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The Unified Standard of Application of International Humanitarian Law in Multinational Military Operations

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I hereby declare that this Doctoral Dissertation on the topic of "The Unified Standard of Application of International Humanitarian Law in Multinational Military Operations" is my original work and I have acknowledged all sources used.

In Olomouc on the 16.10.2018 Tuomas Heikkinen

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1. Introduction

International Organizations are taking more prominent role in military operations. They offer and better possibility for states to join together with their militaries and cooperate in order to achieve greater results by their military operations. The reasons for the cooperation are easily explained. It often brings higher legitimacy for their military operations and shares the costs and burdens of the undertakings. However, multinational military operations (MMOs) are enormously complex undertakings raising numerous issues. One could argue that international law has not completely kept up with the developments of reality and numerous legal questions raised in the context of international organizations-led multinational military operations remain problematic.

Especially problematic for the MMOs are the questions regarding what legal obligations must the multinational operation follow. When the military operations consist of troops contributed by states and is conducted under the leadership of an international organization, multiple entities must be considered when determining what rules apply to the operation. Since there is great disparity in legal obligations of the different entities, and in understanding of common legal obligations, it brings up the question of how the operation must conduct its hostilities.

The MMOs in the study have been defined as a military force which consist of the troop contingents of the troop contributing states (TCS) but is conducted within international organization's framework and under international organization's chain of command. Therefore, those MMOs that are done under leading state or as coalition of the willing by states only are not part of the study. The MMO itself is not a legal person and is not therefore capable of possessing rights or obligations, but the applicable legal framework to it emerges either from the international organizations' obligations, the TCSs' obligations or possibly from both sets of legal obligations.

Today's military operations are extremely deeply interoperating, as all the actors involved seem to act as a single unified military force to outsiders, that it is almost impossible for adversaries or neutrals to determine which troop contingent did which specific sortie or action.[1] That is problematic when trying to evaluate whether e.g. the involved states have conducted the hostilities according to their obligations as one could not be sure which state's troops were involved. Furthermore, it gives certain uncertainties to the combatant parties on

[1] STEIN, Torsten. Coalition Warfare and Different Legal Obligations of Coalition Members Under International Humanitarian Law. International Law Studies US Naval War College. 2002, Vol. 78, p. 315

how their enemies will act in situations, not knowing their legal limits or definitions for example what constitutes a military objective.[2] Therefore it would definitely be advantageous to have single unified standard of IHL application to multinational military operations.

The question has attained some analysis in academia,[3] but it has been often not focused enough to the specific issues arising from the different scopes of IHL obligations between the different involved entities. As such, there are certain gaps in the knowledge. Academic focus has been largely on the responsibility over the conduct of multinational military operations.[4] It is obviously closely connected to the question of possible legal obligations applicable to the military operations and to possible unification of the different scopes of legal obligations that the different entities involved with the military operations might have. However, the question is not simple and there is more to the question of applicable law than the attribution of responsibility. Even when other studies might discuss the legal obligations specifically, the analysis are often limited to international organization's obligations and their sources, and have left the applicability of TCSs obligations to a lesser analysis apart from their possible influence on the organizations obligations.[5] However, this study argues that the TCS obligations can still be applicable to the MMO and have a fundamental effect to the MMO obligations even if they do not bind international organizations who is taking the lead of the operation. Other studies have analysed the question of different scopes of IHL obligations from a point of view of whether MMOs are bound by the lowest common denominator or if the highest standard applicable to the MMO would be the standard MMO must conduct its operations.[6] However, that does not necessarily take into account all the relevant factors regarding the possible unified standards of IHL application to MMOs.

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[2] While one can image that uncertainty can be beneficial in certain cases, especially where the adversaries aim to employ lawfare techniques for their military doctrines by (ab)using their enemies legal obligations against them, there are still cases where the confusion might harm civilians such as situations where the interpretations of what constitutes a legitimate military target differ and could harm combatants attempts to take passive precautions to protect civilians against the effects of military strikes.

[3] LARSEN, Kjetil Mujezinovic. *The Human Rights Treaty Obligations of Peacekeepers.* Cambridge University Press, 2012. BREAU, Susan C. A Single Standard for Coalitions: Lowest Common Denominator or Highest Standard? In ODELLO, Marco, PIOTROWICZ, Ryszard (eds.) *International Military Missions and International Law.* Martinus Nijhoff Publishers, 2011.

[4] Such as ZWANENBURG, Marten. *Accountability of Peace Support Operations.* Martinus Nijhoff Publishers, 2005

[5] MURPHY, Ray. United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers? Criminal Law Forum. 2003, Vol. 14, No. 2, pp. 153-194; DANNENBAUM, Tom. 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. Harvard International Law Journal. 2010, Vol. 51, No. 1, p. 138-9; SCHERMERS, Henry G., BLOKKER, Niels M. *International Institutional Law: Unity Within Diversity.* Martinus Nijhoff Publishers, 2003, 4th edition, p. 996

[6] ZWANENBURG, Marten. International Humanitarian Law Interoperability in Multinational Operations. International Review of the Red Cross. 2013, Vol. 95, No. 891/892, p. 704; BREAU. A Single Standard for Coalitions…, p. 73

1.1 Research objective and questions

The study aims to research the possibility of having unified standards of IHL obligations to MMO under the leadership of international organizations. While it is always possible for the involved entities in the MMO to politically accept or agreeing as a policy to having highest available standard as the common standard, or even higher than what would be required by any law, but that would not necessarily constitute a legal obligation for the entities.[7] The study therefore looks how the international law deals with the question. As such, it can either allow certain entities involved to the MMO to accept less strict scope of IHL than what their scope would be or obligate the MMO and therefore some of its contributors to higher standard of law.

The goal of the thesis is to find whether every TCS and their troop contingents in the MMO ultimately have separate scope of IHL based on the individual TCS' legal obligations or if it is possible to have unified common standard to all contingents of the MMO and to all the troops contributed by the states in the military operation. Since MMOs involve multiple actors from international organizations to states contributing troops to the operation, it raises questions over which entity's legal obligations and understandings of those obligations are applicable to the conduct of the operation. The study aims to bring forward arguments for applicability of a single unified standard of legal obligations applicable to the MMO in certain cases instead of multitude of different scopes of IHL obligations of each actor involved in the operation.

Firstly, it is important understand that while IHL is built around the idea that it is fully homogenous system of legal obligations which are the same for every entity that is bound by them, in reality that is often not the case. Indeed, there are major differences how states and international organizations are bound by IHL or even how different states are bound by the rules or how the different entities understand their binding obligations. Firstly, obviously not all of the entities in the MMO are bound by the same treaties or equivalent customary IHL. As such, there is disparity in their legal obligations. However, even when the entities have mirroring treaty obligations or are bound by equivalent customary law they often interpret those obligations diversely. While in a perfect world the interpretations of the common obligations should be the same among the entities, the reality does not reflect that.[8] As such, the distinct

[7] Such example can be found from NATO's Libyan airfare campaign, where NATO applied rules of engagement that were stricter regarding allowed collateral damages than what IHL would require, due to the politically sensitive nature of civilian casualties. See OLSON, Peter. NATO Legal Adviser, Letter to Judge Kirsch. 23 January 2012, OLA(2012)006. p. 3, quoted in in BASSIOUNI, Cherif M. *Libya: From Repression to Revolution – A Record of Armed Conflict and International Law Violations, 2011-2013.* Martinus Nijhoff Publishers, 2013, pp. 274-283

[8] OLSON, Peter M. A NATO Perspective on Applicability and Application of IHL to Multinational Forces. International Review of the Red Cross. 2013, Vol. 95, No. 891/892, p. 656

interpretations cause issues to interoperability of the MMO. Similar issues arrive from so called common but differentiated obligations, namely obligations to take feasible precautions in attacks. The term "feasible" refers to the fact that states are obligated to do what they can but are not obligated to do the impossible. Based on the premises that different TCSs have different technological capabilities to conduct warfare, the TCSs then have different understandings of what constitutes feasible precautions for example in choice of (precision guided) munitions or certainty of the military character of the intended target. As such, it is inherent to the obligations to take feasible precautions that they differ from entity to entity due to the disparity of their technological capabilities.

The aim of the thesis is not to take part in the discussion regarding the interpretation of the IHL norms and provide objectively "correct" standard for entities to follow, but to take the differences in the scope of obligations into account in MMO setting. Therefore, the question of unified standard can be further divided into which one of the possible different scopes of IHL obligations of the entities involved in the MMO would be the prevailing standard for the MMO. Namely, would the unified standard of law have to be the highest scope among the participating entities, or can it arrive from an entity whose understanding of the scope of its IHL obligations would be lower. Furthermore, if there are possibilities to have less than the highest available standard as unified standard, then which entity's standard would be applicable?

Following that, the premises are that the legal obligations of the entity that the MMO conduct is attributed to are the primary applicable obligations to the MMO. As such, the unified standards of IHL applicable to MMO could arrive from the obligations of the international organization when the organization has been attributed the conduct of the MMO. Question of attribution of conduct to an international organization has been answered to an extent in ILC's Draft Articles on the Responsibility of International Organizations (DARIO).[9] However, the specifics of the rules for when MMO conduct is attributable to the international organization has not been fully agreed, accepted and crystallized and demand further study.

Therefore, when MMO conduct would be attributable to the international organization, it would be possible that the organization can bring its standard as the unifying MMO-wide standard of IHL rules. However, firstly the organizations must have an international legal personality to be able to possess the legal obligations and it must be a party to an armed conflict for its IHL obligations to be present. Secondly, one must find what rules are applicable to the international organizations and where would the legal obligations arise. International

[9] Draft Articles on the Responsibility of International Organizations. 2011 ILC 63rd session (hereafter DARIO)

organizations cannot be parties to IHL treaties and the exact degree of applicable IHL and its sources remains unclear.

However, there is a question regarding what happens to the TCS obligations in cases where the conduct is attributable to the international organization and when the organization's legal obligations would be the primary applicable framework of IHL. The study argues that it would be often impossible for the TCSs to allow their troop contingents to conduct hostilities with less strict scope of IHL obligations, especially for different treaty obligations and different interpretations of the obligations. The IHL treaties have clauses in them that could be interpreted as making TCSs responsible over their troop contingents conduct beyond the rules of attribution of conduct and therefore force the MMO to take them into account when conducting hostilities. The responsibility of the TCSs over the conduct of the MMO arising from the treaty clauses obligates the TCSs to make their obligations applicable to the MMO. As such, it is justifiable to analyse the responsibility regime closely. Therefore, the MMO would be forced to conduct its operations with different scopes of IHL obligations between different parts of the MMO.[10] Similarly, it would mean that the TCSs are unable to escape their higher scope of IHL obligations, especially when their source is the different treaty obligations or when the international organization would interpret their obligations to a standard that the TCS would deem unacceptable. Also, the possibility of dual attribution of MMO conduct and TCSs prohibition of circumvention of legal obligations through international organization must be considered to have both TCS and international organization's legal obligations applicable to the MMO.

However, there is a question whether it is possible to bind the MMO to the highest standard of legal obligations, which would go beyond the standards of some TCSs and the international organization but would fulfil the accepted level of obligations for every entity involved in the military operation. As mentioned earlier, it can be done over policy considerations, and not because of legal obligations,[11] the study analyses whether the international law would in some situations obligate the MMO to apply the highest standard as a legally binding unifying standard for the MMO as whole. Study argues that in specific situations such obligation can be brought up by Common Article 1 of the Geneva Convention and its extensive interpretation, which obligating states to ensure that other entities also respect

[10] Such as Common Article 1 of Geneva Conventions or Article 1(c) of Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. 18 September 1997 (hereafter Ottawa Treaty)

[11] See footnote 6

IHL. In such situations, when the TCSs have effective methods of influencing the conduct of the MMO, the states could be under obligation to ensure that the whole MMO would not breach (their understanding of) IHL obligations. However, it arguably would only be applicable to situations where the entities have different understanding and interpretations of the legal obligations and the Common Article 1 could not obligate others to fulfil treaty obligations that they have not consented to.[12]

1.2 Methodology and materials

The main goal of the thesis is to focus on the current state of international law regarding the possibility of having unified standard of IHL to MMOs. The thesis therefore mostly aims to establish what the law is and focuses on the *lex lata* of the international law instead of analysing what the law should be. Because of the decentralized character of international law the question of "what law is" is more difficult to answer than in questions regarding domestic legal systems.[13] The lack of central authority of international law and universal courts to interpret the law the norms of international law have not been fully developed and universally accepted,[14] which validates the research.

