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

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## Chapter 4. Distribution of secondary obligations amongst participants based on forms and degrees of control

The previous Chapters have demonstrated the circumstances and conditions under which participants in collaborative military operations can be held responsible. The present Chapter enquires into the distribution of secondary obligations that are imposed on responsible entities as consequences of their wrongful acts. It aims at sketching possible solutions to distribute legal consequences of wrongful acts, as the current legal framework lacks answers in situations of shared responsibility where more than one participant bears responsibility in relation to a harmful outcome. Grounded in the analysis of responsibility in terms of control, it suggests that secondary obligations can be distributed on the basis of the forms and degrees of control on the ground of which States and international organizations bear responsibility, so that shared control translates in shared liability.

When allocating responsibility in collaborative military operations, situations of *shared responsibility*, defined as situations where more than one responsible subject can be identified in relation to one harmful outcome,<sup>1</sup> will likely arise. In certain circumstances, the conduct of a soldier will be attributed to several entities. When a participant bears derived responsibility in relation to the conduct of another, two wrongful acts combine to produce harm. Further, by combined operation of rules of attribution and rules of derived responsibility, complex scenarios of

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<sup>1</sup> A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013), *op cit*, at 367.

responsibility can occur where numerous participants bear responsibility in relation to a harmful outcome.<sup>2</sup>

When confronted to situations of shared responsibility, existing law provide very limited guidance on how to determine and distribute secondary obligations when several subjects bear responsibility in relation to a single harmful outcome. The question of the distribution of secondary obligations amongst a multiplicity of States and international organizations is one of the most unexplored areas of the law of international responsibility. In particular, matters of compensation by multiple responsible entities have only rarely been addressed.<sup>3</sup>

It is useful before engaging in the analysis to clarify the terminology used in this Chapter. The term *harmful outcome* is used to designate the overall harm suffered by an injured party, possibly as a result of such a combination of wrongful acts.<sup>4</sup> In the ILC framework, the term *injury* designates the harm suffered as a result of one specific wrongful conduct.<sup>5</sup> Strictly speaking, a harmful outcome resulting from several wrongful acts is thus constituted by the aggregation of a number of injuries.<sup>6</sup> For instance, the injury caused by a wrongful detention is distinct from the injury caused by subsequent mistreatment. However, in situations where the wrongful conduct of one is connected to the wrongful conduct of another, the injuries caused by distinct wrongful acts and forming the harmful outcome cannot be distinguished. For instance, it is difficult to distinguish the injury caused by a failure to ensure the protection of a transferred detainee from the injury caused by its mistreatment. The notion of harmful outcome allows addressing the legal consequences of wrongful acts in the complex situations of shared responsibility that occur in collaborative military operations.

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<sup>2</sup> P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' (2014), *op cit*, at 212.

<sup>3</sup> S Besson, 'La Pluralité d'États Responsables: Vers une Solidarité Internationale ?' (2007), *op cit*; P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' (2014), *op cit*; JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13(2) *Yale Journal of International Law* 225.

<sup>4</sup> A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013), *op cit*, at 367.

<sup>5</sup> ARS, *op cit*, Article 31(2): 'Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State'.

<sup>6</sup> P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' (2014), *op cit*, at 224.

The term *liability* is used to refer to the legal consequences attached to the commission of an internationally wrongful act. This term allows distinguishing issues of content of responsibility from issues of determination of responsibility.<sup>7</sup> Further, for the purpose of the analysis, two modes of distribution of secondary obligations are envisaged. In this Chapter, liability is defined as *solidary* (or joint) when each of the responsible entity can be called to account for the whole harmful outcome.<sup>8</sup> By contrast, liability is *proportionate* when each must only account for part of the harm.<sup>9</sup>

In terms of procedure, liability can be concurrent or non-severable. When liability is concurrent<sup>10</sup> (or several), the responsibility of each entity can be individually sought. In rare situations, liability can be ‘non-severable’, meaning that a claim can only be brought against all responsible entities together.<sup>11</sup> These two aspects are independent,<sup>12</sup> as liability can be substantively solidary and procedurally several, or substantively proportionate and procedurally several, and so on. Only the substantive forms of liability (solidary or proportionate) are analysed

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<sup>7</sup> ARS com, *op cit*, introductory commentary to Part II, para 1: ‘Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. [...] This constitutes the substance or content of the international responsibility of a State under the articles’; A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013), *op cit*, at 414.

<sup>8</sup> Third Crawford Report, Add., *op cit*, para 273.

<sup>9</sup> A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013), *op cit*, at 428.

<sup>10</sup> A Stumer, ‘Liability of Member States for Acts of International Organization: Reconsidering the Policy Objections’ (2007) 48 *Harvard International Law Journal* 553, at 556.

<sup>11</sup> Third Crawford Report, Add., *op cit*, para 273: ‘A possible example of “joint” inseverable responsibility under international law was the responsibility of the Four Powers for Germany as a whole and Berlin prior to 1990. In a series of cases, courts refused to hold that individual States could be sued alone for conduct arising from the quadripartite arrangements’. See for instance: European Commission of Human Rights, *Hess v United Kingdom*, (1975), *op cit*, at 74: ‘The Commission is of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom’s participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter “within the jurisdiction” of the United Kingdom, within the meaning of Art. 1 of the Convention’.

<sup>12</sup> ICJ, *Nauru* (1992), *op cit*, 48: The question whether ‘one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share [...] is independent of the question whether Australia can be sued alone’.

in this Chapter which does not address the implementation of responsibility.

The notion of solidary liability is controversial in international law. It has sparked debates on the extent to which a rule of joint responsibility would be applicable in international law, where some consider that joint responsibility could be seen as a general principle of international law,<sup>13</sup> while others view it as a domestic analogy that does not fit the international legal order.<sup>14</sup> It is submitted that solidary liability as defined above can be used to describe a certain mode of liability and is not necessarily tied with domestic interpretations. Defining solidary liability as a situation where each of a multiplicity of responsible entities in relation to a harmful outcome must provide full reparation, this Chapter enquires in which circumstances several States or international organizations participating in a military operation can be jointly liable for a harmful outcome.<sup>15</sup>

Following the same structure than previous Chapters, this Chapter first presents established rules concerning the content and scope of secondary obligations, together with practice of compensation in military operations, revealing that solutions are lacking in situations of shared responsibility (§1). In a second Section, the Chapter analyses possibilities of how to distribute secondary obligations in the context of collaborative military operations, proposing that different forms of control (effective or indirect) exercised at different levels (eg. operational, strategic, institutional) can translate in forms and degrees of liability (§ 2).

