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Shared Responsibility in North Atlantic Treaty Organization-led Operations

Marten Zwanenburg[*]

1. Introduction

This contribution will focus on shared responsibility in the context of North Atlantic Treaty Organization (NATO)-led operations. Such a focus is timely because NATO-led operations involve a number of different actors, notably NATO itself, troop contributing states, NATO member states not contributing to the operation concerned, as well as a host state. This suggests a large potential for shared responsibility. It is also timely because in the last decade or so NATO-led operations have become more numerous. The contribution is structured as follows. First, the question whether NATO is an international legal person is addressed (section 2). A number of factual situations will then be presented that have arisen in practice and that can be construed in terms of shared responsibility (section 3). This is followed by a discussion of the primary rules that govern those situations (section 4). The contribution will then focus on the secondary rules of international responsibility at play in the situations that have been identified (section 5), and highlight instances where claims have been brought against multiple parties or against one party where arguably there was a situation of shared responsibility (section 6). The contribution concludes with a number of final remarks (section 7).

2. NATO: an international legal person

A preliminary question that needs to be answered is whether NATO has an international legal personality separate from its members. If not, then there can be no shared responsibility between NATO and states. This is because only an international legal person is capable of having obligations under international law, and therefore of being responsible for a breach of

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those obligations. There has been some controversy in the literature concerning the question whether NATO has international legal personality.[1] The criteria used by the International Court of Justice (ICJ or Court) in the *Reparation for Injuries* advisory opinion to conclude that the United Nations (UN) was an international legal person are generally regarded as being the touchstone also for other organisations.[2] In this advisory opinion, the ICJ referred inter alia to the UN being equipped with organs; the defined position of member states in relation to the organisation; the granting of legal personality and privileges and immunities to the organisation in the territory of the member states; and the fact that practice confirmed the character of the organisation occupying a position in certain respects in detachment from its members. This led the Court to conclude that 'the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of a large measure of international personality'.[3] Applying these criteria to NATO leads to the conclusion that NATO has international legal personality. The organisation is a permanent association of states, established by treaty, with a lawful objective. It is equipped with organs, the most important of which is the North Atlantic Council. The functions of the organisation are distinct from those of the member states. The organisation exercises the right under international law to conclude treaties. Statements by the NATO Secretary-General and his legal advisor confirm that the organisation has international legal personality.[4] Finally, this has also been confirmed in the comments submitted by the organisation to the ILC Articles on the Responsibility of International Organizations (ARIO).[5] As far as the author is aware, this claim has not been contested. The European Court of

[1] Contra: D.H. Vignes, 'La Personnalité Juridique de l'O.T.A.N.' (1955) 1 AFDI 471; T. Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)' (2001) 12 EJIL 391, 425. Pro: N. Tsagourias, 'Military Missions and Responsibility of International Organizations', in M. Odello and R. Piotrowicz (eds.), *International Military Missions and International Law* (Leiden: Martinus Nijhoff, 2011), 245; A. Pellet, 'L'Imputabilité d'Éventuels Actes Illicites: Responsabilités de l'OTAN ou des États Membres', in C. Tomuschat (ed.), *Kosovo and the International Community* (The Hague, London: Kluwer Law International, 2002), 193, 198. K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012), 98.

[2] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 (*Reparation for Injuries*).

[3] Ibid., 178.

[4] NATO, Note by the Secretary-general, 'Strategic Airlift Capability (SAC) –Initiative Adoption of the NAMO Charter', 20 June 2007, available at www.nato.int/cps/en/SID-8642E576-06747436/natolive/official_texts_56625.htm; B. de Vidts, 'Aspects Related to the Legal Status of the North Atlantic Treaty Organization', Speaking notes, 22 November 2004, NATO document CJ(2004)0910, cited in J.E.D. Voetelink, *'Status of forces': Strafrechtsmacht over militairen vanuit internationaalrechtelijk & militair-operationeelrechtelijk perspectief* (PhD Thesis, University of Amsterdam, 2012), 161.

[5] ILC, 'Comments and observations received from international organizations', UN Doc. A/CN.4/637 (14 February 2011), 11. 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).

Human Rights (ECtHR) and the International Criminal Tribunal for the former Yugoslavia are of the same view.[6]

3. Factual situations

In the context of NATO, discussions concerning international responsibility are often occasioned by military operations led by the organisation. The following factual scenarios are offered for further analysis. For the purpose of clarity, they have been subsumed in a limited number of categories. The first category is the use of force by troops in a NATO-led operation. This is the kind of situation that has led to the most well-known claims for reparation being brought against NATO itself and/or against member states. This includes Operation Allied Force in 1999 in the Former Republic of Yugoslavia, which led to a case brought by the Federal Republic of Yugoslavia (FRY) before the ICJ; the *Banković* case[7] before the ECtHR; and a number of cases before domestic courts.[8] A more recent operation that led to claims is Operation Unified Protector in Libya in 2011, which occasioned claims against NATO before a Belgian court.[9]

Closely related to, but arguably separate from the above category, because it is not use of force strictly speaking, is the scenario of detention by troops in a NATO-led operation. An example of a claim arising from detention in a NATO operation is the one concerning action taken by the NATO-led Kosovo Force (KFOR) that led to the case of *Saramati* v. *Norway*[10] before the ECtHR.

A second category relates to the fact that decision-making within the highest political body of NATO, the North Atlantic Council, takes place by consensus. This means that there is no voting at NATO. This fact has given rise to claims that one or more member states have committed an internationally wrongful act, by not opposing a particular decision that led to,

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[6] *Emilio Gasparini* v. *Italy and Belgium*, App. No. 10750/03 (ECtHR, 12 May 2009), 7; *Prosecutor* v. *Simic et al.*, Decision on Motion for Judicial Assistance to be Provided by SFOR and others, ICTY Case No. IT-95-9-PT, 18 October 2000, para. 48.

[7] *Banković and others* v. *Belgium and 16 other states*, App. No. 52207/99 (ECtHR, 12 December 2001).

[8] See *Daniković et al* v. *the Netherlands*, Supreme Court of the Netherlands, 29 November 2002, NJ 2003, 35; *Presidenza Consiglio Ministri* v. *Markovic and others*, Order No. 8157, 8 February 2002, ILDC 293 (IT 2002) (*Markovic*), available at www.geneva-academy.ch/RULAC/pdf_state/Markovic.pdf.

[9] See inter alia *El Hamidi and Chlih* v. *NATO*, Tribunal de Première Instance de Bruxelles, 22 October 2012 (copy on file with the author).

[10] *Ruzhdi Saramati* v. *France, Germany and Norway*, App. No. 78166/01 (ECtHR, 2 May 2007).

or at least contributed to, a harmful outcome. Such claims have been made in international cases and at least one domestic case arising from Operation Allied Force.[11]

Harm may also be the outcome of (alleged) inaction by NATO-led forces. Allegations of such inaction were made against NATO forces participating in Operation Unified Protector in 2011, when a migrant boat sank in the Mediterranean Sea. It was alleged that NATO failed to react to distress calls in a military zone under its control.[12] In the *Behrami* case,[13] the applicants also complained of inaction by French KFOR troops.

The categories described above are useful to structure the discussion, but they should not be seen as rigorous distinctions. There may be overlaps between different categories.

