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Matteo Tondini

Researcher and Legal Advisor

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Shared Responsibility in Coalitions of the Willing

Matteo Tondini*

1. Introduction

The subject of this chapter can be illustrated by the following example. In the beginning of 2013, French air and ground forces intervened in Mali to halt the advance of rebel groups towards the south of the country. Military operations (codename Operation ‘Serval’)¹ started on 11 January 2013 and initially involved only Malian and French troops, the latter having been deployed upon the request of the country’s transitional government. By 24 January 2013, the Mali Air War’s order of battle changed radically, including United States (US), British, German, Danish, Belgian, Spanish, Dutch, United Arab Emirates (UAE) and Nigerian forces. At that time, regional states such as Mauritania, Senegal, Chad, Niger and Algeria had already granted French and allied forces the use of their air bases and air space to conduct attacks in the north of Mali.² A few days earlier, on 18 January 2013, the first 40 Togolese soldiers of the ECOWAS (Economic Community of West African States) contingent landed in the Malian capital Bamako. The ECOWAS mission comprised forces from eight other African states,³ and represented the backbone of the United Nations (UN)-mandated International Support Mission in Mali (AFISMA), in charge of assisting Malian forces in ‘recapturing’ and stabilising the north of the country.⁴ The control of AFISMA troops was then transferred on 1 July 2013 to the UN-run Multidimensional Integrated Stabilization

* Researcher and Legal Advisor. The views and opinions expressed are solely those of the author. Information and data are gathered from open sources only. Notes and comments to: m.tondini@gmail.com. The research leading to this chapter has received funding from the European Research Council under the European Union’s Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam. All websites were last accessed in December 2014.

¹ More updated information on Operation ‘Serval’ is available at M. Shurkin, *France’s War in Mali: Lessons for an Expeditionary Army* (Santa Monica, CA: Rand Corporation, 2014).

² D. Cenciotti, ‘Nigerian gunships, European airlifters (and weaponized U.S. drones) join Mali Air War’, *The Aviationist*, 24 January 2013.

³ I.e. Nigeria, Niger, Burkina Faso, Senegal, Benin, Guinea, and Ghana (P. Hille, ‘West African forces begin Mali mission’, *Deutsche Welle*, 18 January 2013).

⁴ UN Doc. S/RES/2085 (20 December 2012).

Mission in Mali (MINUSMA),⁵ with French forces continuing to operate autonomously, but in support to the UN contingent.⁶

During the first days of the intervention, notwithstanding the deployment of a large international military apparatus, summary executions and forced disappearances were reported to have taken place in the towns of Sévaré and in Konna.⁷ These acts of violence were allegedly committed by Malian troops, and Malian authorities were requested to open an official investigation.⁸ The question is whether, even if local troops were guilty of actually committing such war crimes, it would be possible to exclude *a priori* a wider responsibility of allied forces and organisations with whom Malian troops have coordinated their intervention. And how could such an extended responsibility be proved in the absence of publicly-available data on the relevant command/control structure and the flow of information and intelligence sharing among all the contingents involved?

The Mali crisis is a good example of how military operations have progressively evolved to embrace a growing number of actors, such as international organisations, regional organisations and single states, having different roles and obligations within a composite organisational and decisional framework. In this ambiguous international context, like-minded states and organisations do not associate on the basis of long-term alliances, but rather in so-called ‘coalitions of the willing’,⁹ created in view of the participants’ common short-term military-political goals. The term ‘coalition of the willing’ lacks an official definition. It can be simply defined as ‘[a] group of states that cooperate in an ad hoc or informal fashion, outside of more formal multilateral institutions and alliances’.¹⁰ As the Mali crisis clearly demonstrates, a multilateral institution may ‘relieve’ the coalition at a later stage, or otherwise step in aside the coalition or one or more nations (France and the US in the case of Mali) operating individually, so that in practice military operations are eventually conducted or coordinated by a coalition even when an international organisation is present on the scene.

⁵ African Union, ‘AFISMA Transfers its Authority to MINUSMA’, 1 July 2013, www.peaceau.org/en/article/afisma-transfers-its-authority-to-minusma. MINUSMA was established by UN Doc. S/RES/2100 (25 April 2013).

⁶ See UN Doc. S/RES/2100 (25 April 2013), para. 18.

⁷ Human Rights Watch, ‘Mali: Malian Army, Islamist Groups Executed Prisoners’, 1 February 2013, www.hrw.org/news.

⁸ See in particular the ICC Chief Prosecutor Fatou Bensouda’s statement on the matter, ‘Statement by ICC Prosecutor concerning Mali’, 28 January 2013, at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/otpstatement280113.aspx.

⁹ D. Capie and P. Evans, *The Asia-Pacific Security Lexicon*, 2nd edn (Singapore: Institute of Southeast Asian Studies Publishing, 2007), 37.

¹⁰ *Ibid.*

The international community's response to the Mali crisis has been labelled as an example of 'peace operation by proxy'.¹¹

Born from the ashes of the Cold War as a viable alternative to UN-run missions, as originally provided in the UN Charter¹² (Articles 43-47), this organisational model saw its fortune, reaching the apex, during the first Bush Administration (2000-2004) and the US-led military interventions in Afghanistan and Iraq (Operations 'Enduring Freedom' and 'Iraqi Freedom', respectively). Nowadays it is widely used in a large number of interventions, ranging from anti-piracy to traditional warfare. As the former UN Secretary General Kofi Annan once stated: 'The United Nations does not have the capacity to conduct combat operations; ad hoc "coalitions of the willing" are usually better suited for this purpose. But authorization by the Security Council is essential if the enforcement operation is to have broad international support and legitimacy.'¹³ The *raison d'être* of this concept is the fact that it is the mission which determines the coalition, and not the other way around.¹⁴ As a result, partnerships are agreed under a 'variable geometry',¹⁵ i.e. on a case-by-case basis.

The decision-making framework of the coalitions of the willing is modelled around the canons of a traditional military command/control (C2) structure.¹⁶ This is normally divided into three distinct decisional levels, i.e. strategic, operational and tactical. All actors taking part in a military operation participate in one or more of such levels, and may thus be capable of influencing the decision-making process within the hierarchical chain, depending on their functions and specific tasks. Nevertheless, whilst key actors are present at all levels, secondary players (such as less important troop contributing nations – TCNs) normally only

¹¹ See J. Labbé and A. Boutellis, 'Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces' (2013) 95 IRRC 539, 543.

¹² Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).

¹³ Quote from the UN Secretary General Kofi Annan's acceptance speech upon receiving an honorary Degree of Doctor of Philosophy in Political Science *Honoris Causa* from Thammasat University, Bangkok, on 11 February 2000 (UNIS, Press Release No. G/04/2000, 11 February 2000, http://southwest-sro.unescap.org/unis/press/g_04_00.htm).

¹⁴ See Bob Woodward's account of the political debate internal to the US Administration before the 2003 Iraq War in B. Woodward, *Bush at War* (New York: Simon & Schuster, 2002), 48-49. See also I.H. Daalder and J.M. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy*, 6th edn (Washington, DC: Brookings Institution Press, 2003), 104.

¹⁵ The concept of 'variable geometry' of coalitions is reportedly to be attributed to the former US Secretary of Defence Colin Powell (Woodward, *ibid.*, at 49).

¹⁶ For a definition of the various types of command (e.g. 'full command', 'national command', 'operational command', etc.) and control (e.g. operational, tactical, etc.), see B. Cathcart, 'Command and Control in Military Operations', in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 235, at 237-238. See also the NATO Glossary of Terms and Definition, AAP-06, edition 2013, 3 at www.dtic.mil/doctrine/doctrine/other/aap6.pdf.

figure at the lower levels. Alike coalition partnerships, the decisional structure of modern coalition operations has become explicitly tailored to accomplish the mission's goals and it is thus established on ad hoc basis, taking into account the specific circumstances of the case and all the stakeholders concerned, which may vary from time to time.¹⁷ In coalitions led by western states, military directives and planning processes, elaborated by the North Atlantic Treaty Organization (NATO), are normally used as standard organisational and decisional rules/models which may apply and can be adapted to virtually *any* military confrontation involving a coalition of the willing, whether or not the participating states are members of such an organisation.¹⁸

However, the informality and opacity which characterises the decision-making framework and the overall internal organisation of coalitions, together with the ambiguity as to the number of participants¹⁹ and their effective role in the conduct of hostilities or operations, may serve the purpose of hiding the intervening states and their armed forces' potential responsibility or liability to third parties. Indeed, coalitions do not enjoy any international legal personality, because they are not founded by member states with this aim (they also lack a founding treaty), they are not formally recognised as such by other international law subjects, they do not bear international rights and duties distinct from those of its members, and, as a consequence, they do not possess any treaty-making power,²⁰ although they normally present themselves to the public as unified and autonomous entities. Likewise, on the domestic plane, coalitions are not recognised as legal persons; hence, they cannot appear before state courts, neither as plaintiffs nor defendants. Their goal is to be 'transparent' to any

¹⁷ A. Graham, 'Military Coalitions in War', in J. Lindley-French and Y. Boyer (eds.), *Oxford Handbook of War* (Oxford University Press, 2012), 319, 322.

¹⁸ See in particular, NATO-SHAPE, 'Allied Command Operations Comprehensive Operations Planning Directive', COPD interim v1.0, 17 December 2010, at <http://info.publicintelligence.net/NATO-COPD.pdf>. Integration of non-NATO forces in NATO-led missions is decided by the North Atlantic Council, upon consultations with the Supreme Allied Commander Europe (SACEUR) and the Joint Force Command (JFC) concerned.