The sources of the study are mostly library-based sources. The study discusses the primary sources of the law, such as the available treaties and customary law. Due to its underdeveloped stage, the primary sources are often compared to the practice of the actors to gain the precision to the understanding of the law. When possible, the practice of the organizations and TCS will be often gathered from official statements of the international organizations and states regarding their conduct in MMO settings. However, there is a certain lack of available sources on practice of states and institutions. This is partly because the cases where the question would be though out in practice are rare and secondly, on par with International Criminal Tribunal in Former Yugoslavia's statements that, reviewing practice of states (or international organizations) is difficult in questions of armed conflict as actors in conflicts refuse to allow independent observers the access to the field and furthermore withheld the information regarding the conduct of hostilities and often classify documents related to the

[12] NAERT, Frederik. International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights. Thesis for Doctor in Laws in Catholic University Leuven. 2008, pp. 333-4
[13] HALL, Stephen. Researching International Law. In MCCONVILLE, Mike, CHUI, Wing Hong (eds.) *Research Methods for Law.* Edinburgh University Press, 2007, p. 182
[14] Ibidem

conduct.[15] Therefore it is necessary to compliment or substitute those sources by news articles and other publications which might not be endorsed or commented by the actual actors and are therefore open to criticism on their reliability. The study will furthermore include an extensive literature review. Academic writings will take more presenting stage because of the relatively undeveloped stage of the primary rules and lack of available practice.

The study will analyse examples of three different international organizations' and their MMOs. Those selected are NATO, UN and ECOWAS. Reasoning behind the choices is their engagement in high-intensity armed conflicts which allows the study of the IHL obligations better. Especially NATO and ECOWAS have partaken in military operations as a proper combatant party in an armed conflict, in NATO Yugoslavian and Libyan operations and ECOWAS as ECOMOG operations in Liberia and Sierra Leonne. Similarly, certain UN operations, although often called "peacekeeping", clearly go beyond the classical peacekeeping missions and have forced UN to engage into the armed conflicts as a combatant party.[16] Therefore, actors such as EU have been left out of the scope of the study for the reasons that their operations are not of similar intensity and the full applicability of IHL is not obvious to those missions.[17]

Similarly, those operations have been conducted under the leadership and framework of the international organization. There have been fundamental differences between how involved the TCSs have been to the processes and how well the organization was able to uphold unified chain of command to itself and exclude TCSs from interfering with the command and control. However, the criteria for analysing international organization led operations still would exclude most operations done under the umbrella of African Union, which employs a system of lead nation leadership or "network" approach, where African Union gives strategic guidance, direction and coordination assistance but the TCSs themselves employ their contingents independently and merely coordinate at the operational level instead of seconding their troop contingents under other entity's authority.[18]

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[15] ICTY. Prosecutor v. Duško Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995 (Hereafter Tadic Jurisdiction Appeal), para. 99

[16] HILLEN, John. *Blue Helmets: The Strategy of UN Military Operations.* 2nd Edition, Potomac Books, 2000, pp. 22-23

[17] While EU seemingly is capable of having a role in more robust peace enforcement missions, to the date their operations have not been of similar intensity or size as NATO's or even UN's or ECOWAS'. See GIEGERICH, Bastian. *European Military Crisis Management: Connecting Ambition and Reality.* Adelphi Series, 2009, Routledge Publishers, p. 25

[18] DE CONING, Cedric. Peace Enforcement in Africa: Doctrinal Distinctions Between the African Union and United Nations. Contemporary Security Studies. 2017, Vol. 38, No. 1, p. 152

One could find ECOWAS to be a surprise inclusion, due to its less active participation on military missions especially after the two ECOMOG operations. However, it presents a good source to analyse MMOs where one TCSs is in clearly dominant position and allows to showcase situations where the MMO as a whole might not be fully under international organization's command and control and the effects of the failure to uphold unified chain of command throughout the military operation. However, the study uses the case studies as examples, and still aims to find an overall approach to the question and is not therefore limited to only those international organization's military operations listed above.

Furthermore, there will be careful analyses on the DARIO, which are ILC's attempt to codify the customary international law regarding the responsibility of international organizations and give guidance also to the questions of applicable law to international organizations generally and specifically to the MMOs. While it is not legally binding document, it could be argued that it is codified customary law and in any matter the articles have been cited and used in practice by courts.[19] However, the draft articles have attained lots of criticism and have not been accepted as crystallized customary law or ready for codification as a treaty by states or institutions.[20] But they do present good starting point to analyse the question in hand and very least present themselves as influential writing of most qualified publishers. However, in situations where the question of the customary status of the precise rule is present, the study aims to interpret the rules and their specific definitions in a way that they would either fit into the classical practice of international organizations and states or at least take it into account.

The study analyses extensively the responsibility regime regarding international organizations, which can raise certain questions regarding its relevance. One must admit that the ILC's work denied explicitly that the DARIO would deal with the question of applicable law to international organizations.[21] As such, one could claim that it would not deal with the question of applicable law to MMOs, which are after all common enterprises of both the TCSs and the international organizations. However, the study argues that responsibility is relevant to the question of applicable law. Firstly, even if the responsibility and applicable law are held separate issues, the TCSs must ensure that their legal obligations are applicable to the MMO in

[19] GROSS, Richard C., HENDERSON, Ian. Multinational Operations. In CORN, Geoffrey S. et al. (eds) *U.S. Military Operations: Law, Policy, and Practice*. Oxford University Press, 2016, p. 347
[20] UNGA, Seventy-Second Session. Responsibility of International Organizations. Comments and Information Received from Governments and International Organizations - Report of the Secretary-General. 26th April 2017, A/72/80
[21] GAJA, Giorgio. Articles on the Responsibility of International Organizations – Introductory Note. United Nations Audiovisual Library of International Law, p. 5

case they would be responsible over a failure to do so. As such, it is justifiable to analyse the responsibility regime closely. Secondly, arguably applicable law without responsibility would be of merely abstract question and largely indistinguishable from accepting legal norms as a matter of policy without legal relevance, and as such would not have any effect as a matter of law to the conduct of the MMO.[22] Similar approach can find certain support elsewhere in academia, as responsibility and legal consequences can be linked into the very definition of law.[23] In any case, it is debatable to hold the legal obligations applicable, if not in theory then in reality, to the multinational operation if the breaches of those obligations would not bring forward legal consequences to any involved legal entity.

1.3 Outline of the study

The thesis is divided into five parts. First and second parts lay out the framework for the study and gives the definitions for the analysis used in the later chapters. First part lays out the characteristics and definitions of MMOs and their framework. The second part deal with question of when the different entities, either the international organization or the TCSs, can have different scope of IHL and how they present themselves. With that framework, the third part starts the analysis of common standard for the MMO by analysis whether the international organization's scope of IHL can be the common standard unifying the MMO obligations. Fourth part analyses the TCS's obligations and whether they can "escape" their legal obligations when contributing troop contingents to MMO. As such, the MMO contingents can be bound by two different levels or scopes of IHL obligations, one from their home TCS and one from the international organization. Lastly, fifth part deals with possibility of having the highest TCS standard as the common, unifying standard of IHL obligations to the whole MMO.

First part analyses different military operations that have been conducted, their characteristics and frameworks. Operations taken for closer study are those under the auspices of United Nations, NATO, and ECOWAS due to their activity in high intensity conflicts where the threshold of applicability of IHL is clearly breached and therefore they are better suited for the aims of the study. The first two parts should then set the scene for the detailed analysis of how the problem of differentiated obligations can be handled in different MMO settings.

[22] LARSEN. *The Human Rights Treaty Obligations…,* pp. 105-107

[23] PELLET, Alain. The Definitions of Responsibility in International Law. In CRAWFORD, James et al. (eds.) *The Law of International Responsibility.* Oxford University Press, 2010, p. 4. Although, as Pellet further acknowledges, the definitions of law can be debated into eternity and are outside the scope of this study.

Second part deals with the possible differentiated legal obligations applicable to the entities. Firstly, there are different treaty obligations, where the actors in MMO have not ratified and therefore do not possess all the same obligations that IHL treaties lay out. However, even while states accept that they are bound by same legal obligations, either treaty law or customary law, they often interpret the obligations differently. As such there is disparity among the common obligations due to different interpretations of common obligations. Similarly, disparity can arise from so called common but differentiated obligations. These are the obligations that employ the term "feasibleness" in precautions to be taken in order to protect civilians.[24] The term "feasible" refers to the fact that states are obligated to do what they can but are not asked to do the impossible. That can, with different technological abilities or otherwise, bring differentiated obligations to the entities within the MMO framework.

Third part starts with analysing the international organization's obligations as a common standard for the MMO. The chapter also analyses the evolution of MMOs, their characteristics and practice. Based on those analysis, the chapter looks into whether the MMOs can have organization's scope of IHL obligations as MMO wide rules. To that end, the organization must be able to possess IHL obligations. Since they are not capable of being parties to the treaties, the sources of the legal obligations must be researched. Secondly, the study argues that the attribution of conduct is fundamental to *de facto* applicability of legal obligations to the MMO in principle. Without attribution of conduct, and therefore responsibility the legal obligations would not have any weight under them and would not in factual situation be having effect in law to the conduct of the military operation. Therefore, international organization must be attributed the MMO conduct for its obligations to be applicable to the MMO. To that question, the thesis looks into ILC's work on DARIO and applicable practice of the international organizations, states and judicial bodies and especially analyse the principles of attribution of conduct in specific instances of past MMOs. Lastly, the part analyses the organizations capability of being a party to an armed conflict, as without it the organization's IHL obligations could not be applicable. Especially common but differentiated obligations could be presented as a unified standard by the international organization's scope of feasible precautions by constructing the term "feasible" in a way that would not obligate states to ignore the goals and capabilities of the MMO as a whole, even if the TCSs' own scope of feasible precautions would be higher.

[24] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, Article 57(2)(a)(i) & Article 57(2)(a)(ii)

Fourth part deals then with the TCS obligations that might provide an obstacle for MMO's unified standards based on international organization's obligations. First part deals with clauses in the treaty law that might bind the TCS troops even beyond attribution of conduct. Such clauses can be found in Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Treaty) prohibiting assisting or encouraging the use of landmines[25] and Convention on Cluster Munitions specifically mentioning the multinational military operations.[26] Similarly, Geneva Conventions obligate states to "*respect and ensure respect of present conventions in all circumstances.*"[27] However, the specifics of such clauses are unclear, and it requires analysis on their effect to the MMO obligations. Lastly, the MMO soldiers might be bound by domestic legal obligations to conduct hostilities in a certain way, which would make the unified (lower) standard be unattainable. Second part concerns with possible dual attribution of conduct, where the MMO conduct could be attributable to both TCS and the international organization simultaneously, making the MMO to be bound by dual standards of law. Thirdly, the thesis analyses the prohibition of circumventing obligations by TCS abusing international organization's separate legal personality and acting through the organization to avoid their own obligations. The concept of circumventing exists both in DARIO articles and European Court of Human Rights (ECtHR) case law. However, it has gained significant criticism and has not been fully crystallized especially in case of military operations.

The fifth part deals with the possibility of MMO being obligated to have the highest available scope of IHL obligations as its common standard. While such common standard has been used in practice, that can be seen as a policy decision. To that end, one must deal with the clauses in treaties whether agreeing to rules of engagement and accepting MMO to engage in prohibited activities would constitute "*assistance or encouraging*" on par with clauses such as Ottawa Treaty.[28] Similarly Common Article 1 can bring forward such possibilities, if one would interpret the article extensively, by making it to constitute a positive duty to interfere and ensure respect of IHL of other states and entities. One of the methods to ensure respect is the conduct in the institutional decision-making process (especially voting) to ensure that the MMO would not breach IHL, even when said decision-making process would not be attributable to the State

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[25] Ottawa Treaty, Article 1(c)
[26] The Convention on Cluster Munitions. 2008, (Hereafter Convention on Cluster Munitions) Article 21(3) and Article 21(4)(d)
[27] Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 12th August 1949. Art. 1. Common to all Geneva Conventions and Additional Protocol I.
[28] Ottawa Treaty, Article 1(c)

but to the organization itself. The Common Article 1 would be especially present for the different interpretations that the TCS might have regarding the same obligations. However, it seems that the Common Article 1 cannot obligate states to ensure that other entities respect IHL treaty obligations that they have not consented.

The study then concludes that the IHL allows the possibility of having unified standard of common but differentiated obligations based on the overall considerations of the MMO regarding what is feasible. Furthermore, in cases where the TCSs are have significant influence in the conduct of the operation, they are under an obligation to ensure that the interpretations of the common obligations do not allow leeway to an extent that they would consider the conduct a breach of the obligations. However, the entities involved in the MMO are not allowed to escape their treaty obligations when the treaties include clauses obligating state parties to follow them beyond rules of attribution of conduct, which seemingly includes vast majority of the IHL treaties. Similarly, there are no obligations to ensure highest available scope as a unified standard to the operation, still allowing differentiated scopes of obligations to the entities involved in the military operation.

2. Definition and Characteristics of multinational military operations

This chapter aims to give overview of the MMOs that the study will be using. The definition will be shown by analysing the different entities that have undertaken military operations, looking into the past operations, to show the common characteristics that MMOs have and to highlight the differences between them. There are certain unifying characteristics of all MMOs that have been established under the auspices of international organizations. Firstly, the military operations are vehicles for both the organization and the troop contributing states. No international organization currently possess their own troops, and therefore must borrow them from their member states or other states willing to contribute troops for the operation, from TCSs.

