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Responsibility in Connection with the Conduct of Military Partners

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I. Introduction

The conduct of military operations by several States cooperating as a coalition or under the aegis of an international organization raises complex issues of allocation of international responsibility amongst military partners. International military operations involve a multiplicity of States and international organizations participating in different degrees, and, when harmful conduct occurs, it can be difficult to determine which participant should be held responsible, on which ground, and to which extent. A rich literature exists regarding the attribution of conduct in military operations,¹ but less attention has

¹ See, e.g., B. Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control', Vol. 18 *Melbourne Journal of International Law* 2017, pp. 154–179; L. Condorelli, 'Le Statut des Forces de L'ONU et le Droit International Humanitaire', Vol. 78 *Rivista Di Diritto Internazionale* 1995, pp. 881–906; T. Dannenbaum, 'Translating the Standard of Effective Control Into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', Vol. 51 *Harvard International Law Journal* 2010, pp. 113–192; Ö.F. Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the "Effective Control" Standard', Vol. 61 *Netherlands International Law Review* 2014, pp. 1–22; B. Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations', in T.D. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford, Oxford University Press, 2010), pp. 515–534; K.M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', Vol. 19 *European Journal of International Law* 2008, pp. 509–531; C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', Vol. 10 *Melbourne Journal of International Law* 2009, pp. 346–364; C. Ryngaert, 'Apportioning Responsibility Between the UN and Member States in UN Peace-Support Operations: An Inquiry into

been devoted to other aspects of shared responsibility in international military operations. Attribution of conduct concerns the determination of which State or international organization should be deemed to have acted in relation to the given conduct of a soldier.² In operations led by an international organization, it is established that the conduct of soldiers should be attributed to the entity which exercised effective control over the given conduct.³ At a second level of allocation of responsibility, an entity can bear responsibility in connection with conduct that it did not commit (in the sense that the conduct is not attributed to it), on the ground of its implication in the conduct, or lack thereof.

This article sets to address allocation of responsibility in connection with the conduct of military partners. Since it focuses on this second level of allocation of responsibility, the article takes as a hypothesis that some wrongful conduct is attributed to a given military partner, and enquires specifically into the circumstances in which other military partners can bear a share of responsibility in connection with that wrongful conduct. Examples of scenarios of military cooperation that could lead to responsibility in connection with the conduct of partners include: offering air support to ground forces, transporting troops and equipment, providing aerial refuelling, carrying out reconnaissance missions, supplying targeting intelligence, transferring individuals, allowing the use of military bases, providing arms and equipment, and financing.

A myriad of rules of international law prescribes obligations in relation to acts performed by others that should be taken into account when engaging in such forms of military cooperation. These include rules formulated by the International Law Commission (ILC) in the Articles on the Responsibility of States for Internationally Wrongful Acts

the Application of the 'Effective Control' Standard After *Behrami*', Vol. 45 *Israel Law Review* 2012, pp. 151–178; M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden & Boston, Martinus Nijhoff, 2005).

² ILC, *Commentaries to the Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) Report of the ILC on the Work of its Fifty-Third Session, UN GAOR 56th Session Suppl no 10, A/56/10, pp. 30–143 ('ARSIWA Commentaries'), Commentary to Article 2, § 5, p. 35; R. Ago, *Le Délit International* (Collected Courses of The Hague Academy of International Law, Vol. 68, 1939), pp. 462–463.

³ ILC, *Commentaries to the Articles on the Responsibility of International Organizations* (2011) Report of the ILC on the Work of its Sixty-Third Session, UN GAOR 66th Session Suppl no 10, A/66/10, pp. 69–172 ('ARIO Commentaries'), Commentary to Article 7, pp. 87–93.

(ARSIWA)⁴ and the Articles on the Responsibility of International Organizations (ARIO),⁵ as well as a variety of rules found in international humanitarian law and in international human rights law. As will be shown in this article, the interplay of these various obligations results in a framework which regulates military collaboration between States and with international organizations by determining thresholds where implication in the conduct of another, or lack thereof, engages responsibility. The aim of this article is to clarify and to conceptualise this framework, so as to provide an analytical background on the basis on which military officials can determine the proper balance between excessively permissive attitudes fostering violations and unnecessarily precautionary approaches hindering military cooperation.

Section II begins by clarifying the notion of responsibility in connection with the conduct of another and how it is understood in this article. Section III provides a comprehensive overview of rules found in the ILC articles and in primary norms which prescribe negative or positive obligations and are relevant in the context of military operations. It uncovers the conditions under which responsibility in connection with the conduct of others is entailed, and analyses how the rules apply in the military context with reference to examples drawn from practice. In Section IV, the article engages in a more conceptual analysis, identifying four key criteria that are essential for allocation of responsibility in connection with the conduct of others: knowledge, capacity, proximity, and diligence. Section V addresses the issue of apportionment of legal consequences such as reparation. The regime of responsibility in connection with the responsibility of military partners will often result in situations where several military partners are responsible in relation to harmful conduct, and this article provides some possible options regarding apportionment of responsibility in such circumstances. Section VI provides concluding remarks, noting in particular a trend towards a general framework of collective responsibility and mutual compliance.

⁴ ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) Report of the ILC on the Work of its Fifty-Third Session, UN GAOR 56th Session Suppl no 10, A/56/10, pp. 26–30 ('ARSIWA').

⁵ ILC, *Articles on the Responsibility of International Organizations* (2011) Report of the ILC on the Work of its Sixty-Third Session, UN GAOR 66th Session Suppl no 10, A/66/10, pp. 54–68 ('ARIO').

II. Notion of Responsibility in Connection with the Conduct of Another

The notion of ‘responsibility in connection with the acts of another’⁶ was devised by the ILC to cover situations where a State or international organization ‘B’ bears responsibility in relation to 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,⁷ while the State or international organization A is responsible for the commission of the main wrongful act itself. Under this heading appear rules addressing situations of aid or assistance,⁸ direction and control,⁹ coercion,¹⁰ and rules addressing collaboration within international organizations.¹¹ The notion of responsibility in connection with the acts of another is also sometimes referred to as ‘indirect responsibility’,¹² ‘attribution of responsibility’,¹³ or ‘derived responsibility’.¹⁴ The defining feature is that the responsibility of B for its own wrongful conduct arises in connection with a certain act or omission of A, and would not arise if it was not for the conduct of A.

There are contrasting views in scholarship regarding the nature of ILC rules prescribing responsibility in connection with the conduct of another.

⁶ ARSIWA, p. 27; ARIO, pp. 56, 67.

⁷ See, ILC, *Seventh Report on State Responsibility by Mr Roberto Ago, Special Rapporteur* (1978) A/CN.4/307; Add.1 & 2; Corr.1 & 2, p. 52.

⁸ Article 16 ARSIWA; Articles 14, 58 ARIO. See Section III.1.A below.

⁹ Article 17 ARSIWA; Articles 15, 59 ARIO. See Section III.1.B below.

¹⁰ Article 18 ARSIWA; Articles 16, 60 ARIO.

¹¹ Articles 17, 61 ARIO. See Section III.1.C below.

¹² See, e.g., J.D. Fry, ‘Coercion, Causation, and the Fictional Elements of Indirect State Responsibility’, Vol. 40 *Vanderbilt Journal of Transnational Law* 2007, pp. 611–641; N. Voulgaris, ‘Rethinking Indirect Responsibility: A Study on Article 17 of the Draft Articles on the Responsibility of International Organizations’, Vol. 11 *International Organizations Law Review* 2014, pp. 5–52.

¹³ See, e.g., P.J. Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’, Vol.7 *International Organizations Law Review* 2010, p. 9; ILC, *Second Report on Responsibility of International Organizations, by Mr Giorgio Gaja, Special Rapporteur* (2004) A/CN.4/541, § 11.

¹⁴ See, e.g., M. den Heijer, ‘Shared Responsibility Before the European Court of Human Rights’, Vol. 60 *Netherlands International Law Review* 2013, pp. 411–440, p. 421; A. Reinisch, ‘Aid or Assistance and Direction and Control Between States and International Organizations in the Commission of Internationally Wrongful Acts’, Vol. 7 *International Organizations Law Review* 2010, pp. 63–77, p. 76.