¹⁹ The 2003 US-led military operation in Iraq is a good example in this respect (see below at n. 41). More recently, see also the 2014 September statement by President Obama on the Islamic State of Iraq and the Levant (ISIL): 'I can announce that America will lead a broad coalition to roll back this terrorist threat' (The White House, Office of the Press Secretary, 'Statement by the President on ISIL', 10 September 2014, see www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1). In this respect, uncertainty still remains as to the number of effective participants and their roles (see e.g. A. Fantz, 'Who is doing what in the coalition battle against ISIS?', *CNN*, 17 September, 2014).

²⁰ It is not the aim of this chapter to present a comprehensive theoretical analysis of the international legal personality doctrine. It suffices to say that while traditionally the international legal personality of actors other than states is portrayed as quality derived from state sovereignty (as states are in fact considered primary international law subjects), nowadays scholars often look at more functional or pragmatic notions and definitions, which nonetheless tend to appear somewhat tautological (*ex plurimis*, see on the matter R. Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010)).

judicial system,²¹ so that they cannot be held responsible or liable for any wrongdoing. In light of this, it is more convenient for coalition partners to publically attribute any misconduct to the whole coalition, rather than to member states' forces. In practice, this way coalition members act as if the coalition existed as a single entity in the international relations' sphere, but at the same time they deny its existence on the legal plane. This fiction is *prima facie* contradictory, but stands at the very basis of the recurring use of coalitions of the willing in military operations. It is the lack of accountability for member states which makes coalitions so appealing. Nevertheless, one could argue that coalition partners and their armed forces may be brought before international and domestic tribunals. But how to practically do that, if information on the participants in sorties/single operations, as well as on member states' roles/tasks in multinational commands, is confidential or released – at best – during press conferences held by spokespersons belonging to the coalition themselves?

What if coalition operations could also lead to situations of *shared* responsibility,²² i.e. the conduct of coalition troops were to be imputed – at the same time – to all or some coalition partners? In the author's view, this question may be addressed only through the analysis of the decisional processes in place, and the organisational structures characterising coalitions and their executive bodies/commands. This approach focuses on the reality of facts and attempts to look at the real powers and authority exercised by coalition members, rather than relying on formal statements and documents.

The second section will attempt to classify coalitions on the basis of their mandate, distinguishing between UN-mandated operations and interventions carried out under national mandate. This distinction might be relevant to the formal attribution of conduct to TCNs. In the third section, the focus will be on the concept of 'effective participation' in the planning or execution of a specific decision as a precondition for multiple attribution of conduct. Separate sub-sections will be dedicated to: the possibility of establishing different degrees of responsibility among coalition partners by reason of their degree of fault (section 3.1); the

²¹ E. Benvenisti, 'Coalitions of the Willing and the Evolution of Informal International Law', in C. Callies, G. Nolte, and P.-T. Stoll (eds.), *Coalitions of the Willing: Avantgarde or Threat?* (Köln: Carl Heymanns Verlag, 2007), 1, 15.

²² The term 'shared responsibility' is meant to denote an umbrella concept covering, at the same time, situations of 'formal' joint international responsibility (or 'shared responsibility *strictu sensu*'), and circumstances whereby a multiplicity of actors is held accountable for a breach of primary norms, without this being considered as involving their international responsibility in the technical meaning (or 'shared accountability'). See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *MIJIL* 359, 366-369. See also Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1, at ___.

concept of shared responsibility in coalition operations in light of the International Law Commission (ILC)'s Articles on State Responsibility (section 3.2);²³ and the simultaneous application to coalition operations of the 'effective' and 'ultimate authority and control' attribution tests (section 3.3). The latter sub-section also includes a critique of the first decision delivered by the Strasbourg court on the matter of multiple attribution of conduct in coalition operations, namely the *Saddam Hussein* case.²⁴ The fourth section is dedicated to the analysis of the most common decisional and implementation mechanisms adopted by coalition partners in the conduct of operations. Understanding such mechanisms is essential in order to correctly attribute the conduct of coalition troops to TCNs and lead nations. Section 5 presents the 2011 international military intervention against Libya as a case study.

The chapter will demonstrate how individual responsibility of coalition partners may co-exist with forms of *shared* responsibility. From a theoretical point of view, based on the 'traditional' attribution test theory, according to which the responsibility is to be imputed on a factual basis, this can be achieved by assessing the coalition partners' effective participation and degree of responsibility in the alleged breach of law. A conduct which results in a breach of law may in fact represent the product of the actions of a multiplicity of actors, any of which has contributed in a vital manner to its realisation. Nevertheless, the analysis reveals that much depends on the specific circumstances of the case and relevant information is normally not publicly disclosed by coalition members.

This chapter does not include the analysis of primary rules applicable to coalition operations. In view of the lack of international legal personality of coalitions, concentrating on the applicability of existing customary law norms of international humanitarian or human rights law seems somewhat elusive. International law obligations coalitions are due to respect are, *mutatis mutandis*, those of member states, although such obligations may greatly differ from

²³ Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA or Articles on State Responsibility).

²⁴ *Saddam Hussein v. Albania and others*, App. No. 23276/04 (ECtHR, 14 March 2006). For a more recent decision see *Jaloud v. the Netherlands*, App. No. 47708/08 (ECtHR, 20 November 2014). In *Jaloud*, the Netherlands was held responsible for not having properly investigated the circumstances of the death of an Iraqi citizen, Azhar Sabah Jaloud, who was shot dead in 2004 at a military checkpoint controlled by the Dutch contingent belonging to the Multinational Stabilisation Force in Iraq. According to the Court, although the Dutch contingent was deployed in an area in south-eastern Iraq which was under United Kingdom (UK) responsibility, the Dutch authorities alone exercised effective control over the checkpoint in question. In addition, since the Dutch government was held to retain the 'full command' over its forces in Iraq, the Court concluded that Mr Jaloud was under the Netherlands' jurisdiction at the time of his death (see paras. 149-153). Interestingly, the Court did not pronounce on, but left the door open to, the UK concurrent jurisdiction: 'The Court has established jurisdiction in respect of the Netherlands. It is not called upon to establish whether the United Kingdom, another State Party to the Convention, might have exercised concurrent jurisdiction' (para. 153).

state to state. In principle, this matter should be regulated by ‘national caveats’ and transfer of authority agreements among TCNs, as will be reported in section 4.

This chapter does not explicitly deal with the responsibility of international organisations or entities, neither does it concern UN-run peacekeeping operations (as opposed to *UN-mandated coalition operations*, which are considered in section 2.3), nor interventions carried out by international or regional organisations such as NATO or the EU, both being the specific object of other chapters in this volume.²⁵ Although a coalition may in theory encompass both states and international organisations, the practice of operations shows that this mostly occurs when, even though a military intervention is formally implemented by an international organisation, contributing states continue to run national command/control lines in parallel with that of the international command. Here, however, the key question is not represented by the shared responsibility of TCNs, but rather that of the state and the international organisation concerned, and this would lead us, again, to the issue of the responsibility of international organisations. The analysis is thus concentrated solely on operations conducted by groups of states whose forces get together on a temporary basis and by means of non-structured operational assets/commands, i.e. national assets and commands which are only temporary assigned to a coalition or not formally established to serve in the course of coalition operations. For instance, C2 communication assets may be provided by one or more coalition partners, while others may supply ground forces or the warship on board of which a tactical command may be established, etc. The explicit reference to NATO Operation ‘Unified Protector’ contained in section 5 only serves the purpose of affirming the practical irrelevance of a change in the operations’ decisional structure, in order to assess the potential shared responsibility of single troop contributing nations. Finally, this chapter only concerns state responsibility, leaving aside the military officers’ individual criminal and civil liability.

²⁵ See Chapter 25 in this volume, M. Zwanenburg, ‘North Atlantic Treaty Organization-led Operations’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), ___; and Chapter 26 in this volume, F. Naert, ‘European Union Common Security Defence Policy Operations’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), ___.

2. Different types of coalitions of the willing

2.1 *The Security Council, the lead nation(s) and the other state partners*

Coalitions can be categorised on the basis of their ultimate goal. Some coalitions are established for the ‘fulfilment of the global order’s ends, and even of its concrete norms’,²⁶ whilst others are set up simply ‘to defy both substantive and procedural norms of the international system’.²⁷ The purpose of a third group of coalitions would be that of acting in breach of ‘procedural norms of the international system, but arguably in the service of the international order’s substantive ends’,²⁸ under a kind of Machiavellian logic, according to which coalitions of the willing may represent a way to bypass the rules on the use of force established by the UN Charter in view of a higher aim, such as the protection against mass atrocities.

The principle of dividing coalitions of the willing according to their final aim is also satisfied when coalitions are classified by reason of their mandate, since the formal legality of the mission’s goal (i.e. Roth’s ‘respect of international legal norms’) rests – in the last analysis – in a mandate received by the UN Security Council (UNSC). Nonetheless, such classifications may be significant at the theoretical or academic level, but they can hardly be of any use in explaining the powers or the authority effectively exercised by coalition members, and thus, *a fortiori*, the latter’s responsibility for the conduct of specific operations.

A more useful option could be to classify coalitions according to the type of relationship between the political entity/command in charge of the direction of operations and its subordinate units. As a result, it would become essential to focus on the analysis of the chain of command/control and its top level, which can be represented by one or more lead nations. Taking into account both the mission’s mandate and the entity in charge for the strategic direction of operations, one may thus distinguish between first, coalition operations mandated by the UN Security Council and led by one or more nations; and second, coalition operations undertaken without any UN Security Council’s mandate and carried out under national mandate.