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<sup>13</sup> RP Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 *Pepperdine Law Review* 233, 240; JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988), *op cit*; ICJ, *Separate Opinion of Judge Simma in in the Case Concerning Oil Platforms (Iran v United States)*, Judgment (6 November 2003), ICJ Reports 2003, 324, para 74. See also: B Graefrath, 'Complicity in the Law of International Responsibility' (1996), *op cit*, 379.

<sup>14</sup> ARS com, *op cit*, commentary to Article 47, para 3: 'It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions and analogies must be applied with care'; J Crawford, *State Responsibility: The General Part* (2013), *op cit*, at 329; ICJ, *Dissenting Opinion of Judge Ago in Certain Phosphate Lands in Nauru (Nauru v Australia)*, Judgment (26 June 1992), ICJ Reports 1992, 326, at 328: Had the Court decided that 'Australia was to shoulder in full the responsibility in question', it would have been on 'an extremely questionable basis'.

<sup>15</sup> See *infra*, Chap 4 §2.1.

# 1. Law and practice on secondary obligations in collaborative military operations

This Section describes existing rules regarding the distribution of legal consequences of international wrongful acts in military operations. A number of settled general principles define the content and scope of secondary obligations, but provide little guidance in situations of shared responsibility (§1.1). The limited practice relating to reparation in collaborative military operations is rarely based on international law and also provides few insights on possible solutions to the question of distribution of secondary obligations amongst a multiplicity of responsible entities (§1.2).

## 1.1. Existing rules on the content and distribution of secondary obligations

Established principles of international responsibility provide the content of the secondary obligations borne by participants to collaborative military operations as a consequence of their internationally wrongful acts (§1.1.1). However, in situations of shared responsibility, it is very unclear how these secondary obligations could be distributed (§1.1.2).

### 1.1.1. Secondary obligations in the military context

This Section presents a number of established principles prescribing the obligations borne by responsibility entities, and illustrates their functioning in the military context. Secondary obligations arise automatically from the commission of a wrongful act,<sup>16</sup> ‘without any requirement of invocation by the injured State’<sup>17</sup> or international organization. First, a responsible entity has the obligation to provide full reparation, either in kind or in equivalent (§1.1.1.a). Further, responsibility can entail the obligations to cease the wrongful act and provide guarantees of non-repetition, which has particular implications in the military context (§1.1.1.b).

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<sup>16</sup> Article 28 ARS. Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

<sup>17</sup> ARS com, *op cit*, commentary to Article 29, para 3.

### a) Obligation to provide reparation in the military context

Under the very well established principle that ‘the breach of an engagement involves an obligation to make reparation’<sup>18</sup>, States and international organizations bearing responsibility in the context of a collaborative military operation will have the obligation to provide ‘full reparation’. This entails an obligation to ‘wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’,<sup>19</sup> and is reflected in the ARS and ARIO, which provide that a State or international organization having committed an internationally wrongful act ‘is under an obligation to make full reparation for the injury caused’ by that act.<sup>20</sup>

The responsible entity has the obligation to provide restitution in kind, and only ‘if this is impossible, to substitute in some manner, and to such extent, as will be considered to have repaired the injury’.<sup>21</sup> For many types of wrongful conduct occurring in military operations, restitution in kind is often unavailable and reparation frequently takes the form of restitution in equivalent,<sup>22</sup> that is, of monetary compensation.<sup>23</sup> For instance, buildings destroyed by a wrongful airstrike can only be compensated for value.<sup>24</sup> Similarly, personal injuries cannot be repaired through restitution. Even when restitution is possible, it will sometimes be insufficient to completely eradicate the consequences of the wrongful act. For instance, merely returning a detainee after several years in jail does not fully repair the injury.

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<sup>18</sup> Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Claim for Indemnity)*, Jurisdiction (26 July 1927), Series A, No 9, at 21.

<sup>19</sup> Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Claim for Indemnity)*, Merits (13 September 1928), Series A, No 17, at 47.

<sup>20</sup> Article 31 ARS. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the inter-nationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

<sup>21</sup> C Eagleton, *The Responsibility of States in International Law* (1928), *op cit*, at 182.

<sup>22</sup> ARS com, *op cit*, commentary to Article 36, para 3; C Gray, ‘The Choice Between Restitution and Compensation’ (1999) 10(2) *European Journal of International Law* 413, at 416: ‘the award of restitution was rare in the 200 years of modern arbitral practice and in the jurisprudence of the World Court’.

<sup>23</sup> C Gray, ‘The Choice Between Restitution and Compensation’ (1999), *op cit*, at 416.

<sup>24</sup> ARS com, *op cit*, commentary to Article 35, para 8.

When restitution in kind is not feasible or not sufficient, the responsible entity must provide compensation for the injury.<sup>25</sup> Methods to objectively quantify the amount of compensation with regards to certain type of damages have been developed in practice.<sup>26</sup> For instance, destroyed properties are compensated to the amount of their market value,<sup>27</sup> and awards for wrongful death take account of the material losses and moral suffering of relatives.<sup>28</sup> Wrongful detentions have on occasions been compensated by awarding a certain amount per day of detention.<sup>29</sup> In the context of shared responsibility, monetary compensation constitutes the stumbling point of the apportionment of legal consequences amongst multiple responsible entities.<sup>30</sup>

Finally, in order to fully repair certain injuries, satisfaction can be provided in addition to, or instead of, restitution or compensation. Satisfaction addresses non-material damages arising 'from the very fact of the breach of the obligation, irrespective of its material consequences'<sup>31</sup> for the injured party. Satisfaction can first take symbolic forms,<sup>32</sup> such as acknowledging the breach, or issuing an expression of regret or a formal apology.<sup>33</sup> In collaborative military operations, apologies and expressions of regrets have been used in practice by international organizations and States. For instance, ISAF forces have regularly expressed regrets with regards to civilian casualties resulting from air strikes.<sup>34</sup> In a number of missions, the UN expressed regrets for

<sup>25</sup> Article 36 ARS. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

<sup>26</sup> ARS com, *op cit*, commentary to Article 36, paras 8–34.

<sup>27</sup> *Ibid*, commentary to Article 36, para 22.

<sup>28</sup> *Ibid*, commentary to Article 36, para 18.

<sup>29</sup> *Ibid*, commentary to Article 36, para 18.