4. Primary norms

The legal regimes that are most relevant to the situations described above are the *jus ad bellum*, International Humanitarian law (IHL), human rights law, the law of the sea (in particular the UN Convention on the Law of the Sea (LOSC),[14] as well as Status of Forces Agreements (SOFAs) concluded between NATO and host states for out-of-area operations. The first three of these protect interests of the international community at large.[15] This means that the interests they protect go beyond the sum of the individual interests of the international legal persons that partake in that regime. In international law, a number of phenomena have emerged that give expression to the fact that a particular interest is regarded as a community interest, in particular obligations *erga omnes*, *jus cogens*, as well as certain manifestations in the law of international responsibility. It is no coincidence that the *jus ad bellum*, IHL and human rights law are often referred to as regimes in which these phenomena find application. The LOSC, on the other hand, is not a predominantly collective interest treaty.[16] The treaty contains obligations of a varying nature. The obligation to render assistance to persons in

[11] See inter alia *Varvarin*, Bundesverfassungsgericht (German Constitutional Court), 2 BvR 2660/06 and 2 BvR 487/07, n. 84.
[12] Council of Europe, PACE committee finds a 'catalogue of failures' that led to deaths of 63 people fleeing Libyan conflict by sea, 29 March 2012, available at assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7567&L=2.
[13] *Agim Behrami and Bekir Behrami* v. *France*, App. No. 71412/01 (ECtHR, 2 May 2007); and *Saramati*, n. 10.
[14] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (LOSC).
[15] For a general discussion of community interests see S. Villapando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 EJIL 387.
[16] E. de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 67.

distress at sea however, set out in Article 98, certainly appears to serve a community interest. Finally, SOFAs are typical examples of treaties that protect the interests of the states or international organisations concluding them. They attempt to reconcile the divergent interests of sending and receiving states or organisations in relation to forces of the former that are present in the territory of the latter.

In the context of shared responsibility, IHL contains a norm that is particularly relevant. This is common Article 1 to the four Geneva Conventions of 1949,[17] which provides that: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' There is some controversy concerning the precise scope and meaning of the words 'ensure respect', but the better view appears to be that it entails an obligation to ensure that other parties to the Geneva Conventions respect IHL.[18] This is an obligation of means, not one of result.[19] The ICJ held in the *Wall* advisory opinion that '[i]t follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.'[20] The precise scope of the obligation is unclear.

NATO member states and (other) states participating in NATO-led operations are bound by the treaties to which they are parties in the abovementioned fields of international law. Many of the norms in these treaties also constitute customary international law. NATO as an international organisation is not a party to any of the treaties concerned. As an international legal person, however, it can be bound by international customary law.

It is widely accepted that international organisations are subject to the rules of customary international law in the field in which they undertake activities. The ICJ has held that '[i]nternational organizations are subjects of international law and, as such, are bound by any

[17] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85; Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135; Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (together Geneva Conventions).

[18] L. Boisson de Chazournes and L. Condorelli, 'Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 IRRC 67.

[19] C. Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 EJIL 125, at 171, where he states that common Article 1 has 'an unspecified recommendatory meaning'. Indeed, in many cases many states parties to the Geneva Conventions take no action at all in response to violations by other states parties, without there being any evidence in state practice that this is regarded as a breach of common Article 1.

[20] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at 119-200.

obligations incumbent upon them under general rules of international law.' [21] That international organisations are bound by customary law derives from their international legal personality, which enables them to participate in the international legal order. As such, they must accept the rules of that legal order that apply to, and are relevant for, the activities they undertake.[22] There is no reason not to apply this finding to NATO in principle. Careful analysis is however required to determine whether a particular obligation lends itself to application to an international organisation, and whether the activity to which that obligation applies is carried out by the international organisation as one of its functions. This is because the rights and obligations of international organisations, unlike those of states, are circumscribed by their functions. As the ICJ held in the *Reparation for Injuries* advisory opinion:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[23]

Concerning the primary norms mentioned above, it has been maintained that NATO is bound by the prohibition of the threat or use of force as a matter of customary law.[24] As NATO is a military alliance, it appears logical that the customary *jus ad bellum* would apply to its activities, as well as the customary IHL. Activities undertaken by NATO also appear to relate *ratione materiae* to customary norms of human rights, and in the case of naval operations also to the law of the sea.

The customary law obligations of NATO in the fields concerned are not necessarily identical to the obligations of states. First, rules of customary law are not necessarily identical to conventional obligations states may have in the same field. One example is the prohibition of the use of anti-personnel landmines. A large number of states are bound by such a prohibition because they are parties to the anti-personnel mines convention.[25] But there is no absolute customary law prohibition of their use.[26] Secondly, NATO may not be able to implement

[21] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, at 89-90, para. 37.
[22] See inter alia F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict* (Antwerp: Intersentia, 2010).
[23] *Reparation for Injuries*, n. 2, at 180.
[24] B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 3.
[25] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, in force 1 March 1999, 2056 UNTS 211.
[26] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2009), 280.

certain rules, or rules may need to be applied *mutatis mutandis* due to particular characteristics of an international organisation. To give one example, arguably there is a customary international law obligation for states to prosecute grave breaches of the Geneva Conventions. Because NATO does not have a criminal justice system, it could not implement such an obligation, at least not in the way it is implemented by states.

5. Secondary rules

5.1 International legal personality of NATO, the relationship between NATO and member and troop contributing states, and its consequences for attribution of conduct

The answer to the question whether the general principles of responsibility in the regimes discussed above apply to NATO operations is complicated by the fact that for a long time there was uncertainty concerning the international legal personality of NATO, as well as by the dearth of practice (in the public domain) on this issue. In its comments on the ILC Articles on the Responsibility of International Organizations NATO has expressed

> a general concern that the draft articles and associated commentary do not always appear fully to contemplate the specific situation of organizations in which, owing to the nature of the activity in which it is engaged or other factors, the member States retain virtually all decision-making authority and participate on a daily basis in the governance and functioning of the organization.[27]

The comment appears to question a fundamental principle underlying the approach taken by the ILC in the ARIO, namely that international organisations are analogised to states. Like states, international organisations are regarded by the ILC as independent actors that are in principle responsible for their own conduct. International legal personality plays a crucial role, because its existence or absence determines whether an organisation is an independent actor. It appears that NATO considered this approach to be flawed, and that it suggested varying principles of attribution to apply, depending on the role of states in the organisation, more so than is provided for in the ARIO. In particular, the quoted comment above focuses on decision-making in the organisation, which in NATO is done by consensus, so that there is no means to impose a decision on member states by vote. The comment above suggests that in such a case it is not so clear that member states can properly differentiate their responsibility

[27] Comments and observations received from international organizations, n. 5, at 11–12.

from that of the organisation. Similar criticism of the ARIO has also been voiced by commentators, albeit not specifically in relation to NATO.[28]

The heart of the matter is the relationship between the organisation and its member states, and the consequences this has for responsibility in general, and for attribution in particular. In the case of NATO, there are two important aspects to this relationship. The first is the role that states play in the decision-making process within the organisation. As mentioned, in NATO, decisions are taken by consensus. For any decision to be made, as a minimum the tacit consent of each of the member states is required. The second aspect concerns the instrument through which NATO carries out military operations. NATO has no armed forces of its own. It is therefore dependent on the forces of states to carry out military operations. For each operation, states place forces at the disposal of the organisation. There are many different permutations of such 'placing at the disposal'. First, the level of command and control over troops – which serves at least as an indication of factual control – transferred by states to the organisation varies. The control transferred to the organisation may be limited by the imposition of formal 'caveats' and the use of 'Red Card' procedures.[29] Secondly, states may in practice choose to influence the conduct of the troops they have placed at the disposal of an organisation, even in the absence of such formal procedures and if this means interfering in the international chain of command.[30]

In the literature, it has been argued by some authors that member states of an international organisation are responsible for the conduct of that organisation on the mere basis of their membership.[31] Others have taken a less extreme position, holding that the conduct of the

[28] See e.g. I. Brownlie, 'The Responsibility of States for the Acts of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today* (Leiden: Brill, 2005), 355. On page 359 he states that: 'The formation of an international organization cannot result in some species of *erga omnes* limitation of responsibility [of member states – MZ], or immunity, in relation to non-members. This reality has been masked to some extent by the concern of the International Law Commission to maintain a demarcation between State responsibility and other subjects.'