While the organization is in theory in control of the troops of the MMO, the transfer of authority over the TCSs troops to the organization is never full.[29] TCSs keep criminal and administrative jurisdiction over their troops and the organization has very limited authority over the punishment of the individual soldiers in their military operations.[30] Often in reality the command and control that international organization possesses over the MMO is operational command and control.[31] While certain MMOs have different understanding of the terms, the thesis adapts NATO terminology regarding the operational command and control. Under NATO glossary of terms operational command and control refers to "*The authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the commander deems necessary*"[32] and "*The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units*."[33]

[29] FERRARO, Tristan. The Applicability and Application of International Humanitarian Law to Multinational Operations. International Review of the Red Cross. 2013, Vol. 95, No. 891/892, p. 588

[30] LECK, Christopher. International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct. Melbourne Journal of International Law. 2009, Vol. 10, p. 349

[31] CATHCART, Blaise. Command and Control in Military Operations. In GILL, Terry D, FLECK, Dieter (eds.) *The Handbook of the International Law of Military Operations.* 2nd Edition. Oxford University Press, 2015. pp. 261-2

[32] NATO. *NATO Glossary of Terms and Definitions.* AAP-06 Edition 2014. 2-O-3

[33] Ibidem

However, no two MMOs are exactly the same. They all differ in their systems of chain of command, amount of TCSs involvement in the decision-making in different instances, TCS cooperation and collaboration in missions and the intensity of the conflicts and operations and the overall aims of the operations, ranging from peace keeping into military occupation or overthrowing sitting governments. But while all MMOs are different, one can detect general guidelines on how the leading organization conducts their operations under its command and control. Such MMOs can be found especially from NATO and to certain extent UN and ECOWAS, who possibly due their active participation in conflicts have more defined practices in their operations.

To understand the framework of the MMOs and the tasks and influence that the international organization and the TCSs have over it one must look into the relationship between the international organizations and their member states. International organizations exist in both horizontal and vertical relationship to their member states. Vertically, it is the member states that establish international organizations and assign its tasks, authority and competence.[34] Similarly, the member states have the power to dissolve the organizations they establish. In that sense, organizations are vehicles to their member states and are under their influence. Similarly, the organization's representatives in the chain of command of the MMO are often nationals of the TCSs. However, in theory they should own their loyalty to the organization instead of their own states and their conduct should be deemed conduct of the international organization. On the other hand, the horizontal relationship comes from the organizations' autonomy from its member states. They possess separate legal personality from the member states, can enforce their rights against other states as sovereign equals and possess broad immunity from the other states, shielding them from individual member states authority and influence.[35]

The degree of autonomy that international organizations possess differ greatly, and that influences their military operations. If member states are highly influential and often present in the organization's decision-making process, then the autonomy of the international organization would be diminished regarding the conduct of the MMO. However, when the organization itself is stronger and its organs are not seating the member states' representatives but the organization's own personnel, it can have greater autonomy and have more distinct will from its member states in conducting the military operations. These differences influence greatly the MMOs' legal obligations.

[34] DAUGIRDAS, Kristina. How and Why International Law Binds International Organizations. Harvard Journal of International Law. 2016, Vol. 57, No. 2, p. 327
[35] Ibidem

Another point of difference between the different MMOs is the possible inclusion of non-member states of the international organization to the MMO. Such examples have been seen especially in NATO and EU operations. Non-member states might not have similar place in the usual decision-making structure of the organization as the member states might. However, their placement in the structures can be agreed in the inclusion to the MMO and the status of force agreements between the organization and the non-member state TCS.

Since the question of unified standards of IHL application is often based on factual conduct of the MMO, the analysis of the different MMOs is necessary. This chapter focuses on NATO (a.), UN (b.), and ECOWAS (c.) operations. While other entities have carried out military operations, such as European Union and African Union, the ones presented in this paper are characterized by higher intensity of conflict. Therefore, they are more applicable to the study of different IHL obligations, since less intense operations might not breach the threshold of application of IHL at all.

The analysis will focus firstly on how the chain of command structures are arranged in the MMOs and what is the standard and amount of international organization's involvement in the decision-making processes on different instances. Some MMOs can have organizations' organs being very present in the questions of how the MMO conducts its operations, while others can only issue more general guidelines for outline of the operation and allow TCS themselves take the leading role on the ground. Secondly, the chapter inspects the collaboration between the TCS. Whether the TCS act as separate parts of the MMO or they are highly unified and entangled group of soldiers acting together in specific missions can have influence on the common standards of IHL obligations. Lastly, the MMO framework is highly influenced by the intensity of the conflict, and the chapter aims to look into whether there are similarities between different lead-IO operations depending on the intensity of the conflict.

2.1 United Nations

UN operations have been greatly different from each other. Classically the UN has been conducting peacekeeping missions, where the intensity of the conflicts would be already lower and the MMO would be more of impartial entity standing between the combatant parties and securing and upholding the truce or armistice agreements.[36] They were only using force in self-defence and did not take part in the hostilities in a sense of becoming a party to the armed

[36] HILLEN. *Blue Helmets…*, p. 22

conflict and the combatant parties gave their consent to the peacekeeping force.[37] The traditional peace keeping operations were conducted by lightly armed troops employed not for ambitious military missions but to stabilize and offer possible environment for the combatant parties to find diplomatic or political resolution to the conflict.[38]

However, after the cold war UN has taken up so called second-generation peacekeeping operations that are more of peace enforcement than peace keeping.[39] In these missions UN has taken part in the conflict as a combatant party, aiming to enforce the peace. The peacekeeping force acted without the consent of the combatants, and were tasked with disarming and demobilizing belligerents, enforcing safe zones, and even take up many governmental functions.[40] The military function of the operations was merely one part of the whole operation, including diplomatic, political, and economical efforts aiming to strengthening the host state.[41] Many of the second-generation peacekeeping operations, however, lacked the necessary infrastructure, resources and command and control structure for effectively enforcing peace and succeeding in their missions.[42] However, the operations were still tasked with creating possible environment for political resolutions of the conflicts and were not aimed to coerce the warring parties into stopping combatant actions.[43] The second-generation peacekeeping operations are as far as UN went with the peace enforcement. Other missions that went further than mere peacekeeping were usually authorized by UN but conducted by either regional organizations or ad hoc coalitions of willing under lead state command and control.[44] While certain UN operations had limited peace enforcement capabilities and mandates, they never engaged fully in the enforcement operation.[45]

Since the goal of this study is to research the different scopes of IHL of the entities engaged in the MMO and possibility of unifying standards to the operations, the focus is therefore to the second-generation peacekeeping operations regarding UN. The classical peacekeeping operations hardly qualified even as a combatant party and therefore would not be bound by IHL in the first place. Therefore, the interest lies in the operations that could be bound by IHL and to research how the different legal obligations interoperate in such framework.

[37] Ibidem p.23
[38] Ibidem p. 22
[39] Ibidem
[40] Ibidem p. 26
[41] Ibidem p. 141
[42] Ibidem p. 29
[43] Ibidem
[44] Ibidem pp. 29-30
[45] Ibidem p. 143

UN military operations get their authority and strategic direction from Security Council, which establishes the UN MMO by its resolutions.[46] The legal status of the troops contributed to the MMO is established by agreements between UN and the TCS. UN has published a model of the agreements which is intended to be used as basis for the agreements done in actual cases.[47]

Generally, the TCSs retain an element of command and control over their contributed personnel and equipment.[48] They therefore agree on the limits of their troops usage by authorising the troops to the UN operational command and control, giving UN the authority "*over deployment, organization, conduct and direction*" of the troops in the MMO.[49] The limits would specify the time, area and purpose that UN can use the troops.[50] The UN chain of command would then go from UNSC to Secretary General and to Undersecretary General of Department of Peacekeeping Operations (DPKO).[51] UN representatives, namely Head of Mission and Head of Military Component have the overall operational command and authority over the MMO in field.[52] Therefore, the UN MMOs have unbroken chain of command that assigns the operational command and control to Head of Military Component which answers through the chain of command to Secretary General and UNSC.[53] Under the UN representatives the tactical command and control was vested in national contingents' commanders.[54] Otherwise the TCS are largely removed from the operational decision-making process, at least in paper, and only keep their usual rights to call their troops off or refuse orders given to them through the chain of command.

However, in practice the UN chain of command is often broken and TCSs both ask for confirmation to UN orders and seek advice from their national governments outside the chain of command.[55] Often, the TCSs gave primacy to their national governments orders when those conflicted with UN chain of command's orders.[56] Other times, the UN chain of command was replaced by a national one for specific tasks out of necessity, as the practiced national chain of

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[46] CAMMAERT, Patrick C., KLAPPE, Ben F. Authority, Command, and Control in United Nations-led Peace Operations. In GILL, Terry D., FLECK, Dieter (eds.) *The Handbook of the International Law of Military Operations.* 2nd Edition, Oxford University Press, 2015, p.181
[47] UNGA. Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations. 23 May 1991, A/46/185
[48] CAMMAERT, KLAPPE. Authority, Command, and Control…, p. 181
[49] UNGA, Model Agreement…, para 7
[50] CAMMAERT, KLAPPE. Authority, Command, and Control…, p. 182
[51] Ibidem
[52] Ibidem p. 183
[53] Ibidem
[54] HILLEN Blue Helmets…, p. 161
[55] Ibidem p. 182
[56] Ibidem

commands were better equipped to handling the difficulties of the missions.[57] At times the whole UN chain of command was so overwhelmed that the TCSs felt it to be necessary to act outside it.[58] There have been also cases where UN is assisted by parallel forces that do not act within UN command and control.[59] During Yugoslavian mission, it was up to UN special representative of the Secretary General to ask for air support from NATO states. However, after the request it was up to NATO to conduct the tasks.

The command and control of MMO influences greatly the possible legal obligations that the MMO must uphold. Firstly, the attribution of conduct of the MMO is determined by the effective control of the MMO, of which command and control is critical. Following that, as a general rule, attribution of conduct is mirroring to an extent the question of whose legal obligations are applicable to the MMO.

2.2 NATO

After the Cold War was over, the NATO has become more active in other sort of tasks, mainly peacekeeping and peace-enforcement operations, often (but not always) under UNSC authorization. The NATO operations are often highly intensive conflicts where NATO is clear combatant party conducting war-like operations. Examples of these are NATO's Yugoslavian operation, dubbed Operation Allied Force, and Libyan intervention, called Operation Unified Protector. Both of those operations were characterised by widespread use of air power on NATO's part, bringing the full-scale applicability of IHL to the question. While NATO has conducted less intense operations too, such as peacekeeping mission in Kosovo, KFOR, and Afghanistan International Security Force (ISAF), often those operations still breached the threshold of intensity to be considered armed conflicts where NATO was a combatant party.

NATO command structure is generally well established and seemingly follows the similar approach in all of the NATO military operations. The highest decision-making body of the NATO is the North Atlantic Council, which seats representatives of the member states.[60] Under the North Atlantic Council there are different committees, similarly seating representatives of the member states, most importantly the Military Committee and the

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[57] Ibidem p. 159

[58] Ibidem pp. 159-160, giving out an example of UNTAC operation in Cambodia where TCSs reported to their own national authorities instead of UN central command

[59] Ibidem p. 152 showing that US, France, and NATO have been giving air support to UN peacekeepers in Yugoslavia, Rwanda and Somalia.

[60] *North Atlantic Council* [online]. NATO, 10th October 2017 [cit. on 24th May 2018]. Available at <https://www.nato.int/cps/ic/natohq/topics_49763.htm> Member states can be represented either by diplomatic representatives, defence or foreign ministers or heads of state depending on the decision-making level.

International Military Staff.[61] They are tasked with political guidance of the NATO and provide the MMO with its military goals, desired end results and possible constrains on the operation member states might wish to impose, including rules of engagement.[62] NATO decision-making process at that level is also unanimous, meaning that every member state must agree to the decisions in NAC before they can be carried out.[63]

NAC also approves the eventual operational plan composed by another NATO organ, Allied Command Operations, which consists of member states' personnel.[64] Eventually the NAC also approves Supreme Allied Commander Europe's target sets of possible military objectives the MMO will attack against.[65] Joint Operations Command generally has operational command and control over the MMO.[66] It is also the organ who is in charge of decisions regarding which weaponry to use (lethal or non-lethal, precision guided or not) within the limits issued by the North Atlantic Council.[67]

Certain other aspects of NATO operations, however, are not organized in same way. One example of this can be taken from detention policies of NATO operations, which differ considerably between the MMOs. During Kosovo Force peacekeeping operation, NATO declared common policy on detention for the whole operation.[68] The TCS then had to conduct their detentions within the NATO issued limits. But on the other hand, during Afghanistan operation NATO failed to issue similar guidance and the detention issues were left purely to the TCSs considerations.[69]

One can see therefore that in NATO's member states are highly involved in the decision-making process. While the decisions are done in NATO organs and therefore generally attributable to the NATO itself, the TCSs in military operations are able to influence the conduct of the operation greatly. However, the TCSs control over the decision-making process differs from operation to operation. In the beginning of NATO's Yugoslavian operation both NAC and

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[61] Ibidem. Furthermore: *International Military Staff* [online]. NATO, 15th June 2017 [cit. on 24th May 2018]. Available at <https://www.nato.int/cps/en/natohq/topics_64557.htm>
[62] NATO. *Allied Joint Doctrine for Joint Targeting*. April 2016 AJP-3.9 p. 3-1
[63] *Consensus Decision-Making at NATO* [online]. NATO, 14 March 2016 [cit. on 24th May 2018]. Available at <https://www.nato.int/cps/ic/natohq/topics_49178.htm>
[64] NATO. Allied Joint Doctrine for Joint Targeting…, p. 3-1 The Operational Plan is also developed from the North Atlantic Council's political guidance.
[65] Ibidem
[66] CATHCART. Command and Control in Military…, p. 265
[67] NATO. Allied Joint Doctrine for Joint Targeting…, p. 2-4. For example, NATO mandated 100% use of precision guided munitions during Operation Unified Protector, going beyond the requirements issued by IHL. See, OLSON. Letter to Judge Kirsch..., p. 3
[68] DIREK Omar Faruk. *Security Detention in International Territorial Administrations: Kosovo, East-Timor, and Iraq.* 2015, Brill Nijhoff Publishers. pp. 138-139
[69] OLSON. A NATO Perspective on Applicability…, p. 655

every member state individually.[70] The political review also consisted of reviewing every target individually, not as target lists or guidance on types of legitimate targets. However, eventually even during the Yugoslavian bombing campaign the NATO review process eliminated the NAC's review process over individual targets, although individual member states still had the right to veto possible targets.[71] Later, as seen above, NATO operations removed the member states from the operational decision-making process, limiting them into issuing overall constrains and accepting target lists instead of individual targets. But even then, seemingly the presence of TCSs' nationals in the NATO organs (and seemingly in dual capacity as NATO organs and TCS representatives) the TCS had more influence over the MMO than in cases of UN MMOs.