The law of responsibility is traditionally said to be made of secondary rules prescribing the general conditions under which responsibility arises and the legal consequences for it, while primary norms prescribe the substantive content of specific international obligations.¹⁵ However, rules of derived responsibility do not neatly fit this distinction and it can be argued that they are, at least in part, of a substantive nature.¹⁶ The ILC itself admitted that the Chapter of the ARSIWA on responsibility in connection with the acts of another is particular in that it ‘specifies certain conduct as internationally wrongful’.¹⁷ Regarding aid or assistance, it has become relatively well accepted that Article 16 ARSIWA 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.¹⁸ In the words of the ILC, Article 16 ARSIWA constitutes an ‘obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another’.¹⁹ Other rules of derived responsibility can be construed in the same way as substantive obligations not to direct, impose or authorize the commission of a wrongful conduct by another.²⁰

Interpreting ILC rules of derived responsibility as substantive in nature has two main consequences. First, it means that the State or international organization B is not responsible for the conduct of A as such, but for its own distinct wrongful act in breach of its obligation not to assist or

¹⁵ ARSIWA Commentaries, General commentary, §§ 1–4, p. 31.

¹⁶ A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, Vol. 34 *Michigan Journal of International Law* 2013, pp. 359–438, p. 409.

¹⁷ ARSIWA Commentaries, Introductory commentary to Chapter IV of Part I, § 7, p. 65.

¹⁸ See, e.g., J. Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013), p. 399; B. Graefrath, ‘Complicity in the Law of International Responsibility’, Vol. 2 *Revue Belge de Droit International* 1996, pp. 371–380, p. 372; 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* (Cambridge, Cambridge University Press, 2014), pp. 134–168, p. 139; V. Lowe, ‘Responsibility for the Conduct of Other States’ Vol. 101 *Kokusaiho Gaiko Zasshi [Journal of International Law and Diplomacy]* 2002, pp. 1–55, p. 4.

¹⁹ ARSIWA Commentaries, Commentary to Article 16, § 9, p. 67.

²⁰ Kuijper, *supra* note 13, p. 22; N. Nedeski and A. Nollkaemper, ‘Responsibility of International Organizations “in Connection with Acts of States”’, Vol. 9 *International Organizations Law Review* 2012, pp. 33–52, p. 44; O. Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’, Vol. 8 *International Organizations Law Review* 2011, pp. 291–387, p. 301.

direct A to engage in a wrongful conduct.²¹ This conceptual distinction is important to note, because it has direct consequences when it comes to apportioning responsibility.²² Second, it reveals that ILC rules of derived responsibility are akin to a number of primary norms which prescribe obligations in connection with the conduct of others within specific fields of law.²³ These include for instance obligations to prevent in international humanitarian law or international human rights law. In view of their commonalities, this article analyses relevant rules found in primary norms alongside those found in the ILC Articles, so as to provide the full picture of grounds for responsibility in connection with the conduct of military partners.

III. Negative and Positive Obligations in Connection with the Conduct of Military Partners

In line with the comprehensive approach outlined above, the following sections analyse grounds for responsibility in connection with the conduct of military partners found in the ILC Articles as well as in primary rules. The multitude of possibly relevant rules can be divided in two main categories, depending on whether they prescribe a negative obligation not to influence certain conduct of others (Section III.1), or a positive obligation to exercise some influence over the conduct of others (Section III.2).

1. Negative Obligations in Connection with the Conduct of Military Partners

A number of negative obligations prescribe that responsibility can arise if a State or international organization exercises undue influence or control over the conduct of others. Underlying these rules is the idea that States and international organizations should not blindly facilitate or knowingly foster violations of international law by others. In the context of military cooperation, the most relevant rules concern aid or assistance (Section III.1.A), direction and control (Section III.1.B), and some aspects of the relationship between international organizations and their member States (Section III.1.C).

²¹ Crawford, *supra* note 18, p. 399; F. Messineo, 'Multiple Attribution of Conduct', *SHARES Research Paper* No. 2012-11, p. 7; Lowe, *supra* note 18, p. 4.

²² See Section V below.

²³ ARSIWA Commentaries, Introductory commentary to Chapter IV of Part I, § 4, p. 64.

A. Aid or Assistance

Providing support is a defining feature of international military cooperation. Military partners routinely assist each other in various ways through operational or logistical support. One example is when a State conducts air strikes in support of ground forces that are under distinct command.²⁴ This occurred for instance in Afghanistan, where troops under US command as part of Operation Enduring Freedom carried out air strikes in support of NATO-led ISAF forces on the ground,²⁵ and during the UNOCI mission in Ivory Coast, where French forces have provided air support to UN forces.²⁶ Other examples include the various forms of logistical support that can be provided to a mission, including transporting troops and equipment, providing aerial refuelling, carrying out reconnaissance missions, supplying intelligence, granting over-flight and landing rights, allowing the use of military bases, and escorting ships.²⁷ With regard to international organizations, practices of assistance have included the lending of NATO assets to EU-led military operations,²⁸ and the provision of substantial financial support by the EU to a number of AU-led peacekeeping operations.²⁹ When providing such military support, partners must take full account of their obligations not to aid or assist in violations of international law by military partners.

²⁴ Air support during a mission under integrated command does not involve aid or assistance as the conduct of both air and ground forces would be attributed to the same entity.

²⁵ R.J. Barber, 'The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan' Vol. 15 *Journal of Conflict and Security Law* 2010, pp. 467–500, p. 470.

²⁶ B. Boutin, 'An "Unlikely Scenario" That Occurred in Ivory Coast, and a Case for Shared Responsibility Between the UN and France', *SHARES Blog*, 10 April 2011. On the practice of Quick Response Forces (QRF) operating under national command in support to UN missions, see: D.S. Alberts and R.E. Hayes, *Command Arrangements for Peace Operations* (CCRP Publication Series, 1995), p. 36.

²⁷ G. Nolte and H.P. Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' Vol. 58 *International and Comparative Law Quarterly* 2009, pp. 1–30, pp. 2–4; S.A. Carney, *Allied Participation in Operation Iraqi Freedom* (US Army Center of Military History, CMH Pub 59-3-1, 2011); N. Ronzitti, 'Italy's Non-Belligerency During the Iraqi War', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden & Boston, Martinus Nijhoff, 2005), pp. 197–207, p. 201.

²⁸ F. Naert, 'European Union Common Security and Defence Policy Operations', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press, 2017), pp. 669–700, p. 675.

²⁹ European Commission, *African Peace Facility, Annual Report 2014*, ISSN 2363-0914.

i. ILC Articles

Under Article 16 ARSIWA, '[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.' Similar provisions exist with regard to aid or assistance to or by international organizations (Articles 58 and 14 ARIO). The requirement of knowledge means that the supporting State must be aware 'of the circumstances in which its aid or assistance is intended to be used by the other State'.³⁰ The ILC commentaries further add that, in order to be wrongful, aid or assistance 'must be given with a view to facilitating the commission of the wrongful act'.³¹ In terms of causal threshold, the ILC considers that assistance must have 'contributed significantly' to the other's wrongful conduct, but does not need to be 'essential'.³²

The conditions formulated by the ILC have been criticized in some respects in the scholarship. In particular, several authors have argued that the requirement of assistance being provided for the purpose of facilitating the commission of a wrongful act was excessively narrow, since such subjective element would often be very difficult to demonstrate.³³ The requirement that the substantive obligation breached by the aided entity must also be binding on the aiding entity has also been criticised as unnecessarily strict and 'overly formalistic'.³⁴ While it is recognised that the principle of prohibition of aid or assistance is part of customary international law,³⁵ the specific requirements of Article 16 ARSIWA are not established,³⁶ and it can be argued that knowledge and causation are the key requirements to demonstrate wrongful aid or assistance.³⁷

³⁰ ARSIWA Commentaries, Commentary to Article 16, § 4, p. 66.

³¹ ARSIWA Commentaries, Commentary to Article 16, § 5, p. 66.

³² *Id.*

³³ H.P Aust, *Complicity and the Law of State Responsibility* (Cambridge, Cambridge University Press, 2011), p. 377; Graefrath, *supra* note 18, p. 375; Lanovoy, *supra* note 18, p. 152.

³⁴ Lanovoy, *supra* note 18, pp. 159–160.

³⁵ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, § 420; Aust, *supra* note 33, p. 191.

³⁶ Lanovoy, *supra* note 18, pp. 156 and 161.

³⁷ Lanovoy, *supra* note 18, p. 160; H. Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counter Terrorism', *Chatham House Research Paper*, November 2016, p. 22.

