

Understanding the Challenge of Legal Interoperability in Coalition Operations

David S. Goddard*

INTRODUCTION

Coalitions are ubiquitous in modern military operations and play a central role in many States' security strategies.¹ They may be permanent or temporary, created under long-standing alliances, such as NATO, or established ad hoc to meet the needs of a specific situation. Their degree of integration may also vary, from loose alignments of States with shared interests to close-knit structures with unified chains of command. In each case, however, they are formed because significant advantages flow from operating alongside partners rather than alone. The benefits are not only practical in terms of the size and capabilities of the force that can be assembled to achieve a task, but they can also be political, with respect to the substantial legitimacy that accrues through collective action. However, there are costs as well. Managing and reconciling differences between States adds complexity to an operation, thereby potentially reducing the effectiveness of the coalition. Thus, for a coalition to succeed, its members must be able to operate efficiently alongside one another, an attribute referred to as "interoperability."²

Interoperability has several dimensions, including the training armed forces receive, the equipment with which they deploy, and the doctrine under which they operate.³ One important aspect of interoperability is "legal interoperability." While this is often defined as the management of legal differences between coalition partners,⁴ the challenge of legal interoperability arguably runs deeper.

* David S. Goddard is a barrister serving in the Royal Navy and posted, at the time this article was written, as a faculty member of the Stockton Center for the Study of International Law at the U.S. Naval War College. The views expressed are the author's own and do not necessarily represent those of the UK Ministry of Defence or the UK government, the U.S. government, the U.S. Department of the Navy or the Naval War College. © 2017, David S. Goddard.

1. See, e.g., PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 7 (2015); HM GOVERNMENT, NATIONAL SECURITY STRATEGY AND STRATEGIC DEFENCE AND SECURITY REVIEW 2015 ¶ 4.39 (2015).

2. In discussing interoperability, NATO doctrine emphasizes that "[t]he effectiveness of Allied forces in peace, crisis or in conflict, depends on the ability of the forces provided to operate together coherently, effectively and efficiently. Allied joint operations should be prepared for, planned and conducted in a manner that makes the best use of the relative strengths and capabilities of the forces which members offer for an operation." North Atlantic Treaty Organization, *Allied Joint Doctrine for Air and Space Operation*, ¶ 2.2.1, AJP-3.3 Ed. B Version 1 (April 2016).

3. According to NATO, interoperability "has three dimensions, technical (e.g., hardware, systems), procedural (e.g. doctrines, procedures) and human (e.g. language, terminology, and training)." *Id.*

4. Legal interoperability is helpfully defined by the International Committee of the Red Cross "as a way of managing legal differences between coalition partners with a view to rendering the conduct of multinational operations as effective as possible, while respecting the relevant applicable law." INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 32–33 (2011). See also AGNIESZKA JACHEC-NEALE, THE CONCEPT OF MILITARY OBJECTIVES IN

It arises, fundamentally, because individual States may be responsible in law for some, though not necessarily all, of the activities conducted under the auspices of a coalition of which they are a part. As a result, each coalition member has a particular interest in satisfying itself, to its own standards, as to the lawfulness of the conduct for which it may be held responsible. Because the legality of conduct attributable to a State must be considered in light of that State's own legal obligations, substantive legal differences can arise between coalition members. Even when their obligations are the same, the members may differ in how they interpret those obligations and how, or even if, they are to be fulfilled. Therefore, while taking account of legal differences is an important component of legal interoperability, the challenge ultimately concerns the need for States to protect their own legal interests, while minimizing the impact on the effectiveness of operations.

This article presents a framework for understanding and overcoming the challenge of legal interoperability. It begins with an examination of the law of State responsibility in order to understand how and when acts undertaken by a coalition are attributable to individual States. These determinations establish the activities in which States have an individual legal interest, and over which they may, therefore, feel the need to exert control. However, as will be discussed, several issues within this body of law remain controversial. Rather than attempting to resolve these, the article highlights the relevance of each area of controversy to coalition operations. Next, the article analyzes why differences arise between States with respect to their position on the law. As will be explained, the reasons go beyond differing substantive legal obligations; they include questions of interpretation, application and acceptance of risk. Finally, the article concludes with an assessment of how States' legal interests may be protected, and their differences managed, to achieve legal interoperability in practice. This challenge must be met at all levels of a military operation and involves a careful balance between providing uniformity amongst coalition members and unnecessarily hampering the flexibility of individual States to act to the full extent of their perceived legal authority.

Three important points must be made at the outset. First, the article examines only the *legal* interests of States and will not consider related questions of policy, except insofar as they concern the legal positions that States adopt. Second, it considers the obligations of States rather than of individuals, who may bear their own legal responsibility for actions undertaken during military operations.⁵ Finally, the focus will be on international law, rather than on constraints that may be imposed on States and their armed forces by their own

INTERNATIONAL LAW AND TARGETING PRACTICE 215-51 (2015); Marten Zwanenburg, *International Humanitarian Law Interoperability in Multinational Operations*, 95 INT'L REV. OF THE RED CROSS 681 (2013).

5. The circumstances in which this is the case may differ between States. For example, if a State is a member of the International Criminal Court, its nationals are potentially subject to the jurisdiction of the Court wherever they operate. Rome Statute of the International Criminal Court art. 12(2)(b), July 17, 1998, 2187 U.N.T.S. 90.

domestic law.⁶

I. STATE RESPONSIBILITY FOR ACTS UNDERTAKEN AS PART OF A COALITION

Under the law of State responsibility,⁷ States incur responsibility for their “internationally wrongful acts.”⁸ As set out in Article 2 of the International Law Commission’s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), there are two elements required to establish State responsibility for an internationally wrongful act: first, the attribution of particular conduct to a State and, second, that the conduct under consideration be a breach of that State’s obligations under international law.⁹ On the latter question of breach, it suffices to emphasize the point that the lawfulness of conduct attributable to a State must be considered in light of *that State’s* legal obligations.¹⁰ This is the case even in situations, discussed below, where the same conduct is attributable to more than one State. In that case the lawfulness of the conduct must be judged separately, according to each State’s own legal obligations, meaning that it may be lawful for one State but not for another. This need to consider the law that binds each State, individually, explains the importance of accounting for substantive legal differences between coalition partners. However, as will be discussed below, such substantive differences account for only part of the legal interoperability challenge.

Turning to the question of attribution, the starting point with respect to coalition activities is the rule that the conduct of a State’s organs, including its

6. A compelling example of this is the constitution of Japan, which imposes significant restraints on the State with respect to the employment of its armed forces, over and above those imposed by international law. See, e.g., Hitoshi Nasu, *Japan’s 2015 Security Legislation: Challenges to its Implementation under International Law*, 92 INT’L L. STUD. 249 (2016).

