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

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Publication date

2015

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Boutin, B. L. (2015). *The role of control in allocating international responsibility in collaborative military operations*.

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Conclusions

The aim of this thesis was to demonstrate the fundamental role of control for allocating responsibility in collaborative military operations. In view of the particular feature of collaborative military operations, where elements of command and control are distributed between several entities during the operation, the starting hypothesis of the study was that *shared control would entail shared responsibility*.¹ By analysing principles of responsibility in conceptual terms and confronting them to the realities of the military context, the study formulated interpretations identifying the key role of the notion of control in a number of respects.

In collaborative military operations, States and international organizations exercise control in various forms and at various levels. As explained in Chapter 1, States participating to an operation delegate certain elements of military control over their troops to the entity leading the operation, while retaining other elements of control. Pursuant to command arrangements, which precise modalities vary amongst operations, elements of command and control at the strategic, operational, tactical and organic levels are shared amongst participating entities.² In addition, in operations led by an international organization, control is exercised by the organization and its members at the institutional level.³ Grounded in a conceptual analysis of international responsibility in the context of collaborative military operations, the thesis argued that these various forms and degrees of control exercised by participating States and international organizations can serve as a basis to allocate responsibility, because each form of control can be related to the occurrence of certain harmful acts.

¹ See *supra*, Intro.

² *Ibid*, Chap 1 §1.

³ *Ibid*, Chap 3 §1.2.3.

The notion of control, defined as influence exercised over the occurrence of a harmful conduct,⁴ is intrinsic to principles of international responsibility. For the purpose of attribution, control is fundamental in order to attach the conduct of an individual to a State or international organization. It is because a State or international organization has control over a harmful conduct that this conduct is attributed to it.⁵ Regarding derived responsibility, control is a criterion which allows delimiting situations where the implication, or the lack thereof, of a participant in conduct attributed to another entails responsibility.⁶ More specifically, the thesis demonstrated that the causal dimension of control is fundamental to allocate international responsibility. In this analysis, an entity exercising control over a conduct is seen as causing this conduct to occur, and held responsible on this ground.⁷

Reinterpreting principles of responsibility in the context of military collaboration through this lens of causal control, the thesis argued that responsibility can be allocated by analysing the causal links between on the one hand the exercise of control in various forms and at different levels, and on the other hand the occurrence of various types of harmful conduct. First, Chapter 2 argued that the harmful conduct of soldiers should be attributed to the entity or entities exercising a form of control which caused the conduct.⁸ In the analysis developed, attribution is seen as grounded in causal links between the conduct of an individual and the control of States or international organizations, and rules of attribution are interpreted as providing causal standards.⁹ Reinterpreting the criterion of effective control as meaning control which qualifies as a proximate cause of a given harmful conduct,¹⁰ the study submitted that effective control was a determinative test to attribute conduct in all types of collaborative military operations.¹¹ Second, Chapter 3 argued that derived responsibility should be upheld when the control of a participant over the conduct of another is causally linked to the occurrence of that conduct.¹² The analysis of rules of derived responsibility through the lens

⁴ *Ibid*, Intro §1.1.1.d).

⁵ *Ibid*, Chap 2 §2.1.2.

⁶ *Ibid*, Chap 3 §2.1.2.a).

⁷ *Ibid*, Intro §1.1.1.d).

⁸ *Ibid*, Chap 2 §2.

⁹ *Ibid*, Chap 2 §2.1.3.

¹⁰ *Ibid*, Chap 2 §2.2.1.a).

¹¹ *Ibid*, Chap 2 §2.2.2.

¹² *Ibid*, Chap 3 §2.

of causal control reveals that, amongst the various ways in which participants can exercise influence over the conduct of another, forms of control which are causally linked to the conduct of another constitute grounds for derived responsibility. More specifically, the study argued that States or international organizations should bear derived responsibility when their exercise of a form of control qualifies as the necessary (or factual) cause of the wrongful conduct of another participant.¹³ When the control of a participant does not qualify as a cause of the conduct of another, concurrent responsibility can arise for causally independent wrongful acts.¹⁴ Finally, Chapter 4 submitted that, at the stage of reparation, the respective forms and degrees of control exercised by participants and their relative causal significance could be used to distribute secondary obligations in situations of shared responsibility.¹⁵