²⁶ B.R. Roth, ‘Coalitions of the Willing and the International Rule of Law’, in C. Calliess, G. Nolte, and P.-T. Stoll (eds.), *Coalitions of the Willing: Avantgarde or Threat?* (Köln: Carl Heymanns Verlag, 2007), 33, 34. Roth refers, inter alia, to ‘Unified Task Force’ (UNITAF) in Somalia (1992-1993).

²⁷ *Ibid.*, at 35. The author mentions the 1983 US-led invasion of Grenada, carried out in the framework of the Organisation of Eastern Caribbean States (OECS).

²⁸ *Ibid.* The 1991 Operation ‘Provide Comfort’ in Northern Iraq is reported as an example.

In the former case, coalitions are initially established according to a UNSC's mandate and then deployed under the strategic direction of one or more lead nations, which are requested to inform the UNSC through periodical reports. In the latter case, lacking any formal link with the UNSC, states act independently from any external authority. The main difference between the two categories is that in the first case responsibility for any misconduct of troops could potentially be attributed to the UN rather than to the TCNs concerned, according to the often criticised²⁹ 'ultimate authority and control' attribution test, as developed by the European Court of Human Rights (ECtHR or Court) in *Saramati*.³⁰ In the second case, given the absence of any involvement of the UN, the 'ultimate authority and control' of operations is beyond any doubt in the hands of those states sitting at the mission's strategic level, i.e. the decisional level at which military authorities determine military objectives and guidance, in order to develop and use the resources at their disposal to accomplish such objectives. As will be discussed in the following sub-sections, one could argue that the distinction between the above quoted two types of operations is mostly theoretical, as even in the case of UN-mandated coalition operations the coalition's link with the UN is in truth too tenuous to found the latter's exclusive jurisdiction over the acts of coalition troops. Nevertheless, this distinction remains significant to any discourse on the responsibility of sending states in peace support operations, as states have never ceased to try to 'pass the buck' to the UN in case of need.³¹

2.2 UN-mandated coalitions

Numerous coalitions have been set up in view of a specific Security Council's authorisation. This practice started with the 1950 Korea War,³² broke off during the Cold War, and resurged with the fall of the Berlin Wall. Examples of coalitions acting under a UNSC's mandate are

²⁹ *Ex plurimis*, M. Milanović and T. Papić, 'As Bad as It Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267. I explored the issue in M. Tondini, 'The "Italian Job": How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States', in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerpen: Intersentia, 2010), 169, at 202-206.

³⁰ *Agim Behrami and Bekir Behrami v. France* and *Ruzhdi Saramati v. France, Germany and Norway*, App. No. 71412/01 and App. No. 78166/01 (ECtHR, 2 May 2007), para. 140 (*Saramati*) **Error! Hyperlink reference not valid.** The attribution test issue will be discussed below in section 3.

³¹ The issue of the UN's exclusive responsibility was raised, for instance, by the British government in all judicial cases concerning the activity of its troops in Iraq. For a summary of the British government's position see F. Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*' (2011) 50 MLLWR 321.

³² UN Doc. S/RES/84 (1950), paras 4-5.

the US-led coalition participating in Operation ‘Desert Storm’ in Iraq,³³ the US-led ‘Unified Task Force’ (UNITAF) in Somalia,³⁴ the US-led Operation ‘Uphold Democracy’ in Haiti,³⁵ the Italy-led Operation ‘Alba’ in Albania,³⁶ the Australia-led ‘International Force for East Timor’ (INTERFET) in East Timor,³⁷ and more recently, the US-led coalition which launched Operation ‘Odyssey Dawn’ in Libya against the Gaddafi regime.³⁸ In all these interventions, coalitions were never mandated to obey UN directives, being instead merely requested to report to the UNSC (sometimes through the Secretary General) at regular intervals.³⁹ While the effectiveness of such a reporting system is somewhat questionable, it highlights a clear division of tasks: command/control is the coalition’s exclusive responsibility, while the UNSC simply retains – in full or in part – a ‘remote control’ (or better the ‘overall/ultimate authority and control’) over the mission.⁴⁰

2.3 Coalitions operating without a Security Council’s mandate

A well-known example of a coalition of states, belonging to the second group, is the one which defeated Saddam Hussein’s regime in Iraq in 2003.⁴¹ Others are, for instance, the US-led Combined Maritime Forces (CMF),⁴² engaged in maritime security operations in the Persian Gulf, the Red Sea and off the Horn of Africa, and the group of states which have joined the US in Afghanistan and elsewhere since 2001 in Operation ‘Enduring Freedom’

³³ UN Doc. S/RES/678 (1990), para. 2.

³⁴ UN Doc. SR/RES/794 (1992), para. 10.

³⁵ UN Doc. S/RES/940 (1994), para. 4.

³⁶ UN Doc. S/RES/1101 (1997), para. 4.

³⁷ Established on the basis of UN Doc. S/RES/1264 (1999), para. 3.

³⁸ UN Doc. S/RES/1973 (2011), para. 4.

³⁹ UN Doc. S/RES/84 (1950), para. 6; UN Doc. S/RES/678 (1990), para. 4; UN Doc. S/RES/794 (1992), para. 18; UN Doc. S/RES/940 (1994), para. 13; UN Doc. S/RES/1101 (1997), para. 9; UN Doc. S/RES/1264 (1999), para. 12; UN Doc. S/RES/1973 (2011), paras. 4 and 15.

⁴⁰ N. Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing”’ (2000) 11 EJIL 541, at 566-567.

⁴¹ The exact number of coalition partners which assisted the US in Operation ‘Iraqi Freedom’ (2003-2011) is still unknown. Reportedly, however, up until July 2009 about 60 nations were involved in military operations in Iraq on the side of the US forces. Whilst the support provided by some of them was little more than nominal, 37 furnished a total of around 150,000 ground forces (See gen. S.A. Carney, *Allied Participation in Operation Iraqi Freedom* (Washington, DC: United States Army, Center of Military History, 2011)).

⁴² The CMF is a multinational coalition headquartered in Bahrain together with the US Naval Central Command and US Navy 5th Fleet. It is composed of 27 member nations and it is commanded by a US Navy vice admiral, who also serves as Commander US Navy Central Command and US Navy 5th Fleet. A British Royal Navy commodore serves as deputy commander. Senior staff roles belong to personnel from major member nations, including Australia, France, Italy and Denmark. The CMF operates three task forces, i.e. Combined Task Force (CTF)-150 (maritime security), CTF-151 (anti-piracy), and CTF-152 (maritime security in the Persian Gulf). More information is available at CMF’s website at <http://combinedmaritimeforces.com>.

(OEF).⁴³ Although these interventions have been considered and even praised by the UN in UNSC resolutions and other relevant documents⁴⁴ the UN has never established formal links with them, nor has it been possible to impute the conduct of coalition partners to the UN.⁴⁵ Also in the case of the Coalition Provisional Authority (CPA) in Iraq – a body exercising powers of government and even some UNSC-delegated powers under Chapter VII of the UN Charter – the attribution to the UN of conduct performed by the CPA has been correctly excluded.⁴⁶

Also belonging to this group is the counter-proliferation coalition established in 2003 in the context of the US-led Proliferation Security Initiative (PSI).⁴⁷ Even though the member states' obligation to adopt 'effective measures' to counter the diffusion of weapons of mass destruction is contained in UNSC Resolution 1540 (2004), and cases of successful interdictions that could have possibly resulted from PSI cooperation are included in some UN reports,⁴⁸ so far PSI coalition operations have been kept separate from the UN.

⁴³ Established in 2001 in response to the 9/11 attacks, OEF has since then become an 'operational umbrella' for all counterterrorism operations conducted worldwide by the US and its allies. OEF encompasses subordinate operations in Afghanistan (OEF-A), Philippines (OEF-P), Horn of Africa (OEF-HOA – also including CTF-150 and CTF-152), Trans Sahara (OEF-TS), and Caribbean and Central America (OEF-CCA). At the operational level, operations are mainly directed by the US Central Command (CENTCOM), based in Tampa, Florida. The US Africa Command (AFRICOM), based in Stuttgart, Germany, is responsible for OEF-HOA and OEF-TS. The number of coalition partners is still unclear (apparently up to 80). Some of them have established permanent liaison teams or detached liaison officers within CENTCOM. Among them, Denmark, Italy, Belgium, Australia, Canada, United Kingdom, etc. (information available at CENTCOM's website at www.centcom.mil/en/about-centcom-en/coalition-countries-en). Other foreign officers serve within the Command's staff. Liaison officers from roughly 65 countries are embedded in the Command's Coalition Coordination Center (CCC). International staff actively participates in the planning of missions, being part of a Combined Planning Group (CPG) embedded in the Command's J5 Cell. The CPG is composed of officers from over 30 different nations (R. De Feo and R. Minini, 'The Coalition and US Central Command: The Italian Contribution', NRDC-ITA Magazine, 16 (2010), 4, at 8-9, www.nato.int/nrdc-it/magazine/2010/1016/1016b.pdf; S. Wood, 'CENTCOM Coordination Center Represents Strong Coalition', US Department of Defense – American Forces Press Service, 16 March 2007, www.defense.gov/News/NewsArticle.aspx?ID=32480).

⁴⁴ See C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford University Press, 2008), 206-207; and R. Geiß and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011), 25, respectively. The coalition in Iraq was also 'authorised' by the UNSC to provide security and stability in the country once it overruled Saddam Hussein's regime (see UN Doc. S/RES/1511 (2003), para. 13).