<sup>30</sup> JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988), *op cit*, at 226.

<sup>31</sup> ARS com, *op cit*, commentary to Article 37, para 3.

<sup>32</sup> C Barthe-Gay, 'Réflexions sur la Satisfaction en Droit International' (2003) 49(1) *Annuaire Français de Droit International* 105, at 113.

<sup>33</sup> ARS, *op cit*, Article 37.

<sup>34</sup> 'Nato investigates air strike that killed Afghan child' (The Guardian, 2013), *op cit*; AJ Rubin, 'Afghan Leader Calls Apology in Boys' Deaths Insufficient' (The New York Times, 6 March 2011); AJ Rubin, 'Commander Apologizes for Afghan Airstrike' (New York Times, 2012), *op cit*.

failures to protect civilian populations.<sup>35</sup> However, these apologies are not always associated with any acknowledgment of the breach, and sometimes are given while at the same time insisting that no applicable rule was breached. In these situations, it is doubtful that apologies would be considered as a form of satisfaction. In addition, satisfaction can take more concrete forms that are relevant in the context of military operations. Notably, it can include the duty to take 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act'.<sup>36</sup>

## **b) Obligations of cessation and non-repetition in the military context**

In addition to the obligation of reparation, responsibility entails the obligations of cessation, and non-repetition.<sup>37</sup> The obligation of cessation applies to continuing violations,<sup>38</sup> which in military operations include unlawful detentions or failure to protect civilians. Further, it arises in situations of recurrent breaches,<sup>39</sup> such as repeated mistreatment of detainees, sexual abuses or disproportionate air strikes. In some situations, such as wrongful detentions, the cessation of the wrongful act can be equivalent to restitution.<sup>40</sup>

Besides, when there are reasons to believe that the responsible entity is likely to reiterate the wrongful conduct towards the injured entity,<sup>41</sup> a responsible entity has the duty to 'offer appropriate assurances and guarantees of non-repetition, if circumstances so require'.<sup>42</sup> Guarantees

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<sup>35</sup> ARIO com, *op cit*, commentary to Article 37, paras 2–3.

<sup>36</sup> ARS com, *op cit*, commentary to Article 37, para 5.

<sup>37</sup> Article 29 ARS. Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 ARS. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

<sup>38</sup> ARS com, *op cit*, commentary to Article 30, para 3.

<sup>39</sup> *Ibid*, commentary to Article 30, para 3: 'article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions'.

<sup>40</sup> *Ibid*, commentary to Article 30, paras 7 and 8.

<sup>41</sup> *Ibid*, commentary to Article 30, para 9.

<sup>42</sup> Article 30 ARS. Cessation and non-repetition

of non-repetition can consist not only in verbal assurances but also specific 'preventive measures to be taken by the responsible State designed to avoid repetition of the breach'.<sup>43</sup> In the military context, a responsible entity can for instance be required to ensure effective training of forces<sup>44</sup> or improve the planning of operational missions.

### 1.1.2. Secondary obligations in situations of shared responsibility

While the principles described in the previous Section are well established, the way they can apply to situations of shared responsibility arising in collaborative military operations is unsettled. Current international law provides few, and often ambiguous, indications on whether and how secondary obligations can be distributed in situations of shared responsibility, and these indications can equivocally be interpreted. In particular, the issue of the apportionment of compensation amongst responsible participants remains unexplored.<sup>45</sup> It is established that the obligation of reparation of a responsible entity only extends to the injury caused by its own conduct (§1.1.3.a). From this principle, it can be inferred that liability in situations of multiple attribution can be solidary (§1.1.3.b). When the conduct of several States or international organizations combine to produce a harmful outcome,

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The State responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

<sup>43</sup> ARS com, *op cit*, commentary to Article 30, para 12.

<sup>44</sup> UN General Assembly, 'Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) UN Doc A/RES/60/147 (Annex), para IX(23).

<sup>45</sup> RP Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011), *op cit*, at 240: 'there is insufficient guidance under international law with respect to questions of apportioning responsibility'; M den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4(2) *Journal of International Dispute Settlement* 361, at 378: 'International law provides, however, scarce authority on questions of distributing reparation obligations among multiple wrongdoing states'; A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013), *op cit*, at 391; PN Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford University Press, 2000), at 195: 'international law has not developed sophisticated rules and procedures for adjudicating and apportioning responsibility between states in the position of multiple tortfeasors'.

however, it is unsettled how secondary obligations should be distributed (§1.1.3.c).

### a) Scope of reparation: injury caused by own conduct

One of the few indications provided in established rules is that States and international organizations must only provide reparation for the injuries caused by their own wrongful conduct. First, under the principle of independent responsibility, a State or international organization can only bear responsibility for conduct attributed to it and in breach of its obligations.<sup>46</sup> Second, a State or international organization must only provide reparation for the injuries caused by its own conduct.<sup>47</sup> Accordingly, States and international organizations engaged in military operations do not have to provide reparation for injuries that cannot be causally linked to a specific wrongful conduct attributed to them.<sup>48</sup> Yet, the implications of the principle that reparation must be provided only for the injury caused by one's wrongful act are particularly unsettled in situations where a plurality of acts can be seen as having caused a harmful outcome.

### b) Solidary liability in situations of multiple attribution

In situations where the conduct of a soldier is attributed to several participants pursuant to the test of effective control,<sup>49</sup> the argument can be made that the standard application of established principles would lead to imposing an obligation to make full reparation for the harmful outcome on each of the responsibility entity, resulting in a situation of solidary liability. Indeed, since responsibility is determined individually, each entity to which the conduct is attributed can be required to make full reparation of the damage caused by this conduct. In this scenario, 'the wrongful act is the only cause of the injury, even if several subjects

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<sup>46</sup> ARS com, *op cit*, introductory commentary to Chapter IV of Part I, para 1: The principle that 'each State is 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 in accordance with chapter III [...] will be referred to as the principle of independent responsibility' (footnotes omitted); 'The principle that State responsibility is specific to the State concerned underlies the present articles as a whole'.

<sup>47</sup> Articles 31 ARS and ARIO.

<sup>48</sup> ARS com, *op cit*, commentary to Article 31, para 9: continuing that '[t]his phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act'.