Applying this conceptual analysis in terms of causal control to the context of collaborative military operations, the different forms and degree of control exercised in the military context can be used to allocate responsibility. Further, the causal analysis of control allows allocating responsibility when no control was exercised, since an omission to control can be seen as having caused a harmful conduct.¹⁶ Regarding attribution of conduct, one of the main implications of this analysis is that not all types of harmful conduct are to be attributed on the ground of operational control. Analysed in causal terms, the different forms of military control can be linked to different types of harmful conduct. Operational control allows the lead entity to direct the conduct of forces in the field,¹⁷ yet is not the only relevant form of military control for the purpose of allocating responsibility, as some types of harmful conduct are not linked to operational control but rather to control at the organic or strategic level.¹⁸ Organic command, that is authority relating to the preparation, maintenance and discipline of armed forces, is a form of authority always retained by participating States.¹⁹ The thesis demonstrated that control of the State at the organic level can be a ground for attribution of certain types of harmful conduct. Notably,

¹³ *Ibid*, Chap 3 §2.1.2.

¹⁴ *Ibid*, Chap 3 §2.1.2.d).

¹⁵ *Ibid*, Chap 4 §2.

¹⁶ *Ibid*, Chap 2 §2.2.1.c).

¹⁷ *Ibid*, Chap 1 §1.1.2.b).

¹⁸ *Ibid*, Chap 2 §2.2.1.b).

¹⁹ *Ibid*, Chap 1 §1.1.2.d).

occurrences of individual misconduct such as sexual or physical abuses²⁰ are causally linked to the failure of a State to exercise disciplinary control over its troops rather than to control exercised at the operational level. The thesis therefore advocates for attributing individual misconduct to the contributing State rather than to the lead entity vested with operational control.²¹ Furthermore, certain types of conduct can be attributed on the ground of control at the strategic level. Strategic authority includes the determination and organization of the tasks and resources of an operation.²² Pursuant to the causal analysis, failures at the strategic level can be causally linked to certain types of harmful conduct such as failures to protect civilians. When a harmful conduct is causally linked to the inadequate mandate or planning of an operation, it should be attributed to the entity exercising strategic control rather than on the ground of operational control.²³

Concerning derived responsibility, the analysis in terms of causal control allows understanding how control exercised at various levels between participants can be related to the occurrence of different types of harmful conduct and thereby engage responsibility. By definition, collaborative military operations involve scenarios where States or international organizations get implicated in the conduct of others. In order to delimit the situations where the influence, or lack thereof, of a participant over the conduct of another entails responsibility, the thesis argued that control causally linked to the conduct of another participant constitutes the ground on which derived responsibility can be assessed.²⁴ In this analysis, scenarios of participation in the conduct of another through the provision of military support can be interpreted through the lens of causal control. Indeed, by providing operational or logistical support, in the form for instance of air strikes or aerial refuelling, a State or international organization exercises to some degree influence over the occurrence of a wrongful conduct by the supported entity.²⁵ Under the proposed interpretation, influence over the commission of a wrongful act by another entity engages responsibility when it is causally linked to the occurrence of wrongful act by other.²⁶ Conversely, the lens of causal

²⁰ *Ibid*, Chap 1 §2.1.

²¹ *Ibid*, Chap 2 §2.3.2.

²² *Ibid*, Chap 1 §1.1.2.a).

²³ *Ibid*, Chap 2 §2.3.3.

²⁴ *Ibid*, Chap 3 §2.1.2.

²⁵ *Ibid*, Chap 3 §2.2.1.