Applied to military operations, ILC provisions on aid and assistance could be able to address scenarios where an entity provides assistance in the accomplishment of a specific operational mission, for instance by providing precise targeting intelligence or offering air support to a particular ground operation. In this context, the aiding entity presumably is aware of the circumstances of that mission and supports its goals. Furthermore, it can be argued that some forms of logistical support constitute wrongful aid or assistance, as in some circumstances such support is crucial. For instance, the prompt deployment of a new mission can often only be achieved with help in transporting troops and equipment,³⁸ and sustained bombing campaigns require aerial refuelling support.³⁹ In both examples, supporting States arguably possess a certain degree of knowledge of the circumstances in which their assistance is to be used. More remote forms of logistical support could constitute wrongful support under the ILC Articles if they are linked to the commission a wrongful act,⁴⁰ but the legal consequences for the aiding entity would then be limited.⁴¹ Aid or assistance through financial support can be more difficult to apprehend in view of its fungible nature, yet some scholars have demonstrated that providing resources to military partners could qualify as wrongful aid or assistance when funds are provided for a particular purpose and subject to certain conditions.⁴²

ii. International Humanitarian Law

In the context of military operations, responsibility for assisting another to commit a wrongful act can also be grounded in international humanitarian law. Under Common Article 1 to the Geneva Conventions, States have the obligation ‘to ensure respect for [the Conventions] in all circumstances.’⁴³ The duty to ensure respect for international humanitarian law has been interpreted as including an internal obligation for States to ensure respect by their own organs, as well as an external

³⁸ H. Dijkstra, ‘The Military Operation of the EU in Chad and the Central African Republic: Good Policy, Bad Politics’ Vol. 17 *International Peacekeeping* 2010, pp. 395–407, p. 400.

³⁹ J.A. Tirpak, ‘Lessons from Libya’ in *Air Force Magazine* (December 2011), pp. 34–38.

⁴⁰ ARSIWA Commentaries, Commentary to Article 16, § 5, p. 66.

⁴¹ ARSIWA Commentaries, Commentary to Article 16, § 10, p. 67. See Section V below.

⁴² Reinisch, *supra* note 14, pp. 68–69; G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, 2011), p. 136.

⁴³ 1949 Geneva Conventions, Common Article 1.

dimension prescribing that States and other international subjects should ‘ensure that the humanitarian principles underlying the Conventions are applied universally.’⁴⁴ The external obligation is itself two-fold, with ‘at least’⁴⁵ a negative obligation not to encourage or assist in violations of humanitarian law, and arguably a positive obligation to take steps to foster compliance by others.⁴⁶

The initial Pictet commentaries to the Geneva Conventions did not elaborate much on the interpretation of Common Article 1 as including a negative obligation not to encourage or assist in violations of humanitarian law. Since then, it has been widely discussed in scholarship,⁴⁷ upheld by the International Court of Justice as a general principle of humanitarian law,⁴⁸ and endorsed by the ICRC as a customary rule.⁴⁹ Grounded in decades of subsequent practice, the 2016 ICRC Commentary provides further guidance notably by indicating that aid or assistance in humanitarian law violations does not require demonstrating a specific intent to facilitate a breach, and instead relies on the element of knowledge.⁵⁰ Accordingly, States and international organizations have the obligation to refrain from providing support to activities if they are or become aware of the commission of violations of humanitarian law by the supported forces. The 2016 ICRC Commentary

⁴⁴ J.S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Volume IV* (1958), p. 16.

⁴⁵ Aust, *supra* note 33, p. 388.

⁴⁶ On the positive aspect, see Section III.2.A below.

⁴⁷ See, e.g., 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* (The Hague, Martinus Nijhoff, 1984), pp. 17–35; M. Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ Vol. 84 *International Review of the Red Cross* 2002, pp. 401–434, p. 413; O Corten, ‘La Complicité dans le Droit de la Responsabilité Internationale: Un Concept Inutile ?’, Vol. 57 *Annuaire Français de Droit International* 2001, pp. 57–84, p. 64; J. Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ Vol. 57 *British Yearbook of International Law* 1987, pp. 77–131, at 91.

⁴⁸ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, § 220.

⁴⁹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (ICRC and Cambridge University Press, 2005), Rule 144, p. 509.

⁵⁰ ICRC, *Commentary on the First Geneva Convention* (ICRC and Cambridge University Press, 2016) (‘ICRC 2016 Commentary’), § 159. See also Sassòli, *supra* note 47, p. 413; Aust, *supra* note 33, p. 389; Quigley, *supra* note 47, p. 90.

further suggests that aid or assistance could be wrongful not only in case of actual knowledge, but also ‘if there is an expectation, based on facts or knowledge of past patterns, that [a specific operation] would violate the Conventions’.⁵¹

Aid or assistance in international humanitarian law operates as *lex specialis* to the more general rule formulated by the ILC,⁵² and therefore allows capturing scenarios of military support that would not reach the high threshold of Article 16 ARSIWA, as long as actual or foreseeable knowledge can be demonstrated. The obligation enshrined in Common Article 1 applies ‘in all circumstances’ and therefore also binds States that are not directly involved in combat operation but provide some support from a distance.⁵³

iii. *International Human Rights Law*

International human rights law provides for similar obligations not to knowingly aid or assist in human rights violations by others. An in-depth discussion of the applicability of human rights law in extraterritorial military operations would be outside the scope of this contribution, but two relevant trends can be noted. First, it is increasingly accepted that, to a certain extent and with some qualifications, international human rights law applies in situations of armed conflict.⁵⁴ Second, grounds for extraterritorial applicability of human rights obligations have been progressively expanding on the basis of broader interpretations of jurisdiction over individuals or territory.⁵⁵

⁵¹ ICRC 2016 Commentary, § 161.

⁵² Article 55 ARSIWA; Aust, *supra* note 33, p. 389; ICRC 2016 Commentary, § 160.

⁵³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (‘*Wall Opinion*’), § 158; ICRC 2016 Commentary, §184.

⁵⁴ *Wall Opinion*, § 106; Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, General Comment No. 31 (2004) CCPR/C/21/Rev.1/Add. 13, § 11; N. Quenivet, ‘Human Rights Law and Peacekeeping Operations’, in M. Odello and R. Piotrowicz (eds.), *International Military Missions and International Law* (Leiden & Boston, Martinus Nijhoff, 2011), pp. 100–143; D. Murray (ed) *Practitioners’ Guide to Human Rights Law in Armed Conflict* (Oxford University Press, 2016).

⁵⁵ See, e.g., M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford, Oxford University Press, 2011); N. van der Have, *The Prevention of Gross Human Rights Violations under International Human Rights Law* (Asser Press, 2018), Chapters 3 and 4; S. Skogly, ‘Extraterritorial Obligations and the Obligation to Protect’, Vol. 47 *Netherlands Yearbook of International Law* 2016, pp. 217–244.

The obligation not to assist in human rights violations by other States can be inferred from the obligation of States to secure the human rights of individuals within their jurisdiction,⁵⁶ which includes an obligation to protect individuals from human rights violations by third parties.⁵⁷ This obligation itself implies an obligation to refrain from assisting in human rights violations, and can apply not only to violations by private entities, but also with regard to the conduct of other States.⁵⁸ In particular, there exists a strict obligation not to transfer individuals to another State where there is a serious risk of torture or other ill-treatment.⁵⁹ The obligation not to assist in human rights violations can further be relevant in the context of arbitrary deprivation of life and arbitrary detention.⁶⁰ In the case law of the European Court of Human Rights, the applicable standard appears to be one of actual or constructive knowledge, whereby States can be responsible for supporting violations they ‘knew or ought to have known’.⁶¹ Like with humanitarian law, this lower threshold for wrongful assistance can be interpreted as *lex specialis* displacing the strict requirements of the ILC articles in situations of assistance in human rights violations.

iv. Other Relevant Obligations Not to Aid or Assist

Two additional specific obligations that can be construed in terms of aid or assistance are worth mentioning in the context of military operations. First, the Arms Trade Treaty provides for an obligation not to authorise the transfer of arms ‘if [a State] has knowledge at the time of authorization that the arms or items would be used in the commission’ of certain serious violations of international law.⁶² Second, States have

⁵⁶ Article 1 ECHR; Article 2 ICCPR.

⁵⁷ D. Shelton and A. Gould, ‘Positive and Negative Obligations’, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press, 2013), pp. 562–583, p 566.

⁵⁸ Aust, *supra* note 33, p. 415; den Heijer, *supra* note 14, p. 422; Human Rights Committee, *Draft General Comment No. 36 on Article 6 ICCPR on the Right to Life* (2017), § 26.

⁵⁹ Article 3 CAT; ECtHR, *Soering v. the United Kingdom*, Judgment, 7 July 1989, App No. 14038/88.

⁶⁰ ECtHR, *Osman v. the United Kingdom*, Judgment, 28 October 1998, App No. 23452/94, § 116.