<sup>49</sup> See *supra*, Chap 2 §2.3.4.

bear responsibility for it,<sup>50</sup> so that each entity to which the conduct is attached has the obligation to provide reparation for the injury. Crawford pointed out that ‘there is no need to identify this situation with “joint and several liability” as it is understood in certain national legal systems. [...] [T]he normal case of responsibility arises because conduct attributable to a State under the principles set out in chapters II or IV of Part One is a breach of an international obligation of the State concerned vis-à-vis another State which is also a party to, or entitled to the benefit of, that obligation.’<sup>51</sup> Talmon similarly affirmed that ‘[t]he doctrine of joint responsibility [...] is not required to explain the full responsibility of each’.<sup>52</sup> It can be concluded that, by normal operation of existing rules, liability can be solidary in situations where several participants exercised effective control over a conduct.<sup>53</sup>

Yet, in these situations, the law of international responsibility does not provide solutions regarding the internal relations between responsible entities. It is acknowledged that ‘[w]here two or more States engage in a common activity and one of them is held responsible for damage arising, it is natural for that State to seek a contribution from the others on some basis’,<sup>54</sup> but there is no decisive rule in the ILC framework on this issue either. Under current law, such recourse only exists if an agreement between the responsible entities provides for it. This lack of principle of contribution, which can be explained by procedural deficiencies of the international legal order, could undermine the development of a practice of solidary liability.<sup>55</sup>

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<sup>50</sup> P d’Argent, ‘Reparation, Cessation, Assurances and Guarantees of Non-Repetition’ (2014), *op cit*, at 238.

<sup>51</sup> Third Crawford Report, Add., *op cit*, para 277 in fine.

<sup>52</sup> S Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’ (2008), *op cit*, at 211.

<sup>53</sup> This is valid whether or not multiple attribution is conceptualized as resulting in a single wrongful conduct or two identical acts. See: P d’Argent, ‘Reparation, Cessation, Assurances and Guarantees of Non-Repetition’ (2014), *op cit*, at 244: ‘the rather esoteric debate about one same wrongful act or several identical wrongful acts in such exceptional circumstances does not have much practical implication as far as making reparation is concerned’; F Messineo, ‘Attribution of Conduct’ (2014), *op cit*, at 79: ‘Article 47(1) of the ARSIWA operates in such a way that the final result would be identical’.

<sup>54</sup> Third Crawford Report, Add., *op cit*, para 276 (d).

<sup>55</sup> UK, House of Lords, *Maclaine Watson & Co Ltd v International Tin Council* (26 October 1989), [1990] 2 A.C. 418, at 480: one of the Judges considered that ‘[a]n international law or a domestic law which imposed and enforced joint and several liability on 23

### c) Distribution of secondary obligations in relation to a plurality of wrongful acts

In a number of scenarios analysed in this study, harmful outcome arises from a plurality of conduct attributed to different States and international organizations, each exercising some degree of control.<sup>56</sup> No existing rule specifically addresses liability in such scenarios. The general principles of independent responsibility and causal determination of liability are applicable, but provide ambiguous solutions. On the one hand, the principle that responsibility is independently determined can mean that the liability of a given entity is not affected by concurrent causes,<sup>57</sup> suggesting that multiple responsible entities could be jointly liable. On the other hand, the principle that each is only liable for the injury caused by its conduct suggests that the obligation of reparation of that entity should correspond to its causal contribution and thus be proportionate.<sup>58</sup>

In its commentaries, the ILC hinted at a crucial distinction between divisible and indivisible harmful outcomes, by considering that ‘unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct’.<sup>59</sup> A contrario, apportionment would be possible in situations where it is possible to identify the respective causal contribution of each responsible entity. Yet, in many cases, it is very difficult to identify in causal terms the specific amount of injury caused by the respective wrongful acts.

Under existing law, the modalities following which secondary obligations can be distributed are unsettled. The limited practice regarding secondary obligations in military operations does not allow clarifying this ambiguity.

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sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice’.

<sup>56</sup> See *supra*, Chap 3 §2.1.1.b).

<sup>57</sup> ARS com, *op cit*, commentary to Article 31, para 12.

<sup>58</sup> S Besson, ‘La Pluralité d’États Responsables: Vers une Solidarité Internationale ?’ (2007), *op cit*, at 28.

<sup>59</sup> ARS com, *op cit*, commentary to Article 31, para 13. See also: ILC, ‘Third Report on State Responsibility by Mr James Crawford, Special Rapporteur’ (2000) UN Doc A/CN.4/507 (‘Third Crawford Report’), para 35.

## 1.2. Practice of compensation in collaborative military operations

Practice relating to reparation in collaborative military operations is extremely limited. Probably due to procedural constraints, few claims of international responsibility brought in the context of collaborative military operations have reached the stage of the determination of reparation. In the few existing cases, only one responsible entity is usually brought to a court, even in situations where other participants contributed to the harmful outcome, thus offering limited insight on the consequences of shared responsibility for the distribution of reparation. Practice regarding reparation in collaborative military operation is mostly found in claims settlements provided through internal commissions or *ex gratia*, and not pursuant to the application of international law principles.

### a) United Nations

The UN has undertaken to establish mechanisms to settle ‘disputes of a private law character’,<sup>60</sup> which are in practice dealt with by ad hoc claims commissions set up for each mission.<sup>61</sup> The organization has not made clear which rules and procedures these commissions follow, and the results of settlements have not been published.<sup>62</sup> It appears that UN claim commissions are focused on torts law claims, such as damages to property, and operate without regard to either secondary or primary rules of international law. According to a survey, claims are settled by reference to internal liability regulations, or the domestic law of the host or sending State.<sup>63</sup> Pursuant to agreements with contributing States, the

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<sup>60</sup> Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, New York) UN Doc A/RES/22(I); 1 UNTS 15, Section 29(a).

<sup>61</sup> K Schmalenbach, ‘Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations’ (2005), *op cit*, at 41; D Shraga, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’ (2000), *op cit*, at 409.

<sup>62</sup> K Schmalenbach, ‘Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations’ (2005), *op cit*, at 34.

<sup>63</sup> C Baele, ‘Compensation for Damage in Peace Operations - Report Based on the Claims Questionnaire Issued in Preparation of the XVII Congress of the International Society for Military Law and the Law of War’ (2006) 45 *Military Law and Law of War Review* 193, at 195–196. See also: K Schmalenbach, ‘Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations’ (2005), *op cit*, at 43.

UN can internally seek contribution from a State the damage ‘arose from gross negligence or wilful misconduct’ of a member of its contingent,<sup>64</sup> but this rule on contribution only applies to private law claims.