7. In recent years, the International Law Commission (ILC) has conducted two projects which have assisted greatly in addressing questions related to the law of State responsibility. The first concentrated solely on the responsibility of States, resulting in a set of articles adopted by the ILC as the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), accompanied by commentary to each article. Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, UN Doc. A/56/10, at 59 (2001) [hereinafter ARSIWA]. The second considered the responsibility of international organizations, resulting in another set of articles referred to as the Draft Articles on the Responsibility of International Organizations (DARIO). Int’l Law Comm’n, Rep. on the Work of its Sixty-Third Session, U.N. Doc. A/66/10, at 69 (2011) [hereinafter DARIO]. While both are highly influential, they are not, as products of the ILC, binding in a strict legal sense. Furthermore, the aim of both projects was the “codification and progressive development” of the law. ARSIWA, *supra*, General Commentary, ¶ 1; DARIO, *supra*, General Commentary, ¶ 1. Nevertheless, the following discussion will draw heavily from ARSIWA and DARIO, with areas of controversy highlighted where relevant. For commentary on the law of State responsibility, see generally, JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (2013). On the application of the law of State responsibility to military operations, see Boris Kondoch & Marten Zwanenburg, *International Responsibility and Military Operations*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 559–77 (Terry D. Gill & Dieter Fleck, eds., 2d ed. 2015).

8. ARSIWA, *supra* note 7, art. 1.

9. *Id.* art. 2.

10. *Id.* commentary to art. 1, ¶ 6 (“Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.”).

armed forces, is generally attributable to that State.¹¹ This includes *ultra vires* behavior, i.e., that which is in excess of the authority granted to the organ or is contrary to the instructions of the State, e.g., rules of engagement, so long as it is done in an official capacity.¹² The principle also extends to situations where a State's armed forces act jointly with those of another State in breaching an obligation they both owe another. This would be the case, for example, where two States together attack a third, in violation of the prohibition on the use of force set out in Article 2(4) of the UN Charter. Each is responsible independently for the violation of international law,¹³ so long as its involvement amounts, as Crawford puts it, "to an element of the unlawful act."¹⁴ What this means will depend on the unlawful act in question, but, in the context of a violation of Article 2(4), it would certainly be the case where the armed forces of two States are used, together, to mount the attack against the third State. However, if the involvement of one State is limited only to aiding in the commission of an international unlawful act by the other, for example where the assisting State merely allows its territory to be used to mount the attack, it may still bear secondary responsibility for the provision of aid or assistance.¹⁵ This mode of liability will be further discussed below.

There are several, narrow, exceptions to the general rule that a State is responsible for the actions of its own armed forces. Two are of potential relevance to coalition operations. First, a State may no longer be responsible for the actions of armed forces placed at the disposal of another State.¹⁶ In such a situation, the conduct of the individuals concerned is attributable to the receiving State, as though they were organs of that State, and is no longer attributable to the sending State. At first sight, this might appear particularly pertinent to coalition operations, where elements of one State's armed forces may be placed under the command of an officer of another State, or where individuals of one State's armed forces are embedded within the armed forces of another. However, for this provision to apply, the individuals in question must be under the "exclusive direction and control [of the receiving State], rather than on instructions from the sending State."¹⁷

While there are situations in other contexts where the standard of exclusive direction and control is met without controversy,¹⁸ its application to armed forces is difficult in practice. The issue concerns the question of exclusivity, in

11. *Id.* art. 4. See also CRAWFORD, *supra* note 7, at 116–19; KONDOCH & ZWANENBURG, *supra* note 7, at 561.

12. ARSIWA, *supra* note 7, art. 7.

13. *Id.* commentary to art. 1, ¶ 6; *id.*, art. 47. See also CRAWFORD, *supra* note 7, at 333–36.

14. CRAWFORD, *supra* note 7, at 335.

15. ARSIWA, *supra* note 7, art. 16.

16. *Id.* art. 6. See also CRAWFORD, *supra* note 7, at 132–36.

17. ARSIWA, *supra* note 7, commentary to art. 6, ¶ 2.

18. Crawford gives the example of the Judicial Committee of the Privy Council, a judicial body placed by the UK at the disposal of certain Commonwealth States to act as their court of final appeal. CRAWFORD, *supra* note 7, at 133.

light of the control that States retain over forces they contribute to a coalition. Even where elements of the armed forces of two or more States are integrated into a unified command structure, each contributing State will usually reserve to itself the ultimate authority to direct the conduct of its own forces, including the option to end their participation or veto particular activities. States also tend to retain authority over their forces for discipline, pay and many other administrative matters. In such circumstances, it will be difficult to argue that the individuals in question are operating under the exclusive direction and control of the receiving State.

To illustrate, in *Jaloud v. Netherlands*, the European Court of Human Rights (ECtHR) found that the conduct of members of the Dutch armed forces operating in Iraq under the operational control of a British headquarters was still attributable to the Netherlands.¹⁹ The Court referred to the fact that the Netherlands continued to exercise “full command” over its armed forces, referring to the considerable degree of control retained by the Dutch authorities,²⁰ which included “exclusive disciplinary and criminal jurisdiction over its personnel.”²¹ The Court noted that, while “day-to-day orders” might have been taken from foreign commanders, the States supporting the lead nations in the Iraq stabilization effort, including the Netherlands, retained responsibility for the “formulation of essential policy,” including “distinct rules on the use of force” to be followed by their armed forces.²² As a result, the Court could not “find that the Netherlands troops were placed ‘at the disposal’ of any foreign power . . . or that they were ‘under the exclusive direction or control’ of any other State.”²³ Although not amounting to a binding precedent, and of only indirect relevance outside of the context of the European Convention on Human Rights, *Jaloud* provides a useful look into how these principles may be applied by other Courts.

Obviously, it is in large part *because* of their responsibility for the conduct of their armed forces that States choose to retain a degree of control over elements placed under the command or control of other nations. While a State might theoretically cede enough control that it no longer bears responsibility for the actions of forces it places at the disposal of another, it is hard to conceive of a realistic situation where that would occur. Rather, States are likely to have policy reasons for wishing to retain at least some control over assigned forces, especially given the political risks associated with combat operations. Furthermore, a State may need to ensure compatibility of assigned forces’ conduct with its own domestic law. And, where the sending State retains sufficient control to be responsible for the conduct of its forces, then that State will need to ensure that it exerts enough control to ensure compliance with its legal obligations. As

19. *Jaloud v. Netherlands*, App. No. 47708/08 (2014), <http://hudoc.echr.coe.int/eng?i=001-148367>.

20. *Id.* ¶ 149.

21. *Id.* ¶ 101.

22. *Id.* ¶ 147.

23. *Id.* ¶ 151.

a result, States will, in practice, choose to retain a considerable degree of control over forces they place under the command or control of another.

The second relevant situation in which a State may no longer bear responsibility for the conduct of its armed forces is where it places them at the disposal of an international organization, such as the UN, NATO or the European Union. According to Article 7 of the ILC's Draft Articles on the Responsibility of International Organisations (DARIO), where the organization exercises "effective control" over the conduct of forces assigned to it, that conduct will be attributable to the organization.²⁴ Within the scheme established by DARIO, Article 7 is intended to deal with the situation where forces assigned to an international organization "still [act] to a certain extent as organ[s] of the seconding State," such as where the seconding State retains disciplinary authority and criminal jurisdiction, rather than being "fully seconded."²⁵ In several respects, however, it remains a particularly controversial area of law.