⁶¹ ECtHR (Grand Chamber), *El-Masri v. the Former Yugoslav Republic of Macedonia*, Judgment, 12 December 2012, App No. 39630/09, §198.

⁶² Article 6(3) ATT. The serious violations covered are: ‘genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.’

a general ‘obligation not to allow knowingly [their] territory to be used for acts contrary to the rights of other States’,⁶³ which could come into play for instance when a State allows another to use military bases.

B. Direction and Control

Provisions on responsibility for direction and control over the commission of a wrongful conduct address situations ‘where one State exercises the power to direct and control the activities of another State’,⁶⁴ and can be relevant in the context of coalitions with strong lead State having prevailing influence over the chain of command.⁶⁵ The criterion for wrongful direction and control are set out in Article 17 ARSIWA⁶⁶ with a high threshold. Direction refers to ‘actual direction of an operative kind’,⁶⁷ while control is defined as ‘domination over the commission of wrongful conduct’,⁶⁸ and ‘[b]oth direction and control must be exercised over the wrongful conduct’.⁶⁹ Despite these strict conditions, direction and control can arguably be relevant to situations where a dominant State maintains an overly strong position over the direction of a coalition, and is in a position to direct other States to commit wrongful conduct. For instance, the operations in Iraq in 2003–2011 were in large part predominantly directed by the US. At the strategic level, policies and goals were developed by the US with very limited consultations with other coalition States. At the operational level, the organization of the forces and decisions regarding the respective missions and tasks of

⁶³ ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, p. 22. See Aust, *supra* note 33, p. 382.

⁶⁴ ARSIWA Commentaries, Commentary to Article 17, § 5, p. 68. Direction and control over another State differs from attribution of conduct based on effective control over a conduct: the conduct of the directed State remains attributed to it, but the directing State can incur derived responsibility in connection to it.

⁶⁵ A. Ryan, ‘The Strong Lead-Nation Model in an Ad-hoc Coalition of the Willing: Operation Stabilize in East Timor’ Vol. 9 *International Peacekeeping* 2002, pp. 23–44; S.R. Lescoutre, *Command Structure for Coalition Operations: A Template for Future Force Commanders* (Kingston, Canadian Forces College, 2003), pp. 8–9.

⁶⁶ Article 17 ARSIWA provides that ‘[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.’

⁶⁷ ARSIWA Commentaries, Commentary to Article 17, § 7, p. 69.

⁶⁸ *Id.*

⁶⁹ *Id.*

each contingent were initiated to a large extent by the US.⁷⁰ In such settings, it can be argued that, in view of its high capacity to influence the conduct of others, the US could incur responsibility in connection with wrongful conduct attributed to coalition partners.

C. Negative Obligations at the Institutional Level

When military operations are undertaken under the lead of an international organization or with its authorization, additional issues arise pertaining to the responsibility of member States in connection with the conduct of the international organization, and vice versa.

i. Negative obligations of States acting through an international organization

Under Article 61 ARIIO, a member State can incur responsibility if it circumvents its obligations by taking advantage of the distinct personality and competences of the organization and ‘causing the organization to commit an act that, if committed by the State, would have constituted a breach’ of its obligations. For instance, in maritime military missions led by the EU, member States should not take advantage of the limited refugee law and human rights obligations of the organization to circumvent their own obligation of protection and non-refoulement.⁷¹ Some authors have further argued that member States could incur responsibility for their participation in a decision leading to the wrongful conduct of an organization, if they exercised overwhelming influence over the decision-making process.⁷² In NATO operations, sensitive targets are sometimes unanimously approved by member States representatives through the NAC.⁷³ In view of the

⁷⁰ 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), pp. 185–230, pp. 193–194; Carney, *supra* note 27.

⁷¹ R.A. Wessel and L. den Hertog, ‘EU Foreign, Security and Defence Policy: A Competence/Responsibility Gap?’ in M.D. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013), pp. 339–358, pp. 353–354.

⁷² J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, Vol. 4 *International Organizations Law Review* 2007, pp. 91–119; O. Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’, Vol. 8 *International Organizations Law Review* 2011, pp. 291–347.

⁷³ NATO, ‘Allied Command Operations Comprehensive Operations Planning Directive’, 17 December 2010, COPD V1.0, pp. 3–56; US Department of Defense,

particular influence of States in this specific procedure, it could be argued that a wrongful airstrike approved by the NAC and attributed to NATO would engage the derived responsibility of NATO member States.⁷⁴

ii. Negative obligations of international organizations acting through States

Conversely, international organizations have an obligation not to impose or authorize wrongful conduct by member States. Under Article 17 ARIO, an international organization can incur responsibility if 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. The scenario of authorization is particularly relevant to military operations authorized by the UN.⁷⁵ Responsibility can arise if there is a 'direct, causal relationship between the non-binding decision and the implementation by the member(s)'.⁷⁶ 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'⁷⁷ thereafter. In the context of UN-authorized military operations, responsibility under Article 17 ARIO could cover conduct of member States specifically authorized by the UN Security Council, such as security detentions in the context of a particular operation.

'Kosovo/Operation Allied Force: After-action Report', 31 January 2000, Report to Congress, p. 24; P. Gallis, 'NATO's Decision-Making Procedure', 2003, CRS Report RS21510.

⁷⁴ T. Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?', in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague, Kluwer Law International, 2002), pp. 181–192, p. 191.

⁷⁵ Article 17(2) ARIO provides that '[a]n 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.'

⁷⁶ ARIO Commentaries, Commentary to Article 17, § II, p. 109; See also, N. Blokker, 'Abuse of the Members: Questions Concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations', Vol. 7 *International Organizations Law Review* (2010) pp. 35–48, p. 44.

⁷⁷ ARIO Commentaries, Commentary to Article 17, § 13, p. 110.

2. Positive Obligations in Connection with the Conduct of Military Partners

Positive obligations in connection with the conduct of others constitute the reverse side of obligations not to facilitate or induce wrongs by others analysed in the previous Section. They provide that States and international organizations should take active steps to attempt to prevent wrongs by others and to ensure compliance with international norms. Positive obligations to ensure that military partners abide by their international obligations are found in international humanitarian law (Section III.2.A), international human rights law (Section III.2.B), and in the context of military operations involving international organizations (Section III.2.C).

A. Duty to Ensure Respect for Humanitarian Law

Next to the negative aspect analysed above, the duty to ensure respect for international humanitarian law comports a positive dimension, whereby States and international organizations should not only abstain from assisting in violations by others, but should also take steps to ensure that no violation is committed by others.⁷⁸ Under this due diligence obligation, military partners ‘must exert their influence, to the degree possible’⁷⁹ and ‘take proactive steps to bring violations of the Conventions to an end’.⁸⁰ Furthermore, the obligation ‘is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.’⁸¹

The obligation to exert influence over the conduct of others in order to foster compliance has particular implications in the context of multinational military operations. When military partners cooperate in the accomplishment of an operation, they are in a position to exercise a higher degree of influence over the conduct of each other. Since the duty to ensure respect for international humanitarian law is an obligation of means, States and international organization which are involved to some degree in an international military operation must make use of the capacity

⁷⁸ *Wall Opinion*, § 158; Condorelli and Boisson de Chazournes, *supra* note 47, p. 26; T. Meron, ‘The Geneva Conventions as Customary Law’, Vol. 81 *American Journal of International Law* 1987, pp. 348–370, p. 355.

⁷⁹ Henckaerts and Doswald-Beck, *supra* note 49, p. 509 (Rule 144).

⁸⁰ ICRC 2016 Commentary, § 164.

⁸¹ *Id.*

to exercise influence that they possess by virtue of their participation.⁸² For instance, various forms of logistical support such as ‘financing, equipping, arming or training’⁸³ can provide significant leverage over the conduct of partners directly engaged in combat operations, including the possibility to withdraw support in case of violations.

In addition to the general duty to ensure compliance with humanitarian law, specific positive obligations exist in relation to the transfer of individuals in custody. Under the Geneva Conventions, an entity which transfers an individual that it captured has the obligation to ensure that the entity to which the individual is transferred is willing and able to abide by the Conventions.⁸⁴ If the receiving entity nonetheless fails to respect international humanitarian law, the transferring State has the subsidiary obligation to take steps to correct the situation and to request the return of the individual.⁸⁵ The receiving State remains responsible for its own conduct in the treatment of the person in custody, but the transferring State can bear derived responsibility in connection with subsequent mistreatment by the receiving entity.