⁴⁵ See generally the three judgments delivered so far by the ECtHR on the responsibility of the UK for the conduct of its troops in Iraq: *Al-Jedda v. the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011); *Al-Skeini and others v. the United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011); *Al-Saadoon and Mufdhi v. the United Kingdom*, App. No. 61498/08 (ECtHR, 2 March 2010) **Error! Hyperlink reference not valid.**

⁴⁶ See 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* (Oxford: Hart Publishing, 2008), 185, 223.

⁴⁷ More information on the PSI is available at www.state.gov/t/isn/c10390.htm.

⁴⁸ J. Durkalec, *The Proliferation Security Initiative: Evolution and Future Prospects*, EU Non-Proliferation Consortium, Non-Proliferation Paper No. 16, June 2012, at 18, at www.sipri.org/research/disarmament/eu-consortium/publications/nonproliferation-paper-16.

3. Effective participation as the key rationale for the attribution of conduct

At first sight, the issue of responsibility for coalition members does not pose problems from a legal point of view. Since coalitions do not possess any international legal personality, nor are they recognised as legal persons within the states' domestic legal systems, both TCNs and lead nations act in their individual capacity. Hence, in general, they are only responsible for the conduct of their own troops. Upon closer examination, however, reality is a bit more complex and does not preclude forms of shared responsibility among coalition partners. Indeed, as construed in theoretical terms, shared responsibility arises when the 'responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively'.⁴⁹ As a result, given the coalitions' lack of legal personality, this may occur more easily than, for instance, when an international organisation is in charge of the operations. The key issue here is tying the principle of attribution to the 'effective participation'⁵⁰ of state officers – and thus, *a fortiori*, coalition partners⁵¹ – in the alleged misconduct/omission. The 'effective participation' concept may be evoked in two different meanings. Firstly, it may imply the effective participation of coalition partners to the decisional process, as elaborated within the coalition command, which eventually leads to the misconduct in question. In order to assess such a 'participation', it is essential that the coalition command may exercise some form of 'factual control', i.e. 'effective control', over coalition partners acting 'on field'. Secondly, the 'effective participation' concept may be used to indicate a concrete contribution, on the 'physical plane', in the commission of a breach of law by one or more coalition partners.

These circumstances may occur in two cases in particular,⁵² namely: first, when a military unit belonging to a state is instructed or prohibited by the coalition command to carry out a specific action and a breach of an international obligation emerges as a result of such conduct or omission; and second, when military units belonging to two or more coalition partners act

⁴⁹ Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 22, 368.

⁵⁰ The concept of 'effective participation' may be derived by analogy from the 'factual control' test reported in the Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 7 ARIO ('Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization'), para. 4, according to which the attribution of conduct either to a contributing state or international organisation must be based on 'full factual circumstances and particular context', namely 'on the factual control that is exercised over the specific conduct taken by the organ or agent'.

⁵¹ Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 4 ARSIWA.

⁵² See Messineo's analysis in F. Messineo, 'Multiple Attribution of Conduct', SHARES Research Paper 11 (2012), at 10, available at www.sharesproject.nl.

or fail to act jointly and, again, a breach of law emerges as a result of their conduct or omission.

It can be noted that the two cases may occur in parallel, when orders are issued by the coalition command to units belonging to more state partners acting jointly. However, there is also a key distinction. While in the former case attribution stems from the direct participation in the conduct or omission and its rationale thus appears unquestionable, in the latter case the situation seems far more complex. Here the key elements are the entity exercising control over the unit concerned and the chosen concept of ‘control’, whether ‘effective’ or ‘overall’. In this respect, since control over troops is usually exercised by coalition commands, and such commands are composite organs staffed with officers belonging to several state partners, it remains to be seen *who* is in charge for the general conduct of operations, but – more importantly – also *who* exactly, in the case at hand, took the decision which subsequently led to the breach of law: was it the coalition command, i.e. a military asset whose decisions are the outcome of a joint decisional process held by a multiplicity of states, thus possibly entailing their joint responsibility, or the state partner that ordered the conduct or omission in question? Could the state partner refrain from executing the assigned task?

In light of this, in order to assess the joint responsibility of coalition partners, it should be considered how the decision-making and implementation process is framed, since the impugned decision is often the result of a complex planning process involving officers from different TNCs and, in order to be executed, the acting unit frequently necessitates cooperation or assistance by different coalition partners. The decisional mechanisms influencing the conduct of operations will be examined in more detail in sections 4 and 5.

3.1 Joint participation in coalition operations and different degrees of responsibility

Apart from assessing the concrete attribution of conduct, the study of the TCNs’ level of participation in the decision-making process and conduct of operations may also serve the scope of ascertaining their degree of responsibility, especially when the concurrent

responsibility or joint liability of two or more coalition partners is to be determined by an international or domestic court.⁵³

Arguably, the level of participation in a decision or conduct/omission may play an essential part for whether a specific threshold of responsibility is crossed. For instance, in order to assess the potential co-authorship of a misconduct, it could be considered whether the individual participation of a coalition officer in a breach of law has been ‘substantial’ or ‘significant’ for its responsibility/liability – and thus that of his/her sending state – to occur.⁵⁴ The significance of this condition mostly hinges on the legal system of reference, whether domestic or international, and any applicable procedural rules. In any case, the individual criminal liability of state officers should in theory be kept separate from the international responsibility of their governments, as there might be cases where the former could be excluded and – at the same time – the latter could be established.⁵⁵

3.2 *The Articles on State Responsibility*

The potential shared responsibility of coalition partners is in line with the principles formulated by the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁵⁶ In general, the ARSIWA provide for situations where a plurality of states may be responsible for a single misconduct.⁵⁷ Moreover, under certain conditions, the ARSIWA acknowledge the responsibility of a state for actions performed by another state’s organ: Article 6 ARSIWA deals with the conduct of an organ placed at the disposal of a state by another state; while Article 8 ARSIWA concerns the

⁵³ Borrowing the principle from the civil law domain, the shared responsibility of more TCNs could for instance result in their joint and several civil liability towards a third party, but – at the same time – be relevant in the subdivision of payments among them, in proportion to the degree of fault. This general rule is established, e.g., in Article 2055 of the Italian Civil Code in case of a plurality of debtors. See the Commentary to Article 2055 by F.D. Busnelli, G. Comandé and E. Bargelli, ‘Multiple Tortfeasors under Italian Law’, in W.V.H. Rogers (ed.), *Unification of Tort Law: Multiple Tortfeasors* (The Hague: Kluwer Publishing, 2004), 117, at 117-118.

⁵⁴ Concepts such as ‘significant’ or ‘substantial’ participation are borrowed from the international criminal jurisprudence and are at the basis of the notion of joint criminal enterprise (see e.g. *Prosecutor v. Brđanin*, Judgment, ICTY Case No. IT-99-36-A, A. Ch., 3 April 2007, paras. 427 and 430; *Prosecutor v. Bagilishema*, Trial Judgment, ICTR Case No. ICTR-95-1A-T, 7 June 2001, para. 30). On the ‘substantial effect’ test (to prove the defendant’s role in ‘aiding and abetting’ another individual in the planning, preparation, or execution of an international crime), see e.g. *Prosecutor v. Kajelijeli*, Trial Judgment, ICTR Case No. ICTR-98-44A-T, 1 December 2003, para. 766. Joint criminal liability of coalition officers belonging to different TCNs could in turn entail the joint civil liability of their sending states and *a fortiori* the latter’s international responsibility.

⁵⁵ On the distinction between individual responsibility and state responsibility, see ARSIWA Commentary, n. 51, Commentary to Article 58 of the ARSIWA.

⁵⁶ See n. 23.

⁵⁷ Article 47 ARSIWA, *ibid.*

conduct of a person or group of persons – such as a military officer or unit – who acts upon the instructions, or under the direction or control, of a state (also different from their own state). Derived responsibility is addressed in Articles 16-17 ARSIWA. Under Article 16, a state which aids or assists another state in the commission of an internationally wrongful act can be held responsible for the act in question. The same principle applies to a state committing a breach of law or other obligation under the direction and control of another state (Article 17). All these provisions may relate to situations when a staff or liaison officer embedded in a multinational command participates in the decision-making process, or a military unit falls under the operational control of a multinational command, or is assisted in the action by other state partners. In sum, the ARSIWA leave the door open to both the exclusive and concurrent responsibility of TCNs and lead nations in coalition operations, depending on the specific circumstances of the case.