First, courts and other bodies have not always adopted the "effective control" standard as the appropriate test. Notably, the UN takes the position that peacekeeping operations established by the General Assembly or Security Council, and conducted under UN command and control, are subsidiary organs of the UN.²⁶ As a result, it considers their actions to be attributable to the UN on that basis, rather than on an individual assessment of the control in fact exercised by the UN or the contributing State.²⁷ However, as Crawford points out, this position fails to reflect the reality of peacekeeping operations, in which contributing States retain control over forces assigned to the UN with respect to disciplinary matters and criminal jurisdiction.²⁸ It is an oversimplification, therefore, to assume, as the UN appears to do, that forces assigned to a peacekeeping operation "are bound to discharge their functions with the sole interest of the United Nations in view."²⁹ For the UN, it is only where a peacekeeping force operates jointly with another operation under other national or regional command, that the effective control test is to be applied for the purposes of attribution.³⁰

The ECtHR has also departed from the effective control test, most notably in the joined cases of *Behrami v France* and *Saramati v France, Germany and*

24. DARIO, *supra* note 7, art. 7. See also CRAWFORD, *supra* note 7, at 188–211; KONDOCH & ZWANENBURG, *supra* note 7, at 562–72. In this context, the term "international organization" refers to an organization that possesses its own international legal personality. DARIO, *supra* note 7, art. 2(a).

25. DARIO, *supra* note 7, commentary to art. 7, ¶ 1.

26. U.N. Secretary-General, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, ¶ (G)(4)(2), U.N. Doc. A/CN.4/545 (June 25, 2004) [hereinafter *Responsibility of International Organizations*].

27. *Id.*

28. CRAWFORD, *supra* note 7, at 194.

29. *Responsibility of International Organizations*, *supra* note 26, at ¶ (G)(4)(2).

30. *Id.*

Norway.³¹ Both cases arose from the UN-authorized intervention in Kosovo, concerning alleged human rights violations by States that had contributed troops to the Kosovo Force (KFOR). The facts of *Behrami* were concerned with the alleged failure of French KFOR troops to mark or defuse undetonated cluster munitions left over from the conflict, which led to a claimed violation of the right to life.³² However, after examining the mandates of the various entities operating in Kosovo, the Court found that responsibility for the removal of mines fell instead to the UN Interim Administration Mission in Kosovo (UNMIK).³³ Following an examination of the institutional structures involved, it concluded that UNMIK was an organ of the UN and its actions, were, therefore attributable solely to the UN.³⁴ On the facts of *Behrami*, therefore, an examination of the responsibility of States contributing to KFOR was avoided altogether.

The treatment of *Saramati*, which concerned alleged extra-judicial detention by members of KFOR,³⁵ was more controversial. Having found that detention operations did indeed fall within the mandate of KFOR, the Court was required to enquire more deeply into the relationships between the UN, troop-contributing nations, and NATO, to which operational command over KFOR had been delegated by the UN. The Court found that “effective command of the relevant operational matters was retained by NATO,”³⁶ notwithstanding the authority retained by troop-contributing nations with respect to matters such as “safety, discipline and accountability,” as well as the provision by States of material and equipment.³⁷ In isolation, this finding is not necessarily incompatible with the ILC’s approach. However, the Court found that the delegation of security powers by means of the Security Council Resolution meant that while the Security Council had delegated operational command to NATO, it had “retained ultimate authority and control” over KFOR,³⁸ which it considered to be the “key question” with respect to attribution.³⁹ Therefore, despite its findings as to NATO’s role, the Court concluded that the exercise, by KFOR, of “lawfully delegated Chapter VII powers of the UNSC” meant that the conduct in question was solely attributable to the UN.⁴⁰

The ECtHR’s reference to a test of “ultimate authority and control” has been widely criticised,⁴¹ including by the ILC in its commentary to Article

31. *Behrami and Behrami v. France*, App. No. 71412/01 (2007); *Saramati v. France, Germany and Norway*, App. No. 78166/01 (2007), <http://hudoc.echr.coe.int/eng/?i=001-80830>.

32. *Id.* ¶¶ 5–7, 61.

33. *Id.* ¶¶ 125–26.

34. *Id.* ¶¶ 142–43.

35. *Id.* ¶¶ 8–17, 61.

36. *Id.* ¶ 140.

37. *Id.* ¶¶ 138–39.

38. *Id.* ¶¶ 132–41.

39. *Id.* ¶ 133.

40. *Id.* ¶ 141.

41. For a summary, see Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 *EUR. J. INT’L L.* 121, 134 (2012).

7.⁴² Essentially, it foregoes a factual assessment of which entity is, in fact, exercising control over particular conduct, in favour of a more formalistic focus on the legal relationship between them. In any case, the divergence from the ILC's approach created significant uncertainty as to how the law was to be applied in the future, especially by the ECtHR.

While the ECtHR has not overruled its decision in *Saramati*, indeed following it closely in subsequent cases concerning the former Yugoslavia,⁴³ it has arguably now narrowed the circumstances in which such an approach would be applied. In *Al-Jedda v United Kingdom*,⁴⁴ the Court followed an earlier UK domestic decision by distinguishing the situation in Iraq following the 2003 invasion from that in Kosovo, concluding that the conduct of the Multi-National Force (MNF) operating in Iraq was not attributable to the UN.⁴⁵ This was in spite of the MNF's authorization by the UN, which meant that its status was arguably analogous to that of KFOR. The Court referred to the fact that, in contrast to KFOR, the MNF had existed before its authorization by the UN, and that the command structure was unaltered by the authorizing Security Council Resolution.⁴⁶ Consequently, the Court found that the UN did not "assume any degree of control over the [MNF]."⁴⁷ As commentators have noted, the basis on which the Court distinguished *Saramati* is tenuous, given that they relate to matters that did not appear to be material to the earlier decision.⁴⁸ Perhaps more importantly, the Court also avoided dealing with the question as to whether it had been correct to apply a test of ultimate, rather than effective, control in *Saramati*, by finding that neither standard had been met with respect to the MNF.⁴⁹ As a result, there remain significant issues with the consistency of the ECtHR's case law in this area, both internally and with the approach set out by the ILC. However, the approach taken by the Court in *Al-Jedda* arguably reflects an inclination on the part of the ECtHR to place a higher barrier to States seeking to argue away responsibility for the actions of their armed forces on account of their assignment to an international organization.

The second area of controversy concerns whether both an international organization and the contributing State can exercise effective control concur-

42. DARIO, *supra* note 7, commentary to art. 7, ¶ 10 ("One 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.").

43. *Id.* ¶ 11.

44. *Al-Jedda v. United Kingdom*, App. No. 27021/08 Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-105612>.

45. *Id.* ¶¶ 74–86.

46. *Id.* ¶ 80.