The empirical system of internal liability established by the UN is not a procedure to settle claims of international responsibility of the UN. The internal claims commissions do not address violations of international human rights of international humanitarian law as such. A violation of international law can incidentally be compensated, but it would be on the basis of ad hoc considerations and domestic torts principles.

In one occasion, the compensation provided by the UN for the conduct of peacekeepers was made on the basis of international law.<sup>65</sup> In 1965, a number of States filed diplomatic protection claims on behalf of their nationals who had suffered damage from the ONUC operation in DRC. The UN paid lump sum payments to five States which distributed the compensation amongst their nationals.<sup>66</sup> This unique case remains specific, as the victims who obtained reparation were nationals of a few European States and not nationals of war-torn host States.

## b) NATO

Similarly to the UN, NATO has taken steps to settle private law claims for damages caused in the course of its military operations,<sup>67</sup> but its practice of compensation is rather obscure and empirical. Typically, a

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<sup>64</sup> UN Model MoU, *op cit*, Article 9.

<sup>65</sup> J Salmon, ‘Les Accords Spaak - U Thant du 20 Février 1965’ (1965) 11 *Annuaire Français de Droit International* 468, at 480; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 225.

<sup>66</sup> Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (Belgium–United Nations) (adopted 20 February 1965) 535 UNTS 198 (No 7780); Exchange of Letters Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Greek Nationals (Greece–United Nations) (adopted 20 June 1966); Exchange of Letters Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Italian Nationals) (18 January 1967) (Italy–United Nations) (adopted 1967); Exchange of Letters Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Luxembourg Nationals (Luxembourg–United Nations) (adopted 28 December 1966) 585 UNTS 148 (No 8487); Exchange of Letters Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Swiss Nationals (Switzerland–United Nations) (adopted 3 June 1966).

<sup>67</sup> P Degezelle, ‘General Principles of the NATO Claims Policy’ (2012) 28 *NATO Legal Gazette* 13, at 18.

provision regarding claims settlement is included in the Status of Forces Agreement negotiated with the host State.<sup>68</sup> Unlike the UN practice, the claims in NATO-led operations are in principle not settled by NATO but by the troop contributing State whose soldier committed the misconduct causing the damage, if that State can be identified.<sup>69</sup> If a specific national contingent cannot be isolated as having caused the damage, NATO will settle the claim.<sup>70</sup> The practice of compensation thus discards considerations of attribution and focuses on damage.

NATO has a relatively restricted view on the types of damages engaging its liability, whereby claims commissions refuse to entertain any claim arising from combat activities,<sup>71</sup> even on the basis of private law. Yet, the organization is relatively lenient to provide *ex gratia* payments on the basis of unilateral considerations.<sup>72</sup> For instance, SFOR provided a payment for a damage caused by allegedly lawful raids in order to ‘correct “perceived wrongs”’<sup>73</sup> amongst the local population. The Status of Force of ISAF is quite particular in that regard, as it does not provide any claim settlement procedure but mentions that ‘[a]ll compensation payments are *Ex Gratia*’.<sup>74</sup> Whether *ex gratia* or not, compensation for damage in NATO operations is inevitably made on the basis of the domestic laws (of the troop-contributing State and/or of the host State) and general principles of torts, but not on the basis of international law.<sup>75</sup>

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<sup>68</sup> M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 115.

<sup>69</sup> C Baele, ‘Compensation for Damage in Peace Operations - Report Based on the Claims Questionnaire Issued in Preparation of the XVII Congress of the International Society for Military Law and the Law of War’ (2006), *op cit*, at 195; S Vichnevetskaia, ‘ISAF Claims Process in a Nutshell’ (2008) 16 NATO Legal Gazette 2, at 3; M Zwanenburg, *Accountability of Peace Support Operations* (2005), *op cit*, at 116.

<sup>70</sup> S Vichnevetskaia, ‘ISAF Claims Process in a Nutshell’ (2008), *op cit*, at 3.

<sup>71</sup> P Degezelle, ‘General Principles of the NATO Claims Policy’ (2012), *op cit*, at 19.

<sup>72</sup> C Baele, ‘Compensation for Damage in Peace Operations - Report Based on the Claims Questionnaire Issued in Preparation of the XVII Congress of the International Society for Military Law and the Law of War’ (2006), *op cit*, at 205; S Vichnevetskaia, ‘ISAF Claims Process in a Nutshell’ (2008), *op cit*, at 3. On *ex gratia* payments by international organizations in general, see: K Wellens, *Remedies Against International Organisations* (Cambridge University Press, 2002), at 142.

<sup>73</sup> ‘SFOR compensates Bosnian villagers for damage in operation to get Karadzic’ (The Centre for Peace in the Balkans, 27 April 2002).

<sup>74</sup> S Vichnevetskaia, ‘ISAF Claims Process in a Nutshell’ (2008), *op cit*, at 3.

<sup>75</sup> *Ibid*, at 3: Claims settlements in ISAF are ‘within the discretion of the nation and in accordance with its own national laws and regulations’; C Baele, ‘Compensation for Damage in Peace Operations - Report Based on the Claims Questionnaire Issued in

### c) European Union

The EU model agreement on the status of the EU-led forces also includes a provision on the settlement of claims for damages.<sup>76</sup> An amicable settlement is first attempted before forwarding the claim to a claims commission. Diplomatic or arbitral procedures are possible if no settlement can be reached. Such disputes are settled on the background of the provision that, '[i]n the case of non-contractual liability the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'<sup>77</sup> Few harmful conduct by EU forces have been reported,<sup>78</sup> although this can be explained by the fact that the EU only recently began to engage in military operations, and that 'most of the claims brought have been settled amicably'.<sup>79</sup> The EU settles claims in the field but costs are internally recovered from the contributing States.<sup>80</sup>

## 2. Translating forms and degrees of control into forms and degrees of liability

In view of the limited guidance provided by the existing legal framework and the lack of practice on allocation of secondary obligations in collaborative military operations, the present Section builds on the analysis of responsibility conducted in previous Chapters in order to suggest interpretations following which reparation can be distributed and apportioned. It submits that forms and degrees of control in collaborative military operations analysed in the previous Chapters can translate into forms and degrees of liability. First, it argues that whether liability is solidary or proportionate depends on the form of control

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Preparation of the XVII Congress of the International Society for Military Law and the Law of War' (2006), *op cit*, at 196.

<sup>76</sup> EU, 'Draft Model Agreement on the Status of the European Union-led Forces Between the European Union and a Host State', *op cit*, Article 15.