3.3 The simultaneous application of the two ‘classical’ attribution tests

With regard to the attribution test, in principle, attribution can be acknowledged according to both the ‘effective control’ test and the ‘overall/ultimate authority and control’ test.⁵⁸ It is, however, important to note that, in the practice of coalition operations, the two tests are not mutually exclusive and can well apply in parallel. Indeed, on the one hand, there are no

⁵⁸ It is not the scope of this contribution to analyse in-depth the two attribution tests. To the aim of this study, it may be said that the ‘effective control’ test is now the globally recognised criterion for the attribution of responsibility to an international legal person. See in particular ARIO Commentary, n. 50, Commentary to Article 7 ARIO. See also Tondini, ‘The Italian Job’, n. 29, 194. The ‘ultimate authority and control’ test lies at the opposite end of the responsibility spectrum. This criterion was invoked by the ECtHR in the *Saramati* judgment (see n. 30) and was harshly criticised by scholars for the way it was applied by the Court. It originates from Danesh Sarooshi’s ‘overall authority and control’ theory, as expressed in a famous book published in 1999 (D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Clarendon Press, 1999), 163-165). The ICTY also referred to the ‘overall control’ as the right criterion for the attribution of State responsibility (ICTY (Appeals chamber), *Prosecutor v. Tadić*, Judgment, ICTY Case No. IT-94-1-A, 15 July 1999, (1999) 38 ILM 1518, paras 120, 122-3. For the purpose of this study the, ‘overall authority and control’ and ‘ultimate authority and control’ will be considered as synonymous. The ECtHR’s decision in *Saramati* gave rise to a number of similar decisions, all issued in 2007-2009 (see e.g. *Dušan Berić and others v. Bosnia and Herzegovina*, App. Nos. 36357/04 et al., (ECtHR, 16 October 2007); *Gajić v. Germany*, App. No. 31446/02 (ECtHR, 28 August 2007); *Blagojević v. the Netherlands*, App. No. 49032/07 (ECtHR, 9 June 2009); *Galić v. the Netherlands*, App. No. 22617/07 (ECtHR, 9 June 2009). This trend ended soon after with the Court’s 2010 judgment in *Al-Saadoon*, see n. 45; see also the admissibility decision of 30 June 2009, and the following 2011 rulings in *Al-Skeini* and *Al-Jedda*, n. 45), in which the Strasbourg Court held the UK responsible for human rights violations committed by its troops in Iraq before and after the formal end of occupation in 2004. In order not to compromise its previous *dictum* in *Saramati*, however, the ‘Court in *Al-Jedda* cleverly stopped short of explaining which test it was actually applying to decide on attribution and mentioned both the thresholds of “effective control” and “ultimate authority and control” as not having been met’ (Messineo, ‘Things Could Only Get Better’, n. 31, at 339-340).

international law rules preventing the two tests from applying concurrently.⁵⁹ On the other hand, operational reality suggests a concurrent application of both tests as a matter of fact. On the whole, all TCNs participating in a coalition retain the ‘effective control’ of their troops. In addition, lead nations – as well as other nations sitting in the coalition’s command, by reason of their participation in the decision-making process – may also exercise some degree of ‘effective control’ over the troops of other TCNs. This may possibly occur on a temporary basis only. Nonetheless, the above mentioned nations most certainly retain the ‘overall or ultimate authority and control’ of all the contingents placed at the coalition’s disposal. Therefore, whether ‘effective’ or ‘overall’, the presence of forms of joint control over military units during coalition operations – and thus a potential shared responsibility of coalition partners – is likely to be confirmed. The higher the command concerned in the hierarchical line (e.g. strategic as opposed to tactical), the greater is the likelihood that it may exercise some form of ‘overall’, rather than ‘effective’ control, given the planning/guidance, rather than executive, tasks assigned.

Nonetheless, the entity in charge of the ‘overall/ultimate authority and control’ over the operations is frequently unclear, due to the practice of establishing ‘contact groups’ of nations concerned with a specific international crisis.⁶⁰ Such groups end up constituting the top decisional level (i.e. the political-military level) of coalition operations. Being informal by nature, they are not vested with any international or domestic legal personality. However, can member states of a contact group, once their ‘overall/ultimate authority and control’ over a specific coalition operation is clarified, be held jointly responsible for any breach of law or other obligation committed by coalition troops? If one portrays contact groups as ad hoc joint

⁵⁹ See for instance the *Al-Jedda* ruling, *ibid.* Indeed, even though the ECtHR ended up attributing responsibility to the UK on a pure matter of fact (hence in practice applying the ‘effective control’ test without saying it), it did ‘not in any way dispose of the “ultimate authority and control” test from *Behrami/Saramati*’ (K.M. Larsen, ‘“Neither Effective Control nor Ultimate Authority and Control”: Attribution of Conduct in *Al-Jedda*’ (2011) 50 MLLWR 347, 356). As a consequence, the Court’s decision does not prohibit the two attribution tests to apply in parallel. This paves the way to the concurrent responsibility of both the entity retaining the ‘overall/ultimate authority and control’ and the one exercising the ‘effective control’ over the troops concerned.

⁶⁰ See R. Penttilä, ‘Multilateralism Light: The Rise of Informal International Governance’, Centre for European Reform, 2009, at www.cer.org.uk/publications/archive/essay/2009/multilateralism-light-rise-informal-international-governance. The first ‘Western contact group on Namibia’ was established in 1977 to deal with the crisis in the African state. Since then dozens of other contact groups have been set up by like-minded states and organisations. See for instance the Middle East Quartet (US, UN, EU and Russia), the Korean six-party talks (North Korea, South Korea, US, China, Japan and Russia), or the Contact Group on Piracy off the Coast of Somalia (CGPCS – formed by 60 states and a dozen of international organisations and agencies). Contact groups are temporary (i.e. they dissolve once the crisis is over) and work outside the UN framework. Participants are co-opted.

organs established by a plurality of states, the answer could be affirmative.⁶¹ Alternatively, they could be held jointly responsible on the basis of their participation in the decision-making process at the political-military level.⁶² The analysis of the attribution test in coalition operations is at the basis of the *Saddam Hussein* decision,⁶³ delivered by the ECtHR in 2006. The case concerned the former President of Iraq's arrest, detention and handover to the new Iraqi political authorities. Since Saddam Hussein was arrested, detained and transferred solely by US forces, and the latter were also in charge for security in the zone where the alleged human rights violations took place, the Court affirmed that it could not exercise its jurisdiction over the case for the lack of effective control by ECHR member states over the alleged perpetrators. The fact that some ECHR member states 'allegedly formed part (at varying unspecified levels) of a coalition with the US'⁶⁴ was deemed insufficient to prove their responsibility by the Court, in the absence of further particulars on their involvement in the alleged human rights violations. In addition, the 'overall command' of coalition forces was in the hands of a non-member country, i.e. the US, hence the 'overall or ultimate authority and control' test could not be applied as well.⁶⁵ According to the Court, the involvement of European states-members of the CPA could be proved by: first, addressing each TCN's role and responsibilities or the division of labour/power between them and the lead nation(s); second, specifying what coalition partner retained military responsibility for the zone in which the alleged breaches of law occurred; third, identifying relevant command structures between the lead nation(s) and other TCNs; and fourth, indicating whether TCNs (other than the lead nation) had any (and, if so, what) influence or involvement in the alleged breaches of law.⁶⁶

⁶¹ See Messineo's analysis in Messineo, 'Multiple Attribution of Conduct', n. 52, at 13-15, based on the *Eurotunnel*, *Hess* and *Nauru* cases (*Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v. the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le Ministre de l'Équipement, des Transports, de l'Aménagement du Territoire du Tourisme et de la Mer du Gouvernement de la République Française)*, Partial Award, (2007) 132 ILR 1 (*Eurotunnel*), para. 179; *Hess v. the United Kingdom*, App. No. 6231/73 (EComHR, 28 May 1975), D.R. 2, at 72, para. 74; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240, para. 48 (at 22), respectively).

⁶² As the ARSIWA Commentary, n. 51, confirms, Article 47 'neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned' (Commentary to Article 46, para. 6).

⁶³ *Saddam Hussein*, n. 24.

⁶⁴ *Ibid.*, 4.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, 3-4: "The applicant did not address each respondent State's role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US

In the ECtHR's view, state responsibility in coalition operations is therefore totally individual and belongs to the entity in control of either the unit who materially commits the violation or the territory where it takes place. The same principle, i.e. the individual responsibility of TCNs for acts performed by their troops in the course of UN-mandated coalition operations (and thus the lack of responsibility for the UN), has been often asserted by the UN Secretary General.⁶⁷

Nonetheless, the Court's reasoning does not seem so convincing. In fact, what would have happened in *Saddam Hussein* if the lead nation had been an ECHR member state, instead of the US? Moreover, could the apprehension, detention and transfer of Saddam Hussein have been imputed to the CPA as a whole, and thus jointly to all the coalition partners, or at least to both the US and the United Kingdom (UK)?⁶⁸ Furthermore, violations can be committed at the same time by two or more contingents. What if the participation or the mere assistance of British or other coalition officers in the capture of Saddam Hussein had been proved? More importantly, the decision to order a specific conduct that has then led to an alleged breach (in the case at hand, the applicant's capture, detention and transfer) can be taken jointly by, or with the participation (whether limited or substantial) of, officers belonging to several coalition partners. Typically, coalition headquarters are in fact staffed with officers from different TCNs. As regards to omissions, should those TCNs, whose officers could prevent a violation from taking place, or were informed of an order/directive that could presumably lead to a breach of law and did not act accordingly, be held responsible/liable, even though the officer who eventually issued the order/directive and the unit that materially committed the violation belonged to other coalition partners? Perhaps an international or domestic court could answer this question in the affirmative.

and non-US forces except to refer to the overall Commander of coalition forces who was at all relevant times a US General. Finally, and importantly, he did not indicate which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover."

⁶⁷ See e.g. Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations', UN Doc. A/51/389 (20 September 1996), paras. 18-9; ILC, 'Responsibility of International Organizations: Comments and Observations Received from International Organizations', UN Doc. A/CN.4/545 (25 June 2004), at 18.

⁶⁸ According to Talmon, 'A Plurality of Responsible Actors', n. 46, at 204, the CPA was to be regarded as a State organ of the United States, but acting on behalf of both the occupying powers, i.e. the US and the UK. As a consequence, the CPA's conduct was to be imputed to both of them.