An illustrative example of the functioning of this obligation in international military operations is the case of *Rahmatullah*. It concerned a Pakistani national who had been captured by the UK in Iraq in 2004, and subsequently handed over to the US, which transferred him to the Bagram prison in Afghanistan where he remained detained until his release without charges in 2014. Rahmatullah’s lawyers argued before British courts that the UK had the obligation to ensure the protection of transferred individuals and should actively pursue Rahmatullah’s release by the US. The Court of Appeal agreed that, ‘in the light of Geneva IV, there [was] a substantial case for saying that the UK Government [was] under an international legal obligation to demand the return of the

⁸² ICRC 2016 Commentary, § 165.

⁸³ ICRC 2016 Commentary, § 167.

⁸⁴ Article 12(2) GC III provides: ‘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. [...]’ A similar provision with regards to other protected persons is found in Article 45 GC IV.

⁸⁵ Article 12(3) GC III provides: ‘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’. See, J.S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Volume III* (1960), p. 137.

applicant’,⁸⁶ and ordered the UK to take steps to obtain his return.⁸⁷ The Supreme Court further affirmed that ‘there were sufficient grounds for believing that the UK Government had the means of obtaining control over the custody of Mr Rahmatullah’,⁸⁸ but concluded that, in this case, the UK had done enough by sending a formal letter seeking his return.⁸⁹

B. Duty to Protect Against Human Rights Violations

Similarly, the positive dimension of the duty to protect against human rights violations imposes an obligation to take steps to attempt to prevent violations by others.⁹⁰ The duty to prevent human rights violations by third parties concerns to a large extent violations by private entities, but can also apply to violations by other States,⁹¹ in particular with regard to violations of the right to life and the prohibition of torture and other ill-treatment.⁹² The standard is usually one of reasonableness, whereby States have the duty ‘to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid [the] risk [of human rights violations by others].’⁹³ Besides, responsibility is subject to a threshold of actual or constructive knowledge of a foreseeable risk of human rights violations by other States. For instance, in the case law of the ECtHR, ‘[t]he State’s responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment [by another State] about which they knew or ought to have known’,⁹⁴ which is appreciated in light of the circumstances of each

⁸⁶ *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Another* [2011] EWCA Civ 1540 (14 December 2011), § 35.

⁸⁷ *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Another* [2011] EWCA Civ 1540 (14 December 2011), § 54.

⁸⁸ *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48, § 60.

⁸⁹ *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48, § 85. See: *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs & Others*, [2012] EWCA Civ 182.

⁹⁰ Shelton and Gould, *supra* note 57, p. 566; Corten, *supra* note 47, p. 64. See generally: B.G. Ramcharan, ‘The Concept of Protection in the International Law of Human Rights’ in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, Boston & London, Martinus Nijhoff, 1989), pp. 593–621.

⁹¹ den Heijer, *supra* note 14, p. 422.

⁹² Human Rights Committee, Draft General Comment No. 36, *supra* note 58, § 26; Human Rights Committee, General Comment No. 31, *supra* note 54, § 12.

⁹³ ECtHR, *Osman v. the United Kingdom*, *supra* note 60, § 116.

⁹⁴ ECtHR, *El-Masri v. Macedonia*, *supra* note 61, § 198.

particular case.⁹⁵ Responsibility under the ECHR in connection with the conduct of military partners was notably upheld in the cases of *Al-Saadoon* (responsibility of the UK for transferring individuals to Iraqi custody),⁹⁶ and *El-Masri* (responsibility of Macedonia for handing over an individual to the US in the context of the CIA renditions programme).⁹⁷

C. Positive Obligations at the Institutional Level

Also at the institutional level, it can be argued that international organizations and their member States should take steps to ensure respect for international law.

i. Duty of States to ensure equivalent protection by international organizations

At least in the context of the ECHR, States have a duty to ensure that international organizations through which they act provide an equivalent level of human rights protection.⁹⁸ This obligation to ensure respect can be seen as the positive side of the obligation not to circumvent one's obligations by acting through an organization analysed above.⁹⁹ Considering that States 'establish international organisations' and 'attribute to these organisations certain competences and accord them immunities',¹⁰⁰ they are in a position to also ensure that the international organizations through which it acts protect human rights in a way equivalent as guaranteed under the ECHR.¹⁰¹ In the context of military operations, it means that States contributing troops to operations led by an international organization should ensure that the operation is conducted in line with applicable human rights standards, and could

⁹⁵ ECtHR, *Osman v. the United Kingdom*, *supra* note 60, § 116.

⁹⁶ ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Judgment, 2 March 2010, App No. 61498/08.

⁹⁷ ECtHR, *El-Masri v. Macedonia*, *supra* note 61.

⁹⁸ 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', Vol. 13 *German Law Journal* 2012, pp. 874–895; 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' Vol. 10 *Human Rights Law Review* 2010, pp. 529–545.

⁹⁹ See above Section III.I.C.i.

¹⁰⁰ ECtHR, *Waite and Kennedy v. Germany*, Judgment, 18 February 1999, App No. 26083/94, § 51.

¹⁰¹ ECtHR, *Gasparini v. Italy and Belgium*, Admissibility Decision, 12 May 2009, App No. 10750/03, p. 6.

bear a share of responsibility in relation to human rights violations attributed to the organization if they fail to do so.

ii. Duty of international organizations to ensure respect by authorized missions

Conversely, a similar argument could 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. There is no established ground to support this claim, but the emergence of such a rule is well conceivable as part of the overall framework of responsibility in connection with the conduct of military partners. The enforcement of collective security is primarily the responsibility of the UNSC,¹⁰² and it can therefore be argued that it should not give blind checks when authorizing others to use force.¹⁰³ In particular, it can be argued that the UN has a duty to exercise some oversight over the conduct of authorized missions, and to ensure that international organizations or coalitions undertaking authorized operations abide by international standards.¹⁰⁴ Accordingly, the UN could bear derived responsibility in relation to the conduct of authorized forces if it fails to take steps to ensure that the forces operate in accordance with applicable international obligations.

IV. Allocation of Responsibility Amongst Military Partners

The multitude of obligations in connection with the conduct of others that can come into play in military operations, combined with complex scenarios of intricate military cooperation, can make it difficult to ascertain which military partner can be held responsible on which basis and in connection with which conduct. In order to advance towards a clearer view of the overarching legal regime, this Section suggests four key criteria that can be used to determine whether a State or international organization bears responsibility in connection with the conduct of a military partner: knowledge (Section IV.1), capacity (Section IV.2), diligence (Section IV.3), and proximity (Section IV.4). The identification of these four

¹⁰² Article 24(1) UN Charter.

¹⁰³ 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"', Vol. 11 *European Journal of International Law* 2000, pp. 541–568, pp. 555–556.

¹⁰⁴ *Id.*, pp. 564–565; D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford, Oxford University Press, 1999), p. 159.

criteria flows from the above analysis, in which each obligation explicitly or implicitly mentions one or more of these elements. Knowledge refers to whether a partner is aware that another is committing violations of international law. Capacity refers to the ability to influence the conduct of others, used either to induce or to prevent violations by others. Diligence refers to the standard of care and reasonableness exercised in ensuring respect by military partners, or in obtaining knowledge of possible violations. Proximity concerns the causal link between the implication or lack thereof of a military partner and the wrongful conduct of others. These four interrelated criteria can be appreciated relatively in terms of degrees, depending on the type of obligation and the factual circumstances of its breach, and thereby provide a useful conceptual framework to determine responsibility in connection with the conduct of military partners.

1. Knowledge

Knowledge that a partner is committing, or will commit, violations is a key requirement found with different degrees in all positive and negative obligations in connection with the conduct of another. In the ILC rules of derived responsibility, the threshold is high, requiring actual knowledge that another is engaging, or intends to engage, in wrongful conduct. Pursuant to negative and positive obligations found in primary norms, lower degrees of knowledge can engage responsibility, as knowledge can be implied or presumed from circumstances under the criteria of constructive knowledge or foreseeable risk.¹⁰⁵

In practice, the degree of knowledge is likely to be higher amongst military partners closely cooperating in the accomplishment of common goals. For instance, a State which provides close air support, or discloses specific detailed intelligence on possible targets, arguably possesses a significant degree of knowledge of whether the supported entity commits wrongful conduct. By contrast, military partners with a limited involvement in an operation, for instance those only providing limited logistical support by way of airlift, will generally have a lower degree of knowledge of the activities of the States or international organizations to which it provides support. Knowledge that others are committing violations can also be informed by the recurrence and publicity of violations. For instance, the ECtHR considered that, by 2004, there were ample reports of ongoing abuse by the US, so that other States could not hide behind a lack of knowledge of information that was in the public domain.¹⁰⁶

¹⁰⁵ See Section III above.