<sup>77</sup> Consolidated Version of the Treaty on the Functioning of the European Union (2009) Official Journal of the European Union C 326/47, 26.10.2012, Article 340.

<sup>78</sup> F Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' (2013), *op cit*, at 337.

<sup>79</sup> *Ibid*, at 325.

<sup>80</sup> EU, 'Decision Establishing a Mechanism to Administer the Financing of the Common Costs of European Union Operations Having Military or Defence Implications (Athena)' (19 December 2011) 2011/871/CFSP, Official Journal of the European Union L 343/35, Article 42(4).

giving rise to responsibility (§2.1). Further, it proposes refer to the varied forms and degree of control that are exercised in relation to a harmful outcome and to their relative causal significance in order to apportion compensation (§2.2). Finally, it suggests that other secondary obligations can be allocated on the ground of control over their performance (§2.3).

It can be noted that, apart from situations of shared responsibility, it remains that in a number of situations only one participant will be responsible in relation to an injury that was caused by a single conduct attributed it. In that case, the responsible State or international organization will simply be fully liable to provide reparation for the injury caused. For instance, acts of individual misconduct are in most circumstances attributed only to the national State exercising disciplinary control. Unless another participant failed to exercise oversight over recurrent disciplinary offences, disciplinary control is the only relevant cause of the occurrence of individual misconduct.<sup>81</sup> Likewise, when operational control over combat-related wrongs is exercised by a lead organization without interferences and that no failure to control the conduct of the organization occurred at the institutional level, a single wrongful act causing a single injury is attributed to the lead entity alone.

## 2.1. Determination of the form of liability depending on the form of control giving rise to responsibility

The first question regarding the distribution of secondary obligations is to determine the form of liability, that is, whether liability in relation to a harmful outcome should be solidary or proportionate. In the situations of shared responsibility occurring in collaborative military operations, several entities exercise different forms of control over one or more wrongful act. The previous Chapters argued that responsibility was grounded in effective control or indirect control over a conduct. This Section argues that the form of liability can be determined on the basis of the forms of control exercised. Three main scenarios of shared responsibility can be distinguished: several entities each exercising effective control over a conduct (§2.1.1), several entities respectively exercising effective and indirect control over a conduct (§2.1.2), and several entities exercising control over several independent acts (§2.1.3).

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<sup>81</sup> See *supra*, Chap 2 § 2.3.2.

### 2.1.1. Solidary liability of entities each exercising effective control over a conduct

The first scenario concerns situations where several participants exercise effective control over the same conduct, resulting in multiple attribution of the same conduct. This occurs when several entities are exercising the same relevant element of military control, or when several elements of military control are proximate causes of the harmful conduct.<sup>82</sup> For instance, when both the lead entity and a contributing State exercise operational control over a contingent, as it has been the case in Iraq, the conduct of the contingent can be attributed to both the national State and the lead entity. If a wrong such as a failure to protect civilians under threat is committed in the absence of clear orders, it will often be the case that both the operational control of the lead entity and the organic control of the contributing State will be proximate causes of the wrongful act.<sup>83</sup>

In this scenario, this Section argues that the entities exercising effective control over the same conduct should bear solidary liability for the injury caused by the conduct over which they exercised control. Indeed, pursuant to the interpretation developed in Chapter 2, each of the participants having effective control exercises a form of military control which qualifies as a proximate cause of the conduct causing the injury. Since the control exercised by each responsible entity is causally linked to the injury caused by a single conduct, each entity has the obligation to provide reparation for the injury caused by the conduct it controlled.

As explained above, situations of multiple attribution are not the most problematic, as the application of existing rules allows arguing for solidary liability, although no solution is provided concerning internal contribution between responsible entities.<sup>84</sup>

### 2.1.2. Solidary liability of entities respectively exercising effective and indirect control over a conduct

The second scenario concerns situations where one entity exercises effective control over a conduct while another entity exercises indirect control over it. In these situations of derived responsibility, the two entities commit distinct but causally related wrongful acts. Under the

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<sup>82</sup> *Ibid*, Chap 2 §2.3.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*, Chap 4 §1.1.2.b).

interpretation developed in Chapter 3, derived responsibility arises when the indirect control of B qualifies as a necessary cause of the wrongful conduct of A, so that the indirect control of B and the effective control of A can be seen as *cumulative causes* of the harmful outcome.<sup>85</sup> In these situations where two forms of control are cumulative cause a harmful outcome, the respective injury caused by each cannot be identified within the harmful outcome.

For instance, in situations where an operational wrong attributed to a State in a coalition on the basis of effective control was causally linked to the indirect control of a dominant State, both the operational wrong and the undue control were necessary to bring about the resulting harmful outcome. Likewise, the failure by one subject to ensure the protection of a transferred detainee and its subsequent mistreatment by another are cumulatively causing the harm suffered by the detainee, and wrongful assistance given to the commission of air strikes constitutes a cumulative cause of the harm suffered as a result of the bombing.<sup>86</sup>

This Section submits that, in these scenarios, the entity exercising effective control and the entity exercising indirect control could bear solidary liability for the harmful outcome. As both forms of control are cumulative causes of an indivisible injury, it can be argued that each entity bearing responsibility in relation to this injury has the obligation to provide full reparation for this injury.<sup>87</sup> Accordingly, it is submitted that entities sharing responsibility on the ground of effective and indirect control can bear solidary liability.

That shared responsibility in situations of derived responsibility can lead to solidary liability for the harm caused is debated. Some authors have argued that in situations of aid or assistance the aiding and the aided entity could be jointly liable,<sup>88</sup> and the same has been said in situations of

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<sup>85</sup> *Ibid*, Chap 3 §2.1.2.c)

<sup>86</sup> *Ibid*, Chap 3 §2.3.

<sup>87</sup> P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' (2014), *op cit*, at 231.

<sup>88</sup> 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 379: 'it may be assumed that the principle of joint and several liability has to be applied'; J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987), *op cit*, at 127: 'in the case of an aider and a principal, where there is no separate harm caused by each, it would seem that joint and several liability would be appropriate'.

coercion.<sup>89</sup> In opposition, several authors consider that derived responsibility cannot give rise to solidary liability,<sup>90</sup> although they rarely propose which other modality of liability would apply. The argument developed here considers that in situations where several wrongs *cumulatively cause an indivisible injury*, the application of the principle that a responsible entity must provide reparation for the injury caused by its own conduct leads to the conclusion that each author of a wrongful act must provide reparation for the whole injury. Accordingly, participants exercising effective and indirect control can bear solidary liability in relation to the harmful outcome caused by their respective conduct.