4. Attribution of conduct in practice, according to the decisional mechanisms in place

As indicated above, the analysis of the decisional mechanisms in place is fundamental in assessing the effective participation of coalition partners in the conduct of operations, and thus in proving their individual or shared responsibility. In this respect, the analysis of the coalition's command/control internal structure is particularly difficult to carry out, as unfortunately – but unsurprisingly – the coalitions' organisational framework is, most of the time, established in confidential agreements. Under these circumstances, it becomes difficult to say whether such agreements also contain clauses on the responsibility of coalition members and thus 'piercing the coalition veil' may prove to be a tricky affair. In addition, the C2 structure and decisional mechanisms of the coalitions of the willing reveal a complex bundle of links and relationships among TCNs which are themselves difficult to disentangle. In view of the lead nations' political goals, significant organisational changes may occur in the hierarchical chain over time and national contingents being subject to different commanding authorities.⁶⁹ In general, coalitions' operational commands are established according to three different organisational structures: 1) integrated command structure; 2) parallel command structure; and 3) 'lead nation' command structure.⁷⁰ The key features of the integrated command structure is the presence of a designated single commander, a staff composed of representatives from member states and subordinate multinational commands, and staffs integrated into the lowest echelon. The parallel command structure is characterised by the absence of a single force commander and the presence of distinct national chains of command, interacting by means of 'coordination centres'. In the last command structure, namely the 'lead nation' command structure, coalition partners place their forces under the control of one lead nation, supported by an international staff. Subordinate commands are normally composed of national contingents, answerable to national commanders.

All these organisational models may give rise to forms of joint responsibility, according to the attribution rules established by the ILC. In two out of three organisational models, namely the

⁶⁹ See e.g. the account of the changes in the chain of command occurred in the naval component of the US-led anti-terrorism coalition in the Persian Gulf in 2003, in the wake of the US-led invasion of Iraq, made by D.B. Crist, 'The Formation of a Coalition of the Willing and Operation *Iraqi Freedom*', in B.A. Elleman and S.C.M. Paine (eds.), *Naval Coalition Warfare: From the Napoleonic War to Operation Iraqi Freedom* (Abingdon: Routledge, 2008), at 208. Such changes included the creation of three autonomous Combined Task Forces (CTFs), distinct, but in support of, Iraqi Freedom naval coalition operations. Interestingly, such CTFs comprised countries such as France, Germany and Canada who – at that time – were opposing the war in Iraq, although their contribution in the anti-terrorism naval coalition is deemed to have been vital for the conduct of operations against Iraq (*ibid.*, at 209).

⁷⁰ US Department of Defense, Joint Chiefs of Staff, 'Multinational Operations', Joint Publication 3-16, 16 July 2013, at II-4.

integrated and the 'lead nation' command structures, there may be: a) situations of plurality of responsible states for the same internationally wrongful act (see e.g. the case of a misconduct ordered/committed by a multinational command or planned by a multinational staff);⁷¹ b) cases of organs placed at the disposal of a state by another state (see national commands at the disposal of the lead nation or the national staff members put under the authority of the coalition commander in the integrated command model);⁷² c) the direction/control exercised by a state over the commission of an internationally wrongful act by another state (a situation which may arise in the same circumstances as in the previous case);⁷³ or d) circumstances in which a state aids or assists another state in the commission of an internationally wrongful act (again, see – in both command structures – the case of a multinational staff planning and conducting an unlawful military operation).⁷⁴ Even in the case of a parallel command structure, joint responsibility of coalition partners under Articles 16 and 47 ARSIWA is still possible, by means of the above mentioned 'coordination centres'. Coordination could in fact be so tight that two or more coalition partners are eventually to be held responsible for the same misconduct (Article 47), or that a state ends up aiding or assisting a coalition partner in the commission of an internationally wrongful act (Article 16).

On the other hand, potentially the attribution rules established by the ILC may fall short of concrete application, as the requirements provided in the ARSIWA may be difficult to prove in practice. For instance, how to demonstrate a coalition member's 'knowledge of the circumstances of the internationally wrongful act' (Articles 16 and 17 ARSIWA), in the absence of clear or publically disclosed information as to the commission of the misconduct in question? Limiting the potential attribution of responsibility in coalition operations to the ARSIWA rules would therefore be quite risky.

Ultimately, on occasion, even when an international organisation (such as NATO or the UN) is officially in control of the mission, the reality of facts suggests that operations continue to be carried out under a coalition-type logic.⁷⁵ See for instance the case of Afghanistan, where, on the one hand, notwithstanding the formal NATO chain of command, TCNs still exercise a

⁷¹ Article 47 ARSIWA, n. 23.

⁷² Article 6 ARSIWA, *ibid.*

⁷³ Article 17 ARSIWA, *ibid.*

⁷⁴ Article 16 ARSIWA, *ibid.*

⁷⁵ See for instance the decision of the Dutch Supreme Court in the *Nuhanović* and *Mustafić* cases, where the conduct of Dutch troops was attributed first and foremost to the Netherlands, although the control of operations was formally in the hands of the UN, *The Netherlands v. Hasan Nuhanović*, ECLI:NL:HR:2013:BZ9225 (6 September 2013); and *The Netherlands v. Mehida Mustafić-Mujić et al.*, ECLI:NL:HR:2013:BZ9228 (6 September 2013).

tight control over their troops, and, on the other hand, some coalition partners prefer to establish informal coordination mechanisms among them, or with US forces acting under national chain of command.⁷⁶

Coalitions often intervene in the aftermath of a crisis and their role is often provisional, being limited to paving the way to the deployment of forces belonging to regional organisations or the UN itself.⁷⁷ Nonetheless, this change of authority is sometimes only related to the formal C2 structure in place, as the troops initially brought in by coalition partners remain deployed on the ground also after the formal handover. In addition, especially in missions led by the US, having a ‘double-hatted’ force commander – and thus two distinct hierarchical chains – is the rule, not the exception.⁷⁸ This makes it particularly difficult to assess the responsibility of single contributing nations re a specific operation, since it is often quite unclear under what chain of command the operation in question has been carried out. The ‘double-hatted’ force commander could in consequence be seen as a common organ of both the lead nation and the coalition, paving the way for the joint responsibility of both entities for a force commander’s wrongful conduct. This could in turn entail the responsibility of *all* coalition partners, under Article 47 ARSIWA, since the force commander can be seen as a ‘joint authority responsible for the management’⁷⁹ of coalition operations. In case ‘double-hatting’ is used in operations carried out by an international organisation vested with an international legal personality, the organisational structure ends up being that of a coalition formed by one or more lead nations and an international organisation.⁸⁰

Coalition members may directly control their own national assets and simply coordinate operations with other nations (i.e. according to the above mentioned parallel command structure), or – and this happens most times – opt for transferring their assets under the

⁷⁶ D.P. Auerswald and S.M. Saideman, *NATO in Afghanistan: Fighting Together, Fighting Alone* (Princeton University Press, 2014), 45 and 58.

⁷⁷ For instance, the above-mentioned operations in Somalia, Haiti and East Timor were all followed by UN missions, while the conduct of operations in Libya were handed over to NATO on 31 March 2011. The same occurred with the NATO-led Afghanistan International Security Assistance Force (ISAF). Set up in December 2011 as a coalition operation, the operation’s command originally rotated among different nations on a 6-month basis. NATO assumed the leadership of ISAF only on 11 August 2003.

⁷⁸ Having a ‘double hat’ in military jargon means to serve, at the same time, as a commanding officer in two distinct C2 lines. Normally, one of them is the national one. So, for instance, ISAF Commander in Afghanistan is, at the same time, the top-level commander of NATO and US troops. As a result, he may opt for the national chain of command for the accomplishment of a specific mission (to be assigned to US troops only), and rely on the NATO one for other tasks.

⁷⁹ ARSIWA Commentary, n. 51, Commentary to Article 47, para. 2.

⁸⁰ During virtually all military operations carried out by international organisations and led by the US (see e.g. Somalia, Kosovo, Afghanistan, etc.), the latter has always maintained a national chain of command/control running in parallel with the international one.

control of the coalition's multinational command, by issuing a 'Transfer of Authority' (ToA) telegraphic message. Through the ToA, TCNs formalise the passage of Operational/Tactical Control (OPCON/TACON)⁸¹ from national to coalition authorities. Before the formal ToA, usually command relationships have however been already agreed and described in more detail in the Operation Plan (OPLAN).⁸² After the ToA, coalition members should in principle only retain the Operational/Tactical Command (OPCOM/TACOM)⁸³ of their troops. Nevertheless, as mentioned above, coalition partners tend to keep a good deal of authority over their contingents. In addition, when necessary, coalition partners may temporarily re-shift their assets under national control for the accomplishment of specific tasks. In this case they notify a 'Reverse ToA' message,⁸⁴ which has basically the same form and functions of the ToA, although it is used to switch the control of national contingents from the coalition to a TCN. Under the ToA scheme, tasks are assigned and instruction issued to TCNs' units by the coalition's multinational command. However, as anticipated above, multinational commands are complex bodies, staffed with officers from different nations.

More specifically, coalition headquarters and operational commands may be provided by one or more lead nations, but are usually staffed with liaison officers, whose task is to inform and coordinate military operations with coalition partners. Typically, liaison officers are assigned to the office of the Chief of Staff and work closely with the head of the operations branch to resolve interagency problems.⁸⁵ Other officers (coming from the most influent TCNs) are part of the staff and may be tasked with planning, conduct of operations, intelligence gathering, training, administrative duties, etc., depending on the specific agreements reached with the

⁸¹ OPCON is 'the authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control' (AAP-06, n. 16, at 2-O-3).