¹⁰⁶ ECtHR, *El-Masri v. Macedonia*, *supra* note 61, § 218.

2. Capacity

The second key criteria to allocate responsibility in connection with the conduct of others concerns the capacity to influence the conduct of military partners, either by virtue of institutional or military agreements, or due to factual circumstances. With regard to negative obligations, capacity constitutes a prerequisite to wrongful facilitation or direction, which, in conjunction with causation,¹⁰⁷ limits the scope of obligations to situations where an entity had the ability to induce or contribute to the wrongful conduct of another. In that sense, a State providing very limited remote forms of support will have a limited capacity of influence over the conduct of the assisted entity. At the institutional level, when a State or international organization has the capacity to influence the conduct of another, the abuse of such ability is sanctioned by negative obligations.¹⁰⁸

Capacity is particularly relevant to positive obligations, which impose a duty to make use of available means to influence the conduct of others. It is generally admitted that such obligations are more demanding towards military partners which, by virtue of military cooperation, can be endowed with a unique capacity to influence the conduct of each other.¹⁰⁹ When a participant has the ability to exert some influence over the conduct of military partners, it has the duty to make use of that capacity so as to foster compliance. For instance, close military partners must take steps both at the strategic and operational levels to ensure that each participant acts in accordance with international standards. Furthermore, States or international organizations with limited involvement can also be able to exercise significant influence. In particular, certain forms of indirect support, such as authorizing the use of strategic military bases, can be crucial to the supported operation,¹¹⁰ and therefore provide strong leverage, including through the withdrawal of the support provided.

¹⁰⁷ See Section IV.4 below.

¹⁰⁸ See Sections III.1.B and III.1.C above.

¹⁰⁹ See, e.g., ICRC 2016 Commentary, § 167; ICRC, 'Improving Compliance with International Humanitarian Law', Expert Seminar Report, October 2003, p. 5; C. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (Oxford, Hart, 2008), pp. 161–183, p. 165.

¹¹⁰ See, for instance, on the fundamental importance of the Ramstein military base for US drone strikes in Yemen: Cologne Administrative Court (Verwaltungsgericht Köln), 27 May 2015, 3 K 5625/14, § 6.

3. Diligence

The third main criteria relevant to allocate derived responsibility amongst military partners is the degree of diligence exercised. Diligence comes into play with regard to positive obligations, which typically embed a standard of reasonableness, but also in the context of certain negative obligations with a low threshold for knowledge. Indeed, where knowledge can be inferred from circumstances, the degree of diligence exercised to obtain (or evade) knowledge is used to ascertain whether a participant should have known of ongoing or possible violations. Low degrees of diligence can be expressed through the notion of ‘wilful blindness’,¹¹¹ where a participant deliberately avoids knowledge of violations. Depending on the obligation concerned, diligence requires the participant to at least seek information on the activities of military partners.

One of the highest form of diligence probably lies in the adoption of conditional policies which seek to ensure compliance. In order to secure respect for their international obligations, military partners can enter into agreements stipulating that the participation in or support to a military operation is subject to respect by the other party of international norms. In practice, military partners sometimes enter into agreements regarding the transfer of captured individuals, which can include provisions regarding the right to access and to request the return of a detainee, or the prohibition to hand over a transferred individual to a third party.¹¹² Another example is the UN Human Rights Due Diligence Policy adopted in 2013, which prescribes that UN support to other forces is subject to prior risk assessment and monitoring of possible abuse, and that support is to be withdrawn in case violations nonetheless occur.¹¹³

¹¹¹ Moynihan, *supra* note 37, p. 14

¹¹² See, e.g., 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, 25 March 2003 (Memorandum of Understanding for the transfer of prisoners in Iraq), §§ 4 and 6; 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’, *Journal Officiel de la République Française* n°101, 30 April 2013, Article 10.

¹¹³ UN, *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, 5 March 2013, A/67/775-S/2013/110, Annex; H.P. Aust, ‘The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?’, Vol. 20 *Journal of Conflict and Security Law* 2015, pp. 61–73.

4. Proximity

Finally, responsibility depends on the degree of causal proximity between the main wrongful conduct and the acts or omissions of others in connection with it.¹¹⁴ Causation is not always expressly mentioned but is often implicitly required to determine whether a State or international organization contributed to the wrongful conduct of another. Furthermore, the degree of proximity can serve as a factor to assess the extent of such contribution. Proximity relates to all other three criteria, which can also be expressed in causal terms, and seeks to more generally capture the differences between essential and more remote contributions. Responsibility is more likely to arise when support, control, or failure to prevent have a close, proximate link with the commission of wrongful conduct by another.

V. Apportionment of Responsibility Amongst Military Partners

When allocating responsibility in international military operations, situations of shared responsibility will likely arise where more than one responsible subject can be identified in relation to a single harmful outcome.¹¹⁵ By combined operation of rules of attribution and rules on responsibility in connection with the conduct of others, complex scenarios of shared responsibility can occur where numerous participants bear responsibility for different wrongful acts in relation to a single injury.¹¹⁶ As the result of their wrongful conduct, military partners face legal consequences which include the obligations to provide full reparation, either in kind or in equivalent, to cease the wrongful act, and to provide guarantees of non-repetition.¹¹⁷ Yet, existing law provides very limited guidance on how to apportion the legal consequences of responsibility amongst a multiplicity of States or international organizations with varied degrees of involvement.¹¹⁸ The following

¹¹⁴ See also, I. Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', Vol. 26 *European Journal of International Law* 2015, pp. 471–492, pp. 479–480.

¹¹⁵ Nollkaemper and Jacobs, *supra* note 16, p. 367.

¹¹⁶ P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), pp. 208–250, p. 212.

¹¹⁷ Articles 28–42 ARSIWA; Articles 28–42 ARIO.

¹¹⁸ S. Besson, 'La Pluralité d'États Responsables: Vers une Solidarité Internationale?', Vol. 17 *Revue Suisse de Droit International et de Droit Européen* 2007, pp. 13–38, p. 15; J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle

Section provides some guidance and options on how legal consequences of responsibility can be apportioned in the context of military operations. It first addresses the obligation to provide compensation for the injury caused, which raises specific issues (Section V.1), before turning to other legal consequences (Section V.2).

1. Apportionment of the Obligation to Provide Compensation for the Injury Caused

The obligation to provide compensation does not always arise. Primarily, responsible entities have a duty to provide full reparation through restitution, and the obligation to compensate only arises if restitution in kind is not possible.¹¹⁹ In practice, however, monetary compensation is often the main remedy available to provide reparation for injury.¹²⁰ Even when restitution is feasible, it is sometimes insufficient to ‘wipe out all the consequences of the illegal act’.¹²¹ For instance, releasing an individual after several years in arbitrary detention does not fully repair the injury.

In situations of shared responsibility, the question is to determine the extent to which each responsible partners must provide compensation in relation to a common injury. In theory, the obligation of reparation only extends to the injury caused by a participant’s own conduct,¹²² but in reality it is often impossible to isolate the respective contribution that each co-responsible brought to a final injury. In view of the limits posed by causal approaches to apportionment of compensation (Section V.1.A), this article proposes some possible alternative options (Section V.1.B).

A. The Limits of a Causal Approach

The basic principle that a responsible entity has the obligation to provide reparation for the injury caused by its own conduct reaches

of Joint and Several Liability’, Vol. 13 *Yale Journal of International Law* 1988, pp. 225–267; R.P. Alford, ‘Apportioning Responsibility Among Joint Tortfeasors for International Law Violations’, Vol. 38 *Pepperdine Law Review* 2011, pp. 233–256, p. 240; Nollkaemper and Jacobs, *supra* note 16, p. 391.

¹¹⁹ Article 36 ARSIWA; C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), p. 182.

¹²⁰ C. Gray, ‘The Choice Between Restitution and Compensation’, Vol. 10 *European Journal of International Law* 1999, pp. 413–423, p. 416.

¹²¹ PCIJ, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Merits, 13 September 1928, Series A, No 17, p. 47.

