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EXPERT SEMINAR REPORTS

SHARES Expert Seminar Report

Responsibility in Multinational Military Operations: a Review of Recent Practice

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Foreword

The Amsterdam Center for International Law held a one-day Expert Seminar in Amsterdam on 16 December 2010 devoted to the topic of Responsibility in Multinational Military Operations, with a specific focus on practice. The seminar was organized in cooperation with the International Law Centre of the Swedish National Defence College as a follow up to a previous seminar organized in Stockholm in October 2009.

The seminar was part of the project research project on Shared Responsibility in International Law (SHARES),[1] which seeks to rethink the allocation of international responsibilities in cases where multiple actors, through concerted action, a joint enterprise or other forms of interaction contribute to an international wrong.

In order to enhance the understanding of shared responsibility, the SHARES project has launched a Expert Seminar Series to uncover the practice in diverse areas. The seminar on allocation of responsibility in the context of multinational military operations was the first of these seminars, later followed by seminars on protection of refugees and international environmental law.

This Expert Seminar examined the practice of four international organizations engaging in multinational military operations: the United Nations, the North Atlantic Treaty Organization, the European Union, and the African Union.

This report summarizes, without any claims of being complete, the presentations made by the experts and the following discussions. The meeting was held under the Chatham House rule therefore the report does not attribute any point to participants or organizations.

André Nollkaemper

[1] For more information, see www.sharesproject.nl.

1. Practice of the United Nations

The first panel of the Expert Seminar discussed the practice of the United Nations in relation to responsibility in peacekeeping operations. One of the initial observations made by participants was that the practice of the UN played a particularly important role in the work of the International Law Commission and has been frequently referred to in the Commentaries to the Draft Articles on the Responsibility of International Organizations.[2] Yet, the practice of actual international claims against international organizations is very limited, arguably due to the lack of judicial remedies. On the other hand, institutional practice exists within the internal doctrines of organizations: agreements signed by participants to military operations,[3] and policies on acceptance of liability and payment of claims[4] inform the views of organizations and States on their responsibility in multinational military operations. Additionally, decisions of courts faced with claims against troop-contributing States may implicitly assess the responsibility of organizations.

Recent multinational military operations are increasingly complex integrated enterprises comprising not only contingents from different countries, but also several components and missions faced with the challenge to conduct operations together. In order for various military organs to cooperate, agreements on the status of forces are necessary to define the command and control structures.

In peacekeeping operations under UN command, the command and control structure starts with the Security Council, which decides on a mandate that is to be implemented by the Secretary-General. The Secretary-General delegates his authority on the field to the Special Representative of the Secretary-General having under its authority military, police and civil personnel. To exercise authority over military organs, operational command

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[2] International Law Commission 'Draft Articles on the Responsibility of International Organizations with commentaries' (2009), Report of the International Law Commission on the Work of its 61st Session, UN GAOR Suppl No 10 (A/64/10), chap IV, pp 39-178.

[3] See, e.g.: Model Status of Forces Agreement for Peace-Keeping Operations between the United Nations and [Host State] (1990) UN Doc A/45/594; Model Contribution Agreement between the United Nations and [Contributing State] to Peace-Keeping Operations (1996) UN Doc A/50/995 Annex.

[4] See, e.g.: United Nations General Assembly, Report of the Secretary-General 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations' (20 September 1996) UN Doc A/51/389.

is vested to the UN Force Commander by troop-contributing States — which retain full command over their troops.[5]

1.1. The form and the facts

The UN has always maintained that peacekeeping forces are its subsidiary organs,[6] entailing UN's responsibility under the principle of attribution enshrined in Article 5 DARIO 2009.[7] However, it was pointed out at the Expert Seminar that the ILC's position appears to insist much more on the actual authority over the contingent rather than the formal status within the UN system. In that regard, participants to the Expert Seminar interestingly discussed the relative importance of the factual and the formal status of military troops for purposes of attribution. Observing that because an international organization never holds full or exclusive command over the troops, the military organs placed at its disposal necessarily remain organs of their States, it was argued that the status of troops being neither purely organs of the organization, not merely organs of the State justifies the application of the criteria of factual control of Article 6. In that sense, the factual test comes into play because the formal status does not suffice for attribution.