47. *Id.*

48. Milanovic, *supra* note 41, at 135 (referring to the earlier UK domestic case, but making a point that applied equally to the ECtHR decision).

49. *Al-Jedda v. United Kingdom*, App. No. 27021/08 Eur. Ct. H.R., ¶ 84 ("... the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.").

rently. Article 7 itself leaves the question open and, while Article 48(1) clearly contemplates multiple attribution more generally under the DARIO scheme,⁵⁰ it is not clear that this includes the situation dealt with in Article 7. Neither is the commentary to DARIO entirely clear. On the one hand, the commentary to Chapter II, which contains Article 7, states that:

Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization.⁵¹

On the other hand, the commentary to Article 7 itself, while not discussing the possibility of dual attribution directly, arguably implies that the test amounts to a choice of attribution. It states that the concept of control relates “to which entity—the contributing State or organization or the receiving organization—conduct has to be attributed.”⁵²

Courts have not dealt with the issue consistently, either. Multiple attribution was not entertained as a possibility by the ECtHR in *Behrami* and *Saramati*, discussed above, in which the conduct in question was found to be attributable to the UN alone. However, the judgment in *Al-Jedda* implies that the ECtHR at least considered this to be a possibility, when it stated that: “The Court does not consider that . . . the acts of soldiers within the Multinational Force became attributable to the United Nations or—more importantly, for the purposes of this case—ceased to be attributable to the troop-contributing nations.”⁵³ Clearer still is the opinion of the Supreme Court of the Netherlands in the “Dutchbat” cases, discussed further below, in which it stated expressly that Article 7, when considered alongside Article 48(1), “does not exclude the possibility of dual attribution of conduct.”⁵⁴

While the cases mentioned arguably suggest a trend towards the acceptance by Courts of the possibility of dual attribution, the issue is not yet resolved.⁵⁵

50. Art. 48(1) states that “Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.” DARIO, *supra* note 7, art. 48(1).

51. *Id.* commentary to Chapter II, ¶ 4.

52. *Id.* commentary to art. 7, ¶ 5.

53. *Al-Jedda v. United Kingdom*, App. No. 27021/08 Eur. Ct. H.R., ¶ 80.

54. HR 6 september 2013, RvdW 2013, 1037, ¶ 3.11.2 (*Staat/Nuhanovic*) (Neth.). HR 6 september 2013, NJ 2015, 376 m.nt NJS (*Staat/Mustafic*) (Neth.). English translations of the judgments, from which quotes in this article are taken, were released by the Court and are available at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003324.pdf> (*Nuhanovic*) and [https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20\(1\).pdf](https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20(1).pdf) (*Mustafic*).

55. *See, e.g.*, KONDOCH & ZWANENBURG, *supra* note 7, at 569 (noting the controversy). *But see* CRAWFORD, *supra* note 7, at 204 (expressing his view that dual attribution is a possibility); Francesco

However, from the perspective of States contributing forces to an operation conducted by an international organization, perhaps the most important point is that the possibility of multiple attribution cannot be excluded and it therefore cannot be assumed that their responsibility ends once that of the international organization is engaged. If multiple attribution is a possibility then, if a State is to avoid attribution of the actions of forces assigned to an international organization, not only must the international organization exercise effective control over their conduct, but the contributing State must cease to do so. However, what this means in practice will depend on what is meant by “effective control,” discussed next.

The final area of controversy discussed here is the issue of what is meant by “effective control” in the context of Article 7.⁵⁶ The law provides few clear answers, beyond that the meaning is to be determined factually, rather than by relying on a formal transfer of authority, and that it relates to control over the specific conduct in question.⁵⁷ While it has been argued that effective control might require some sort of positive act,⁵⁸ others have proposed a much broader conception, focused on the ability of an entity to prevent conduct that amounts to an internationally wrongful act.⁵⁹ The latter approach was adopted by the Dutch courts in the “Dutchbat” cases, ultimately decided by the Supreme Court of the Netherlands.⁶⁰ Dutchbat was a Dutch military force operating as part of the UN Protection Force in Bosnia-Herzegovina. It operated a compound in the vicinity of the Srebrenica enclave; however, when the enclave fell in 1995, Dutchbat was withdrawn. The cases concerned the alleged wrongful eviction, and resulting deaths, of certain individuals evicted from the compound around the time of Dutchbat’s evacuation.⁶¹ The Supreme Court, affirming an earlier decision of the Court of Appeal, found that the actions of Dutchbat in evicting

Messineo, *Attribution of Conduct*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* 60, 88–96 (André Nollkaemper & Ilias Plakokefalos eds., 2014) (concluding that multiple attribution is possible, though noting difficulties with the formulation of art. 7).

56. See, e.g., CRAWFORD, *supra* note 7, at 203–10; KONDOCH & ZWANENBURG, *supra* note 7, at 562–68.

57. DARIO, *supra* note 7, commentary to art. 7, ¶ 4 (“The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.”).

58. CRAWFORD, *supra* note 7, at 205–10 (comparing positive and negative approaches).

59. Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 *Harv. Int’l. L. J.* 113, 157 (2010) (“Defined succinctly, ‘effective control,’ for the purposes of apportioning liability in situations of the kind addressed by [Article 7], is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question.”).

60. HR 6 september 2013, RvdW 2013, 1037, ¶ 3.11.2 (Staat/Nuhanovic) (Neth.); HR 6 september 2013, NJ 2015, 376 m.nt NJS (Staat/Mustafic) (Neth.).

61. HR 6 september 2013, RvdW 2013, 1037, ¶ 3.1 (Staat/Nuhanovic) (Neth.); HR 6 september 2013, NJ 2015, 376 m.nt NJS (Staat/Mustafic).

the individuals were attributable to the Netherlands,⁶² although leaving open the possibility of attribution to the UN as well.⁶³ In reaching its conclusion, the Supreme Court affirmed the Court of Appeal's reliance on the point that

... not only the United Nations but also the Dutch government in the Hague had control over Dutchbat and also exercised this in practice. The Dutch government was closely involved in the evacuation of Dutchbat and of the refugees as well as in the preparations for this, and *it could have prevented the conduct in question if it had been aware of [it] in good time.*⁶⁴

While this passage notes the involvement of the Dutch government in the evacuation, the key point is that the Dutch government retained sufficient control over Dutchbat, such that it could have prevented the eviction of the individuals had it been notified of it in time. In other words, effective control can arise from the notional ability of a State to prevent particular conduct. If, as they usually do, States retain the ultimate right to veto certain conduct or to withdraw their forces entirely from an operation, then it is hard to see how they could ever relinquish effective control in this sense. While the Dutchbat cases involve the position taken in just one domestic legal system, they illustrate a remarkably broad view of how effective control can be understood in the context of Article 7.