[29] Caveats generally limit the type of activities that a state's troops may undertake. Examples of caveats are limitations of the geographical area in which troops may operate or the limitation of the use of airfields at night. F. Meulman, 'Experiences as Deputy Commander Air' (2009) NL-ARMS NARMS 297, 303; the Netherlands is one of a number of states that participated in ISAF to have had a national Red Card Holder. A Red Card Holder is a representative of the troop contributing state who has been given the authority to reject missions given by the international commander to the troops contributed by that state.

[30] This was reported to occur frequently in KFOR. See H.H. Perritt, Jr., *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan* (Cambridge University Press, 2010), 10.

[31] See e.g. Brownlie, 'The Responsibility of States for the Acts of International Organizations', n. 28, 359.

organisation can only be attributed to a state in certain situations.[32] What those situations have in common is that there is a closer link between the impugned conduct and the state concerned than mere membership of the organisation. Such an approach, in which responsibility of states in the context of conduct of an international organisation is decoupled from membership and linked to particular factual circumstances and/or conduct of the state concerned, is better attuned to the reality that states contributing to military operations led by NATO are not always NATO member states. For example, Australia was an important provider of troops for the NATO-led Afghanistan International Security Assistance Force (ISAF) in Afghanistan. This approach is the one that the ILC adopted in the ARIO. Article 48 ARIO refers to the possibility of an international organisation and one or more states being responsible for the same internationally wrongful act. The ILC ARIO Commentary clarifies that the situations envisaged by this Article are the ones referred to in Articles 14 to 18 ARIO, which concern the responsibility of an international organisation in connection with the act of a state, and in Articles 58 to 62 ARIO, which deal with the responsibility of a state in connection with the internationally wrongful act of an international organisation. Responsibility arising from these rules is sometimes referred to as 'indirect' responsibility. This appears to be the kind of responsibility that Special Rapporteur Gaja referred to when he suggested that member states could be responsible in addition to NATO for the bombing in 1999 of the territory of the FRY by NATO-led forces. He wrote that:

> Thus, one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.[33]

The contribution to planning or execution of an operation appears to refer to specific conduct of member states rather than mere membership of the organisation.

'Direct' responsibility for such conduct is then seen principally in terms of troops as organs or agents. Military forces are traditionally regarded as organs or agents of their states. The question is then how this changes when they are placed at the disposal of NATO.

[32] This includes certain circumstances irrespective of the conduct of states, such as the fact that the international organisation concerned does not provide redress for its wrongful act. It also includes certain conduct of member states, such as voting by its representative within an organ of the organisation.
[33] G. Gaja, Special Rapporteur, 'Second report on responsibility of international organizations', UN Doc. A/CN.4/541 (2 April 2004), 3, para. 7.

In terms of attribution of conduct of those forces, at least two lines of reasoning are possible. One is that the troops, as a consequence of having been placed at the disposal of NATO, have become an organ or agents of that organisation. The definitions of 'organ' and in particular of 'agent' in Article 2 ARIO are quite broad and do not preclude this possibility. If this approach is taken, Article 6 ARIO appears to contain the appropriate rule for attributing the conduct of the forces concerned. As an organ or agent of NATO, such conduct is to be attributed to NATO. This is the approach taken by the UN in relation to UN peace operations.[34] The UN considers such operations to be subsidiary organs of the principal organ that has established them. As far as the author is aware, NATO has not taken a clear public position on the question of attribution, and it is thus unknown whether it takes the same approach as the UN. In view of the emphasis NATO has placed on the role of states in the context of decision-making within the organisation in general, and in respect of NATO-led operations in particular, this seems unlikely however.[35]

An alternative approach starts from the observation that when troop contributing states place troops at the disposal of NATO, the umbilical cord between those troops and the state is not fully cut: the state retains certain powers in relation to those troops. The state organ or agent is not fully seconded, but still acts to a certain extent as organ of the seconding state. According to the ILC, this occurs for instance in the case of military contingents that a state places at the disposal of the UN for a peacekeeping operation, since the state retains, inter alia, disciplinary powers and criminal jurisdiction over the national contingent.[36] The ILC has included a separate rule for attribution in such cases of 'incomplete' secondment in Article 7 ARIO. The criterion for attribution of conduct either to the contributing state or to the receiving organisation is based, according to this Article, on the factual control that is exercised over the conduct of the organ or agent placed at the receiving organisation's disposal.[37] The ILC does not make clear precisely when control can be considered to be 'effective' or 'factual'. At one end of the spectrum are specific instructions or directions, which clearly qualify as such. It is much more difficult to determine the other end of the spectrum, however. A Dutch Court

[34] See Chapter 23 in this volume, R. Murphy and S. Wills 'United Nations Peacekeeping Operations', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.
[35] See also B. Boutin, SHARES Expert Seminar Report, 'Responsibility in Multinational Military Operations: A Review of Recent Practice', 16 December 210, available at www.sharesproject.org, 13.
[36] 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, 20, para. 1.
[37] Ibid., para. 4.

of Appeal found that there is 'effective control' if the conduct could have been prevented.[38] Upon appeal in cassation to the Supreme Court of the Netherlands of that judgment, the Supreme Court found that the Court of Appeal was justified in using such a definition.[39] This cannot be right, as in that case the conduct of troops placed at the disposal of an international organisation would always be attributable to the troop contributing states, and Article 7 ARIO would be redundant. States always have the possibility to give instructions to their troops.[40]

Where effective control lies must be determined on a case by case basis, because it relates to specific conduct. Particularly in the case of military operations, it may be difficult for a claimant or court to establish the precise facts. Conduct in military operations will often take place in the 'fog of war'. Documents and other materials may be classified by the states concerned, or by NATO, and therefore not made public. In such cases, an important factor to take into account is formal military command relationships.[41] NATO defines 'command' as '[t]he authority vested in an individual of the armed forces for the direction, coordination, and control of military forces.'[42] This reflects the fact that the purpose of a system of military command is to create a structure in which directions can be given and followed. NATO doctrine, which reflects practice, distinguishes between different levels of command and control. In most cases, troop contributing states transfer 'operational control' over forces they place at the disposal of NATO.[43] This is defined as '[t]he 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.'[44] After such control has been transferred and within the limitations referred to, decisions concerning operational issues are, in principle, the prerogative of the NATO commander. This prerogative is exercised within the parameters set out in the 'Operation Plan' (OPLAN) and the 'Rules of Engagement' (ROE). NATO defines an OPLAN as: 'A plan for a single or series of connected operations to be carried out

[38] *Mehida Mustafić-Mujić et al.* v. *the Netherlands*, ECLI:NL:GHSGR:2011:BR5386 (5 July 2011); *Hasan Nuhanović* v. *the Netherlands*, ECLI:NL:GHSGR:2011:BR5388 (5 July 2011); also ILDC 1742 (NL 2011).
[39] *The Netherlands* v. *Mustafić et al.*, ECLI:NL:HR:2013:BZ9228 (6 September 2013).
[40] P.A. Nollkaemper, 'Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 JICJ 1143, 1148.
[41] See U. Hauβler, 'Human Rights Accountability of International Organisations in the Lead of International Peace Missions', in J. Wouters, E. Brems, S. Smis, and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerpen: Intersentia, 2010), 215, 245.
[42] AAP-06, 'NATO Glossary of Terms and Definitions', edition 2012, version 2 (NATO Standardization Agency, 2012), at 2-C-9.
[43] The transfer is effected by means of a classified 'Transfer of Authority' message sent by the military authorities of the troop contributing state to the NATO commander to whom command and control is transferred.
[44] NATO Glossary of Terms and Definitions 2012, n. 42, at 2-O-3.