Furthermore, non-member states to the NATO have taken part in the operations. Those states generally are planted into the NATO chain of command and are under NATO's operational and tactical command and control.[72] However, the NATO organs would have the non-member state TCS's nationals in those organs, to assist with issuing correct tasks to the TCS's troops, ensure that the capabilities of the troops is correctly understood and finally to be a "red card" holder, to ensure that the tasks of the TCS's troops would stay within their national caveats and legal obligations and possibly refuse orders if there is a threat of the orders breach their legal obligations.[73] In an essence, the non-state member TCSs operations followed closely the state-member TCS approach, although they were not present at the political review sector at NAC and had to issue national caveats for the limits of their participation. Therefore, they lacked some of the influence that member states had on how the NATO as a whole conducted the operation.

2.3 ECOWAS

ECOWAS as an organization was founded to increase economic cooperation and integration among West African states.[74] Ultimately it was meant to lead into European Union

[70] PETERS, John E. et al. *European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation.* Rand publications, 2001. p. 26
[71] Ibidem p. 27
[72] EGNELL, Robert. The Swedish Experience: Overcoming the Non-NATO-Member Conundrum. In MUELLER, Karl P. (ed.) *Precision and Purpose: Airpower in the Libyan Civil War.* 2015, Rand Corporation, p. 320 regarding Swedish experience in Operation Unified Protector. See also NARDULLI, Bruce R. The Arab States' Experience. In MUELLER, Karl P. (ed.) *Precision and Purpose: Airpower in the Libyan Civil War.* 2015, Rand Corporation, pp. 352-1, 355-6 for Qatar's and United Arab Emirates role in the operation and their place under NATO chain of command and their nationals placed in NATO organs.
[73] EGNELL. The Swedish Experience…, p. 320
[74] UKAIGWE, Jerry. *ECOWAS Law.* 2016, Springer, p. 4

like customs union and common market between the member states.[75] While the organization originally did not hint in any way towards any military capabilities or intents, it did develop into possessing capability and mandate of enforcing peace by military means in the region.

ECOWAS military operations, especially the ECOMOG, has been characterized by weak chain of command and a domination of the whole MMO by one TCS, namely Nigeria, during the operation. During the Liberian operation, vast majority of the troops, rising up to 70%, were contributed by Nigeria.[76] Similarly, many of the leadership positions were reserved to Nigerians and all the commanders of the ECOMOG apart from the first one (Ghanan national) were all Nigerians.[77] However, the ECOMOG was still nominally under unified command of ECOWAS and its conduct could therefore be seen as attributable to ECOWAS,[78] although there were claims that in reality the unified chain of command of ECOWAS was breached by Nigeria often.[79] Nigerian troops preferred to both confirm the ECOWAS chain of command orders but also to completely ignore the ECOWAS wishes and act according to the wishes of their national government. The domination got so far that the MMO was hardly acting under ECOWAS' wishes as an autonomous entity but were largely an agent of Nigeria. Similarly, the smaller TCSs exercised considerable operational control and command over their contributed troops, to further compromise the unified chain of command.[80] The ECOWAS representative who was charged with directing the conduct of the ECOMOG did not have specific lines of communications with the MMO, which further ensured the lack of ECOWAS control over the MMO.[81]

2.4 Conclusion

The unifying characteristics of MMO, and how the study understands MMOs, can be therefore be deducted from the examples listed earlier. They consist of international organizations framework but since the organizations do not possess their own troops, the troop contingents must be contributed to the MMO by the TCSs. The command and control of the

[75] Ibidem
[76] WALRAVEN. *Containing Conflict in the Economic Community…,* p. 43
[77] FRANCIS. A New Security Agenda…, p.184
[78] Ibidem 180; also: ECOWAS Community Standing Mediation Committee. Decision A/Dec.1/8/90 On the Ceasefire and Establishment of an ECOWAS Ceasefire Monitoring Group for Liberia. Official Journal of the Economic Community of West African States. Vol. 21 November 1991, p. 7
[79] WALRAVEN. *Containing Conflict…,* p. 43
[80] TUCK, Christopher. "Every Car Or Moving Object Gone" the ECOMOG Intervention in Liberia. African Studies Quarterly. 2000, Vol. 4, No. 1, p. 6
[81] WALRAVEN. *Containing Conflict…,* p. 43

contributed troops is then at least on paper authorized to the international organization and its organs.

But the command and control is not unlimited, as in all the cases the TCSs keep criminal and administrative jurisdictions over their troops and are still responsible for their training and salaries. The organization possess operational command and control. However, how the international organizations command and control is respected in practice still differs a lot. NATO has seemingly strongest chain of command and highly developed interoperability regarding their operations. TCSs rarely act outside the chain of command or avoid orders from the NATO personnel. However, as seen in certain examples of UN operations, their TCSs are not always willing to respect the chain of command and the TCSs governments can interfere with the chain of command of the military operation. ECOWAS operations can be taken as an extreme example where the organization's command and control over the MMO is extremely limited due to the TCSs interference and neglect of the chain of command. Furthermore, seemingly TCSs have more powers in influencing the NATO's decisions due to the unanimous rule in the decision-making process.

It is important to look into the factual situations in the MMOs. It is the facts, not the control on paper, that influences the legal framework that will be analysed in the following chapters. Legal questions such as attribution of conduct and possibilities to ensure respect of IHL are dependable on the factual effective control in the field or real capabilities of ensuring respect of IHL, not on what has been written on paper and signed in agreements between the organizations and TCSs.

3. Sources of different obligations

Before getting into the question whether MMO have unified standards of IHL application it is important to look into how the differences in MMO obligations can come into being. In other words, what are the different obligations that must be folded into a common standard for the MMO. On the first glance one could argue that since Geneva Conventions are universally accepted and most of the additional protocols and other IHL is established customary law, the TCS of the MMO would be bound by same legal obligations anyway.

However, that is not the case and, there are major differences in their obligations. There are differences in binding treaty law to the entities. While it is true that Geneva Conventions are universally binding, that is not the whole regime of IHL. First of all, not all of Additional Protocol I is accepted as customary law by all states.[82] Since major powers, such as United States or Israel, still have not ratified the Additional Protocol I and have not accepted the whole treaty as customary law, which can cause TCS to be bound by different rules within MMOs. However, arguably the biggest differences in the binding treaty law arises from weapons conventions,[83] such as Ottawa Treaty,[84] Convention on Cluster Munitions (Cluster Munition Convention),[85] and Convention Prohibiting Certain Conventional Weapons and its additional protocols,[86] as not all of them have attained universal acceptance and have not necessarily acquired customary law status.[87]

However, even when the binding obligations are, on paper, the same, the entities often interpret them differently. Prime example of this can be found in NATO operations, where certain states, mainly USA's, interpretation of legitimate military target goes beyond what has been accepted by other NATO states.[88] USA includes economic targets and other "war sustainability" targets, which has attained critique from their allies.[89] However, since there is

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[82] SOFAER, Abraham. Agora: The U.S. Decision Not to Ratify Protocol I to The Geneva Conventions on The Protection of War Victims: The Rationale for The United States Decision. American Journal of International Law. 1988, Vol. 82, No. 4, pp. 784-787; LEVIE, Howard S. The 1977 Protocol I and United States. International Law Studies US Naval War College. 1993, Vol. 70, pp. 340-346

[83] STEIN. Coalition Warfare and Different…, p. 316

[84] Ottawa Treaty

[85] Convention on Cluster Munitions

[86] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effect, 10 October 1980 and its protocols

[87] ICRC Customary International Humanitarian Law Study states that only "particular care must be taken to minimise" landmines' indiscriminate effect, to mark the mine fields during the conflicts and remove them at the end of hostilities without claiming for an outright ban. HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise. *Customary International Humanitarian Law: Volume I: Rules.* International Committee of the Red Cross, 2005, pp. 280-286

[88] HENDERSON, Ian. *Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I.* Martinus Nijhoff, 2009. pp. 142–143

[89] Ibidem

no centralized authority that can issue rulings over the interpretations, it can be difficult to have accepted "correct" interpretations and treat different interpretations of IHL as breaches of law.

Similar disparity arrives from so called common but differentiated obligations. These are mainly the obligations to take precautions "to do everything feasible" to verify the military character of the objects[90] and avoid and minimize incidental civilian casualties.[91] The argument therefore is that the term "feasible" includes differentiated standard of obligation based on the technological and military possibilities of the states. States with better technological capabilities, by for example so called smart weapons (i.e. munitions that can be controlled during their flight to their assigned targets) or better intelligence gathering systems are obligated to protect civilians to a higher standard than states that simply do not possess the technology and therefore the does not have similar possibilities to protect the civilian population to the same extent. When TCSs in the operation has different scopes of what is feasible, there can be problems regarding which standards the MMO follows or whether all TCS have their own, individual scope of feasible precautions.

3.1 Different treaty obligations

As mentioned earlier, the most likely source of differences regarding the different treaty obligations that TCS might possess arise from the weapons conventions. However, that is not always the case and they are not the only treaties where TCS might have different obligations. While majority of Additional Protocol I might have customary status, there are still certain parts that have not been crystallized to customary law. Especially United States has been vocal in its opposition in certain clauses in the convention, namely granting irregular fighters a prisoner of war status (continuing issue especially in the time of war on terror), total ban on reprisals and limiting of legitimate targets (especially Article 56(1) prohibiting attacks against dangerous forces).[92]

Out of the weapons conventions, Ottawa Treaty has been the one that has caused most controversy in MMOs in the past. One of the reasons for that is United States' refusal to ratify the treaty. There have been reports of possible United States' use of anti-personnel mines in Afghanistan during early days of the campaign, although before the MMO was conducted under

[90] Additional Protocol I, Article 57(2)(a)(I)
[91] Ibidem Article 57(2)(a)(II)
[92] SOFAER. Agora: The U.S. Decision Not to Ratify…, p. 784-787; LEVIE. The 1977 Protocol I and United States…, pp. 340-346

auspices of NATO.[93] However, the situation for NATO seems to be getting better regarding interoperability after United States have changed its policy regarding anti-personnel mines stating that it will not use them outside the Korean peninsula.[94] However, it is still just a policy decision and not a legal obligation for US and can therefore be changed in the future.

