limited freedom of action, while others have a predominant capacity to influence the conduct of partners.²⁶⁸ As a result, one or more dominant partners can bear responsibility for unduly controlling a conduct attributed to another. For instance, in Iraq, the US has a dominant role at each level of the chain of command. Conduct of other coalition partners that was caused by the dominant strategic or operational control of the US can thus engage the derived responsibility of the US.

b) Institutional level

When operating in the framework of an international organization, participants to military operations can exercise control over the conduct of another at the institutional level. As demonstrated in §2.2.3 of this Chapter, control exercised at the institutional level can in certain circumstances constitute indirect control causally connected to the conduct of others in the field.

First, member States could bear derived responsibility if they cause the organization to adopt a conduct that violates their obligations.²⁶⁹ When the control of member States is a necessary cause of the organization's conduct, control by member States over the decisions of an international

²⁶⁷ *Ibid*, Chap 3 §2.2.2.

²⁶⁸ *Ibid*, Chap 1 §1.2.4.

²⁶⁹ *Ibid*, Chap 3 §1.2.3.b) and §2.2.3.a).

organization can be seen as a ground for responsibility.²⁷⁰ For instance, when sensitive targets require unanimous approval of NATO member States through the NAC, wrongful targeting would not occur but for the institutional control of member States.

Conversely, an international organization could bear derived responsibility when its decision contributes to the commission of a wrongful act by member States. Notably, mandates and authorizations by the UN which are causally linked to subsequent wrongs in the field can in certain circumstances serve as a ground for responsibility of the organization.

The link between a UN decision to conduct a military operation and the occurrence of wrongs in the field rarely qualify as a necessary cause. For instance, the decision authorizing States to engage in an operation cannot be causally linked to subsequent wrongs in the field which could have happened but for the authorization.²⁷¹ Yet, the argument can be made that UN mandates occasionally contribute to the occurrence of wrongful conduct in the field. Notably, in situations where the means and mandate of a mission are inadequate due to the UN's strategic decisions, it can be argued that the control of the UN in determining the mandate is causally linked to the failure of troops to ensure the protection of local populations.²⁷²

2.3.2. Failure to indirectly control

The reverse scenario concerns situations where one of the participants failed to ensure that the conduct of its partners complied with applicable international obligations. By failing to take positive steps to exercise control over the conduct of others so as to ensure respect for international law, a participant can causally contribute to the occurrence of wrongful conduct by others.

a) Operational level

At the operational level, the failure by States or international organizations to take steps to ensure that other participants are conducting operations in accordance with humanitarian and human rights law can be a ground for derived responsibility. A breach of substantive obligations attributed to one partner can engage the derived

²⁷⁰ *Ibid*, Chap 3 §2.3.2.b).

²⁷¹ *Ibid*, Chap 3 §1.2.3.a).

²⁷² *Ibid*, Chap 3 §2.2.3.b).

responsibility of other participants which adopted a permissive attitude by not making use of their capacity to influence the perpetrator's conduct.²⁷³

As explained in §2.2.4 of this Chapter, the extent to which a participant must exert influence to control the conduct of another depends on the extent of control afforded by command arrangements and the degree of participation. Indeed, a failure to control is wrongful when a participant has the capacity to exert influence in view of the distribution of military control and fails to make use of it, so that the failure can be causally linked to a subsequent wrong.²⁷⁴ For instance, States providing logistical support usually have a limited influence over harmful conduct by States engaged in combat, and could only bear derived responsibility in situations where failing to make use of their influence caused a wrongful conduct.²⁷⁵ By contrast, States and international organizations engaged in combat must make use of the elements of military control that they possess over each other's in order to ensure respect for international obligations. Notably, in the specific case of transfers of prisoners, failure by a participant to exercise control over the entity to which it transferred the individual is often causally linked to the potential subsequent mistreatment of the detainee.²⁷⁶

b) Institutional level

At the institutional level, failure by States or international organizations to ensure that entities to which they delegate competences do not violate certain international obligations can be a ground for derived responsibility.

First, member States can bear responsibility if they fail to ensure that the international organization through which they conduct military operations afford human rights protection and/or abide by international humanitarian law.²⁷⁷ Permissive attitudes of States failing to exercise control at the institutional level and not requiring the organization to respect international obligations can be seen causally linked to the occurrence of wrongs in operations led by an international organization and on this ground can engage the derived responsibility of States.

²⁷³ *Ibid*, Chap 3 §1.3 and 2.1.2.a)

²⁷⁴ *Ibid*, Chap 3 §2.2.4.

²⁷⁵ *Ibid*, Chap 3 §2.2.1.b).

²⁷⁶ *Ibid*, Chap 3 §1.3.3 and §2.2.4.