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.'[45] The OPLAN essentially sets out the objectives to be achieved by the operation, and in broad terms the manner in which it is envisaged that those objectives will be achieved. NATO defines Rules of Engagement as '[d]irectives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered.' [46] Both documents are approved by the North Atlantic Council for each NATO-led operation.[47]

In actual practice, command relationships are quite nuanced. A level of command and control may have been transferred by a troop contributing state to a NATO commander, but this may have been limited by the imposition of 'caveats' or by the intervention of a 'Red Card holder'. In practice, troops sometimes also receive instructions from national capitals in the absence of formal procedures providing for this. Such instructions may be similar to, contrary to, or in the absence of, instructions in the international chain of command. Such mechanisms remain exceptions to the principle that a large measure of control has been transferred by assigning operational control to the international commander, however.

Considering the limited influence that troop contributing states to NATO-led operations retain after the transfer of operational control, and the fact that NATO approves the OPLAN and ROE, it is appropriate to assert that in case of doubt whether the troop contributing state or the international organisation exercised effective control over specific conduct, there is a rebuttable presumption that conduct must be attributed to NATO.[48]

Article 7 ARIO nor the Commentary thereto are clear on the question whether the ILC considers that both a state and an international organisation may exercise effective control at the same time.[49] On the one hand, the ARIO Commentary suggests that dual attribution on

[45] Ibid., at 2-O-4.
[46] Ibid., at 2-R-10.
[47] The question of what the consequences in terms of attribution are in case troops act outside the OPLAN or the ROE would seem to depend to a large extent on whether one takes Article 6 or Article 7 ARIO, n. 5, as the starting point. In the former case, acting outside the ambit of the OPLAN or ROE is not necessarily a reason not to attribute the conduct to NATO. This is the result of the application of Article 8 of the ARIO, which provides for the attribution of conduct ultra vires of organs or agents of an international organisation. In the latter case, however, the fact that troops acted in contravention of the OPLAN or ROE could be an indication that NATO did not exercise effective control over the conduct concerned.
[48] Hauβler, 'Human Rights Accountability of International Organisations', n. 41, 249.
[49] See F. Messineo, 'Attribution of Conduct', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 60.

this basis is not possible when it states that 'control' concerns the issue to 'which entity — the contributing State or organization or the receiving organization — conduct has to be attributed'.[50] On the other hand, the Commentary also refers to a judgment by a Dutch Court that considered the possibility of dual attribution, without rejecting that possibility.[51] Commentators are also divided on this question.[52]

Apart from Article 7 ARIO, Article 61 ARIO is also important in the context of responsibility in NATO operations. This Article provides that:

> 1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
>
> 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

According to the ILC, this Article is not concerned with attribution of conduct. It thus appears to provide for responsibility of a state irrespective of whether conduct breaching an obligation of that state is attributable to it. Therefore, it could provide a basis for holding a NATO member state responsible for agreeing to the establishment of an operation, even if that state does not contribute troops.[53] The ILC stated that one of the conditions for international responsibility to arise according to this Article, is that there be a significant link between the conduct of the circumventing member state and that of the international organisation. The act of the international organisation has to be caused by the member state. Because the North Atlantic Council operates on the basis of consensus, there is at least a 'significant link' between a member state and the establishment of an operation, as well as the approval of the

[50] ARIO Commentary, n. 36, Commentary to Article 7 ARIO, 21, para. 5.
[51] Ibid., Commentary to Article 7 ARIO, 25, para. 14, at footnote 129.
[52] This kind of dual attribution must be distinguished from the situations envisaged in Articles 14–18 and 58–62 ARIO, n. 5. Spieker argues that Article 7 ARIO allows for dual attribution and that on this basis the conduct of KFOR at issue in the *Behrami/Saramati* case was attributable both to NATO and to troop contributing States. H. Krieger, 'A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights' (2009) 13 JIP 159, at 170–173.
[53] A caveat that must be made concerns the question whether in establishing a new operation, NATO member states are conferring a new power on NATO or merely making use of its existing power to carry out military operations. As Blokker points out, Article 60 ARIO, n. 5, only refers to existing powers of the organization. N. Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-term Review', in J. Klabbers and A. Wallendahl (eds.), *Research Handbook on International Organizations* (Northampton, Massachusets: Edward Elgar, 2011), 313, 329. Note that the case law of the ECtHR from which Article 61 ARIO is derived does expressly relate to the transfer of competences.

OPLAN and ROE of an operation, all matters decided on by the Council. This means that if the establishment of the operation itself would violate an obligation of the state, e.g. because its mandate violates the prohibition of the use of force in Article 2(4) of the UN Charter,[54] a member state could be responsible for not opposing such establishment. There is not necessarily such a link between each member state and the specific conduct carried out by the operation.

Another element required for Article 61 ARIO to apply is the intention on the part of the state to avoid compliance with its international obligations. International responsibility will not arise when the act of the international organisation, which would constitute a breach of an international obligation if done by the state, has to be regarded as the unintended result of the member state's conduct.[55] This constitutes a high threshold, both in terms of substance and in terms of burden of proof for an actor invoking responsibility. This is perhaps more so in the case of NATO than in the case of certain other international organisations. Because NATO is a military alliance, many documents concerning NATO decision-making are classified and therefore cannot be relied upon as evidence of a particular intention.

Article 61 ARIO appears to be derived from case law of the ECtHR and the former European Commission of Human Rights. Starting with the *M. & Co.* v. *the Federal Republic of Germany* case, they have held that the European Convention on Human Rights (ECHR) does not exclude the transfer of competences to international organisations, provided that ECHR rights continue to be 'secured'.[56] Member states' responsibility therefore continues even after such a transfer.[57] In *Gasparini* v. *Belgium and Italy*,[58] the Court applied this theory to NATO, albeit not in the context of a military operation. The case concerned the procedures of the NATO administrative tribunal, which had been approved by the North Atlantic Council, and which the applicants contended did not provide for a fair trial. The ECtHR proceeded to analyse the impugned procedures, concluding that at the time they approved these procedures, the member states could consider that they provided sufficient protection.

[54] Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).
[55] ARIO Commentary, n. 36, Commentary to Article 60 ARIO, 93.
[56] *M. & Co.* v. *the Federal Republic of Germany*, App. No. 13258/87 (EComHR, 9 January 1990). Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).
[57] *Matthews* v. *the United Kingdom*, App. No. 24833/94 (ECtHR, 18 February 1999), para. 32.
[58] *Gasparini*, n. 6.