As the discussion above illustrates, important unresolved questions remain concerning the responsibility of States for internationally wrongful acts committed by forces they contribute to operations undertaken by international organizations. For States, the resulting practical implication is that, given the current state of the law, they should be extremely wary of assuming that the actions of forces assigned to an international organization will cease to be attributable to them. While it is plausible that a future Court might follow the approach of the ECtHR in *Saramati*, this outcome seems unlikely except in the narrowest of circumstances. Even if the State can make the case for attributing the actions to the international organization in question, it must also convince the Court to exclude the possibility of multiple attribution to the State as well. If judges follow the approach of the Dutch courts in the Dutchbat cases, such an argument seems extremely difficult to make.

Just as there are situations in which the actions of a State's armed forces may no longer be attributable to that State, there are also circumstances in which a State may incur responsibility relating to the actions of armed forces other than

62. HR 6 september 2013, RvdW 2013, 1037, ¶ 3.12.3 (Staat/Nuhanovic) (Neth.); HR 6 september 2013, NJ 2015, 376 m.nt NJS (Staat/Mustafic).

63. HR 6 september 2013, RvdW 2013, 1037, ¶ 3.11.2 (Staat/Nuhanovic) (Neth.); HR 6 september 2013, NJ 2015, 376 m.nt NJS (Staat/Mustafic).

64. HR 6 september 2013, RvdW 2013, 1037, ¶ 3.12.2 (Staat/Nuhanovic) (Neth.); HR 6 september 2013, NJ 2015, 376 m.nt NJS (Staat/Mustafic) [emphasis added].

its own. Three scenarios are of particular relevance to coalition operations.⁶⁵ First, there is the situation, already discussed, in which one State places its forces at the disposal of another. Second, where forces act on the instructions of another State *as well as* their own, their conduct may be attributable to *both*.⁶⁶ This may often be the case in coalition operations, in which it is common for forces to follow the day-to-day orders of officers of another State, while remaining bound to follow instructions issued by their own national authorities. For example, a national contingent may be bound to follow national direction on the use of force, while their operational tasking may be set by a chain of command from another State. When members of the contingent execute their mission, they will do so according to both sets of instructions. Noting the attribution to a State of even the *ultra vires* acts of its organs, discussed above, the sending State may still incur responsibility where forces it assigns to a coalition act in contravention of their national instructions while following foreign orders, and vice versa.

Third, a State may incur responsibility when it aids or assists another in the commission of an internationally wrongful act.⁶⁷ This is distinct from the concept of joint responsibility, discussed above; it is a separately defined internationally wrongful act, crucially requiring a degree of involvement lower than that required for joint responsibility. This scenario is clearly of potential relevance to coalition operations, in which States regularly provide assistance to each other by, for example, allowing their territory to be used as a base for operations by the armed forces of other States, providing logistical support, or sharing intelligence. The assistance need not be indispensable, so long as it is significant.⁶⁸ Hence, with respect to the basing of operations, it would not matter that the assisted State might have found an alternative location from which to mount its operations, so long as the provision of a base was significant in the context of the internationally unlawful act it assisted.

There are, however, two important caveats that narrow the scope of the principle of aid and assistance significantly. First, the State providing assistance or support must do so “with knowledge of the circumstances of the internationally wrongful act” committed by the assisted State.⁶⁹ The International Court of

65. In addition to the situations discussed in this article, States may be responsible for internationally wrongful acts committed by other entities in a number of other circumstances. In particular, States may incur responsibility through their direction and control, or coercion, of another State or international organization. In some circumstances States may incur responsibility for internationally wrongful acts committed by international organizations of which they are a member. ARSIWA, *supra* note 7, arts. 17–18; DARIO, *supra* note 7, arts. 59–62. *See also* CRAWFORD, *supra* note 7, at 412–34.

66. ARSIWA, *supra* note 7, commentary to art. 6, ¶ 3 (“Situations can also arise where the organ of one State acts on the joint instructions of its own and another State In these cases, the conduct in question is attributable to both States under other articles of this chapter.”).

67. *Id.* art. 16.

68. *Id.*, commentary to art. 16, ¶ 5 (“There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”).

69. *Id.* art. 16(a).

Justice has stated this requirement to mean that an assisting State “at the least . . . was aware of the specific intent . . . of the principal perpetrator” to commit the internationally unlawful act.⁷⁰ This would mean, for example, that a State would need to be at least aware of the nature of foreign operations being launched from its territory in order for its provision of basing to be considered aid or assistance. Arguably, therefore, if it chooses not to enquire as to what the foreign State is doing, it bears no responsibility. The ILC commentary goes further, explaining the requirement to be that a State *intends* to facilitate the wrongful conduct.⁷¹ While possibly defensible on account of the progressive nature of Article 16,⁷² the ILC approach has been criticized as overly restrictive,⁷³ and it has been suggested that in some circumstances a lower standard might be appropriate.⁷⁴ Second, the internationally wrongful act committed by the assisted State must be unlawful *both* for that State and the State providing aid or assistance if the latter is to be held responsible.⁷⁵ If the conduct in question is lawful for either one then the provision of aid or assistance is not, in itself, unlawful. Therefore, according to Article 16, if a State is prohibited from using a certain weapon, it does not commit an internationally wrongful act when it aids or assists in its use by a State not subject to that prohibition (noting, however, that treaties may contain specific provisions dealing with this issue). As a result, the scope of the principle is narrower than it may, at first, appear.

This brief survey of the law of State responsibility reveals some broad foundational points in understanding the problem of legal interoperability. Ultimately, States are almost always responsible for the conduct of their armed forces, whether those forces act alone or jointly with those of other States. While there exist circumstances in which a State may cease to be responsible for the actions of its armed forces, such situations are defined narrowly. Furthermore, the law in this area, especially that which relates to forces assigned to international organizations, remains controversial and courts have arguably shown increasing reluctance to accept States’ arguments that their armed forces’ conduct should not be attributable to them. States, therefore, would be well-advised, in all but the very clearest of circumstances, to act on the basis that they may bear responsibility for the conduct of their armed forces, even when those forces act under some degree of control by another State or international organization.

70. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz./Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 421 (Feb. 26).

71. ARSIWA, *supra* note 7, commentary to art. 16, ¶ 5 (“A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.”).

72. CRAWFORD, *supra* note 7, at 408.

73. For a summary of the objections see *id.* at 407–8.

74. See, e.g., Brian Finucane, *Partners and Legal Pitfalls*, 92 INT’L L. STUD. 407, 417 (2016).

75. ARSIWA, *supra* note 7, art. 16(b).

Conversely, as well as bearing responsibility for the conduct of their own armed forces, States may sometimes incur responsibility with respect to the acts of the armed forces of another. However, this will only be the case in a specific set of circumstances, most notably those described above. There is therefore no general principle whereby coalition members are *necessarily* responsible for other members' actions. Importantly, it follows that there is no general principle prohibiting States from acting in a coalition alongside States that adhere to different legal standards to their own.