### 2.1.3. Proportionate liability of entities exercising control over several independent acts

In a number of situations where reparation is sought with regards to a harmful outcome, the harmful outcome is actually constituted by several independent wrongful acts which caused distinct injuries.<sup>91</sup> In this scenario of concurrent responsibility, two or more participants exercised control over two or more conducts that are causally independent from each other.<sup>92</sup> The wrongful acts are concurrent causes of the harmful outcome, as each wrongful act could have occurred in the absence of the other.

In the context of collaborative military operations, this occurs notably when the indirect control of a participant was not a necessary cause of the conduct of another, yet constituted an independent breach of a substantive obligation to take specific actions.<sup>93</sup> For instance, the failure of a lead entity to exercise oversight over detentions operations independently conducted by a State operating under national command would in most cases not be causally connected to the mistreatment of detainees by that State. Similarly, the failure of a participant to take steps to ensure that troops do not commit individual misconduct is causally

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<sup>89</sup> JD Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007), *op cit*, at 636.

<sup>90</sup> C Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' (2008), *op cit*, at 178; A Orakhelashvili, 'Division of Reparation Between Responsible Entities' (2010), *op cit*, 652.

<sup>91</sup> P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repitition' (2014), *op cit*, at 224.

<sup>92</sup> See *supra*, Chap 3, §2.1.2.d).

<sup>93</sup> *Ibid.*

independent from the failure of the national State to exercise disciplinary control over its troops.

In situations of concurrent responsibility, each form of control is an independent cause of a distinct injury, so that the harmful outcome can be divided in several concurrent injuries, since each form of control is the cause of only part of it. Accordingly, this Section argues that liability can be proportionate when several participants exercised causally independent forms of control, in the sense that each responsible subject must provide reparation for the specific injury caused by its own conduct, that is, provide reparation to the extent of its causal contribution to the overall outcome.

## 2.2. Apportionment of compensation pursuant to degrees of control

In situations of shared responsibility, the question inevitably arises of how to evaluate the amount of compensation to be provided by each responsible entity. In situations of proportionate liability, compensation is apportioned *externally*, so that the relative contribution of each to the overall harm suffered must be assessed in order to evaluate the amount of compensation to be paid by a given party. In situations of solidary liability, it is possible for the parties to *internally* seek contribution depending on the relative contribution of each to the harmful outcome.

In the absence of established views on the issue, this Section suggests that, in the context of collaborative military operations, compensation can be apportioned amongst responsible entities on the basis of forms and degrees of control over the occurrence of a harmful conduct analysed in this thesis. In this analysis, forms of control on the ground of which responsibility is determined can be used as ground of apportionment (§2.2.1) by appreciating their relative causal significance (§2.2.2).

### 2.2.1. Control as ground for apportionment

This Chapter submits that the forms and degrees of control analysed in previous Chapters can serve as a basis to apportion compensation amongst several responsible participants. In this argument, the varied forms of control on the basis of which responsibility is determined can translate in degrees of causal contribution to the harmful outcome, so as to assess the relative contribution of each to the harm.

Indeed, whether responsibility arises from effective or indirect control, the forms and degrees of control on which responsibility is grounded are causally connected to the occurrence of injuries via the harmful conduct of soldiers.<sup>94</sup> Rather than enquiring in the causal link between the harmful conduct as such and the injury, the thesis proposes to refer to the respective degrees of effective and indirect control exercised over the occurrence of the conduct. The respective control exercised by participants over the occurrence of harmful acts can be used to convey the respective causal contribution to the resulting harmful outcome. Accordingly, the relative influence of each subject in the occurrence of the conduct which caused the harm is a meaningful basis to apportion compensation.

### 2.2.2. Relative significance of forms of control

It is extremely difficult to formulate or systemize *degrees of causation* over an event. The notion is 'inescapably vague',<sup>95</sup> and ordinary language is used to express that one cause is more or less relevant than the other.<sup>96</sup> Further, the relative significance of forms of control over the occurrence of a harmful conduct is highly contingent on the specific circumstances of a case and cannot always be generalized. Yet, some indications can be given as to how forms of control used to determine responsibility causally relate to the occurrence of injuries, and an attempt at hierarchizing their relative significance can be made so as to identify degrees of control.

#### a) Equally significant forms of control

In some situations, the different forms and degrees of control involved are all *equally relevant*, commanding an apportionment in equal shares. In situations of multiple attribution based on effective control, several entities exercise a form of control that constitute the proximate cause of the conduct causing the injury, so that each form of control is equally significant in causing the harm.

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<sup>94</sup> *Ibid*, Chap 2 §2.2.1 and Chap 3 §2.1.2.b).

<sup>95</sup> M Braham and MV Hees, 'Degrees of Causation' (2009) 71(3) *Erkenntnis* 323, at 325.

<sup>96</sup> *Ibid*, at 325: 'Given the practical demand, can any factual content be given to the notion of degrees of causation? One prominent answer, which is the one that Hart and Honoré provided in their seminal monograph *Causation in the Law* is to say that the concept, while valid, is inescapably vague with its substance being provided by attributive terms of ordinary language. That is, 'degrees of causation' is captured by locutions such as the 'chief' or 'main' or 'principal' cause, or of 'more important', 'effective' or 'potent' causes' (references omitted).

Occasionally, indirect control can qualify not only as a necessary cause of the overall harm (resulting in an indivisible injury), but also a proximate cause of this harm. The proximity of the cause can be determined notably by reference to foreseeability. If the harmful outcome was a foreseeable consequence of the exercise of indirect control, indirect control will be a proximate cause equally significant to effective control. For instance, in situations of undue support in the commission of wrongs or failures to control their occurrences, knowledge by the entity exercising indirect control that violations of international law are committed by the entity exercising effective control would make it foreseeable that providing support or failing to prevent breaches will result in harmful acts.

### **b) Unevenly significant forms of control**

In other cases, one form of control can be said to be *more or less significant than another*, so as to operate a relative ranking of the respective importance of different forms of control in relation to a given harm. Much depends on the circumstances of the harmful outcome and on the type of wrong considered, but a few general observations can be made.