The wording used by the Court suggests that in case equivalent protection in the international organisation to which powers have been transferred is lacking, and a particular conduct by that organisation violates the ECHR, the state party is responsible.[59] In such a case there could be shared responsibility between NATO and the state party to the ECHR.[60]

Article 61 ARIO is controversial, because it seeks to progressively develop a general rule of responsibility that would 'pierce the veil' of international organisations, by holding member states responsible for acts of the organisation.[61] To the extent that it becomes regarded as *lex lata*, it could be the basis for responsibility of states alongside that of NATO itself. The fact that NATO takes decisions by consensus increases the possibility of such responsibility.

5.2 Case law and state practice relevant to shared responsibility in the NATO context

5.2.1 General issues

Questions of shared responsibility in NATO-led operations have arisen in the settlement of claims before a number of international and domestic courts, as well as outside the courts. These cases and state practice will be discussed briefly in this section. Generally, they have touched on the issue of shared responsibility in an indirect way. The principal reason for this is the fact that courts have no jurisdiction over NATO. As a consequence, courts have focused on the question of the responsibility of states, and dealt with the responsibility of NATO itself only to the extent necessary for deciding on the responsibility of states. Notwithstanding this fact, the practice does provide some clues on the possible application of the theories discussed in paragraph 5.1, in specific factual circumstances involving NATO-led operations.

[59] Ibid., 6.
[60] The responsibility of NATO in such a case would not be based on a violation of the ECHR, as NATO is not bound by that treaty.
[61] O. Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011) 8 IOLR 291, 296.

5.2.2 International Court of Justice

In the *Use of Force* cases[62] before the ICJ, the FRY argued that if two or more states together take joint action to the detriment of a third state, they are co-authors of any internationally wrongful act derived from their joint action, and that each of the states would be responsible for that action. It argued that the respondent states were jointly and severally responsible for the actions of the NATO military command structure, which constitutes an instrumentality of the respondent states.[63] The FRY did not dispute that NATO has international legal personality. It argued that this did not preclude the responsibility of NATO member states, however. During the proceedings, several of the respondent states maintained that no facts specifically attributable to them had been adduced by the FRY.[64] France went further, arguing that the impugned conduct was attributable to NATO, and that the latter's international legal personality prevented the conduct from being attributable to France.[65] Portugal made a similar argument.[66]

It is noteworthy that other states did not make this argument, and appeared to accept that military actions carried out by NATO-led forces were attributable to them. The proceedings do not make it very clear on what legal basis the FRY considered conduct to be attributable to member states, nor what the precise views of respondent states on the question of attribution were, particularly of those states that did not explicitly reject attribution of the bombing to them. With respect to the latter states, it is possible that they considered that NATO was not an international legal person, and that therefore conduct could a priori only be attributable to states.[67] With regard to the FRY, certain statements made during the oral arguments suggest that it considered that member states were responsible because of their role in the decision-making within the North Atlantic Council. In particular, during the oral proceedings the FRY focused on the role of member states in decision-making within NATO organs. It stated for example that:

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[62] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium; Canada; France; Germany; Italy; the Netherlands; Portugal; Spain; United Kingdom; United States of America)*, see www.icj-cij.org (together *Use of Force* cases).
[63] P.A. Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', SHARES Research Paper 01 (2011), ACIL 2011-01, available at www.sharesproject.nl, at 32.
[64] Canada, CR99/16, 15, para. 24; Spain, CR99/22, 10.
[65] France, CR2004/12, 19, paras. 50-51.
[66] Portugal, CR2004/9, 22-23, para. 4.8.
[67] Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', n. 63.

> The North Atlantic Council directs the war against Yugoslavia as a joint enterprise. It constantly says so. It would be a legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member states.[68]

This statement points to the theory of 'dédoublement fonctionnel', i.e. the theory according to which representatives of states in those organs acted not only qua organ of NATO, but also as an agent of the member state concerned. The theory of 'dédoublement fonctionnel' was not included by the ILC in the ARIO.[69] It could also be that the FRY considered that even though the forces of the states participating in the operation had been placed at the disposal of NATO, those states continued to exercise 'effective control' over those forces in the sense of Article 7 ARIO. Indeed, the FRY stated that 'even as a part of the integrated military force of NATO, military forces of the Respondents are under their control and guidance'.[70] As is well-known, the ICJ did not render judgments on the merits in these cases.

5.2.3 European Court of Human Rights

In the *Banković* case before the ECtHR, the applicants submitted that the actions by NATO-led forces in the FRY were imputable, jointly and severally, to the respondent states. The application focused in particular on the role of the representatives of those states in the selection of targets within the relevant NATO bodies.[71] The applicants appear to have had in mind the theory of 'dédoublement fonctionnel'.[72] They also appear to have based their attribution argument on the transfer of powers by the member states to NATO. The application suggests that the powers concerned were decision-making powers delegated to military organs, specifically in connection with Operation Allied Force. Of the respondent states, France argued that the bombing was not attributable to the respondent states, but to NATO. The other respondents focused on the personal jurisdiction of the Court and the 'indispensable third party' doctrine. The Court declared the application inadmissible on the

[68] Federal Republic of Yugoslavia, CR99/25, at 16.
[69] The ILC underscores that participation in decision-making in accordance with the rules of the organisation does not amount to 'direction and control' by a State over that organisation, thereby suggesting that the former does not lead to responsibility. See ARIO Commentary, n. 36, Commentary to Article 59 ARIO, 92, para. 2. Pleadings by Canada and the Netherlands suggest that they understood the FRY to be putting forward this theory, which they stated lacked a basis in international law. Canada, CR99/27, the Netherlands CR99/31, para. 3.
[70] FRY, CR99/14, para. 5.5.
[71] *Banković*, n. 7. Application on file with the author.
[72] See M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff Publishers, 2005), 120–124.

basis that the victims did not fall within the jurisdiction of the respondents as required by Article 1 ECHR. It did not pronounce on the attribution of the impugned acts.

The ECtHR dealt with the *Behrami* and *Saramati* cases together. In the *Behrami* case, the applicants complained of the failure to mark or remove unexploded ordnance by French troops forming part of the NATO-led KFOR. In the *Saramati* case, the application concerned detention by KFOR, as ordered by the Norwegian KFOR commander at the time. The applicants argued that the impugned conduct was not attributable to the UN or NATO, but rather to the troop contributing states in view of the 'significant power' those states retained over their troops. Alternatively, they argued that the troop contributing states remained responsible under the ECHR even after the transfer of powers to NATO, because that organisation did not provide equivalent protection of human rights. France put forward that the troops concerned were under NATO command and UN political control. In such circumstances, the acts of the national contingents could not be imputed to a state, but rather to the UN which exercised overall effective control of the territory. Both France and Norway stressed the separate international legal personality of NATO and the UN. The Court first determined that at the point in time at which the incident occurred that led to the application, KFOR was involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf. Their action or inaction in this field was, according to the Court, attributable to the UN because UNMIK was a subsidiary organ of the UN.[73] With regard to the detention by KFOR, the Court found, based on an inquiry into the delegation of the Security Council's security powers to KFOR, that the UN Security Council retained 'ultimate authority and control' and that 'effective command of operational matters was retained by NATO'.[74] Therefore, according to the Court, the impugned action was attributable to the UN. The Court then looked at the *M. & Co.* theory, but considered that it could not apply it in this case because the measures concerned were taken pursuant to a mandate under Chapter VII of the UN Charter. To inquire into these measures would 'be to interfere with the fulfillment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations'.[75] The 'ultimate authority and control' test used by the Court appears to be an interpretation of Article 7 ARIO. This at least is suggested by the fact that this is the only Article of the ARIO mentioned by the Court in its discussion of the relevant law. The 'ultimate authority and control test' appears to be based on an approach that has

[73] *Behrami*, n. 13, para. 143.
[74] Ibid., para. 140.
[75] Ibid., para. 149.

been advocated in legal literature concerning the legality of delegations from the Security Council.[76] The Court appears to have interpreted the 'effective control' for organs or agents placed at the disposal of an international organisation test through this lens. This was not how the ILC intended the Article to be interpreted, however. The final Commentary to Article 7 ARIO, in discussing the *Behrami/Saramati* decision, states that '[o]ne may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.'[77] The second aspect of the decision that has received much criticism is that the Court failed to inquire into the possibility of dual or multiple attribution, i.e. whether NATO and/or troop contributing nations could also be responsible.[78] The non-application by the Court of the *M. & Co.* theory has also been criticised.