II. HOW DIFFERENCES ARISE WITH RESPECT TO STATES' LEGAL POSITIONS

The foregoing discussion explains why participants in a coalition have an individual interest in ensuring that certain conduct, i.e., that which is attributable to them, conforms to the legal obligations to which they are bound. That interest may be particularly acute in light of the high stakes often at play in military operations, where decisions at all levels may lead to death, injury and destruction, sometimes on a massive scale. Consequently, even if the members of a coalition all apply identical legal standards, they may nevertheless be reluctant to rely upon decisions taken by their partners, where those decisions affect conduct that may be attributable to them. However, standards often *do* differ between coalition members, meaning that structures and processes must be implemented not only to give each a say in conduct for which they may be held responsible, but so that each may apply its own standards. This section will analyze the ways that differences can arise between States with respect to their legal standards for operations.

First, States may have different substantive legal obligations. Indeed, at first glance, legal interoperability might seem mainly concerned with such differences. It is certainly true that members of a coalition may not all be parties to the same treaties. For example, the United States is not a party to the 1977 Additional Protocols I or II to the Geneva Conventions of 12 August 1949; the 1997 Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and on their Destruction; or the 2008 Convention on Cluster Munitions, whereas 21 of its 27 NATO partners are parties to all four and every other NATO nation is party to at least one.⁷⁶ However, while important, concrete, differences can arise between States operating alongside each other in a coalition, the extent of such issues should not be overstated. All States are parties to the four Geneva Conventions of 1949, and many provisions found in other IHL treaties reflect customary law. As a result, much (though certainly not all) of the remaining body of IHL is considered binding on all

76. For a summary of the status of key international humanitarian law treaties, see INTERNATIONAL COMMITTEE OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/4B377401045736E0C12580A300505F5B/%24File/IHL_and_other_related_Treaties.pdf?Open (last visited Jan. 5, 2017).

States whether they are parties to the treaties or not.⁷⁷ What remain are much narrower differences than those that arise on the basis of States' treaty obligations alone, differences that generally focus on specific areas, such as the express prohibitions on certain weapons.⁷⁸

Differences may arise in States' obligations in bodies of law other than IHL. In particular, human rights law is often highlighted as an important area of tension between coalition partners.⁷⁹ However, the majority of States are party to at least one treaty containing a core set of human rights obligations, encompassing many of the rights most relevant to military operations, including the right to life and the rights to freedom from torture and arbitrary detention.⁸⁰ These rights may be expressed and interpreted slightly differently from treaty to treaty, and there are important substantive differences in how rights may be enforced under different regimes.⁸¹ Nevertheless, the essence of each right is broadly the same. Arguably, therefore, it is not so much that States differ on substantive human rights obligations, but rather that they diverge on ancillary matters such as enforcement and, importantly, how they interpret the law.⁸²

This brings us to the second source of differences between States: their understanding and interpretation of the obligations to which they are bound. This is an important source of interoperability issues within coalitions, arguably more so than the substantive differences discussed above. It may extend to fundamental differences on the content, even existence, of particular legal rules. For example, all States are bound by the same prohibition on the use of force in

77. The International Committee of the Red Cross identified a significant corpus of customary IHL in its comprehensive survey. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) [hereinafter CIHL Study]. While many of the rules identified are uncontroversial, the study has provoked much debate. For a collection of critical views of the ICRC study, see PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau, eds., 2007). See also the views of the United States government. Letter from John Bellinger III, Legal Adviser, U.S. Dep't of State & William J. Haynes, General Counsel, U.S. Dep't of Defense, to Dr. Jakob Kellenberger, President, Int'l Committee of the Red Cross (Nov. 3, 2006), in 46 INT'L LEGAL MATERIALS 514 (2007).

78. Some treaties contain specific provision setting out the obligations of States parties with respect to their cooperation with non-parties. An example of this is art. 21 of the 2008 Convention on Cluster Munitions. For discussion, see Zwanenburg, *supra* note 4, at 698–99.

79. See, e.g., Kirby Abbott, *A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship Between IHL and IHRL in Light of the European Convention on Human Rights*, 96 INT'L REV. OF THE RED CROSS 107 (2014); Vicki McConachie, *Coalition Operations: A Compromise or an Accommodation*, 84 INT'L L. STUD. 235, 237, 239 (2008); CHRIS DE COCK, TARGETING: THE CHALLENGES OF MODERN WARFARE 231, 235–37 (Paul A. L. Ducheine et al. eds., 2016).

80. Most notably, as of Nov. 11, 2016, 168 States, including the United States, are parties to the International Covenant on Civil and Political Rights. *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org> (last visited Nov. 11, 2016).

81. For a discussion of different implementation mechanisms, see WALTER KÄLIN AND JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 207–38 (2009).

82. For example, for a discussion of the United States' position with respect to the extraterritorial application of its human rights obligations, see Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014).

their relations with other States, as reflected in Article 2(4) of the UN Charter, but may differ significantly in what they consider to be the contours of the rule and its exceptions. The UK, for example, takes the position that force may be used, in very limited circumstances, to avert an immediate and overwhelming humanitarian catastrophe.⁸³ Many of the UK's allies, including the United States, however, interpret precisely the same obligations as denying such a basis.⁸⁴

Varying interpretations of the same obligations can give rise to significant, concrete differences in the parameters to which States consider themselves bound in conducting military operations. For example, with respect to physical objects, such as buildings or equipment, it is generally accepted as a rule of customary law that only those that make an effective contribution to military action are classed as military objectives and may be attacked as such.⁸⁵ However, the United States has interpreted this to include objects that make an effective contribution to an enemy's "war-sustaining," as well as its "war-fighting" and "war-supporting" capability.⁸⁶ This position is controversial,⁸⁷ amounting to a broader definition than what many other States, including other NATO members, apply.⁸⁸ For instance, while the United States would consider certain economic targets to be lawful military objectives, its coalition partners would not. From the perspective of those partner States, those targets would be considered civilian in nature and any attack against them would be unlawful. This represents but one example of differences in interpretation between States.⁸⁹

Looking at this point more broadly, differences in interpretation underpin many of the key issues arising in human rights law, including its extraterritorial application.⁹⁰ For example, in interpreting the applicability of the International Covenant on Civil and Political Rights, the United States takes the position that the Covenant applies only within its own territory, while acknowledging that other States interpret the same provisions as meaning that the Covenant may apply, in certain circumstances, extraterritorially.⁹¹ Likewise, it is differences of interpretation, rather than substance, that underpin the debate on the interaction between human rights law and IHL, and hence the application of human rights

83. UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* ¶ 1.6 (2004).

84. OFFICE OF THE GEN. COUNSEL, DEP'T OF DEF., *LAW OF WAR MANUAL* § 1.11.4.4 (2d ed. 2016) [hereinafter D.O.D. *LAW OF WAR MANUAL*].

85. CIHL Study, *supra* note 77, at 29–32.

86. D.O.D. *LAW OF WAR MANUAL*, *supra* note 84, § 5.7.6.2.

87. WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 106 (1st ed. 2012).

88. Kenneth Watkin, *Coalition Operations: A Canadian Perspective*, 84 INT'L L. STUD. 251, 255 (2008). According to Zwanenburg, such differences were manifested during the International Security Assistance Force (ISAF) operation in Afghanistan. Zwanenburg, *supra* note 4, at 692–93.