In general, effective control has a higher causal relevance than indirect control because effective control is a proximate cause of the harmful outcome. Indirect control can occasionally qualify as a proximate cause, but is most often only a necessary cause of the harm. Therefore, the entity or entities exercising effective control will usually provide a greater share of compensation than entities exercising indirect control.

Again in general, a positive exercise of control is more closely connected to the occurrence of harm than a failure to control the conduct of another. For instance, the failure to ensure that other participants operate in accordance with their international obligations is less causally significant in relation to the harmful outcome than the actual violation.

Regarding the relative significance of operational, strategic, disciplinary or other forms of control, it can only be assessed in concreto with regards to the wrongful acts concerned. For instance, disciplinary control is a more significant cause of individual misconduct than a lack of monitoring at the operational level.

## **2.3. Distribution of other secondary obligation on the basis of control over the performance of the obligation**

Apart from compensation, other forms of reparation and other legal consequences of responsibility must be distributed amongst entities responsible in relation to a harmful outcome. Other forms of reparation and other obligations are do not have the fungible character of monetary

compensation, in the sense that these obligations cannot be apportioned. They can rest on more than one entity, but they are borne fully. In addition, the particularity of these obligations in situations of shared responsibility is that it is not always materially possible for every responsible entity to perform every secondary obligation. It is a well-known example that restitution in case of wrongful detention can only be performed by the entity within the custody of which the detainee is, so that another State responsible for having contributed to the injury suffered would not be able to provide restitution.

In case of independent wrongs causing divisible injuries and leading to proportionate liability, each responsibility entity must cease its conduct, and provide, as applicable in the case, restitution, satisfaction, and assurances of non-repetition. In cases of indivisible or single injury engaging the responsibility of several entities, the situation is more complex since various parties are involved at different levels in the same harmful outcome. This Section proposes to allocate secondary obligations other than compensation to the responsible entity which exercises the relevant control over performance of the given obligation.

### 2.3.1. Cessation and restitution

Cessation attaches to the wrongful conduct and not to the injury, therefore, quite straightforwardly, each responsible entity must cease its own wrongful conduct.<sup>97</sup> For instance, supporting State must cease providing support, and supported State must cease carrying wrongful attacks.

In case of multiple attribution, the statement needs refinement. Indeed, when a single conduct is attributed to several entities, each cannot necessarily cease the whole conduct. According to the proposition that secondary obligations should be distributed to the entities having control over the performance of the obligation of cessation, each must cease its contribution to the wrongful act.

If restitution is available to repair an injury for which several entities are responsible, the entity exercising a form control allowing it to provide restitution should perform that obligation. For instance, an entity to which a detainee wrongly captured by another has been transferred should provide restitution by freeing the detainee.

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<sup>97</sup> P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' (2014), *op cit*, at 215.

### 2.3.2. Training and prosecuting soldiers

In the context of military operations, the obligations to provide guarantees of non-repetition by taking specific measures to avoid future breaches and to provide satisfaction by prosecute individuals having perpetrated the conduct arise under humanitarian law, independently from the determination of responsibility. Indeed, under the obligation to ensure respect for humanitarian law enshrined in common Article 1 of the Geneva Conventions,<sup>98</sup> each State ‘must establish effective command and control structures to supervise compliance with the applicable provisions of humanitarian law and to punish any grave breaches committed by its own armed forces or those of its adversaries.’<sup>99</sup>

When a State fails to prosecute a soldier, the conduct to be attributed is precisely *the failure to prosecute*, not the conduct of the soldier itself.<sup>100</sup> The failure to prosecute is itself committed by States organs in the executive and judiciary, and is attributed on that ground to the national State. Therefore, even when the wrong of a soldier is attributed to, for instance, the UN, the failure to prosecute, remains a matter of the State, which has the authority and the duty to enforce discipline, that is, to properly train its troops and to punish violations if they nonetheless occur.<sup>101</sup> International organizations have limited influence in this regard, but they should diligently attempt to prevent future breach by monitoring discipline enforcement by contributing States or developing codes of conduct.<sup>102</sup>

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<sup>98</sup> 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’.

<sup>99</sup> BD Tittmore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’ (1997), *op cit*, at 75.

<sup>100</sup> N Tsagourias, ‘The Responsibility of International Organisations for Military Missions’ (2011), *op cit*, at 256.

<sup>101</sup> F Adaka, ‘The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines’ (2008), *op cit*.

<sup>102</sup> H McCoubrey and ND White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996), *op cit*, at 178; BD Tittmore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’ (1997), *op cit*, at 111.

### 3. Conclusion: Framework for distribution of secondary obligations based on forms and degrees of control

As with previous Chapters, the conclusion presents a systematic method following which secondary obligations can be distributed according to the argument developed.

**1) Forms of control and forms of liability.** In order to determine whether liability in relation to a harmful outcome is solidary or proportionate, the forms of control exercised in relation to a harmful outcome must be identified.<sup>103</sup> In situations where several participants exercise effective control over a conduct, liability is solidary. In situations of derived responsibility, where one participant exercise effective control over a conduct while another exercise indirect control over it, the forms of control are causally connected and cumulatively caused the harm, so that liability for it can be solidary. In situations of derived responsibility where two acts or omissions are causally connected, each conduct is a cause of the whole harmful outcome, so that the injury is indivisible. Liability should then be solidary. By contrast, when several participant exercise control over several acts which are causally independent from each other, liability can be proportionate.

**2) Apportionment of compensation pursuant to respective degrees of control.** In a second step, the relative significance of the control exercised by each responsible entity is assessed in order to apportion compensation either externally or internally.<sup>104</sup> The relative significance of forms and degrees of control depends on the circumstances. In general, multiple attribution implies that each entity is equally responsible, effective control is more significant than indirect control, and failures to control are less proximate causes of harm than positive exercise of control in the occurrence of a violation.

**3) Distribution of other secondary obligations.** Finally, other secondary obligations are allocated to the responsible entity exercising the relevant form of control over the performance of other secondary obligation.<sup>105</sup> Specific measures to prevent future breaches should be taken by each responsible entity at the level where it has influence. Each

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<sup>103</sup> See *supra*, Chap 3 §2.1.

<sup>104</sup> *Ibid*, Chap 3 §2.2.

<sup>105</sup> *Ibid*, Chap 3 §2.3.

responsible entity must cease its own conduct if continuing, and provide guarantees of non-repetition of its own conduct. Independently from the determination of responsibility, States have the obligation to ensure that their armed forces are well trained and to engage if warranted in disciplinary or criminal procedures against soldiers.