5.2.4 Domestic case law

There have also been a number of domestic cases in which attribution of conduct in the context of a NATO-led operation was at issue. The *Markovic* case before the Italian Supreme Court was concerned with the same facts as the *Banković* case.[79] The nationality of the planes that carried out the attack was unknown. The relatives of the victims contended that the Italian government could be held liable on two grounds: first, as a NATO member state for having participated in the decision to select the headquarters of the Serbian state television and radio as a specific target; and secondly, because Italian military bases were used to carry out the bombing operation. The latter ground was said to allow the claimants to rely on Article VIII(5) of the NATO SOFA.[80] The Italian Supreme Court in its order rejecting the complaint based itself largely on the 'act of government' doctrine. It regarded acts pertaining to the conduct of hostilities as acts that were per se immune from judicial review. In this context, it referred to the choice of a modality of conducting hostilities that it considered to have been

[76] K. Milutinovic Larsen, 'Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test' (2008) 19 EJIL 509, 521.
[77] ARIO Commentary, n. 36, Commentary to Article 7 ARIO, 23, para. 10.
[78] Larsen, 'Attribution of Conduct in Peace Operations', n. 76, 517. Krieger, 'A Credibility Gap', n. 52.
[79] *Markovic*, n. 8.
[80] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 19 June 1951, 199 UNTS 67.

made by the Italian government.[81] This suggests that the Court considered the non-veto by Italy of target lists in the North Atlantic Council as conduct of Italy.

After the Italian Supreme Court had issued its order, the plaintiffs lodged an application with the ECtHR, claiming a violation of Article 6 ECHR. Before the ECtHR, Italy submitted inter alia that the bombing was imputable to NATO.[82] The issue of attribution did not play an important role in the case, however. This was the case because the ECtHR had found the application inadmissible as regards inter alia Article 2, because there had been no 'jurisdiction' in the sense of Article 1 ECHR.[83] The Court focused rather on whether the legal proceedings in Italy had been in accordance with Article 6 ECHR. In this context, the issue of attribution was considered only obliquely. Italy argued inter alia that local remedies had not been exhausted because the applicants did not continue their case against NATO. On this point, the Court held that no concrete example of a civil action being successfully brought against NATO had been provided. For that reason, the Court was not convinced by the government's argument that the proceedings against NATO would have offered better prospects of success than those against the Italian state. This suggests that the Court did not exclude that the underlying conduct was attributable, or also attributable, to NATO.

Another attack that took place during Operation Allied Force led to a case before the German courts.[84] The attack was not carried out by Germany. The plaintiffs however argued that all member states were responsible jointly and severally for the attack, which they argued had breached several norms of IHL. All member states had the right of veto when the target list that included this particular target was put before the North Atlantic Council, but none of them had used that right. The plaintiffs also argued that Germany was responsible, because German planes had allegedly provided air space protection for the airplanes carrying out the attack. Germany argued that it had limited control over the operation as a whole, and had no detailed information about the specific attack concerned. Germany also maintained that the

[81] Ibid. ('La scelta di una modalità di conduzione delle ostilità rientra tra gli atti di Governo.'), at para. 2.
[82] *Markovic and others* v. *Italy*, App. No. 1398/03 (ECtHR, 14 December 2006), para. 59.
[83] *Markovic and others* v. *Italy*, App. No. 1398/03 (ECtHR, 12 June 2003).
[84] Bombing of the Bridge of Varvarin, Landgericht Bonn, Judgment of 10 December 2003, No. 1 O 361/02, available at dejure.org/dienste/vernetzung/rechtsprechung?Text=NJW%202004,%20525; Oberlandesgericht Cologne, Judgment of 28 July 2005, 7 U 8/04, available at dejure.org/dienste/vernetzung/rechtsprechung?Text=NJW%202005,%202860; German Supreme Court (Bundesgerichtshof), Judgment of 2 November 2006, III-ZR 190/05, available at lexetius.com/2006,2924; Bundesverfassungsgericht, ECLI:DE:BVerfG:2013:rk20130813.2bvr266006 (13 August 2013), 2 BvR 2660/06 and 2 BvR 487/07, see www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/08/rk20130813_2bvr266006.html (*Varvarin*).

attack could not be attributed to it, because no German planes had been involved in the attack, directly or indirectly.[85] Germany's written submissions to the Constitutional Court included an extensive discussion of questions of attribution.[86] Germany denied that there exists a general joint and several responsibility of an international organisation's member states for the acts of that organisation, as submitted by the plaintiffs. Any responsibility of Germany would thus have to be in connection with the internationally wrongful act of another state and/or NATO. The submission then applied Article 58 and 59 ARIO and Articles 16 and 17 of the ARSIWA respectively to the facts of the case, and concluded that none of these are applicable.[87] The German courts rejected the claims on the basis that IHL does not provide for the invocation of responsibility by individuals vis-à-vis states. The courts then went on to examine the possible responsibility of Germany under domestic German civil law, but did not find such responsibility. It is interesting to note that the courts rejected the claim, based on Germany not vetoing the target, on the basis of the fact that in doing so German authorities had not committed a breach of official duty. This rejection was not based on a consideration that those authorities were acting as part of a NATO organ when they did so.

5.2.5 Other state practice

In a number of cases, individual member states have taken measures that could be construed as the fulfillment of obligations arising from international responsibility, following acts by forces they had placed at the disposal of a NATO-led operation. One example is the apologies and reparations made by the US for the bombing of the Chinese embassy in Belgrade during Operation Allied Force.[88] It has been suggested that the US considered this attack to be attributable to it on the basis that the US has overwhelming control over the NATO decision-making process.[89] Other possible legal bases are at least as plausible, however. The bombing resulted from information on the location of the target passed by the US to NATO. This could be seen as a case of 'aid or assistance' by the US to NATO. Another possibility is that the US

[85] *Varvarin*, Judgment Landgericht Bonn, ibid., paras. 109-110.
[86] A. Zimmermann, 'Verfassungsbeschwerdeverfahren - 2 BvR 2660/06 und 2 BvR 487/07 – Stellungnahme der Bundesregierung', Submission by Germany, March 2010, available at www.nato-tribunal.de/varvarin/Stellungnahme_d_Bundesregierung_nebst_Anlagen.pdf.
[87] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA). Articles 16 and 58 ARSIWA concern aid or assistance to an internationally wrongful act of a state or organisation, Articles 17 and 59 ARSIWA concern direction and control of such a wrongful act.
[88] S.D. Murphy, 'Contemporary Practice of the United States' (2000) 49 AJIL 127.
[89] C. Ryngaert and H. Buchanan, 'Member State Responsibility for the Acts of International Organizations' (2011) 7 ULR 131, 140.

decided to adopt the conduct of NATO as its own, in application of Article 62(1) ARIO.