¹²² Article 31 ARSIWA.

its limits in situations where multiple wrongful acts caused together a single injury.¹²³ In case of multiple attribution of the same wrongful conduct, the standard operation of the principle leads to the conclusion that each entity to which the conduct is attributed has the obligation to provide full reparation.¹²⁴ In situations of responsibility in connection with the conduct of another analysed in this article, however, it is not clear whether each responsible entity has the obligation to provide full or partial compensation. The ILC commentaries indicates with regards to aid or assistance that ‘the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act’¹²⁵ of another, but in many cases it is impossible to identify respective causal contribution to an indivisible injury. For instance, if significant military support is provided to a wrongful airstrike, it cannot be ascertained which part of the resulting injury was specifically caused by the conduct of each military partner. In that regard, the ILC commentaries mention 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’,¹²⁶ which could mean that, when respective causal contributions to the injury cannot be isolated, each responsible bears an obligation of full compensation. It is also difficult to assess what part of an injury could be ascribed to a partner which failed to take steps to prevent the conduct of another. When it comes to apportioning compensation in concrete scenarios, the causal approach appears both equivocal and unhelpful.

B. Possible Alternative Options

A possible solution to the difficulties raised by apportionment could be to consider that States or international organizations responsible in connection with the conduct of each other are jointly liable, meaning that each has the obligation to provide full reparation for the injury they caused together, at least in situations where a causal apportionment is inconclusive. This has some theoretical support and practical value,¹²⁷

¹²³ Plakokefalos, *supra* note 114, p. 480.

¹²⁴ ILC, *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum* (2000) A/CN.4/507/Add.2., § 277.

¹²⁵ ARSIWA Commentaries, Commentary to Article 16, § 1, p. 66.

¹²⁶ ARSIWA Commentaries, Commentary to Article 31, § 13, p. 93. See also: ILC, *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur* (2000) UN Doc A/CN.4/507, § 35.

¹²⁷ I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (New York,

but does not fully answer the question of apportionment. Indeed, even in situations where participants are jointly liable, it remains useful to identify possible criteria to apportion reparation internally amongst responsible entities, which might seek contribution from each other.¹²⁸

As an alternative approach to the question of apportionment, this article proposes to rely on the four key criteria for derived responsibility identified in Section IV. The respective degrees of knowledge, capacity, and diligence give valuable indications of the degree of involvement of each participant in the final injury. Taken together, they allow a more tangible analysis of the respective contribution of various military partners. Causation, reflected in the criterion of proximity, remains relevant, but not as a sole standing standard. The relative significance of each criterion is highly contingent on the specific circumstances of a case, but it could for instance be considered that a military partner with a high degree of knowledge, or a strong capacity to influence partners, or which exercised low diligence, would bear a larger share of liability. These various factors can be appreciated in concert so as to offer a more nuanced analysis of the apportionment of compensation.

2. Distribution of Non-Pecuniary Obligations: Cessation, Non-Repetition, Restitution

The other obligations arising from the commission of a wrongful act are not fungible and cannot be apportioned in the same way as compensation. In addition, it is not always materially possible for every responsible entity to perform obligations of cessation or restitution. For instance, only the entity having custody of an individual has the capacity to release him or her. Accordingly, this article proposes to allocate non-pecuniary obligations arising from responsibility on the basis of the capacity to perform the obligation. Furthermore, taking into account the fact that, in the context of military cooperation, some partners can exert influence over others, it suggests that States or international organizations having the capacity to influence the entity able to perform the obligation could have a subsidiary obligation to ensure cessation, non-repetition and restitution.

The obligation of cessation applies to continuing violations,¹²⁹ which

Clarendon Press, 1983), p. 191; Graefrath, *supra* note 18, p. 379; Quigley, *supra* note 47, p. 127.

¹²⁸ ILC, *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum* (2000) A/CN.4/507/Add.2., § 276(d).

¹²⁹ ARSIWA Commentaries, Commentary to Article 30, § 3, p. 89.

include for instance unlawful detentions, as well as recurrent breaches,¹³⁰ such as repeated mistreatment of detainees, widespread sexual abuses or disproportionate air strikes. Cessation attaches to the wrongful conduct and not to the injury. Therefore, quite straightforwardly, each responsible entity must cease its own wrongful conduct.¹³¹ For instance, supporting States must cease providing support, and the supported entity must cease carrying wrongful attacks. In addition, if one of the co-responsible entity fails to cease its wrongful conduct, the other should attempt to ensure cessation.

When there are reasons to believe that a responsible entity is likely to reiterate the wrongful conduct,¹³² it also has the duty to ‘offer appropriate assurances and guarantees of non-repetition, if circumstances so require’.¹³³ Guarantees of non-repetition can include not only verbal assurances but also specific ‘preventive measures to be taken by the responsible State designed to avoid repetition of the breach’.¹³⁴ For military partners found responsible in the connection with the conduct of others, non-repetition means that they should take steps to ensure that further cooperation does not lead to wrongful conduct, for instance by adopting a due diligence policy, and make use of their capacity to influence the conduct of partners so as to foster future compliance.

Finally, if restitution is available to repair an injury for which several entities are responsible, such as in the case of wrongful detention, the entity having the capacity to provide restitution should perform that obligation. If the entity having custody of the individual fails to provide restitution, other military partners with a capacity to influence should seek the individual’s release.¹³⁵

VI. Conclusion

Allocating and apportioning responsibility in connection with the conduct of others can be an intricate matter. In order to clarify the legal framework, this article provided an overview of various relevant negative and positive obligations that are rarely comprehensively analysed, and explained their interplay. It showed that there can be a fine

¹³⁰ *Id.*

¹³¹ d’Argent, *supra* note 116, p. 215.

¹³² ARSIWA Commentaries, Commentary to Article 30, § 9, p. 89.

¹³³ Article 30 ARSIWA.

¹³⁴ ARSIWA Commentaries, Commentary to Article 30, § 12, p.90.

¹³⁵ This corresponds to the specific obligations to ensure respect that exist with regard to the transfer of captured individuals. See Section III.2.A above.

line between undue facilitation of wrongful conduct, and failure to act to prevent such wrongful conduct. In order to further provide guidance in the determination of responsibility in complex scenarios, the article identified the four main criteria of knowledge, capacity, diligence, and proximity. Appreciated relatively, these interrelated criteria can lead to a more systematic and nuanced analysis.

The arguments developed in this article are not only geared towards responsibility *ex post facto*, and also invite States and international organizations to take full account of their negative and positive obligations prior to engaging in military cooperation. From the onset, military partners must assess their respective duties, and together aim at overall compliance with international standards. Participants which choose to have a limited or indirect involvement in a military operation are not shielded from responsibility and should likewise assess the risk of fostering violations and the possibilities to ensure compliance.

At a more general level, the analysis conducted reveals the emergence of a legal regime aimed at ensuring compliance in the context of military operations, and perhaps more generally in international law. The combined operation of obligations not to support or induce wrongful conduct and obligations to take steps to prevent such conduct results in an overall duty for States and international organizations not to directly or indirectly engage in military cooperation without having regards to the possible unlawful activities of partners. In a context where the enforcement of international law remains faced with hurdles, a framework where military partners mutually ensure respect for international norms constitutes a possible way forward.

Summary – Responsibility in Connection with the Conduct of Military Partners

This article analyses situations in which States and international organizations partnering in military operations can bear responsibility in connection with conduct attributed to another. When engaging in military cooperation, a variety of international norms providing for obligations in relation to others should be taken into account. These include negative obligations not to assist or direct military partners in engaging in conduct violating international obligations, and positive obligations to take steps to ensure that military partners do not commit wrongful conduct. Taken together, they result in a framework which regulates military collaboration by determining thresholds where implication in the conduct of another, or lack thereof, engages responsibility. The aim of this article is to clarify and to conceptualise this framework, so as to provide an analytical background on the basis on which military officials can determine the proper balance between excessively permissive attitudes fostering violations and unnecessarily precautionary approaches hindering military cooperation. Based on a comprehensive review of relevant rules found in the ILC articles on the responsibility of States and of international organizations, international humanitarian law, and international human rights law, the article identifies four key criteria to allocate responsibility in connection with the wrongful conduct of military partners: knowledge, capacity, diligence, and proximity. In addition, the article offers some perspectives on the apportionment of legal consequences such as reparation.