89. For examples drawn from the ISAF operation, see Zwanenburg, *supra* note 4, at 687–94.

90. See, e.g., Van Schaack, *supra* note 82.

91. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report, United States of America, ¶ 505, U.N. Doc. CCPR/C/USA/4 (May 2012).

in situations of armed conflict.⁹²

The third source of differences between States lies in how they apply the law to a situation. Even while agreeing on the relevant law, States may reach different conclusions when they apply that law to the facts at hand. For example, States may differ in whether they consider a situation to have reached the level of an armed conflict,⁹³ with important consequences as to the applicable legal regime. Likewise, even where States agree on the definition of, for example, a military objective, there may be disagreement as to whether a particular building, vehicle or piece of equipment does, in fact, meet the agreed criteria. Such determinations are inherently factual, being based on evidence, the interpretation of which may be, to some extent, subjective. The problem may be particularly acute where the law requires commanders to balance competing interests, as is the case for the rule of proportionality, whereby a decision-maker must weigh expected military advantage against anticipated civilian harm. Even where States agree on the test to be applied, their officers may reach markedly different conclusions due to variations in their training, culture and experience.

Finally, States may differ in the extent to which they are willing to risk that their actions may be perceived, or judged, by others as wrong. In interpreting the law, and then applying it to particular scenarios, States bear the risk that their position will be condemned as unlawful by courts, States or other interested parties. As established above, there is room for diverging views on both the content and application of the law. Therefore, even if a State interprets and applies the law in good faith, this does not mean that other actors will agree, especially where the law, or its application to the relevant facts, is unclear or controversial. Thus, if a court subsequently judges the State to have acted unlawfully, the State may suffer immediate political consequences, as well as eventual legal consequences.

The risk of being judged to have acted unlawfully is something that States are likely to consider when deciding on whether, and how, to conduct military operations. However, States may differ in their willingness to accept the risk that their position on the law and its application may be viewed as wrong. This will depend not only on their appetite for risk, but on the consequences that each State may face, which may vary. For example, numerous different treaties protect human rights.⁹⁴ The consequences of violating human rights depends, in large part, on the specific treaty or treaties to which the State is party. Where a

92. See, e.g., MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* 229–61 (2011).

93. This was the case for several States participating in the ISAF mission in Afghanistan. Zwanenburg, *supra* note 4, at 687.

94. For example, many States are parties to both the International Covenant on Civil and Political Rights, as well as a regional human rights treaty, such as the European Convention on Human Rights. The rights protected overlap significantly, *Compare*, G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); with European Convention on Human Rights, Apr. 11, 1950, E.T.S. No. 005.

State is party to the International Covenant on Civil and Political Rights, the main risk is that the conduct will be declared as unlawful by the Human Rights Committee, the supervising body created by the ICCPR.⁹⁵ However, the Human Rights Committee, while influential, is not a court and its findings do not formally bind States as a matter of law. In contrast, a State that is party to the ECHR bears the risk that its conduct will be judged as unlawful by the ECtHR, in the form of a legally binding judgment.⁹⁶ Therefore, while the obligations in question may be essentially the same, the risk borne by a State in adopting a position with respect to their interpretation and application may depend on the legal mechanisms to which it is bound.

In summary, States may differ not only in their substantive legal obligations, but in the way that they understand and interpret those obligations, in how they apply them to concrete situations, and in the amount of risk they are willing to bear that they subsequently might be judged as having been wrong. It follows that even where States' substantive obligations are the *same*, there is still significant latitude for divergence in the positions they adopt. Such differences may not be obvious and may not be known—or even knowable—in advance of a particular operation. However, they lead ultimately to situations where specific conduct may be deemed lawful by some States within a coalition, but unlawful by others.

III. MECHANISMS FOR ACHIEVING LEGAL INTEROPERABILITY

The preceding sections disclose two key points. First, individual States bear responsibility for certain conduct, mainly that of their own armed forces, undertaken under the auspices of a coalition. Second, each State within a coalition may adopt a different legal position with respect to the conduct attributable to it. In order for States to operate alongside one another, the differences between them must be understood and managed so as to minimize the impact of legal differences on the effectiveness of operations, while allowing individual States to protect their own interests. This challenge extends from the initial decision by a coalition of States to use force against another State, to the individual decisions taken by soldiers on the battlefield. Consequently, legal interoperability can only be achieved through mechanisms and processes that function at every level of decision-making within a coalition.⁹⁷

It is essential, therefore, that legal interoperability be considered when first setting the initial parameters according to which a coalition agrees to conduct an operation. Conceptually, coalition members may take one of two broad ap-

95. KÄLIN & KÜNZLI, *supra* note 81, at 206–8.

96. *Id.* at 208.

97. For a summary of common mechanisms, see PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 302–3 (2010).

proaches.⁹⁸ First, participants may all agree to operate according to a common set of rules, each rule defined by the most restrictive position from amongst the coalition members. In theory, this should then mean that any conduct undertaken under the auspices of the coalition will be lawful with respect to the legal position of every participant. Arguably, this approach has the advantage of clarity and simplicity, in that every member of the coalition will follow the same rules, each set according to the most restrictive legal position. However, this may come at the cost of flexibility, in that coalition members may be prevented from operating to the full extent that each, individually, believes lawful. In other words, conduct may be restrained even where it is not attributable to the State that considers it unlawful. Furthermore, even if all participants are notionally operating under the same rules, they may in fact interpret them very differently. In any case, States may be uncomfortable relying on critical decisions taken by individuals from outside their own forces. However well-aligned two States may be, one may be unwilling to allow the other to make decisions, in which the first is implicated, that may lead to large-scale or particularly sensitive loss of life. This means that mechanisms may still need to be introduced to ensure that States are sufficiently involved in those decisions in which they wish to have a say.

The second broad approach is to allow each participant to operate according to parameters defined by its own individual legal position. In this case, the only conduct prohibited by the coalition, as a whole, will be that which is prohibited by *every* participating State. It will then be for individual States to apply further restrictions to ensure that conduct for which they may be held responsible conforms to their own legal positions. This approach has the advantage of being the least restrictive, in that it allows the coalition members to each operate to the full extent of the law as they, individually, perceive it. However, this comes at a cost. In order to protect their positions, States must ensure that they have sufficient control over *all* the conduct for which they may be held responsible, which may become increasingly difficult as the level of integration between coalition members' armed forces increases. Furthermore, this approach will mean that different parts of a coalition will operate according to different rules, making it more difficult for coalition commanders to understand and predict how different forces will act in particular situations.

In reality, these approaches represent extremes, between which coalitions usually plot an intermediate course, which is determined by balancing the simplicity of the first approach with the flexibility of the second.⁹⁹ The balance struck may depend, to some extent, on the level of integration between coalition members. The more integrated a coalition, the greater the benefit of a common set of rules; conversely, where members operate more independently, that

98. Zwanenburg, *supra* note 4, at 700–3. Zwanenburg refers to the two approaches as either “maximalist” or “minimalist.”