1.2. Military command and effective control

Under Article 6 DARIO 2009, an international organization incurs responsibility for troops formally placed at its disposal 'if the organization exercises effective control over that conduct.'[8] Having said that, many experts observed that the notion of 'effective control' is in itself quite

[5] Report of the Secretary-General 'Command and control of United Nations peace-keeping operations' (21 November 1994) UN Doc A/49/681: 'In general, United Nations command is not full command and is closer in meaning to the generally recognized military concept of "operational command". It involves the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole).'

[6] Model Status of Forces Agreement for Peace-Keeping Operations between the United Nations and [Host State] (1990) UN Doc A/45/594, para 15.

[7] Art 5 DARIO 2009: 'The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law'.

[8] Art 6 DARIO 2009: 'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.'

problematic: not only has it given rise to many definitions, it also proves difficult to apply in practice in peacekeeping operations. The test requires factual control over a specific conduct, but its exact meaning beyond this is relatively unclear.

When applying the 'effective control' test to military operations undertaken in the framework of an international organization, some participants to the Expert Seminar took the view that it was in many cases sufficient to look at the formal agreements on the distribution of command and control powers. Indeed, although the military concepts of command and control should not be equated with the legal concept of effective control, the transfer of operational command to an organization and its exercise through a unified chain of command — such as the UN one — indicates that *prima facie* the organization had effective control over the acts of peacekeepers. Thus, in most cases, Article 6 would lead to attribution to the UN and therefore fit the practice of acceptance of liability by the UN based on formal status. This presumption would be rebutted only in specific cases where a peacekeeper acts on direct contradictory instructions of its State, prompting attribution to the contributing State.

1.3. State influence and shared responsibility

Other experts considered that States exercise influence over the acts of their military forces in many more various ways than by directly infringing the UN command structure. Indeed, the military powers retained by States pursuant to the command and control agreements can have a significant influence on the conduct of troops in the field.

Firstly, the administrative powers which remain exclusively within the troop-contributing States can provide the State with at least some degree of effective control. The selection and training of military personnel is an exclusive competence of the troop-contributing States and there is a risk that some States send poorly trained peacekeepers. Besides, the troop-contributing States retains exclusive criminal jurisdiction. States have the obligation to take action against perpetrators and the UN has a limited influence on this. Whether the exclusive criminal jurisdiction retained by States indeed plays a role in attribution and on which basis in the ILC articles was debated.

Additionally to administrative powers, each troop-contributing State comes with different standards for its troops regarding the conditions for the use of force, integrated into carefully drafted Rules of Engagement, with the aim of protecting the safety of their forces. This practice of 'national caveats' has a strong influence on the exercise of command powers in the field, since the Force Commander needs to verify that a contingent is able to carry an order, and the National Commander may refuse to carry orders contrary to its Rules of Engagement. It was noted that the more forces are deployed in volatile and difficult situations, the more interferences are made by States. From these considerations, it can be said that troop-contributing States play a large role and exercise influence in the field.

This view however was not unanimous amongst participants, and other Experts insisted that those powers retained by States are not sufficient to give effective control, as long as the State does not break the chain of command by giving direct instructions to its troops. In this opinion, short of direct contradictory instructions, the troop-contributing States could not exert sufficient control over the troops to qualify as effective. This was the position of the District Court in The Hague in 2008 in a case related to the massacre of Srebrenica.[9]

The views expressed on the question of dual attribution were quite contrasted. Dual attribution is increasingly advocated and attracting more interest. There seems to be quite some room for its application in peacekeeping operations, but not all Experts where convinced by the idea. The ILC acknowledged the possibility of dual attribution, but its approach is still premised on the idea that responsibility is in most cases borne by *either* the UN *or* the State. Some expressed doubts on dual attribution because there was no practice of decisions attributing a conduct to two entities. Others noted that in practice it would very difficult to demonstrate facts leading to dual attribution and that findings of individual single attribution are more easily made. Besides, politically, the UN would rather accept a

[9] *H N v the Netherlands*, District Court in The Hague, Civil law section, 10 September 2008, LJN: BF0181; 265615 / HA ZA 06-1671; ILDC 1092 (NL 2008), para 4.14.1 : 'If Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests. [...] If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution.'

broad responsibility rather than applying a detailed test finding it was not exercising control over its forces.