Finally, it may be asked whether the US considered that the US actions reflected acceptance of international responsibility at all. The US State Department Legal Advisor is reported as having said of at least part of the settlement that 'payment will be entirely voluntary and does not acknowledge any legal liability. This payment will not create any precedent'.[90]

After an incident in which US personnel forming part of the NATO-led ISAF killed 24 Pakistani border guards in 2011, the commander of ISAF and US troops in Afghanistan apologised to Pakistani authorities. It is unclear in which capacity he did so, but it is interesting that the Pakistani authorities specifically demanded a high-level official apology from the US, and in response to the incident conducted a policy review of its ties with the US.[91] This suggests that Pakistan held the US responsible for the incident, but it is unclear on precisely which legal basis.

In the safety of life at sea incident described above, it was argued by the Rapporteur of the Council of Europe's Committee on Migration, Refugees and Displaced Persons that both NATO and the flag states of ships forming part of Operation Unified Protector, who were reportedly near the boat in distress but did not respond, were responsible. The Rapporteur did not however develop on the legal aspects of attribution and responsibility, so that it is unclear on the basis of which principles she reached this conclusion. It is interesting to note that the Netherlands government, in response to questions from Parliament concerning this incident, stated that the NATO member states are aware of their responsibilities under international law in respect of ships in distress.[92] This suggests that it viewed these states as at least potentially responsible. This may be related to the nature of the obligation in Article 98 LOSC, which is addressed to flag states. When a state places a warship at the disposal of NATO, this does not change the flag state of that ship. NATO does not become the flag state and as such cannot violate Article 98 LOSC.

Another instance of relevant practice is the detention and subsequent transfer of persons by ISAF troops. Individual states participating in the operation have concluded Memoranda of

[90] S.D. Murphy, *United States Practice in International Law – Volume 1:* 1999-2001 (Cambridge University Press, 2002), 102.
[91] 'ISAF Commander has Offered "Personal Apology" over Salala Incident', Pakistan Defence News, 3 July 2012, available at pakarmedforces.com/2012/07/isaf-commander-had-offered-personal.html.
[92] 'NAVO - Reactie op verzoek Van Bommel over het beleid van de NAVO voor NAVO-schepen die vluchtelingen aantreffen op de Middellandse Zee', Kamerstukken II 2011-2012 (Parliamentary papers), no. 28676-151, 7 May 2002, 1.

Understanding with Afghanistan regulating such transfer. In domestic court cases concerning detention and transfer, Canada and the UK have not argued that the detention and transfer carried out by the troops they contributed to ISAF are not attributable to them. In the literature, it has been suggested that particularly in the case of detention, the authorities of troop contributing states will frequently interfere with the international organisation's command, and give orders to their contingents, and that this may lead to the conduct being attributable to those states because they exercise effective control over the conduct concerned.[93] This is echoed by the NATO Legal Advisor who has stated that 'it is the nationality of the force involved in detention that determines initially the procedures and rules by which an individual will be detained'.[94]

6. Processes

6.1 Limited avenues for implementing shared responsibility in relation to NATO

This section discusses the availability of avenues for implementing shared responsibility in relation to NATO. It will become clear that this availability is very limited.

6.2 Courts

Whether shared responsibility in relation to NATO can be implemented through courts depends on those courts being able to exercise jurisdiction over NATO, as well as states. The possibilities for courts to this this are very restricted, if not entirely absent.

NATO cannot be a party to proceedings before international courts. As regards the ICJ, its Statute provides that only states may be parties to cases before the Court.[95] Thus, in the *Use of Force* cases, the FRY could not successfully bring an application against NATO.[96] As a

[93] C. Droege, 'Transfers of Detainees: Legal Framework, Non-refoulement and Contemporary Challenges' (2008) 90 IRRC 669, 685.
[94] B. de Vidts, 'A NATO Perspective', in International Institute of Humanitarian Law, San Remo (ed.), *International Peace Operations and International Humanitarian Law* (Rome, 27 March 2008), 57, at 59.
[95] Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 3 Bevans 179, Article 34 (1).
[96] N. Blokker, 'From a Dispute about the Use of Force to a Non-dispute about Jurisdiction', in N. Blokker, R. Lefeber, L. Lijnzaad, and I. van Bladel (eds.), *The Netherlands in Court: Essays in Honour of Johan G. Lammers* (Leiden: Brill, 2006), 19, 40.

consequence, the only option left to the FRY was to bring applications against NATO member states. Similarly, NATO cannot be a party in proceedings before the ECtHR. The ECHR is open to signature and ratification by member states of the Council of Europe. The possibility for the accession of the EU to the ECHR was opened by the entry into force of Protocol 14 to the Convention in 2010, but it is limited to this specific organisation.[97]

The immunity from jurisdiction of NATO will generally be an obstacle to domestic courts exercising jurisdiction over NATO, at least in NATO member states.[98] Those states are parties to the Ottawa agreement that provides that NATO shall enjoy immunity from every form of legal process.[99] An example of the application of immunity is the case of *El-Hamidi and Chlih* v. *NATO*. This case concerned a civil complaint brought before the Brussels Court of first instance. It related to a bombing by the NATO-led operation Unified Protector in Libya. In October 2012, the Brussels Court declared that it did not have jurisdiction over NATO by reason of the organisation's immunity.[100]

Whether proceedings against NATO member states or troop contributing states can be brought before an international court depends on whether the state concerned has accepted the jurisdiction of that court. A good illustration of cases in which the ICJ found that such consent had not been accepted at the relevant point in time are the *Use of Force* cases, discussed above. States may also try to argue that the Court should decline to exercise jurisdiction based on the 'indispensable third party' doctrine, as certain respondent states did in the *Banković* case before the ECtHR.[101]

Whether proceedings can be brought against NATO member states or troop contributing states before a national court will depend on the domestic legal system concerned. Although national legal systems vary, many include legal doctrines that may limit the possibility that a state will be held responsible. For example, many legal systems contain a doctrine according

[97] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004, in force 1 June 2010, CETS No. 194.
[98] This author is not aware of any cases brought against NATO outside its member states.
[99] Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, Ottawa, 20 September 1951, in force 18 May 1954, 200 UNTS 3 (Ottawa Agreement), Article V.
[100] *El Hamidi and Chlih* v. *NATO*, n. 9.
[101] See on the doctrine in the context of the ECtHR M. den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights (2013) 4 JIDS 361, at 373-375.

to which certain acts of state are immune from jurisdiction. The order of the Italian Supreme Court in the *Markovic* case provides an example of the application of such a doctrine.[102]

It may be concluded that there are many obstacles to the exercise of jurisdiction by international or domestic courts over NATO and member states or troop contributing states, respectively. The chances of a court exercising jurisdiction over both are very small indeed. The author is not aware of any case in which this has happened.