The issue also exists outside NATO states. Outside Western countries, Nigeria, a dominant state within ECOWAS and one of the main contributors to ECOWAS military operations,[95] has signed but not ratified the Ottawa Treaty and continues to hold a stockpile of mines.[96] Yet, other ECOWAS partners, such as Ivory Coast,[97] and Senegal[98] have ratified the treaty and abstained from using anti-personnel mines. Of the other states who have had or continuingly have active roles in military missions, Israel,[99] Russia,[100] China,[101] and Saudi Arabia[102] have not joined the Ottawa Treaty and continue to keep the option of using anti-personnel mines open for their military operations. Similar differences exist for the cluster munition treaty,[103] but there have been relatively few instances where either of the weapons have been used. However, it is not unheard of. Saudi-Arabia led coalition of the willing has been reported to be using cluster munitions, despite some active or supportive members have ratified the treaty.[104]

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[93] *Landmine Use in Afghanistan* [online]. Human Rights Watch, October 2001 [cit. on 1st October 2018]. Available at <https://www.hrw.org/legacy/backgrounder/arms/landmines-bck1011.htm>

[94] *U.S. Landmine Policy* [online]. US Department of State, September 2014 [cit. on 1st October 2018]. Available at <https://www.state.gov/t/pm/wra/c11735.htm>

[95] WALRAVEN, Klaas van. *Containing Conflict in the Economic Community of West African States: Lessons from the Intervention in Liberia 1990-1997.* Netherlands Institute of International Relations Clingendael, 1999, p. 43

[96] WARNER, Jason. Nigeria and "Illusion Hegemony" in Foreign and Security Policymaking: Pax-Nigeriana and the Challenges of Boko Haram. Foreign Policy Analysis. 2017, Vol. 13, No. 3, pp. 345-7

[97] *Cote d'Ivoire Mine Ban Policy* [online]. Landmine & Cluster Munition Monitor, 30th October 2014 [cit. on 1st October 2018]. Available at <http://www.the-monitor.org/en-gb/reports/2015/cote-divoire/mine-ban-policy.aspx>

[98] *Senegal Mine Ban Policy* [online]. Landmine & Cluster Munition Monitor, 2nd November 2011 [cit. on 1st October 2018]. Available at <http://www.the-monitor.org/en-gb/reports/2015/senegal/mine-ban-policy.aspx>

[99] *Israel Mine Ban Policy* [online]. Landmine & Cluster Munition Monitor, 28th November 2013 [cit. on 1st October 2018]. Available at <http://www.the-monitor.org/en-gb/reports/2015/israel/mine-ban-policy.aspx>

[100] *Russian Federation Mine Ban Policy* [online]. Landmine & Cluster Munition Monitor, 11th October 2012 [cit. on 1st October 2018]. Available at <http://www.the-monitor.org/en-gb/reports/2015/russian-federation/mine-ban-policy.aspx>

[101] *China Mine Ban Policy* [online]. Landmine & Cluster Munition Monitor, 28th October 2014 [cit. on 1st October 2018]. Available at <http://www.the-monitor.org/en-gb/reports/2015/china/mine-ban-policy.aspx>

[102] *Saudi-Arabia Mine Ban Policy* [online]. Landmine & Cluster Munition Monitor, 19th June 2010 [cit. on 1st October 2018]. Available at <http://www.the-monitor.org/en-gb/reports/2015/saudi-arabia/mine-ban-policy.aspx>

[103] US, China, Saudi-Arabia and Israel, among others, are not members

[104] Senegal has ratified the treaty and contributes to the coalition of the willing. *Senegal to Send 2,100 Troops to Join Saudi-Led Alliance* [online]. Reuters, 4th May 2015 [cit. on 1st October 2018]. Available at <https://www.reuters.com/article/us-yemen-saudi-senegal/senegal-to-send-2100-troops-to-join-saudi-led-alliance-idUSKBN0NP1N920150504>

The IHL treaties therefore can cause different IHL obligations to MMOs. As the practice shows, it has happened in the past and can be happening in the future. While the treaties occasionally deal with the interoperability issues, such as Common Article 1 of Geneva Conventions[105] or prohibition to assist or encourage non-parties to conduct prohibited by Ottawa Treaty,[106] the specifics of those are far from established and will be dealt later in the thesis.

3.2 Different interpretations

Even when the entities are bound by same obligations, either by being parties to same treaties or the obligations have been crystallized into customary IHL, the involved entities can still have different interpretations of their common obligations. Therefore, one state might engage in actions that it deems fully lawful while its MMO partners might question its legality. Of course, not every disagreement on an interpretation mean that someone is breaching their obligations, but it can be possible to stretch the interpretations too far.

Different interpretations of legal rules are almost automatic consequence of the lack of centralized system where one entity can give the correct and precise standards for obligations. This study will focus more on more fundamental different interpretations that exist beyond the individual soldiers' conduct, such as characteristics of legitimate targets, characterization of armed conflicts or proportionality principle. In a sense, not every difference in interpretations are within the study's scope. One of the clearest examples of different interpretations arise from the laws of targeting and the question of what constitutes a legitimate military objective. United states have notoriously used a wide definition of military objectives.[107] Additional Protocol I defines the military objectives as objects whose destruction offers definite military advantage, United States uses terminology of objectives that brings "*effective contribution to war-fighting or war-sustaining capabilities.*"[108] While it is true that United States is not a state party to the AP, ICRC study on customary law ruled the obligation as customary law and no state, including

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UK, US, and France are contributing logistical and intelligence support to the coalition. *Saudi-Led Coalition Probably Used Cluster Bombs in Yemen: HRW* [online]. Reuters, 3rd May 2015 [cit. on 1st October 2018]. Available at <https://www.reuters.com/article/us-yemen-security-cluster-bombs/saudi-led-coalition-probably-used-cluster-bombs-in-yemen-hrw-idUSKBN0NO09J20150503>

[105] Common Article to all Geneva Conventions and Additional Protocol I states that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Geneva Convention I, Art. 1

[106] Ottawa Treaty and Convention on Cluster Munitions have clauses for dealing with the possible situations in MMOs. Ottawa Treaty prohibits member states "to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." See: Ottawa Treaty Article 1(c)

[107] HENDERSON. *Contemporary Law of Targeting…*, pp. 142–143

[108] United States Department of Defense, *Law of War Manual.* June 2015, p. 210

United States, disagrees with the findings regarding the principle of distinction.[109] Similarly, since United States has signed and ratified the Conventions on Certain Conventional Weapons and its additional protocols, which define the term "military objective" mirroring the Additional Protocol 1[110] it seems far-fetched to claim that United States would follow different customary law definition.

The change in terminology allows the wider targeting practice of United States against economic targets.[111] Some of those strikes, such as strikes against ISIS oil refineries and unofficial "banks", i.e. buildings where stashes of cash are hidden, have not been objected by most states.[112] However, that is not true in all the cases. During Afghanistan NATO operation, Supreme Allied Commander in Europe, US General John Craddock distributed a guidance stating that NATO troops can and should target Afghanistan's opium farmers directly without presenting proof that the opium farmers are connected with enemy combatants and are legitimate military objectives.[113] Certain NATO states, among them Germany, challenged the guidance and with their strong opposition managed to get the order withdrawn. Similar issues were presented in Yugoslavian conflict in Operation Allied Force where the NATO member states vetoed certain the targeting decisions over their threats of it violating the law even if other TCS were ready to launch the attacks.[114]

The main problem with the different interpretations is the fact that there is no centralized authority providing the "correct" interpretations of the IHL. Indeed, every state seems to come up with their own. It is not only in targeting decisions, as during NATO's Afghanistan operation there were major disagreements on the detention issues, on the status of detainees and their treatment.[115] During the same conflict, the TCS to NATO operation even failed to find agreement on the status of the armed conflict, its existence and its parties.[116] Furthermore, the issue is not limited only to Geneva Conventions, as also different weapons treaties have been interpreted differently. During NATO peace keeping operation in Kosovo, the NATO

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[109] HENCKAERTS, DOSWALD-BECK. *Customary International Humanitarian Law Volume 1…,* p. 31
[110] Protocol II to the Convention Prohibiting Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 October 1980, Article 2(4)
[111] ROBERTSON, Horace, Jr. The Principle of the Military Objective in the Law of Armed Conflict. United States Air Force Academy Journal of Legal Studies*,* 1997, vol. 8, pp. 50–51
[112] GOODMAN, Ryan. Targeting 'War-Sustaining' Objects in Non-International Armed Conflict *NYU School of Law Public Law Research Paper*, 2016 No. 16–20, pp. 11
[113] ZWANENBURG. International Humanitarian Law Interoperability…, p. 694
[114] PETERS et al. *European Contributions to Operation Allied Force…,* pp. 28-29
[115] OLSON. A NATO Perspective…, p. 655
[116] ENGDAHL, Ola. Multinational Peace Operations Forces Involved in Armed Conflict: Who Are the Parties? In. MUJEZINOVI LARSEN, Kjetil et al.(eds.). *Searching for a 'Principle of Humanity' in International Humanitarian Law.* Cambridge University Press, 2012, pp. 234-7

leadership got a request to assist the local police forces in crowd control operation and to assist restoring peace and safety to the area. However, some of TCS to the peace keeping operation were not authorized to use tear gas, as they interpreted it being prohibited by the Chemical Weapons convention while other TCS did not have such limitations.[117] Therefore NATO leadership had to be careful in choosing the correct TCS in the missions that benefited from possible use of tear gas.[118]

The problem with different interpretations is that where is the line between mere different interpretation and outright illegal conduct. In other words, how flexible are the legal obligations. It seems difficult to have a straight cut answer to the question, but they can be better judged case-by-case basis. Out of the examples above, it seems sufficient to say that especially the question of scope of military objective has risen few eyebrows and has crossed the line between different interpretation and legality in the eyes of some other TCS partners.

3.3 Common but differentiated obligations

The last part deals with obligations that are shared between the TCS and even follow the same interpretations but have different scope of obligations depending on the TCS' capabilities. These obligations are Article 57(2)(a)(I) and 57(2)(a)(II) of the Additional Protocol I, which obligates states to take "all feasible" precautions to verify the military character of the targets and avoid and minimize incidental civilian casualties in the course of attacks. The term "feasible" means that the state parties are only obligated to do what is possible to protect the civilian population. States that can protect civilians to higher standards are obligated to do so, and those that cannot are not obligated to do the impossible.

What is possible and practicable then is influenced by the technological advancements of the party. Especially by the precision technology in armed conflicts, namely precision guided munitions (PGMs), and new intelligence gathering methods of satellites or spy-drones. Smart weapons especially are a big deal and deserve scholarly attention. Firstly, they are massively more accurate than the old dumb bombs. During the World War II, the 2000-pound bombs used by allied forces had circular error probable of 1000 meters, while the PGMs can bring the circular error probable down to couple of meters.[119] During the US military operation Desert

[117] BARON, Wiebe. Command Responsibility in a Multinational Setting: How to Deal with Different Interpretations of International (Humanitarian) Law. Some Experiences from Practice. Military Law and Law of War Review. 2005, Vol. 44, p. 138
[118] Ibidem
[119] PUCKETT, Christopher. In This Era of "Smart Weapons," Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict? Emory International Law Review, 2004, vol. 18, pp-649-651

Storm, PGMs hit their targets 90% of the times while the unguided bombs achieved accuracy rate of mere 25%.[120] Such increase in accuracy obviously influences the party's ability to protect civilian bystanders by massive margins. However, the PGMs are only as accurate as the target intelligence and communications systems allow them to be.[121] It does little good to have accurate bombs flying into wrong targets. However, the continuing trend in the recent conflicts has been that the parties have been using increasing amount of PGMs and the conflicts have been more and more discriminatory.[122]

The advantages of the new technology make it easier for states to discriminate between the intended military objectives and non-combatant objects. That fact has then brought forward claims that states are under obligations to use the new technology and moreover the obligations would impose different scope of feasibleness to militaries based on their technological capabilities. If the party is in possession of high-tech radars, intelligence gathering technology and PGMs, it can and is obligated to do more to protect the civilian population and civilian objects from the dangers of armed conflicts.

There are claims that that line of argumentation falls down in Russian conduct in Chechnya, where the Russian military operations predominately used dumb bombs without care for what is feasible for civilian protection.[123] However, that fails to take into account the fact that Russia Chechnya conflict was deemed internal armed conflict by the Russian government. The Additional Protocol I obligations to take feasible precautions exists in international armed conflicts. On the other hand, Russia is using at least limited amounts of PGMs in its operations in Syria, and while it is seemingly far off from NATO standards of total precision warfare it does not have the capabilities to carry out extended strikes with PGMs.[124] Similarly, criticism for Russian's failure to strike against correct military targets can be to some extent (although not fully) be explained by their lack of reconnaissance and surveillance drones used by NATO

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[120] INFELD, Daniel. Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy In Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage? George Washington Journal of International Law and Economics. 1992, vol. 26, p. 128

[121] SCHMITT, Michael. Effect-based Operations and the Law of Aerial Warfare. Washington University Global Studies Law Review. 2006, Vol.5, No. 2, p. 270

[122] From 8% of Gulf war to 100% in Operation Unified Protector. SCHMITT, Michael. The Principle of Distinction In 21st Century Warfare. Yale Human Rights and Development Journal. 2014, Vol. 2, No. 1, p. 167, United Nations Human Rights Council. Report of the International Commission of Inquiry on Libya. 2nd March 2012, A/HRC/19/68, para. 605

[123] Ibidem p. 697

[124] ANTIDZE, Margarita, STUBBS, Jack. *Before Syria, Russia Struggled to Land Air Strikes On Target* [online]. Reuters, 26th October 2015 [cit. on 1st October 2018]. Available at <http://www.reuters.com/article/us-mideast-crisis-syria-russia-bombing-idUSKCN0SK1WF20151026>

states to gather intelligence and verify the targets.[125] Therefore it is not obvious whether Russia would have breached its obligations to verify feasibly that its targets are legitimate military targets, because Russia lacked the adequate technology and therefore had lower standards than for example some NATO states would have.