1.4. The responsibility of the UN for authorized operations

Under a long-established practice and principle of attribution, the direct responsibility of the UN only comes into play if the operation is under UN command. For instance, the operation in Korea in 1950 was under the unified command of the US,[10] and this State accordingly paid damages for all claims. The situation in Somalia in 1993 was more complex due to the simultaneous presence on the field of the UNOSOM II under UN command and of US troops operating in parallel as a Quick Reaction Force under national command. Each assumed it will only pay damages for injuries caused by its forces and two parallel claims commissions were established, which referred cases to each other when the damage was not from their forces. Quite exceptionally, in the AU/UN Hybrid Operation in Darfur (UNAMID), the UN has accepted to pay for all damages caused by the mission,[11] despite the fact that troops are under the joint command of UN and AU.

The principle that operations under national or regional command do not incur the responsibility of the UN — uncontested in 60 years of military operations — has been put at doubt by the holdings of the European Court of Human Rights in the *Behrami* case.[12] The ECHR considered acts of the KFOR troops (which were not under UN command) to be attributable to the UN which had 'ultimate authority and control'[13] over the operations. Experts at the Seminar agreed that when the UN has no command and control over an operation, its (direct) responsibility is not involved. The test of ultimate authority and control is far too broad and not in line with the ILC Articles. It was interestingly suggested at the meeting that beyond overall control, the

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[10] UNSC Resolution 84 (1950) of 7 July 1950, UN Doc S/1588.

[11] Agreement between the UN and the AU and the Government of Sudan concerning the status of the AU/UN Hybrid operation in Darfur ('UNAMID SOFA') of 9 February 2008 (unpublished), Paragraph 54: 'Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to UNAMID, except for those arising from operational necessity, […] shall be settled by the United Nations […]. Upon determination of liability as provided in this Agreement, the United Nations shall pay compensation […].'

[12] European Court of Human Right, *Behrami and Behrami v France*, Application No 71412/01 and *Saramati v France, Germany and Norway*, Application No 78166/01 (2 May 2007).

[13] *Behrami*, paras 140-141.

idea expressed by the Court was one of normative control of the UN over the authorized States. This control could to play a role not in attributing the conduct, but rather in attributing responsibility under Article 16 DARIO 2009,[14] for the UN can be responsible for having authorized a State to commit an internationally wrongful act. The strict conditions of Article 16 would ensure that the scope of attribution of responsibility to the UN for authorized activities is not excessive.

It was agreed that although overall control is not a good test for direct attribution, the UN should not wash its hands after authorizing and must oversight the authorized operations.

1.5. Wrongful aid and assistance by the UN

The UN is present in many conflict areas with the mandate to protect civilians. When it helps governmental forces in the repression of rebel groups, there is a risk for the UN to be responsible for aiding and assisting a State in the commission of a wrongful act, under Article 13 DARIO[15]. This situation arose in practice in relation to activities of the MONUC in 2008, where governmental forces assisted by the MONUC were committing human rights and humanitarian law violations.[16] Against this background, the UN formulated the condition that it will only keep helping States that abide by international human rights and humanitarian law.[17] Participants at the Seminar found that the high threshold of Article 13 was satisfying as it

[14] Art 16(2) DARIO 2009: 'An international organization incurs international responsibility if: (a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and (b) That State or international organization commits the act in question because of that authorization or recommendation.'

[15] Art 13 DARIO 2009: 'An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that organization.'

[16] On this example, see the subsequent UN Comments to DARIO (17 February 2011) UN Doc A/CN.4/637/Add.1, Comments to Draft Article 13.

[17] UNSC Resolution 1906 (2009) of 23 December 2009 (UN Doc S/RES/1906), para 22: 'The support of MONUC to FARDC-led military operations against foreign and Congolese armed groups is strictly conditioned on FARDC's compliance with international humanitarian, human rights and refugee law.'

prevents a too broad attribution to the UN — which aids countries in many ways.

1.6. The practice of the UN Claims Review Boards

Due to privileges and immunities, the UN practice of reparations does not take place within Courts, but rather within claim commissions. The standing claim commission called for in Paragraph 51 of the 1990 UN Model SOFA[18] never came into existence, and instead *ad hoc* claims review boards have been dealing with claims for each UN operation. These commissions tackle claims of a private law nature and are not applying international law. There can sometimes be an underlying wrongful act, but most of the practice of claim commissions concerns down-to-earth torts claims such as damages to property. With the exception of the lump sums agreements that were negotiated by some injured States in relation to the ONUC actions in the 1960s,[19] reparation of injuries caused by peacekeepers does not formally occur on the basis of international law.