99. *See, e.g., id.* at 704.

benefit may be outweighed by the flexibility afforded by permitting States to operate to the full extent permitted by their own legal positions.

Consider NATO, which operates, notionally at least, on the basis of consensus between its members. Therefore, the decision for NATO to conduct an operation, and the parameters within which that operation is conducted, must be agreed upon by all its members. This decision-making process may extend to the selection of targets to be attacked in the course of the operation.¹⁰⁰ However, NATO has developed a practice whereby States may specify caveats, which take the form of additional rules or amplifications declared by States with respect to how their armed forces will implement the common plan.¹⁰¹ Thus, States may agree to NATO acting in a certain manner, while prohibiting their own armed forces from doing so. These caveats are reported formally to NATO, meaning that commanders should be aware of them, mitigating, to some extent, the complexity introduced by allowing States to deviate from the common set of rules. However, while the system of formal caveats may be designed in theory to identify differences between NATO members, in practice it may not reveal everything.¹⁰²

Beyond the initial parameters for an operation, legal interoperability issues arise throughout its execution. Three aspects of this challenge to successful coalition operations are particularly important. First, it is essential that commanders within the coalition understand where differences between coalition members lie in order that forces may be assigned efficiently or effectively. With or without caveats, a common set of rules is unlikely to capture the full extent to which States differ in their legal positions, especially with respect to how rules are applied in practice. For example, the members of a coalition might agree to target individuals meeting a certain definition, such as members of a particular armed group, but fail to specify precisely how that definition is to be applied and to what standard of certainty. Even where a coalition, like NATO, has well-developed doctrine, this specification still may not capture all of the nuances in how it is actually applied by different States. Capturing the differences between members is a practical, concrete challenge for any coalition, and it is essential in order for commanders to understand what the various forces within the coalition may, and may not, do.¹⁰³

100. JACHEC-NEALE, *supra* note 4, at 245.

101. *See, e.g.*, North Atlantic Treaty Organization, *Allied Joint Doctrine for Joint Targeting*, ¶ 2.2.1, AJP-3.9(A) (2016). On the use of caveats by NATO States in Afghanistan, see DAVID P. AUERSWALD & STEPHEN M. SAIDEMAN, *NATO AT WAR: UNDERSTANDING THE CHALLENGES OF CAVEATS IN AFGHANISTAN* (2009), <http://shape.nato.int/resources/1/documents/nato%20at%20war.pdf> (paper prepared for presentation at the annual meeting of the American Political Science Association).

102. *See, e.g.*, AUERSWALD & SAIDEMAN, *supra* note 101, at 7.

103. *See* Neil Brown, *XI Issues Arising from Coalition Operations: An Operational Lawyer's Perspective*, 84 INT'L L. STUD. 225, 229–31 (2008). In practice, coalitions will often create a matrix setting out the positions of each State with respect to particular issues that may arise during the course of an operation. On the use of such matrices in Iraq, see JACHEC-NEALE, *supra* note 4, at 246.

Second, individual States' legal positions must be reflected in the decision to authorize individual missions undertaken in the course of an operation. As discussed above, even where States agree on their legal position with respect to a certain activity, they may still be reluctant to let other States authorize conduct without their involvement or consent if that conduct ultimately can be attributable to them. Because of this concern, States may wish to be able to veto certain types of activity undertaken under the auspices of the coalition, but for which they may be responsible. Within NATO, this capability may be achieved through the involvement of national "red-card" holders, individuals who may exercise a veto on behalf of their own State with respect to coalition activity.¹⁰⁴ In practice, this means, for example, that the decision to launch an attack on a certain target will be considered, usually in parallel, by a coalition commander as well as the red-card holders of each State whose equipment and personnel may be used to execute the mission. Each red-card holder will require legal advice pertinent to their State's own national position,¹⁰⁵ as well as all of the information, including imagery and other intelligence, required to make an informed decision. While the involvement of red-card holders adds further complexity to the coalition decision-making process, effective communications and the development of robust procedures can minimize the impact.

Finally, the interests of individual coalition members must still be protected all the way through the execution of authorized missions, as well as during unplanned encounters with the enemy. For example, States may differ on the circumstances in which they believe it is lawful for their soldiers to open fire, or in which they are permitted to detain an individual. As noted above, the conduct of members of the armed forces is generally attributable to the State. Therefore, in order to protect its interests fully, the State must ensure that its individual soldiers, sailors and airmen adhere to its national legal positions while conducting hostilities, whatever other direction may separately be given by the coalition. This may be achieved in part through training, but also through providing individuals with national instructions to be implemented in addition to any provided by the coalition. In practice this may mean that members of the armed forces participating in coalition operations must apply both national and coalition rules of engagement, and other directives, in parallel, ensuring that their actions comply with both concurrently.

104. North Atlantic Treaty Organization, *Allied Joint Doctrine for Air and Space Operation*, ¶ 2.2.1, AJP-3.3 Ed. B Version 1 (April 2016). On the concept of red-card holders more generally, see Jachec-Neale, *supra* note 4, at 244–47.

105. Under NATO doctrine, it is recognized that senior national representatives will receive "support from national legal, policy and targeting advisors." North Atlantic Treaty Organization, *Allied Joint Doctrine for Joint Targeting*, ¶ 0127, AJP-3.9(A) (2016).

CONCLUSION

This article has laid out a framework for analyzing the challenge of legal interoperability, in order to better understand how it can be met. The law of State responsibility is of considerable importance to this framework because the question of attribution is essential to understanding the challenge of legal interoperability. Each of the States operating as part of a coalition is responsible, generally, for the conduct of its own armed forces; only in narrow circumstances does this cease to be the case. Conversely, while States do not *necessarily* bear responsibility for the actions of their partners' armed forces, there are particular circumstances in which they do. Overall, though, individual coalition partners have an interest in ensuring their own legal position is protected with respect to certain specific conduct undertaken by the coalition.

Likewise, it is important to understand how differences arise between States with respect to their legal positions. Perhaps contrary to first impressions, these differences are not restricted to their substantive obligations. Differences of interpretation, application and acceptance of risk all play their part in determining the position that each State adopts. Even close allies can arrive at different conclusions on important questions of law, with concrete, practical consequences for the parameters within which they conduct operations.

Finally, conceptually, differences between coalition partners can be resolved. To a large extent, achieving legal interoperability involves finding a balance between the certainty achieved by adopting a common, but restrictive, set of rules, and the flexibility afforded by allowing member States to operate to the extent of their perceived legal authority. In any case, the initial parameters set for an operation alone cannot fully protect coalition members' interests. Instead, States' legal positions must be reflected in decisions taken throughout the operation's execution, and efficient mechanisms must therefore be implemented to incorporate national representatives into the decision-making process. Furthermore, individual service members must conduct themselves in accordance with instructions given by the national authorities, in addition to any provided by a separate coalition chain of command. The complexity of such arrangements creates a considerable practical challenge. However, the importance of being able to operate effectively as part of a coalition means that the challenge of legal interoperability is one that modern armed forces have no choice but to meet.