Such increasing discriminatory possibilities and the ability to avoid collateral damages then brings forward arguments that the feasible precautions are inherently subjective and differ between states. Schmitt calls this approach "normative relativism", where states are judged by their capabilities of protecting civilians.[126] Simply put, states with precision warfare abilities must do more to protect civilians than states without such capabilities. The approach has not been fully accepted in academia and scholars have argued against the doctrine by claiming that it conflicts with principles of parity, equality of combatants, and rejection of reciprocity.[127] IHL has been applied to all combatant states equally. However, while it is true that the law does not directly obligate states to use PGMs,[128] the wording of "all feasible precautions" speaks for subjective standard of law which would take into account the different weaponry that the combatant parties possess. Unlike many other rules of IHL, the precautions have not been worded as absolute prohibitions (such as prohibition to targeting civilians, using human shields or prohibition of using certain weapons) but allow such disparity between the combatants.[129]

That approach would be on par with certain environmental treaties, which allow less developed states to escape the same obligations that bind the developed states to accommodate their technological and economical standing and incapability of fulfilling the higher obligations.[130] Certainly, there is no clauses allowing technologically advanced party to take less than feasible precautions only because its adversary lacks the possibilities of upholding same standards.[131]

Similarly, authors argue that such approach would put technologically advanced parties to disadvantage because they would be hold to a higher standard.[132] Following that, states might not wish to develop precision technologies in order to avoid being bound by higher scope of

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[125] MARCUS, Jonathan. *Syria: What Can Russia's Military Do?* [online]. BBC, 7th October 2015 [cit. on 1st October 2018]. Available at <http://www.bbc.com/news/world-asia-34411477>
[126] SCHMITT. The Principle of Distinction…, p. 170
[127] GROSS, Oren. The New Way of War: Is There a Duty To Use Drones? Florida Law Review. 2015, Vol. 67, p. 63
[128] INFELD. Precision-Guided Munitions Demonstrated…, pp. 134–5
[129] BLUM, Gabriella. On a Differential Law of War. Harvard International Law Journal. 2011, Vol. 52 No. 1, p. 186
[130] BELT, Stuart Walter. Missiles Over Kosovo: Emergence, *Lex Lata*, Of a Customary Norm Requiring the Use Of Precision Munitions in Urban Areas. Naval Law Review. 2000, Vol. 47, p.170
[131] SCHMITT. The Principle of Distinction…, p. 177
[132] GROSS. The New Way of War…, p. 69

law, which would then hurt the development of capabilities of conducting more humane and discriminate military operations. However, such fears should be diminished by the fact that PGMs are still highly advantageous in armed conflicts despite the increased obligations. The states with precision technology can reach their targets with higher accuracy and better chances of success than those without such technologies. Therefore, the states without PGMs should not want to avoid gaining that technology merely to escape higher scope of obligations.[133]

Second string of arguments against the normative relativism arrive from the fact that there are multiple reasons to use PGMs apart from legal requirements. Contemporary conflicts often require political support from domestic population, international community and from the public in the war zone.[134] Civilian casualties hurt that support. Collateral damages work as a propaganda tool, fuel the recruitment campaign for further terrorists and increase anti-war sentiments.[135] Therefore on the absence of clear treaty clause for obligating states using PGMs,[136] the state practice only proves that the use of PGMs is helpful for the war effort but is not a legal obligation.[137] Yet, while the argument can be taken against the existence of crystallized customary law norm, such argumentation does not take into account the fact that the use of PGMs, when feasible, is obligated by Article 57 of API.[138] While there are other reasons for states to use PGMs, that does not mean that there would not be a legal obligation to do so as well.

However, the obligations to protect civilians can be taken too far by media or NGOs, who can see PGMs as a magical tool for zero-casualty warfare.[139] Such examples are Human Rights Watch's criticism of NATO operations in Yugoslavia and US operations in Iraq, where the reports focused on specific incidents arguably within the normal conduct of war resulting in low amounts of collateral damages.[140] However, those are not legal obligations to minimize collateral damages to unreasonable levels, but are merely de facto standards that states can be judged upon, based on so called "CNN effects", where the conduct of warfare is judged by the public based on public opinion instead of law.

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[133] BELT. Missiles Over Kosovo…, p. 175
[134] PUCKETT. In This Era of "Smart Weapons…, p. 709
[135] Ibidem 710
[136] SOLIS, Gary. *The Law of Armed Conflict: International Humanitarian Law In War.* Cambridge University Press, 2010, p. 275
[137] PUCKETT. In This Era of "Smart Weapons…, pp. 713-4
[138] Additional Protocol I Article 57
[139] SCHMITT, Michael. War, Technology and the Law of Armed Conflict. International Law Studies US Naval War College. 2006, Vol. 82, p.165
[140] Ibidem

Therefore, accepting that the obligations to take feasible precautions are influenced by technological advancements, there is still a question on the specifics of the obligations. Namely authors have debated whether the obligation to use PGMs is absolute and states are obligated to use them all the time, or at least in every case where specific qualifications are fulfilled such as urban warfare. There are arguments that seem to claim that the states' actions in the recent conflicts have modified the rules regarding the use of PGMs in urban settings.[141] The argument is based on the fact that states' actions should be used to reveal *opinion juris* instead of their statements. However, that fails to take into account that there are multiple other reasons to use PGMs in conflicts apart from legal obligations, as explained earlier. Further, that fails to acknowledge the fact that it might not be "feasible" to use PGMs at every case. Firstly, there are scenarios where the PGMs might not even be better for avoiding collateral damages. They can be countered by smoke screens and GPS jammers.[142] Further, smaller calibre unguided bombs can be less deadly for civilian bystanders in urban areas.[143]

But even if one would form the obligation to force states to use PGMs in urban settings when they are the most collateral damage-limiting form of warfare, such obligation might not be possible. States do not necessarily possess unlimited numbers of PGMs and might wish to save them for situations where the likelihood of collateral damages is higher and PGMs are needed more.[144] That argument has then been criticized for allowing states to refuse the use of PGMs over future hypothetical situations.[145] While states have in some cases acted according to those principles and used their PGMs in the early stages of the conflicts, that has been done for tactical reasons to achieve air superiority by PGMs instead of legal obligations.[146] Indeed it is not simply hypothetical question that states might run out PGMs without saving them for future targets. It has been very real possibility that states would run out of PGMs. In the latest NATO conflict in Libya most states were running low on PGMs merely after a month into the

[141] BELT. Missiles Over Kosovo…, p. 174
[142] PUCKETT. In This Era of "Smart Weapons…, pp. 714-6
[143] Ibidem 717-8
[144] VON HEINEGG, Wolf Heintschel. Asymmetric Warfare: How to Respond? International Law Studies US Naval War College. 2011, Vol. 87, p. 471
[145] BOIVIN, Alenxandra. The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare. University Centre for International Humanitarian Law Research Paper Series. 2006, Vol. 2, p. 40
[146] PUCKETT. In This Era of "Smart Weapons…, p. 720

conflict.[147] Even United States, the spearhead for PGMs, has been facing similar problems.[148] It would be counterproductive to obligate states to use their PGM reserves straight into the conflict, especially in cases where the conflicts are expected to last for a longer time. Of course, Libyan conflict was conducted totally with PGMs without NATO forces dropping a single unguided bomb.[149] That does not prove that there is an obligation to use PGMs all the time, but that it was feasible for the NATO parties to use PGMs in all situations in the Libyan conflict considering their reserves. Obviously, the decisions on limiting the sorties because of the lack of PGMs would be a political one and not mandated by a legal obligation.

The obligations to use technology in order to protect civilians vary based on the available technology. Additional Protocol I standard of what is feasible logically means that states are not expected to do the impossible. However, that does not mean that states who possess PGMs would be obligated to use them in every case, but merely when it is feasible. While the latest NATO campaign has been conducted fully with PGMs, that has not crystallized any norms to obligate states to use only PGMs, it merely proves that when NATO has been fighting with a large arsenal of precision weapons it is feasible to use them in every case. Often the question is not about protection of civilians but merely military strategical issues, as it is advantageous to actually hit the intended targets instead of dropping multiple sorties of dumb bombs off-target.

Establishing the existence of common but differentiated obligations brings forward the question to the thesis regarding how obligations are dealt with in a multinational coalition setting. Is the whole MMO treated as a single entity regarding what is feasible, or are all coalition members following their own scope of feasibleness? Or is there a minimum scope that the MMO must at least fulfil, before looking into possible higher scopes of the certain TCS? Such multi-level system of feasible precautions can cause issues for interoperability of the MMO and might force the TCS with higher scope of feasibleness to use the (limited) stacks of precision guided munitions in situations where their need is not the most fundamental.

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[147] DEYOUNG, Karen, Jaffe, Greg. *NATO Runs Short on Some Munitions in Libya* [online]. Washington Post, 15th April 2011 [cit. on 1st October 2018]. Available at < https://www.washingtonpost.com/world/nato-runs-short-on-some-munitions-in-libya/2011/04/15/AF3O7ElD_story.html>

[148] DANIELS, Jeff. *US Has Depleted Much of Munitions Needed Against ISIS* [online]. CNBC, 26th April 2016 [cit. on 1st October 2018]. Available at < http://www.cnbc.com/2016/04/26/us-has-depleted-much-of-munitions-needed-against-isis.html>

[149] United Nations Human Rights Council. Report…, para. 605

3.4 Conclusion

The TCS of the MMOs can, and often do, have varied obligations under IHL. While major parts of IHL is either universally binding or established customary law, that does not mean that states have managed established a single unified and common standard for their IHL obligations. Parts of the treaty law have not crystallized into customary norms and do not have universal acceptance. Those are mainly the weapons treaties, but also parts of additional protocols to the Geneva Conventions.

However, even when the norms are universally accepted and customary law and therefore binding in principle to all TCS in MMOs, the states can interpret them differently. Such situations are problematic as every TCS believes that their interpretation is correct one and is fully compatible with their IHL obligations. However, there is a possibility that other TCS in the MMO disagree with the interpretations and hold them illegal altogether. Of course, not every case of different interpretations of obligations result into one party breaching their obligations. It is entirely possible that one party interprets their obligations too strictly. It is also questionable if the IHL does allow some flexibility. However, the system is still highly problematic as without centralized authority that could issue judgments over the correct interpretations it is impossible to know how is correct and when do states cross the lines of legitimate interpretations. Especially issues regarding targeting, such as definition of military objective or proportionality, can cause problems within the MMOs.

Lastly, the MMOs can have different standards of feasible precautions, so called common but differentiated obligations. The TCS can have different levels of technological advancements and therefore different scopes of what is considered feasible precautions to minimize the risk to civilians in military operations. Since the PGMs can be scarce, MMO might want to save them to cases where the precision is most useful. However, that might force exceptionally advanced TCS (such as USA, with by far the greatest stocks and highest rate of munitions) that has higher scope of what would constitute feasible precautions either to abandon its own standard of feasible obligations or refuse from taking part in the missions without PGMs. Therefore, IHL is not fully homogenous regime. That can cause fundamental problems. The question is how international law manages the issue.

4. International organization's scope of obligations as unified standard

After establishing the framework of defining the characteristics of MMOs and how the different IHL obligations can come into being, the next step is to look into the possibilities of having unified standards of the obligations for the whole military operation. The chapter explores international organizations' obligations as the base for the unified standards for the whole MMO. When the MMO is conducted under the auspices and leadership of an international organization, it would then be the international organizations' obligations that could provide the baseline.

However, there are certain qualifications for the international organization to fulfil before its obligations can be established as common standard for the MMO. Firstly, the organization must be able to possess legal obligations. To that end, the organization must have legal personality[150] and be able to be a party to an armed conflict.[151] The following chapter shows that the international organizations that are currently conducting military operations are widely regarded, and should be regarded, as having international legal persons. However, it is more difficult question to find when the organizations can become a party to an armed conflict. Attempt will be made to analyse and establish the standard for holding the organizations as combatant parties. Secondly, since the organizations cannot be parties to the IHL treaties,[152] the obligations binding force must be established from other sources. Possible sources of the obligations can be found from customary international law, unilateral declarations of the organizations and bilateral or multilateral agreements between the international organizations and TCSs or host states.[153]

Next, the conduct of the MMO must be attributable to the international organization. Without the attribution, the organization's legal obligations would not come into effect and the MMO would be based on primarily on the obligations of the TCS that the conduct of the MMO is attributable.[154] Unless specifically mentioned in the treaties or elsewhere, the entity that is attributed the conduct or responsibility will have its obligations the being solely applicable to

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[150] DANNENBAUM. Translating the Standard of Effective Control…, p. 129
[151] AARON, Marvin R., NAUTA, David R. D. Operational Challenges of the Law on Air Warfare. The Example of Operation Unified Protector. Military Law and Law of War Review. 2013, Vol. 52, No. 2, p. 357
[152] TITTEMORE, Brian D. Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations. Stanford Journal of International Law. 1997, Vol. 33, pp. 95-97
[153] DANNENBAUM. Translating the Standard of Effective Control…, p. 130
[154] DARIO Article 4

the MMO.[155] It would be difficult to see how TCSs obligations would be applicable to conduct of an MMO that is not attributable to them. By definition, TCSs would find it difficult to ensure their obligations to be fulfilled in a situation where they are not attributed the conduct, and in any hand would not be responsible over the breaches of their obligations by the MMO without attribution of conduct or responsibility without specific clauses. It is questionable if the obligations could exist in purely theoretical manner without any entity being responsible over fulfilment of those obligations.[156]

Therefore, the chapter shows an overview of the possibility of having international organization's scope of obligations as a common standard of the MMO. However, it also highlights fundamental issues with the idea that the organization's obligations would be the only applicable standard. TCSs generally have refused their contingents from conducting hostilities with less strict legal obligations that are binding to the state itself. The state practice in that issue is seemingly well established. Since the international organization's obligations are often minimum applicable scope of legal obligations, they are often unable to provide the common standard for MMO obligations.