²⁶ *Ibid*, Chap 3 §2.3.1.

control allows to assess whether the failure of a participant to exercise control over the conduct of another engages responsibility. Obligations prescribing to exercise control over the conduct of others in order to ensure that others do not breach their international obligations found in human rights law and international humanitarian law²⁷ have a particular significance in the context of collaborative military operations, where command arrangements can provide participants with some degree of control over each other. Indeed, it is often because it had the capacity to exercise control that the failure of a participant to exert influence over the conduct of another can be causally linked to that other conduct.²⁸ For instance, the failure by a participant conducting air strikes in support of another to take steps to ensure that this other participant abides by international obligations can qualify as a factual cause of the wrongful act of the supported entity, while the same failure by a State providing only aerial refuelling would rarely be a cause of the conduct of the supported entity.²⁹

Finally, the analysis of responsibility through the lens of causal control can inform the modalities under which reparation and other legal consequences could be distributed in situations where there is a multiplicity of responsible entities with regards to a harmful outcome. As few answers on this issue can be found within existing rules,³⁰ the thesis suggested that secondary obligations could be distributed and apportioned on the basis of the forms and degrees of control identified when determining responsibility. In order to assess the extent to which a participant is liable for a harmful outcome, the thesis proposes to refer to the respective forms and degrees of control exercised over the occurrence of the conduct, which can be used to convey the respective causal contribution of each to the resulting harmful outcome.³¹

One of the important conclusions of this thesis is that the role of control analysed in causal terms to allocate responsibility is *multidimensional*. First, control has a direct and an indirect dimension. Attribution is grounded on control of a State or international organization over the conduct of a soldier, while derived responsibility is grounded in control of a State or international organization over the another State or

²⁷ *Ibid*, Chap 3 §1.3.

²⁸ *Ibid*, Chap 3 §2.2.4.

²⁹ *Ibid*, Chap 3 §2.3.1.a).

³⁰ *Ibid*, Chap 4 §1.1.2.

³¹ *Ibid*, Chap 4 §2.2.1.

international organization. Conceptually, control exercised over organs over which authority is shared differs from control over another State or international organization. The latter form can be analysed as control over how another State or international organization exercises effective control over the harmful conduct of soldiers. In that sense, control as a ground for derived responsibility is indirect as it is exercised over another State or international organization rather than directly over the harmful conduct of soldiers attributed to that other State or organization on the ground of (direct) effective control.³² Further, control for the purpose of allocating responsibility has a positive and a negative dimension. Both positive acts of control and failures to exercise control are grounds to attribute conduct, assess derived responsibility and distribute secondary obligations. The causal analysis allows determining which positive or negative manifestations of control relate to a given harmful outcome.³³ Recognizing that causal analyses can present some limits due to the complexity of the notion,³⁴ the thesis developed a line of reasoning more grounded in the general notion of causation than tied to particular definitions, leaving it to further research to refine this part of the analysis.

The interpretations thereby developed suggest that the complexity of military collaboration translates in complex situations of shared responsibility. When taking full account of the military context, allocation of responsibility operates on the basis of the variety of ways in which States and international organizations exercise control over soldiers and over each other pursuant to subtle command structures. The thesis advocates that responsibility should depend on the particular modalities of control in collaborative military operations. Yet, taking account of the *complexity* of military realities does not mean reaching complex unpractical solutions. Rather, the thesis developed a framework to determine responsibility by *abstracting* to a level sufficient to grasp various factual scenarios.³⁵ The solutions proposed require to inquire to a certain extent into factual complexities in order to allocate responsibility, because ignoring the military realities pursuant to which control is

³² *Ibid*, Chap 3 §2.1.2.b).

³³ *Ibid*, Chap 2 §2.2.1.c).

³⁴ *Ibid*, Intro §1.1.1.d).

³⁵ *Ibid*, Chap 2 §3, Chap 3 §3 and Chap 4 §3.

exercised would not be in line with the fundamental principles underlying international responsibility.³⁶

This study focused on the determination of international responsibility on the basis of control and thus only addressed part of the issues related to responsibility in collaborative military operations. Notably, the topic was not addressed under a victim-based approach aiming at fostering implementation of international responsibility, where many challenges remain. Victims of harmful conduct in military operations have limited means to enforce claims of international responsibility, and often face hurdles related to standing, immunities, and jurisdiction. In addition, it is usually difficult to bring several parties before a court in situations of shared responsibility. Further research grounded on different methods could attempt to develop innovative mechanisms for victims to obtain redress for violations of international law. In that perspective, the interpretations developed in the thesis could be used to allocate responsibility amongst States and international organizations engaged in military operations, while constituting a contribution to the more general academic debates on responsibility and control.

³⁶ *Ibid*, Chap 2 §2.1 and Chap 3 §2.1.