In practice, the UN has been inclined to accept broad liability towards third parties, and to not share the burden of reparation with troop-contributing States. Agreements concluded between the UN and troop-contributing States contain clauses on the allocation of liability in the event of a damage. Under Article 9 of the 1996 Model Contribution Agreement,[20] all

[18] Model Status of Forces Agreement for Peace-Keeping Operations between the United Nations and [Host State] (1990) UN Doc A/45/594, Paragraph 51: '[a]ny dispute or claim of a private law character to which the United Nations peace- keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claim commission to be established for that purpose.'

[19] Exchange of letters (with annex) constituting an agreement relating to the settlement of claims filled against the United Nations in the Congo by Swiss nationals of 3 June 1966, 564 UNTS 193; Exchange of letters constituting an agreement relating to the settlement of claims filled against the United Nations in the Congo by Greek nationals of 20 June 1966, 565 UNTS 3; Exchange of letters constituting an agreement relating to the settlement of claims filled against the United Nations in the Congo by Luxembourg nationals of 28 December 1966, 585 UNTS 147; Exchange of letters constituting an agreement relating to the settlement of claims filled against the United Nations in the Congo by Italian nationals of 18 January 1967, 588 UNTS 197.

[20] Model Contribution Agreement (1996), Article 9: 'The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this Agreement. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.'

claims are received and dealt with by the UN, with the option of reverting to the troop-contributing State in case of gross negligence or wilful misconduct.[21] It was mentioned at the Seminar that the UN has never claimed back contribution from a State.

1.7. Limitations of liability and lex specialis

At a time where the UN received a very large number of claims and notably unreasonable claims for road damages, the UNGA adopted a Resolution[22] limiting the scope of UN's liability towards third parties and the amount of financial compensation, together with some time limitations. Some participants at the Seminar, after considering that this delimitation of liability qualifies as a *lex specialis* under Article 63 DARIO,[23] fostered a debate on whether internal rules of international organizations can unilaterally override ILC principles. Other Experts expressed the opinion that, from a strict point of view, internal rules decided by the organization do not have effect towards third States unless they are implemented into an agreement between that State and the UN. The limitations of liability spelled out by the UN are thus binding on States only because they are implemented into the SOFA signed between the UN and host-States.

Many patterns of the UN practice are replicated in international military operations conducted by other international organizations. In general organizations set up a command structure under which the organization is vested with operation command over the contributed troops, as well as

[21] Model Contribution Agreement (1996), Article 10: 'The Government will reimburse the United Nations for loss of or damage to United Nations-owned equipment and property caused by the personnel or equipment provided by the Government if such loss or damage (a) occurred outside the performance of services or any other activity or operation under this Agreement, or (b) arose or resulted from gross negligence or wilful misconduct of the personnel provided by the Government.'

[22] UNGA Resolution 52/247 (17 July 1998), Third-party liability: temporal and financial limitations, UN Doc A/RES/52/247.

[23] Article 63 DARIO 2009: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the relations between the international organization and its members.'

claim settlement mechanisms. The following sections outlines discussions that concerned some specificities in the practice of NATO, the European Union and the African Union.

2. Practice of the North Atlantic Treaty Organization

The practice of peace operations by NATO is a more recent one than the UN. It consists of some large operations (IFOR/SFOR, KFOR, ISAF) and other smaller missions. NATO is a very effective military organization, but there is relatively few legal doctrine on its military operations.

2.1. Command and control, and attribution

Similarly than in UN peacekeeping, experts noted that the operational control formally transferred to NATO creates a presumption that NATO has effective control, that can be rebutted in case of State's interference (i.e. direct orders).

During the discussion, some experts had difficulty envisaging dual attribution, considering that in practice two distinct entities could hardly have effective control over the same act at the same time. Besides, for an injured party it would be very difficult to prove that an entity other than NATO was exercising control over an act, notably because of documents being classified.

2.2. NATO SOFAs and its practice of claims settlement

The 'NATO SOFA',[24] adopted in 1951, defines in advance the status of NATO forces or national forces when present in the territory of another NATO Member State. It includes provisions regarding the immunity of troops (Article VII), and the settlement of disputes (Article VIII) — providing that compensation should be paid when a damage has been caused between

[24] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (19 June 1951).

NATO Parties. The 'PfP SOFA',[25] which mostly transposes provisions of the NATO SOFA, was subsequently adopted in 1995 to regulate the status of forces of States participating in the so-called Partnership for Peace. In addition, other agreements, such as transit agreement with third States, are concluded by NATO.