4.1 International organizations' possibilities of being bound by the legal obligations

If the international organization's obligations would constitute the bottom line of the unified legal obligations of the MMO, the organization must be able to possess international legal obligations in the IHL framework. Therefore, the organization must firstly have an international legal personality to make it possible generally that they can possess international rights and obligations. Secondly, the international organization must be able to become a party to an armed conflict in order to its IHL obligations can become applicable.

[155] Such specific clauses can be found in Convention on Cluster Munitions (dealt earlier) or in Common Article 1 of Geneva Conventions which obligates parties to "ensure respect of the present convention in all circumstances" which specifically targets their armed forces even in cases where the conduct might not be attributable to the TCS. DÖRMANN, Knut et al. *Commentary on the First Geneva Convention.* International Committee of the Red Cross, 2016, pp. 40-41

[156] However, difference should be made between any responsibility over the breaches of legal obligations, as discussed here, and effective enforcement of the obligations which is debatable issue. However, the study does not claim that the existence of legal obligation would be subject to possibility of effective enforcement, merely that one entity should be responsible for fulfilling the obligations.

4.1.1 International legal personality of international organizations

Firstly, it is important to remember that in order for international organization to possess legal obligations it must have separate international legal personality from the member states.[157] Without that, the organization would be nothing more than a forum of cooperation between its member states without any practical relevance regarding legal obligations of the MMO. Regarding to the question of how international organizations gain the international legal personality there are two dominant theories, namely objective and subjective theories. Under objective theory the organizations have legal personality when it fulfils the criteria of legal person regardless of the wishes or intentions of the member states.[158] On the other hand, under subjective theory the legal personality is based on the intentions and wishes of the member states who, either expressly or implicitly, give the organization its legal personality.[159] Expressly given legal personality refers to cases where the member states expressly state it or write it in the constituent instruments of the international organization.[160] On the other hand, implicitly given legal personality refers to cases where the legal personality is derived from the functions and rights of the international organization as if member states would not have given the organization its legal personality they would not have conferred it functions that require legal personality.[161]

While International Court of Justice (ICJ) has endorsed the subjective legal personality in its reparations advisory opinion, in practice the theoretical framework is not as important as generally the status of international organizations' legal personality does not change too much regarding which theory is followed.[162] The member states could still be in control regarding whether the international organization fulfils the objective criteria or not. However, analysis of most active organization who conduct military operations have been affirmed to have international legal personality.[163]

UN legal personality has been confirmed in numerous situations, such as in the earlier stated Reparations advisory opinion and in the Convention on Privileges and Immunities of the United Nations.[164] Generally there is no doubt left that UN is an international legal person.[165]

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[157] DANNENBAUM. Translating the Standard of Effective Control…, p. 129
[158] ZWANENBURG. *Accountability of Peace Support…,* p. 65
[159] Ibidem p. 66
[160] Ibidem
[161] Ibidem
[162] Ibidem
[163] FERRARO, Tristan. IHL Applicability to International Organizations Involved in Peace Operation. Proceedings of the Bruges Colloquium: International Organizations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011, p. 17
[164] Convention on Privileges and Immunities of the United Nations, 1946, Article 1
[165] DANNENBAUM. Translating the Standard of Effective Control…, p. 129

Similarly there is little doubt that ECOWAS possesses international legal personality due to its explicit clause in it constituent treaty.[166] Similar clauses exists in EU constituent treaty[167] and precursor of African Union, Organization of African Unity.[168]

More controversial question is the possible legal personality of NATO. Former senior NATO legal officer Peter M. Olson claimed that NATO would not be a "*free standing entity differentiated from its member states*"[169] which could be taken as to argument against NATO possessing distinct will, or *volonté distincte*, which has been argued to be a requirement for legal personality.[170] Indeed, it can be difficult to see where the NATO's distinct will is, considering the close control its member states have over the organization.[171] The distinct will should not be only aggregated will of its member states.[172] However, that does not refer to independent organ completely removed from the member states.[173] The representatives of the member states in the international organization have a dual role in the organization, to represent their own states and to also pursue in good faith the aims of the organization.[174] Furthermore, it can be noted that NATO organs seating the member states representatives are not directly subjected to the authority of other organized communities or member states.[175]

That is further supported by overwhelming evidence and academic opinions that support the arguments for the legal personality of NATO.[176] Furthermore, NATO has entered into

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[166] Revisited Treaty of the Economic Community of West African States. 24th July 1993. Article 88(1)

[167] Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community. 13 December 2007. Article 46A

[168] TSAGOURIAS, Nicholas. The Responsibility of International Organisations for Military Missions. In ODELLO, Marco, PIOTROWICZ, Ryszard (eds.) *International Military Missions and International law.* Martinus Nijhoff Publishers, 2011, p. 256.Therefore, it seems safe to assume that AU has legal personality implied to it by the fact that it succeeded another organization with a legal personality

[169] OLSON. A NATO Perspective…, p 654

[170] WHITE, Nigel. *The Law of International Organizations.* 2nd edition, Juris Publishers, 2005, p. 30-31. Some argue that the relationship between legal personality and distinct will not the same as far as sources and normative framework goes, as the distinct will is based on institutional rules and decision-making process while legal personality is a question of general international law. However, even then it would be difficult to produce independent legal personality without distinct will. See BRÖLMANN, Catherine. *Institutional Veil in Public International Law: International Organizations and the Law of Treaties.* Hart Publishing, 2007, p. 76

[171] GAZZINI, Tarcisio. NATO Coercive Military Activities in the Yugoslavian Crisis (1992-1999). European Journal of International Law. 2001, Vol. 12, No. 3, p. 425

[172] WHITE. *The law of the International Organizations…,* p. 31

[173] Such as European Commission, which owns its loyalty to the European Union instead of the commissioners' states of origins. See CRAIG, Paul, DE BURCA, Grainne. *EU Law: Text, Cases, and Materials.* 5th ed. Oxford University Press, 2011, p. 34

[174] SCHERMERS, BLOKKER. *International Institutional Law…,* p. 1211

[175] LARSEN. *The Human Rights Treaty Obligations…,* p. 94. Even taking into account the consensus decision making process, NATO still clearly displays its distinct will from its member states.

[176] ZWANENBURG. *Accountability of Peace Support…,* p. 67; STUMER, Andrew. Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections. Harvard International Law Journal. 2007, Vol. 48, No. 2, p. 557; Also, Italian courts have recognized the NATO legal personality based on its international legal personality, see SCHERMERS, BLOKKER. *International Institutional Law…,* p. 1010; Similarly, ICTY case law recognized NATO as separate entity from its member states and capable of possessing rights and obligations by ordering SFOR (for which NATO was responsible authority) to disclose documents.

treaties with non-member states in the past and its member states have used the separate legal personality as a defence for liability from NATO operations.[177]

Lastly, the legal personality of the international organizations is not unlimited. It is limited by the principle of functionality, where the rights and duties what are granted by the legal personality to the international organizations are limited by the organizations functions.[178] This approach was confirmed also by ICJ in reparations case[179] and the first Nuclear Weapons case.[180] However, seemingly when the organizations' functions include engagement in military operations their functions would mandate the of possession of obligations under international humanitarian law.

4.1.2 International organization being a party to an armed conflict

The next question before one can establish the international organizations' obligations as the common standard for the MMO, one must find out whether the international organization can be a party to the conflict. Entity must be able and be party to the armed conflict before most of its IHL obligations can be applicable to the conflict.[181] If it is the TCS and not the organization that is party to the armed conflict, the organization could not have its IHL obligations to be applicable *ratione personae*.[182]

Firstly, the claims that only states can be parties to the armed conflicts must be rejected. The argument is based on the fact that Geneva Conventions limit at least the international armed conflicts to "*declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.*"[183] As only states can be "high contracting parties" some

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ICTY. Prosecutor v. Simic, Decision on the Motion for Judicial Assistance to be Provided by SFOR and Others. 18th October 2000, IT-95-9-PT, para. 48. Quoted in ZWANENBURG. *Accountability of Peace Support…,* p. 68; Arguably if the court would not have treated NATO as separate legal personality it would have addressed the order to the individual member states. See LARSEN. *The Human Rights Treaty Obligations…,* p. 96

[177] Zwanenburg shows examples of NATO's Status of NATO force agreements with Bosnia-Herzegovina, and France has used NATO's international legal personality as a defence in ECtHR cases about Operation Allied Force, see ZWANENBURG. *Accountability of Peace Support…,* p. 67

[178] SCHERMERS, BLOKKER. *International Institutional Law…,* p.1067

[179] International Court of Justice. Advisory Opinion of 11th April 1949, *Reparations for Injuries Suffered in the Service of the United Nations*. para. 10

[180] International Court of Justice: Advisory Opinion of 8th July 1996, *Legality of the Use of Nuclear Weapons in Armed Conflict.* para. 25Quoted in: MICHA, Eleni. The Fight Against Corruption Within Peace Support Operations: In Search of the Responsibility of International Organizations. International Organizations Law Review. 2008, Vol 5, p. 89

[181] AARON, NAUTA. Operational Challenges of the Law…, p. 357

[182] ZWANENBURG, Marten. International Organizations vs Troop Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict During Peace Operations? Proceedings of the Bruges Colloquium: International Organizations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011. p. 26

[183] Geneva Convention 1, Article 2

authors then claim that this means that only states, not other legal subjects, can be parties to the armed conflicts.[184] However, that seems unnecessarily strict interpretation. The possibility for international organizations has generally been indirectly recognized in Additional Protocol I commentary for Article 43.[185] The commentary specifically states that the criteria for being an party to the armed conflict does not only include states but also entities "*representing a pre-existing subject of international law*"[186] and more specifically states that "*it is not out of question that United Nations could be a "Party to an armed conflict."*"[187] Similarly, the new commentary to Geneva Convention I recognized the possibility of international organizations being parties to the conflicts.[188]

It is still unclear when an entity becomes a party to an armed conflict. One approach is to link it with the standards of attribution of conduct.[189] 2016 Commentary to Geneva Conventions recognizes this as a possibility as well.[190] Under it, the party to which the conduct of MMO is attributable is also party to the armed conflict. There are certain attractive points to that approach. Both of the questions try to resolve which obligations come into play in the conduct of MMO.[191] Therefore, it could be useful to use same tests for the operation of linking the MMO conduct to different legal persons.[192] Furthermore, if the tests would be the same, then in all situations where the conduct would be attributable to the entity, also that entity would be party to the conflict and its obligations would be applicable.

However, there are some problems with mirroring the attribution of conduct test for establishing the parties to the armed conflict. Firstly, while they might share some fundamentals, they are meant to determine different issues. Attribution of conduct is meant to use for specific conduct in field, not overall conduct.[193] The test for attribution of conduct is meant to be taken for every instance of action of the MMO to find out which entity, international organization or TCS, should be liable for possible breaches of their legal obligations. In cases where the attribution of conduct is not clear and might differ from one instance to another it

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[184] JOHTNSTON, Katie A. Transformations of Conflict Status in Libya. Journal of Conflict and Security Law. 2012, Vol. 17, No. 1, p. 104
[185] ENGDAHL. Multinational Peace Operations Forces…, p. 249
[186] PILLOUD, Claude et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. International Committee of Red Cross, 1987, p. 507
[187] Ibidem
[188] DÖRMANN. *Commentary on the First Geneva Convention…,* p. 90
[189] ZWANENBURG. International Organizations vs Troop Contributing Countries…, pp. 25-26
[190] DÖRMANN. *Commentary on the First Geneva Convention…*, p. 91
[191] ZWANENBURG. International Organizations vs Troop Contributing Countries…, p. 26
[192] Ibidem
[193] INTERNATIONAL LAW COMMISSION. Draft Articles on the Responsibility of International Organizations, with Commentaries. Sixty-third session, 2011, p. 91

would cause the parties to the armed conflict to flip in and out of armed conflict. As an example, for this can be taken from the earlier DUTCHBAT case. In that case the Netherlands government was attributed the conduct that the DUTCHBAT took *ultra vires* giving the protected Bosnaks from their safe heaven to Serb paramilitaries.[194] In that case then the Netherlands would be party to the conflict only for that limited period of time and conduct while otherwise the international organization, either NATO or UN, would be the sole party to the conflict. That would not be suitable approach to determine the parties. It would be impossible for the troops on the ground to take into account different regimes of law and obligations depending on who the conduct is attributable, especially since the question of attribution itself is difficult to solve in practice. While it is true that fundamental changes on the field should, and can, effect the entities status as parties to the conflict the test should not be too fickle. ICJ has recognized that the tests can be, and probably is, indeed different for determining parties to armed conflicts and attribution of conduct under international law.[195]

Certain notion of control is, however, necessary for fulfilling the characteristics of being a party to an armed conflict. That has been recognized by ICTY in Tadic Judgment[196] and the Commentary to the Geneva Convention I.[197] One can look into how non-state actors become parties to armed conflicts for guidance and example. Indeed, the ICTY in its Tadic judgment has used for this better suited "overall control" test.[198] ICTY appeal chambers claimed that the test refers to a

> "*control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military*

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[194] Hague District Court. *Mothers of Srebrenica vs The Netherlands, C/09/295247 / HA ZA 07-2973*. para 4.57

[195] International Court of Justice: Judgment of 26 February 2007, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Hereafter Bosnian Genocide Case). para. 403-407

[196] ICTY. Prosecutor v Dusko Tadic Appeals Chamber judgment. 15th July 1999, IT-94-1-A (ICTY Tadic Appeals Chamber). para. 95

[197] DÖRMANN. *Commentary on the First Geneva Convention*…, p. 91

[198] ENGDAHL. Multinational Peace Operations Forces…, p. 245. While Tadic case was about whether the armed conflict existing was international or non-international, the court established its status as an international armed conflict though Serbia being a party to the conflict.

operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."[199]

If one were to take that test to refer also to international organizations, then the "*role in organising, coordinating or planning military actions of the military group*" would refer to more stable control and overall control over the MMO, which would be better suited for determining parties to the conflict.[200] Similarly, it would follow ICJ's approach of separating the tests of attribution of conduct and being party to an armed conflict better.