⁸² OPLAN is defined as '[a] plan for a single or series of connected operations to be carried out simultaneously or in succession. It is usually based upon stated assumptions and is the form of directive employed by higher authority to permit subordinate commanders to prepare supporting plans and orders. The designation "plan" is usually used instead of "order" in preparing for operations well in advance. An operation plan may be put into effect at a prescribed time, or on signal, and then becomes the operation order' (ibid., at 2-O-4).

⁸³ OPCOM is 'the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the commander deems necessary. Note: It does not include responsibility for administration' (ibid., at 2-O-3).

⁸⁴ The 'Transfer of Authority' (ToA) is a formal act by which a government transfers, on a temporary basis, the operational command or control of designated forces to a multinational command. ToA is a unilateral act and can be revoked at the TCN's convenience, also only temporarily and for the accomplishment of a single mission. In this case the TCN issues a 'Reverse ToA'. The whole procedure is rather informal and normally the ToA/Reverse ToA is announced to the multinational command and other TCNs through an electronic message.

⁸⁵ K.E. Bonn and A.E. Baker, *Guide to Military Operations Other Than War* (Mechanicsburg, PA: Stackpole Books, 2000), 85-86.

lead nation(s). Staff officers normally fill posts only up to the operational level. At the strategic level, coalition partners are represented by senior liaison officers or military representatives.

Therefore, it may be said that officers from different countries – in different capacities and degrees of responsibility – *may* all *actively* contribute to the generation, training, deployment and conduct of coalition operations. Even when they do not actively contribute, they (or at least some of them) are informed of the conduct of operations. In practice *any* single coalition operation is in principle the outcome of a complex planning and execution process. An example is the case of an aerial bombing of a target on the ground. Even though the coalition fighter jet who materially hits the target belongs to a single TCN, the planning team behind the attack would probably be ‘joint and combined’, i.e. comprising officers from different armed forces and contributing nations. In addition, the jet could drop bombs supplied by a third country;⁸⁶ and be assisted by other aerial, naval and terrestrial assets (such as radars, Airborne Warning and Control Systems – AWACS, and missile systems); while bombs could be dropped with the support of ‘spotters’ on the ground, i.e. military officers – possibly belonging to different coalition partners – who illuminate the target with a laser (in case of laser-guided bombs), or communicate the exact coordinates of the target to the pilot (in case of GPS-guided bombs). As this example clearly illustrates, in coalition operations, a single action can easily be attributed to several TCNs, as its outcome is normally the product of the effective participation (meaning physical participation or contribution on the physical plane) of numerous coalition partners.

Central to the discourse on the joint responsibility of TCNs is also the role of two different types of senior officers, who are usually seconded by contributing nations to multinational commands. The first is the Senior National Representative (SNR), who is in charge of high level coordination between the multinational command and his/her government. The second is the Red Card Holder, namely a senior officer whose task is that of checking the compatibility with national policies, laws, directives and the sending state’s international obligations of mission tasks assigned to national forces by the multinational command, also in view of the existing ‘national caveats’.⁸⁷ The SNR’s role consists of liaising with the force commander

⁸⁶ See for instance the role of supplier played by Germany during the 2011 NATO military campaign against Libya, T. Harding, ‘Germany Replenishes NATO’s Arsenal of Bombs and Missiles’, *The Telegraph*, 28 June 2011.

⁸⁷ National caveats are restrictions in the use of national contingents put forward by TCNs in view of their national legislation or policies. They can be issued by TCNs at different levels and stages, including the force

when important changes take place, concerning in particular the area of operations, the rules of engagement, the execution of the mandate, and the composition of the force. In case of concern of the SNR, issues are normally settled at the government level. On the contrary, the Red Card Holder is vested with the authority to refuse the assigned mission tasks.⁸⁸ As US General Wesley Clark, former Supreme Allied Commander in Europe (SACEUR), reported in his memoir on the 1999 NATO intervention in Kosovo, ‘red-carding’ is a normal practice in multilateral operations. In his words, during the Kosovo campaign, ‘[i]t was well understood that nations always retained ultimate authority over their forces and had the right to override orders at any time, if they chose to do so’.⁸⁹ The presence of staff officers, liaison officers, SNRs and Red Card Holders reveals that – at the operational level – information as to the concrete conduct of operations is widely spread among coalition partners, and this entails that there might be a considerable number of officers/TCNs who ‘could know or had reason to know’⁹⁰ when a certain breach of law is committed. Of course, this does not imply that any misconduct of any military unit/officer is automatically imputable to all TCNs.

Ultimately, the coalition partners’ shared responsibility could be established by attributing to the force commander and staff officers the status of common organs of the coalition,⁹¹ or otherwise consider multiple attribution to several TCNs as the object of a rebuttable presumption. Under the latter theory, *any* wrongful act would in principle be attributed to more than one TCN by reason of their effective participation in the conduct or omission. Again, assessing the ‘effective participation’ of TCNs in the conduct/omission concerned, in turn entails clear information about the roles and responsibilities in the decisional and

generation stage (i.e. at the political-military level, in the early stages of the mission’s preparation), but can also be notified to allied forces once the Operational Plan (OPLAN) and related rules of engagement (ROE) are finalised and distributed to all TCNs. National caveats are usually set out in the ToA message and can be lifted or re-issued once the operation has already commenced.

⁸⁸ M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff Publishers, 2005), 48. See also M. Kelly, ‘Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force’ (2005) 2(2) AAJ 161, 165.

⁸⁹ Quoted in Auerswald and Saideman, *NATO in Afghanistan*, n. 76, at 6.

⁹⁰ The reference to the ‘knew or had reason to know’ formula is not casual and is taken from para. 2 of Articles 7(1)(3) and 6(1)(3) of the ICTY and ICTR Statutes (ICTY Statute, 25 May 1993, UN Doc. S/RES/827 (1993); ICTR Statute, 8 November 1994, UN Doc. S/RES/955 (1994)). In this respect, criminal liability of planners and commanding officers sitting in the coalition command – and thus the responsibility of their sending States – cannot be excluded in case an international crime is committed by a dependent unit and they failed to prevent it, also with active opposition.

⁹¹ See ARSIWA Commentary, n. 51, Commentary to Article 47, para. 2.

execution process. Unfortunately, the hypothesis in question has not yet been explored by scholars the way it deserves.⁹²

5. The 2011 military intervention in Libya

The military intervention in Libya of March 2011 is a clear example of this ‘responsibility puzzle’ that serves to illustrate the possibility of shared responsibility identified above. It started as a pure UN-backed coalition operation led by the US (codename Operation ‘Odyssey Dawn’) and then evolved into a NATO-led intervention after the command and control of coalition forces was formally transferred to NATO on 31 March 2011.⁹³ Nonetheless, upon closer examination, the bundle of links and relationships among all the actors involved reveals the presence of several hierarchical chains operating simultaneously, also following the formal end of coalition operations. In practice, the ‘coalition logic’ has never really abandoned the conduct of operations.

Indeed, nine of the eleven states initially participating in Operation Odyssey Dawn were also members of NATO,⁹⁴ and all of them continued to take a major part in the operations over Libya after the formal handover to NATO. Again, the US joint task force commander was ‘double hatted’, namely the commander of the US naval forces in Europe (NAVEUR) and Africa (NAVAF) and, at the same time, the commander of NATO’s Allied Joint Force Command (JFC), based in Naples.⁹⁵ Once NATO took over, JFC Naples was tasked with the conduct of NATO Operation ‘Unified Protector’ (OUP); in practice, the Commander JFC Naples remained in charge and only changed ‘hat’.⁹⁶ Even before the formal handover to

⁹² Among the others see the contributions of Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, n. 22, 388; Talmon, ‘A Plurality of Responsible Actors’, n. 46, 204; Messineo, ‘Multiple Attribution of Conduct’, n. 52, 13-15; and M. den Heijer, ‘Issues of Shared Responsibility before the European Court of Human Rights’, SHARES Research Paper 06 (2012), 24-26, at www.sharesproject.nl.

⁹³ The formal NATO-led chain of command and control in OUP is briefly explained in a letter dated 23 January 2012, written by the NATO Legal Advisor Peter Olson to the International Commission of Inquiry on Libya, appointed by the Human Rights Council to investigate possible human rights violations committed during the Libyan campaign (‘Report of the International Commission of Inquiry on Libya’, UN Doc. A/HRC/19/68 (2 March 2012), Annex II, at 203).

⁹⁴ G.K. James, L. Holcomb, and C.T. Manske, ‘Joint Task Force Odyssey Dawn: A Model for Joint Experience, Training, and Education’ (2012) 64 JFQ 25, 27.

⁹⁵ *Ibid.*, 26.