The two NATO SOFAs are important documents which form the basis of how NATO approaches its liability. They cover about 50 States, consistently applying the same provisions to a broad range of situations. In principle, the status of all personnel during a NATO operation is uniform.

In fifteen years, NATO established a framework and practice to deal with liability claims. In practice, it appears that NATO indeed pays compensation for damages caused by its operations. Besides, it occasionally acknowledges some flexibility when compensation should occur for matters of equity (despite being justified by operational necessity) and in order to gain local support for operations.

A growing practice of *ex gratia* payments — when compensation is paid by NATO or a State without formally admitting responsibility — can be observed. In relation to this, Article 61(1)(b) DARIO[26] was mentioned to be relevant. Indeed, this practice of payments could create legitimate expectations for injured parties that compensation will be provided.

2.3. Decision-making by consensus and Member States' responsibility

Within NATO, decisions of the North Atlantic Council (NAC) are taken by consensus and in that sense are ostensibly backed by all Member States. This consensus procedure appeared as a distinguishing feature of NATO and it was debated at the Seminar whether this consensus requirement could

[25] Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces (19 June 1995).

[26] Article 61(1)(b) DARIO 2009: '[A] State member of an international organization is responsible for an internationally wrongful act of that organization if [...] [i]t has led the injured party to rely on its responsibility.'

induce the responsibility of the Member States together with NATO.[27] To some participants, accepting that voting procedures can affect the determination of responsibility has consequences on questions of legal personality. On the other hand, voting could lead to separate responsibility of Member States without affecting NATO's personality. Some mentioned that voting procedures can lead to attribution of responsibility, but not of conduct.

3. Practice of the European Union

Military operations by the EU are conducted in the framework of the Common Security and Defence Policy. Such operations are engaged on the basis of a Council decision defining the mandate and organization of the mission.

3.1. Command and control, and attribution

Forces participating in EU military operations are placed under the operational command or control of the EU Operation Commander.[28] In legal terms, the degree of military command and control vested in the EU will in principle amount to a degree of effective control by the EU over the operations. This is again only a presumption and, when faced with a concrete question of attribution, the formal (or normative) control vested in the EU needs to be balanced with the reality of the factual (or operational) control exercised in the field.

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[27] This view was supported in the NATO Comments to DARIO (14 February 2011) UN Doc A/CN.4/637, General comments, para 4: 'Decisions are thus the expression of the collective will of the sovereign member States, arrived at by common consent and supported by all. Each member State retains full responsibility for its decisions.'

[28] 'EU Military C2 Concept', EU Council Doc 11096/03 of 26 July 2006, p 14: 'For the conduct of an EU-led military CMO, the OpCdr will be vested with the appropriate Command authority, allowing him sufficient flexibility (e.g. OPCON or possibly OPCOM) over forces by Transfer of Authority (TOA) from the contributing Member States and non-EU TCN'.

3.2. Provisions for the settlement of claims and practice of liability

The EU normally concludes a SOFA with the Host State, following a Model document.[29] Article 15 of the Model SOFA provides several procedures for the settlement of claims of (private law) liability. When no amicable settlement is reached in the first place, claims are handled locally by a claim commission. In case of further difficulties, claims will be handled by diplomatic means or by an arbitral tribunal, depending on the amount of the claim.

The SOFA does not settles the question of whom is to bear the costs the compensations awarded. In that respect, Article 43(4) of the 'Athena' Council decision[30] provides that '[i]n the case of non-contractual liability, any damage caused by the operation headquarters, force headquarters and component headquarters [...] shall be covered through ATHENA by the contributing States, in accordance with the general principles common to the laws of the Member States and the Staff Regulations of the forces, applicable in the theatre of operations.'

Importantly, it was pointed out that responsibility under international law and allocation of liability under EU law does not necessarily coincide. Thus, States may be ultimately liable under EU law even though the operations are the responsibility of the EU under international law.

3.3. EU liability under EU law

Article 340 TFEU enshrines the principle of EU non-contractual liability 'in accordance with the general principles common to the law of Member States', but, with respect to CSDP operations, the CJUE does not have

[29] 'Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State', EU Council Doc 11894/07 of 20 July 2007, corrected by EU Council Doc 11894/07 COR 1 of 5 September 2007, revised by EU Council Doc 12616/07 of 6 September 2007.