Résumé – La responsabilité relative à la conduite de partenaires militaires

Cet article analyse des situations où des États et des organisations internationales travaillant avec des partenaires dans le cadre d'opérations militaires peuvent porter une responsabilité pour des faits attribués à un autre partenaire. Un certain nombre de normes internationales prévoyant des obligations envers d'autres doivent être prises en compte lors de la mise sur pied d'une coopération militaire. Ces obligations comprennent des obligations négatives, telles que l'interdiction d'ordonner à ses partenaires militaires d'entreprendre des actions en violation d'obligations internationales ou de les assister dans de telles actions, et des obligations positives, telles que l'obligation de prendre des mesures pour s'assurer que ses partenaires militaires ne

commettent pas d'actes illicites. Ensemble, elles constituent un cadre qui régit la collaboration militaire en fixant des seuils au-delà desquels l'implication – ou l'absence d'implication – dans la conduite d'un autre engage la responsabilité du partenaire. L'objectif de cet article est de clarifier et de conceptualiser ce cadre, de manière à fournir une base analytique sur laquelle les responsables militaires puissent s'appuyer pour déterminer le bon équilibre entre un comportement excessivement permissif favorisant les violations et une approche inutilement prudente entravant la coopération militaire. Cet article se fonde sur un examen complet des règles pertinentes énoncées dans les articles de la Commission du droit international sur la responsabilité de l'État et sur la responsabilité des organisations internationales, dans le droit international humanitaire et dans le droit international des droits de l'homme pour identifier quatre critères déterminants pour attribuer la responsabilité relative à des faits illicites de partenaires militaires : la connaissance, la capacité, la diligence et la proximité. L'article offre également quelques points de vue sur la répartition des conséquences légales telles que les réparations.

Samenvatting – Aansprakelijkheid voor het optreden van militaire partners

Dit artikel analyseert situaties waarin staten en internationale organisaties die partners zijn in militaire operaties aansprakelijk kunnen worden gesteld voor het optreden dat een ander wordt toegerekend. Bij het aangaan van een militair samenwerkingsverband moet er rekening worden gehouden met een grote verscheidenheid van internationale normen die voorzien in verplichtingen met betrekking tot anderen. Het gaat hierbij om zowel de negatieve verplichtingen om militaire partners niet bij te staan in, noch hen het bevel te geven tot, een vorm van optreden met schending van internationale verplichtingen, als de positieve verplichtingen om stappen te ondernemen zodat militaire partners niet overgaan tot onrechtmatig optreden. Samen vormen ze een referentiekader voor militaire samenwerking dat voorziet in drempels waar betrokkenheid bij het optreden van een ander, of het gebrek daaraan, leidt tot aansprakelijkheid. Dit artikel geeft het genoemde kader vorm en licht het toe om een analytische achtergrond te verschaffen op basis waarvan militaire autoriteiten overdreven permissieve attitudes die schendingen in de hand werken, en een al te strikte voorzorgsaanpak die militaire samenwerking in de weg staat, nauwkeurig tegen elkaar kunnen afwegen. Op basis van een uitgebreide studie van de toepasselijke

regels vermeld in de artikels van de ILC over de aansprakelijkheid van staten en internationale organisaties, internationaal humanitair recht en het internationale recht inzake de mensenrechten, onderscheidt het artikel vier sleutelcriteria om te bepalen wie aansprakelijk kan worden gesteld voor het onrechtmatig optreden van militaire partners: kennis, capaciteit, toewijding en nabijheid. Daarnaast biedt het artikel verschillende perspectieven voor de verdeling van de rechtsgevolgen zoals schadeloosstelling.

Resumen – Responsabilidad en relación con el comportamiento de socios militares

Este artículo analiza situaciones en las que Estados y organizaciones internacionales que colaboran en operaciones militares pueden ser considerados como responsables de un comportamiento atribuido a otro asociado. Al participar en una colaboración militar, se deben tener en cuenta una serie de normas internacionales que establezcan obligaciones con respecto a la otra parte. Entre ellas figuran las obligaciones negativas : no facilitar asistencia o dirigir a socios militares a que actúen violando obligaciones internacionales, y obligaciones positivas como tomar medidas para asegurarse de que los socios militares no lleven a cabo conductas ilegales, y obligaciones positivas como tomar medidas para asegurarse de que los socios militares no lleven a cabo conductas ilegales. En conjunto, estas actuaciones constituyen un marco que regula la colaboración militar estableciendo límites más allá de los cuales la implicación en la actuación del otro, o la falta de ella, conllevan responsabilidad. El presente artículo pretende aclarar y conceptualizar dicho marco ofreciendo un trasfondo analítico que permita a las autoridades militares determinar el justo equilibrio entre las actitudes excesivamente permisivas que fomentan las violaciones y los enfoques inútilmente cautos que obstaculizan la cooperación militar. El artículo se basa en un amplio estudio de las normas pertinentes contenidas en los artículos de la Comisión de Derecho Internacional sobre la responsabilidad de los Estados y la de las organizaciones internacionales, en el Derecho Humanitario Internacional y en el Derecho Internacional de Derechos Humanos. Sobre esta base, el artículo identifica cuatro criterios clave para asignar responsabilidades en relación con el comportamiento ilícito de socios militares: conocimiento, capacidad, diligencia y proximidad. Además, el artículo presenta algunas ideas en relación al reparto de las consecuencias legales, como la reparación.

Riassunto – Profili di responsabilità in relazione alla condotta di Partner militari

Questo articolo analizza situazioni nelle quali gli Stati e le Organizzazioni Internazionali che collaborano in operazioni militari possano assumersi responsabilità in relazione alla condotta tenuta dall'altro. Impegnandosi nella cooperazione militare è necessario tenere in considerazione un elevato numero di norme interazionali che prevedono l'attribuzione di doveri spettanti ad altri. Queste norme includono obblighi negativi di non assistere e di non indirizzare i partner militari nell'impegnarsi in una condotta che violi gli obblighi internazionali, e obblighi positivi a prendere provvedimenti per garantire che i partner militari non commettano illeciti. Considerate insieme, esse delineano un quadro che regola la collaborazione militare determinando soglie nelle quali il coinvolgimento nella condotta altrui, o la sua mancanza, determina responsabilità. Lo scopo di questo articolo è chiarire e concettualizzare questo quadro, in modo da fornire uno sfondo analitico sulla base del quale i funzionari militari possono determinare il giusto equilibrio tra condotte eccessivamente permissive che promuovono violazioni e approcci inutilmente precauzionali che ostacolano la collaborazione militare. Sulla base di una revisione completa delle pertinenti norme contenute negli artt. dell'ILC sulla responsabilità degli Stati e delle Organizzazioni Internazionali, del diritto internazionale umanitario e della legge internazionale sui diritti umani, l'articolo identifica quattro criteri chiave per determinare l'attribuzione della responsabilità rispetto alla condotta illecita dei partner militari: consapevolezza, capacità, diligenza, vicinanza. Inoltre, l'articolo offre alcune prospettive sulla ripartizione delle conseguenze legali come il risarcimento.

Zusammenfassung – Haftung für das Verhalten von Militärpartnern

Dieser Artikel analysiert Situationen, in denen Staaten und internationale Organisationen, die im Rahmen von Militäreinsätzen als Partner auftreten, für das Verhalten, das einem anderen zugeschrieben wird, haftbar gemacht werden können. Im Falle der militärischen Zusammenarbeit sind eine Menge internationaler Normen, die Verpflichtungen gegenüber anderen enthalten, zu berücksichtigen. Es handelt sich dabei sowohl um negative Verpflichtungen, um Militärpartnern nicht beizustehen in bzw. Militärpartnern nicht den Befehl zu geben zu einer Verhaltensweise, die internationale Verpflichtungen verletzt, als um positive Verpflichtungen

zur Veranlassung von Schritten, die gewährleisten, dass Militärpartner kein fehlerhaftes Verhalten an den Tag legen. Die Gesamtheit dieser Normen bildet einen Rahmen für die militärische Zusammenarbeit, der Schwellen vorsieht, bei denen die Beteiligung am Verhalten eines anderen oder der Mangel daran zur Haftbarkeit führt. Ziel dieses Artikels ist es, diesen Rahmen darzustellen bzw. zu erläutern, um einen analytischen Hintergrund zu verschaffen, auf dessen Basis Militärbehörden das richtige Gleichgewicht zwischen einer allzu permissiven Haltung, mit der Verletzungen Vorschub geleistet wird, und einer unnötig bedachtsamen Verhaltensweise, die die Militärkooperation behindert, finden können. Auf der Basis einer umfangreichen Beurteilung der in den Artikeln der VRK in Bezug auf die Haftung der Staaten und internationalen Organisationen, internationales humanitäres Recht und internationale Menschenrechtsnormen erwähnten relevanten Regeln, unterscheidet der Artikel vier Schlüsselkriterien für die Zuweisung der Haftung in Bezug auf fehlerhaftes Verhalten von Militärpartnern: Wissen, Kapazität, Hingabe und Nähe. Darüber hinaus verschafft der Artikel einige Ansichten zur Umlegung der gesetzlichen Folgen, wie des Schadenersatzes.