⁹⁶ NATO strategic decisions were implemented by JFC Naples, whose Commander, Adm. Samuel Locklear, had previously commanded Operation Odyssey Dawn in his capacity as a US officer. The OUP operational commander was the Deputy Commander of JFC Naples, Canadian Gen. Charles Bouchard. Once NATO took over, significant changes occurred in the command/control structure at the lower level: air operations passed

NATO, NATO had conducted surveillance operations of the Libyan skies using AWACS aircrafts deployed as part of NATO's Operation 'Active Endeavour', and had carried out maritime embargo operations⁹⁷ making the exact moment of the transfer of responsibility from the coalition to NATO forces quite uncertain.⁹⁸ In addition, remarkably, single states such as France and the UK, ran separate military operations in parallel with both Operation Odyssey Dawn and the subsequent OUP (Operations 'Harmattan' and 'Ellamy', respectively),⁹⁹ retaining 'operational discretion over [their] assets'.¹⁰⁰ As a result, even after the formal handover to NATO, operations against loyalist forces could have in fact been conducted under national command/control and not within the NATO command/control chain, possibly because of the uncertainty as to whether such actions could be considered covered by the UNSC's mandate. Also the bombing of Gaddafi's convoy, which then led to the capture and killing of the Libyan leader, was carried out by both NATO (i.e. French) and national (i.e. US) assets.¹⁰¹ NATO itself had to admit that it was in contact with 'allied forces in Libya', i.e. special forces operating under national command, but coordinating their activities with NATO forces,¹⁰² notwithstanding the explicit prohibition of 'a foreign occupation force of any form on any part of Libyan territory', contained in paragraph 4 of

from the US Air Base of Ramstein, Germany, to NATO's Air Command Headquarters for Southern Europe, located in Izmir, Turkey, although the air campaign itself was conducted from NATO's Combined Air Operations Centre, based in Poggio Renatico, Italy. The command of maritime operations, which was originally established aboard the US command and control ship USS Mount Whitney, transited to the NATO Maritime Component Command Naples. Notably, initially the Command of Joint Task Force Odyssey Dawn was established in Naples and then moved on board the USS Mount Whitney, together with the mission's maritime component command. Likewise, NATO maintained the presence of a Task Force Commander on board an Italian command and control ship navigating off the Libyan coasts for all the duration of operations.

⁹⁷ J. Gertler, 'Operation Odyssey Dawn (Libya): Background and Issues for Congress', Congressional Research Service Report No. R41725, 28 March 2011, at 6, see <http://fpc.state.gov/documents/organization/159790.pdf>. Even the enforcement of the no-fly zone by NATO aircrafts started before the formal handover, as the first patrol mission under NATO command took place on 27 March 2013.

⁹⁸ As confirmed in a recent RUSI Report, the handover was described by some commentators as a 'Hail Mary pass', E. Quintana, 'The War from the Air', in A. Johnson and S. Mueen (eds.), *Short War, Long Shadow: The Political and Military Legacies of the 2011 Libya Campaign*, Royal United Services Institute, Whitehall report 1-12 (2012), 31, at 33, available at www.rusi.org/downloads/assets/WHR_1-12.pdf.

⁹⁹ Gertler, 'Operation Odyssey Dawn (Libya)', n. 97, 18-19.

¹⁰⁰ A. Cameron, 'The Channel Axis: France, the UK and NATO', in A. Johnson and S. Mueen (eds.), *Short War, Long Shadow: The Political and Military Legacies of the 2011 Libya Campaign*, Royal United Services Institute, Whitehall report 1-12 (2012) (ibid.), 15, at 18. See also the written evidence (Supplementary evidence from the Ministry of Defence) submitted by the UK Ministry of Defence to the British Parliament in relation to the military operations in Libya: 'Some nations also deployed assets in support of operations in Libya under National Command arrangements, which were also made available for NATO tasking. The UK's deployment of HMS OCEAN was done under such arrangements' (House of Commons, Defence Committee, *Operations in Libya: Ninth Report of Session 2010-12*, 8 February 2012, Evidence No. 56, available at www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/950/950.pdf).

¹⁰¹ 'NATO and Libya', Operational Media Update, 20 October 2011, www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111021_111021-oup-update.pdf; T. Gaynor and T. Zargoun, 'Gaddafi's death - who pulled the trigger?', *Reuters*, 21 October 2011.

¹⁰² B. Barry, 'Libya's Lessons' (2011) 53(5) *Survival* 5, at 8.

Resolution 1973 (2011). In light of that ‘asserting that NATO exercised the “effective control” over the conduct [of operations] seems inappropriate’.¹⁰³

Concerning the participation of non-US officers in the planning and conduct of Operation Odyssey Dawn, in support of the US joint task force staff there were reportedly 10 foreign liaison officers (all from Italy, France, and the United Kingdom).¹⁰⁴ British liaison and staff officers were embedded at every level of the C2 structure.¹⁰⁵ National Red Card Holders, supported by legal advisors, were appointed within national cells established in the operational commands of both Operation Odyssey Dawn and OUP, so that they could follow ‘each mission in detail, from preparation to debriefing, and had access to all available intelligence products and means of communications’.¹⁰⁶ With regard to the ‘overall political direction’ of military operations, starting from 29 March 2011, it was split between a dedicated Contact Group, the most powerful coalition members and the North Atlantic Council, the UN Secretary-General being relegated to the coordination of humanitarian assistance.¹⁰⁷

In sum, lead nations – also retaining the ‘overall political direction’ of operations – remained the same for all the duration of hostilities. Their forces operated several times under exclusive national control, even when formally assigned to NATO. Some TCNs actively participated in the planning and decisional process behind the conduct of coalition operations, while all TCNs were constantly informed about missions, targets and tasks through their liaison officers. More importantly, state forces tasked with the conduct of a specific ‘kinetic operation’ by the coalition or NATO command could decline the assignment on the basis of a

¹⁰³ G. Bartolini, ‘L’Operazione Unified Protector e la Condotta delle Ostilità in Libia’ (2012) 95 RDI 1012, at 1037 (author’s translation from Italian: ‘Alla luce degli elementi descritti appare quindi improprio affermare che la NATO esercitasse un “controllo effettivo” sulle condotte’).

¹⁰⁴ James et al., ‘Joint Task Force Odyssey Dawn’, n. 94, 25. Other sources reported the presence on board the USS Mount Whitney of British and French naval officers, ‘as well as liaison officers from a number of other countries’ (Gertler, ‘Operation Odyssey Dawn (Libya)’, n. 97, 14).

¹⁰⁵ C. Taylor, ‘Military Operations in Libya’, House of Commons, Note No. SN/IA/5909, 24 October 2011, at 11, at www.parliament.uk/briefing-papers/SN05909.pdf.

¹⁰⁶ J. Schoofs, ‘Operation Freedom Falcon’, at <http://home.scarlet.be/~jansensa/OperationFreedomFalcon.htm> (Article written with the assistance of the former tactical commander of the Belgian air contingent participating in both Operation Odyssey Dawn and OUP). See also Stato Maggiore dell’Aeronautica, ‘The Italian Air Force in Operations Odyssey Dawn and Unified Protector’, at www.aeronautica.difesa.it/News/Documents/pdf/Cerimonia%20chiusura%20Unified%20Protector_151211/Brocchure%20Libya%20EN.pdf. According to a 2012 RUSI Report, ‘Initially, France, the UK and the US set the plan together and de-conflicted three national operations. Major General Margaret Woodward at AFRICOM ran the Joint Force Air Component and the Air Tasking Order (ATO), but gave different target sets to different members’ (Quintana, ‘The War from the Air’, n. 98, 33).

¹⁰⁷ Statement from the Conference Chair Foreign Secretary William Hague following the London Conference on Libya, London, 29 March 2011, at www.gov.uk/government/news/london-conference-on-libya-chairs-statement.

national decision, by means of their Red Card Holders. In light of this, it seems clear that primary responsibility for the conduct of national forces remained in the hands of TCNs, even when assigned to an international control structure, whether led by the US or NATO. This, however, does not exclude the latter's concurrent responsibility from any breach of law committed by TCNs' forces.¹⁰⁸ More importantly, the above-mentioned information on the C2 structure and the decisional mechanisms in place makes the case for a shared responsibility among a good number of coalition partners.

6. Conclusion

Based on the analysis contained in the previous sections, it is possible to conclude that the responsibility of states participating in a coalition of the willing is – at the same time – both individual and *shared*. On the one hand, since TCNs never really cease to exercise control over their troops, even when formally assigned to a coalition, any violation of law or other obligation committed by military contingents is to be attributed first and foremost to their sending states. On the other hand, in order to establish responsibility concretely in specific cases, it becomes essential to rely on the 'effective participation' of coalition partners in the decision-making and execution process, and their presence within the C2 organisational framework. The goal is that of assessing the coalition members' real powers, capacities, influence and participation in the commission of any alleged breach of law. Depending on the C2 structure and decisional mechanisms in place, a plurality of state partners could easily be held jointly responsible for the conduct of operations. However, any assessment should be based upon clear and publicly-available information, whereas such information and data are almost always classified or unpublished. This makes the responsibility of coalition partners difficult to be established in practice.

Shared responsibility of lead nations and TCNs may be ascertained by applying the 'effective control' test, also in conjunction with the 'overall/ultimate authority and control' test. In addition, the latter may be used to found the concurrent responsibility of states exercising political direction over coalition operations, especially when organised in 'contact groups'.

¹⁰⁸ The multiple attribution of conduct to both contributing States and NATO is confirmed in Bartolini, 'L'Operazione Unified Protector e la Condotta delle Ostilità in Libia', n. 103, 1038. See, *mutatis mutandis*, the recent decision of the Dutch Supreme Court in the *Nuhanović* and *Mustafić* cases, confirming the multiple attribution of the actions performed by the Dutchbat in Srebrenica to the Dutch Government and the UN, n. 75, para. 3.12.2.

Also the ARSIWA support the potential shared responsibility of coalition partners. Other general rules on responsibility/liability, which may be significant in proceedings before international or domestic courts, provide for the existence of forms of shared responsibility, even though the ECtHR – in its case law concerning the responsibility of coalition members for acts performed by one of them – considered the responsibility of TCNs as being exclusively individual. The same decision, however, did not rule out the possibility to extend responsibility to more TCNs and listed some relevant criteria in this respect.

As the military intervention in Libya shows, today the ‘coalition logic’ is present in any military intervention, even when it involves regional or international organisations. This is why only an in-depth analysis of the decisional and operational mechanisms and rules which regulate the conduct of operations may pierce the ‘coalition veil’ and consent to a fair attribution of responsibility in case of need.