[30] Council Decision 2008/975/CFSP of 18 December 2008 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications ('Athena').

jurisdiction[31] and national courts would be competent to decide on the liability of the EU. The scope of the applicable principles is relatively unclear as, for instance, the concept of liability for lawful acts is not known in all European legal systems.

In any case, the practice has so far focused on the liability of Member States rather than of the EU, but the Lisbon Treaty could strengthen the principle of the responsibility of the EU itself.

It was noted that, while the determination of a breach of a treaty by an international organization can be difficult, the planned accession of the EU to the European Convention of Human Rights is likely to enhance the accountability if the organization.

3.4. Member States' responsibility for decision-making and implementation

For many participants, the responsibility of the EU for the acts of EU forces does not necessarily preclude some responsibility of the Member States. Notably, based on their participation in the decision-making, or in the implementation of EU decisions, attribution of responsibility to Member States is a possibility. Some experts on the other hand asserted the view that Article 60 DARIO[32] is too far fetched and that voting in favour of a decision of the organization should not entail any liability, as States are then functionally acting as organs of the organization.

It was suggested that the decision to undertake a military operation could — as such — be attributed to Member States and entail their responsibility if breaching international law. The acts of the resulting military operation, however, would be attributed to the organization.

[31] Article 275 TFUE: 'The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.'

[32] Article 60(1) DARIO 2009: 'A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.'

4. Practice of the African Union

The African Union — which Constitutive Act endorses as a principle the right to intervene 'in grave circumstances'[33] — is increasingly participating in regional peace operations under UN mandate. Its practice is quite recent but is partly grounded on previous operations by ECOWAS.

Operations within the framework of the AU are not always placed under the command of the organization, and are frequently carried out under the leadership of one of the participating States. For instance, while in the AU Mission in Sudan-Darfur (AMIS), the AU was clearly the entity vested with operational command and control over the forces in the field, the African Union Mission in Somalia (AMISOM) was under the lead of Uganda.

Further, operations by the AU have occasionally involved the sequential deployment of a mission led by one State, subsequently subsumed by the AU. For instance, following the Arusha Peace and Reconciliation Agreement for Burundi (2000), South Africa was the only state 'willing and able' to respond to the call for troop contributions so that it deployed the South African Protection Support Detachment (SAPSD), which later became the AU Mission in Burundi (AMIB).

Experts debated on questions of attribution in such settings. Some voiced out that lead-nations exercise military command on behalf of the organization, so that the organization remains responsible, but others argued that in reality States are exercising military command in their own capacity and should thus be responsible. It was pointed out that — as in any international military operation — command structures tend to be closely followed in mild conflicts, while State's interferences are more common in intense conflict situations.

[33] Article 4(h) AU Constitutive Act (2002): 'The Union shall function in accordance with the following principles: […] h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;'

5. Conclusions

The presentations and following discussions held at the SHARES Expert Seminar on Responsibility in Multinational Military Operations demonstrated that common patterns can be found in the practice of international organizations conducting military operations. Generally, the organizations undertaking military missions exercise operational command over the troops, and consequently accept to endorse responsibility, as implemented through some claims commissions. Some experts concluded that, to some extent, the practice of international organizations — including their internal doctrines — fits the principles of attribution and liability developed by the ILC.

On the other hand, each organization tends to claim some specificities and exceptions, and expresses doubts as to whether general principles can fit the diversity of international organizations. As a result, some experts advocated for a broad role of liability rules internally developed, as *lex specialis* under Article 63 DARIO.

A couple of months after the Expert Seminar, the ILC adopted on second reading the final version of the DARIO.[34] The practice of organizations in the upcoming years will further answer the question of the respective importance of the Draft Articles and of internal rules in the implementation of the responsibility of international organizations.

[34] International Law Commission 'Draft Articles on the Responsibility of International Organizations' (2011), Report of the International Law Commission on the work of its sixty-third session, UN GAOR 66th Session Suppl no 10 (A/66/10 and Add.1), Yearbook of the International Law Commission 2001, volume II (Part Two), chap V, para 87.

List of participants

Speakers

- Festus Aboagye, Peace Missions Programme, Institute for Security Studies
- Muhammad Khan, Department of Peacekeeping Operations, United Nations
- Frederik Naert, Council of the European Union
- Daphna Shraga, Office of Legal Affairs, United Nations
- Baldwin de Vidts, North Atlantic Treaty Organization

Commentators

- Pierre Klein, Université Libre de Bruxelles
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