²⁷⁷ *Ibid*, Chap 3 §1.2.3.b), §1.3 and §2.2.3.a).

Conversely, it can be argued that international organizations delegating competences should ensure that the entities through which they act respect international obligations. Notably, in situations where the UN authorizes States or other international organizations to undertake military operations but fails to monitor their activities, the UN could bear derived responsibility on the ground of its failure to exercise control at the institutional level.²⁷⁸ While a UN authorization can rarely qualify as a form of undue control,²⁷⁹ the lack of monitoring after authorizing can be seen as a failure to control engaging responsibility.

3. Conclusion: Framework for derived responsibility based on indirect control

As the previous one, this Chapter concludes by presenting a systematic method following to which derived responsibility in collaborative military operations can be allocated.

1) Attribution of conduct to A. The determination of derived responsibility builds on the steps presented for attribution of conduct, since the derived responsibility of B arises in relation to a harmful conduct attributed to A. Once identified the entity exercising effective control over a given conduct following the five steps proposed,²⁸⁰ the entity bearing derived responsibility in relation to this conduct can be determined in three additional steps.

2) Particular context. In addition to the context and circumstances identified when attributing the conduct, further circumstances linking the conduct attributed to A to the acts and omissions of B must be identified. The modalities of the collaboration and the nuances of the command arrangements must be taken into account to identify whether certain participants could exercise control over the conduct of A. For instance, when a State dominates the command structure of a coalition, when a sensitive target requires to be approved by the NAC, or when some States provide logistical support to a mission without engaging in combat, the wrongful conduct of A can be linked to the control of other participants.

In relation to failures to take steps to prevent the wrongs of other participants, the capacity of a given participant to influence the conduct

²⁷⁸ *Ibid*, Chap 3 §2.2.3.b).

²⁷⁹ *Ibid*, Chap 3 §2.3.1.b).

²⁸⁰ *Ibid*, Chap 2 §3.

of others will depend on the distribution and factual exercise of control. For instance, when a participant transfers a detainee to a partner, it can exercise some influence to ensure that the other participants abide by its international obligations. In addition, knowledge is often higher in a collaborative context, especially in the case of recurring violations. In situations where B turns a blind eye to violations committed by others, its lack of control can be linked to the conduct of A.

3) Causally relevant form of indirect control. The next step to allocate derived responsibility with regards to a harmful conduct is to identify the relevant form of indirect control over its occurrence.

First, indirect control can take the form of *undue control* facilitating or directing the conduct of another, or of a *failure to control* causally linked to the occurrence of a conduct. If a participant induced the wrongful acts of others, undue control will be a source of responsibility if it caused the wrongful conduct of A. If a participant failed to take steps to prevent wrongs of which it was aware, derived responsibility will be engaged on the ground of this failure to control if it is causally linked to the wrong of A.

Second, undue control and failures to control can occur at different levels of authority. For instance, failures by participants to ensure that offensive missions are conducted in compliance with international obligations or to protect transferred detainees occur at the operational level, while in the context of international organizations, member States can yield institutional control over the acts of the organization, such as decisions adopted by the NAC.

Indirect control is a ground of derived responsibility only if it is a necessary condition of the occurrence of the conduct of another. Yet, if the influence exercised by a participant does not give rise to derived responsibility as such, it can independently violate a substantive rule and constitute an autonomous wrong in relation to the harmful outcome. Such situations of concurrent responsibility are conceptually distinct from situations of derived responsibility.

4) Entity bearing derived responsibility in relation to the conduct of A. Finally the entity exercising the causally relevant form of indirect control over the conduct of A can be identified, by looking at the formal distribution of authority and possible factual deviations. For instance, indirect strategic direction would be exercised by the UN or of NATO, whereas indirect institutional control is can be exercised by member States.

It is important to note that conduct constitutive of indirect control must itself be attributed to engage responsibility. For instance, if a specific

contingent in a UN mission has knowledge of wrongs committed and fails take steps to ensure compliance, this failure to control at the operational level will be attributed to the entity exercising effective control over it. Unless the failing contingent is under the operational control of its State, the failure will be attributed to the UN, thus engaging the responsibility of the organization and not of the State for its failure to control. Similarly, it is because detentions centres operate under national command that the transfer of detainees without protection engages the responsibility of the transferring State. If in a given mission operational control over detentions is exercised by NATO, the transfer of detainees captured by NATO would be attributed to NATO itself.²⁸¹ In that sense, identifying the entity exercising the relevant form of indirect control requires attributing the act of indirectly controlling.

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After having determined in Chapters 2 and 3 how responsibility for the harmful conduct of international forces is to be allocated, the next and final Chapter analyses how secondary obligations can be distributed amongst responsible entities.

²⁸¹ *Ibid*, Chap 3 §1.3.3.