6.3 Claims settlement procedures

Status of Forces Agreements concluded between NATO and host states generally include a provision on the settlement of claims. The SOFA for ISAF, for example, provided that the ISAF and its personnel will not be liable for any damages to government property caused by any activity in pursuit of the ISAF mission.[103] Such provisions and the actual claims settlement procedures established concern claims of a private law nature and are in principle not relevant in the framework of international responsibility. Claims settlement procedures are generally established in the context of NATO operations to counterbalance the impossibility to bring private law claims arising from the operation before the courts, as a result of the immunity granted to the operation. A claim of a private law nature may be based on conduct that would also constitute an internationally wrongful act, but this does not play a role in the claims settlement process. The host state can bring a claim for breach of an international obligation directly against NATO without need for a claims settlement mechanism. NATO has developed a non-binding internal policy regarding claims in crisis response operations. This document contains guidelines on the relationship between NATO Operational Headquarters, as well as on categories of claims that will not be considered for compensation.[104] Concerning the first element, the policy provides for a waiver between troop contributing nations, and between such nations and the operational headquarters, for material damage and for injury or death. Troop contributing states are expected to settle claims resulting from conduct of their troops. At first sight this could be considered as reflecting the view that the conduct of those troops must be attributed to those states. Such a conclusion is

[102] See n. 8.
[103] Arrangements Regarding the Status of the International Security Assistance Force, Annex A to the Military Technical Agreement between ISAF and the Interim Administration of Afghanistan, 4 January 2002, para. 10, available at webarchive.nationalarchives.gov.uk/+/http://www.operations.mod.uk/isafmta.pdf (SOFA for ISAF).
[104] P. Degezelle, 'General Principles of the NATO *Claims* Policy', NATO Legal Gazette, 13 July 2012, at 18-19.

premature, however. In the first place, as already noted, the claims policy concerns claims of a private law nature. In addition, the distribution of responsibility agreed between NATO and the troop contributing states may be regarded as *res inter alios acta* vis-à-vis third parties.

7. Conclusion

As was noted above, the heart of the matter discussed in this contribution is the relationship between NATO and member or troop contributing states. This relationship largely determines the possibilities for shared responsibility between the organisation and one or more states. In this contribution, a number of these possibilities were analysed, taking the ARIO as a starting point.

Section 5.2 inquired into how these possibilities have been dealt with in case law and state practice relevant to shared responsibility in the NATO context. It was found that there is very limited case law and practice in which shared responsibility has been confronted head on. Rather, the focus has been on the responsibility *either* of NATO *or* of one or more states.

This is at least in part a result of the nature of the dispute settlement mechanisms involved. For various reasons, international and national courts have not been able to deal with, or have been able not to deal with, claims against both NATO and member states. The ICJ only has jurisdiction over states, and the ECtHR lacks jurisdiction over NATO because NATO is not a party to the ECHR. Domestic courts have declined exercising jurisdiction over NATO because of the immunity from jurisdiction of that organisation, as in the *El-Hamidi* case, or applicants have discontinued their claims against NATO presumably on the basis of such immunity, as in the *Markovic* case before the Italian courts. More generally, there appears to be no dispute settlement mechanism before which the international responsibility of NATO can be invoked, thus creating a ‘geometrie variable’ in terms of possible respondents.

As a result, practice has tended to focus on the question whether or not states are responsible in the framework of a NATO-led operation, and the question of NATO responsibility or shared responsibility has been somewhat neglected.

In part as a result of this fact, the state practice discussed above does not allow for clear conclusions concerning the acceptance in state practice of the possibility of shared

responsibility in general. It can be concluded, however, that the available practice does not as a general principle reject the possibility of shared responsibility.

It is true that in the *Use of Force* cases France and Italy argued that NATO rather than they were responsible with respect to the facts of that case, but they did not argue that there could be no shared responsibility under any circumstances. In the *Varvarin* case, Germany itself discussed possible grounds for shared responsibility in its submission to the Bundesverfassungsgericht, finding that in this case these did not lead to attribution to Germany.[105]

The practice suggests that the content of the primary norm plays an important role in situations where arguably there is a situation of shared responsibility. This is illustrated by the distress at sea incident during Operation Unified Protector. Because Article 98 LOSC concerns flag states, and naval vessels placed at the disposal of NATO retain their national flag, it is not illogical that states would consider that a breach of that obligation would be attributable to them, even after the ship concerned had been placed at the disposal of NATO.

As regards secondary norms, the practice does not support the existence of a general principle of attribution that flows from the participation in a common enterprise.[106] Such a theory was rejected by the respondents in the *Use of Force* cases, as well by Germany in the *Varvarin* case. This suggests that the mere membership of an organisation does not justify 'piercing the veil' of that organisation and holding its member states responsible for conduct of the organisation.

This does not preclude the possibility that in certain specific situations where there is a link between the state concerned and the harmful outcome that goes beyond mere membership of the organisation, there can be shared responsibility between the state and the organisation.

It is noteworthy that in the state practice discussed, potential grounds for 'direct' responsibility of states in the context of NATO-led operations seems to have played a minor role. Only in the *Behrami/Saramati* case does Article 7 ARIO appear to have been applied, and in a manner which has been strongly criticised by the ILC and in the literature.

[105] *Varvarin*, n. 84.
[106] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 424–425.

Plaintiffs in the case law discussed have particularly focused on the role of states in the decision-making of the organisation. In this regard, NATO has suggested that it is in a position that is different from many other organisations, because decision-making in NATO takes place by consensus. It has implied that this must have consequences for the regime of responsibility, presumably in the sense that there is a presumption that member states are implicated.[107] Interestingly, this appears to reflect arguments made by claimants trying to hold NATO member states responsible. The theory of 'dédoublement fonctionnel' was relied on in the *Use of Force* cases before the ICJ, in the *Banković* case, as well as in the *Markovic* and *Varvarin* cases. It is interesting to note that respondent states in the cases concerned do not appear to have expressly rejected the suggestion that the conduct of their representatives in the North Atlantic Council can be attributed to the state they represent. Such conduct could then arguably constitute 'aid or assistance' by the state in the commission of an internationally wrongful act by the international organisation. The ILC however suggests that this is not the case as long as the conduct of the state representative is in accordance with the pertinent rules of the organisation.[108] Alternatively, the role of states in the decision-making process of NATO could also be seen through the lens of Article 61 ARIO. This Article requires there to be a significant link between the conduct of the member state and that of the international organisation. The act of the international organisation has to be caused by the member state. Because of the fact that the North Atlantic Council operates on the basis of consensus, there is at least a 'significant link' between a member state and the establishment of an operation, as well as the approval of the Operational Plan and Rules of Engagement of an operation, all matters decided on by the North Atlantic Council. A more in-depth analysis of the role of state representatives in the decision-making organs of international organisations, which is outside of the scope of this contribution, appears useful.

The theory of attribution that the ECtHR developed in its case law in the wake of the *M. & Co.* case appears to be limited to the framework of the ECHR. It has not been adopted by other courts, and does not even appear to have been put forward by plaintiffs outside the context of the ECHR. This leads to the conclusion that the ECtHR has developed a differentiated regime.[109] It has linked such a differentiation with the object and purpose of the

[107] See Comments and observations received from international organizations, n. 5.
[108] See ARIO Commentary, n. 36, Commentary to Article 59 ARIO, 92, para. 2. Commentators are divided. See inter alia Ryngaert and Buchanan, 'Member State Resonsibility for the Acts of International Organizations', n. 89, 134; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels: Bruylant, 1998), 469-470.
[109] See Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 106, 415-417.

ECHR, in other words with the human rights nature of the norms involved. Such a regime constitutes a *lex specialis* in the sense of Article 55 ARSIWA and Article 64 ARIO.