That does not mean that both, the international organization and the TCS cannot be parties to the conflict simultaneously, as long as they would both fulfil the criteria set out in Tadic "overall control" test.[201] However, TCS would not become party to an armed conflict automatically merely by the fact that "it is their armed forces are taking part in the conflict" as has been argued.[202] While the military of the state are engaged in the armed conflict, that does not mean that the state is automatically party to the conflict when its troops have been seconded to an international organization who exercises control over them while the TCS's control has been diminished. But when the TCSs would fulfil the criteria for being a party to the conflict it would become a party, possibly together with the international organization. In a sense, the MMO is the "non-state actor", such as in the Tadic case, and then the Tadic "overall" control test shall be used to test for both TCSs and organization for their control over the MMO and possible position as a party to an armed conflict.

Furthermore, it would be preferable to have the test for being party to the conflict relatively flexible and easily fulfilled. Otherwise, there could be cases where the conduct is attributed to an entity which is not then party to the armed conflict. In such cases the entity would enter into legal limbo where its IHL obligations are not applicable, but it is attributed MMO's conduct in the conflict. This would have happened in UN peacekeeping force in Yugoslavia, where certain authors claim that only UN, based on its command and control arrangements, would be the party to an armed conflict while TCS would be not.[203] Since there

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[199] ICTY Tadic appeals chamber. para. 137
[200] ENGDAHL. Multinational Peace Operations Forces…, p. 255
[201] DÖRMANN. *Commentary on the First Geneva Convention*…, p. 91
[202] AARON, NAUTA. Operational Challenges of the Law…, p. 358
[203] FERRARO. The Applicability and Application…, p. 593

are cases where the TCS has been attributed conduct, as noted earlier in the case of DUTCHBAT and Netherlands, then they would fall into the mentioned legal limbo of being attributed MMO's conduct but not being party to the armed conflict.

State practice can hardly give guidance to the question. Firstly, statements made by TCS or international organizations do not often specify which entity they deem party to the armed conflict.[204] They more often merely refer to the possible MMO participation in the conflict as a party to the conflict.[205] Yet, there are certain instances where the TCS have made statements regarding to the question of which entity would be party to the conflict. The TCS have surprisingly differentiated opinions on the subject. In NATO's Afghanistan operation, Sweden and Germany believe that they are not parties to the conflict and indeed either NATO or UN should be deemed as the sole party to the armed conflict.[206] On the other hand, Denmark in Libya and Norway in Libya and Afghanistan takes a point of view that the TCS are the parties to the conflicts.[207] Similarly, United Kingdom has given statements that can imply that it was a party to the Libyan conflict.[208] However, one can argue that the TCS' positions regarding being party to an armed conflict can be politically influenced.[209] But it seems that the state practice is far from unified and remains unclear. In any case, the use of state practice for the question of who is party to an armed conflict should be taken with a grain of salt since it is highly politically charged question and the existence of armed conflict and its parties should be based on purely factual situation, not on declarations from the participants.[210] Therefore, the state practice might not give the full picture of the legal situation.

However, what would the result be from looking into the situations and trying to apply the standard of "overall control" for being party to the conflicts? Some argue that regardless of which test, overall control of the DARIO-borrowed attribution of conduct test, would be chosen the parties to the recent armed conflicts would not have changed.[211] In Ferrero's opinion the recent operations under UN chain of command would have UN as the sole party to the armed conflict from the MMO's side.[212] That argument is based on the construction of command and control arrangements and the chain of command of the MMO.[213] However, that is a

[204] ZWANENBURG. International Organizations vs Troop Contributing Countries…, p. 27
[205] Ibidem
[206] ENGDAHL. Multinational Peace Operations Forces…, p. 254
[207] Ibidem p. 235-6, 258-9
[208] Ibidem p. 259
[209] Ibidem 236, 254, 259. Sweden could have been reductant to imply that the country was in war for the first time in 200 years.
[210] DÖRMANN. *Commentary on the First Geneva Convention*…, pp. 73-75
[211] FERRARO. The Applicability and Application…, p. 593
[212] Ibidem
[213] Ibidem

misinterpretation of the DARIO effective control test. Such overall generalization of effective control on paper would have no bearing of the attribution of conduct, for the attribution of conduct is a question of specific instance of specific action taken by the MMO.

But looking by the more applicable "overall control" test, would the presumption still be true that only UN and not TCS would be the party to an armed conflict? That is questionable. As noted earlier, TCS never transfer full control of their troops to the international organization but keep at least disciplinary powers and criminal jurisdictions over their contingents and reserve rights to call their troops back.[214] Therefore, the MMO troops continue being simultaneously as organs of their TCS while being seconded to the international organization's authority.[215] However, is the leftover control that TCS have enough for them to be considered parties to an armed conflict? That obviously depends on the specifics of the mission. Certainly, NATO missions where TCS are in control of certain of the combatants' tasks, such as detention, and have place in the decision-making structure they are fulfilling the criteria for being considered parties to an armed conflict.[216] However, while some argue that based on the UN command and control structures, the TCS influence is so limited that only UN and not the TCS should be deemed a party to the armed conflicts. Yet, there are reports that the conduct on the ground is greatly different from the command and control arrangements. There have been cases where the TCS troops do not necessarily follow the commands coming from the MMO leadership in all cases and might ask for their national governments for orders.[217] The TCS are also having major influence to the conduct of UN MMOs by consultations and meetings with the UN bodies (Secretary General and his representatives and Security Council).[218] Together these facts speak of quite substantial role of TCS in the conduct of MMOs, fulfilling the criteria of "overall control" of "*organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support…*"[219]

The control test for being party to an armed conflict should be flexible enough to avoid placing entities in legal limbo. It would be attractive to mirror the "effective control" test of attribution of conduct. Then the entity which is attributed the conduct would be automatically the party to the conflict and such possibilities of legal limbo would be denied. But that would

[214] LECK. International Responsibility in United Nations…, p. 349
[215] FERRARO. The Applicability and Application…, p. 588
[216] Ibidem p. 593
[217] GRAY, Christine. Peacekeeping After the *Brahimi Report*: Is There a Crisis of Credibility for the UN? Journal of Conflict and Security Law. 2001, Vol. 6, No. 2, p. 281. DANNENBAUM. Translating the Standard of Effective Control…, p. 148-9
[218] GRAY. Peacekeeping After the *Brahimi Report…,* p. 283
[219] ICTY Tadic appeals chamber. para. 137

cause problems elsewhere, for the parties of conflict can jump back and forth regarding on specific missions in the operation and whoever was attributed whichever conduct whenever. Furthermore, at worst cases such turbulent test would cause the whole armed conflict to change back and forth between international and internal armed conflicts. Therefore, the ICTY supported Tadic "overall control" test could be sufficient, taking into account both ends of the problems. It would not allow parties to change at every given moment and have more longevity, but it would be unlikely to allow entity being attributed the conduct of MMO in armed conflict without that entity being a party to an armed conflict.

4.1.3 Characterization of conflicts involving international organizations

Linked to the question of international organizations being a party to an armed conflict is the characterization of the conflicts involving organizations. Namely, are the conflicts involving international organizations characterized into international and non-international armed conflicts according to the same principles as states. Of course, the difference is no longer that major, especially for the question of international organizations. There has been major decomposing of the difference of applicable legal obligations in international and non-international armed conflicts, especially regarding customary IHL. Especially the ad hoc international tribunals have built up to the integration of the two types of conflicts, arguing that "*in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.*"[220] However, it is not completely meaningless and there are still parts of customary IHL that are not equally applicable to both international and non-international armed conflicts. If they would be characterized differently, that could cause fundamental differences of the obligations applicable to international organizations and TCSs.

Therefore, one must determine whether international organizations are parties to international or non-international armed conflicts. At the first glance, one could suggest that since international organizations are not *states*, and since international armed conflict is a conflict between states, international organization could not participate in international armed conflict.[221] One could draw analogies from treatment and classification of conflicts involving

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[220] Tadic Jurisdiction Appeal para. 96, Quoted in ZWANENBURG, Marten. *Accountability of Peace Support…,* p. 182

[221] ZAMIR, Noam. *Classifications of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*. 2017, Edward Elgar Publishing, p. 193

non-state actors. However, as noted earlier, it is often both the international organization and the TCSs to the MMO who are parties to the armed conflict. Therefore, international organization would be fighting an international armed conflict with the TCSs, in same manner as ICTY ruled internal armed conflict to turn into international armed conflict when the non-state actor was supported by a state.[222] Furthermore, since international organizations are international legal personalities, unlike non-state actors, there should be no similar obstacles to classifying the conflict as international armed conflict.[223] That approach has been gaining most support from academia and practice.[224]

However, on the other hand, arguments have been forwarded that all conflicts that involve international organization should be classified as an international armed conflict, even when fighting against non-state actors.[225] The argument is based on the fact that the distinction between international and non-international armed conflicts is based on the sovereignty of states, who are unwilling to limit their rights of action in their sovereign territory and furthermore are not willing to treat their domestic insurgents and rebels as they would treat other sovereign states' militaries.[226] Therefore, since international organizations do not possess sovereign territory, they could not use the sovereignty as an reasoning for not applying the more protective regime of international armed conflict to their operations.[227] However, those arguments are not fully convincing. Seemingly, the idea that "it takes two to tango" has been rooted into the classification of conflicts relatively deeply.[228] Therefore, how could states hide behind the sovereign territory claim when they are fighting abroad their sovereign borders, but international organizations would be denied the same reasoning. There is no reason why the participation of international organization would "upgrade" the adversary non-state actor into fulfilling the criteria of state of Common Article 2 of Geneva Conventions.[229] It also fits quite awkwardly to situations where the international organization has been invited by a host state to

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[222] Tadic Jurisdiction Appeal, para. 72

[223] GREENWOOD, Christopher. International Humanitarian Law and United Nations Military Operations. Yearbook of International Humanitarian Law. 1998, Vol. 1, p. 25

[224] See ZAMIR. Classifications of Conflicts…, p. 196 for data collected from authors, military manuals, ICRC's position and statements of international organizations.

[225] ZWANENBURG. *Accountability of Peace Support…,* p. 185; SASSOLI, Marco. International Humanitarian Law and Peace Operations, Scope of Application *Ratione Materiae.* In BERUTO, Gian Luca (ed.) International Humanitarian Law Human Rights and Peace Operations. International Institution of Humanitarian Law. 31st Round Table on Current Problems of International Humanitarian Law. Sanremo, 4-6 September 2008, p. 104

[226] Ibidem

[227] Ibidem

[228] FERRARO. The Applicability and Application…, p. 598

[229] ZAMIR. Classifications of Conflicts…, p. 201

participate in internal armed conflict on the host state's behalf.[230] Therefore, the study argues that international organizations should be held to same standards as states regarding the characterization of conflicts and application of law applicable to international or non-international armed conflict.

4.2 Sources of international organizations' IHL obligations

The next question is to find the actual sources of legal obligations that the organization would possess. When the international organizations have legal personality and can become parties to armed conflict, they must still be bound by IHL obligations. As international organizations are not parties to the humanitarian treaties, the obligations cannot be found in treaty law. Only states can join the Geneva Conventions and its Additional Protocols.[231] Similarly the Weapons conventions are not open to international organizations.[232] At the present no international organization is a party, or can be a party, to any of the IHL treaties.[233] Therefore, one would need look elsewhere for the legal obligations. The possible main sources of the legal obligations for the organizations' that the thesis will be looking into are customary international law and general principles of law, TCSs and member states obligations, possible agreements between international organizations, TCS or host countries, and unilateral declarations made by the organizations.

4.2.1 Customary law and general principles of law

Arguably primary source of international organizations' IHL obligations are the rules that have been crystallized into customary IHL. Customary law applicability to the organizations has been generally recognized by the academia.[234] This approach has further support from ICJ's WHO-Egypt advisory opinion,[235] stating that "*International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international*

[230] KOUTROULIS, Vaios. International Organizations Involved in Armed Conflict: Material and Geographical Scope of Application of International Humanitarian Law. Proceedings of the Bruges Colloquium: International Organizations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011. pp. 31-33
[231] TITTEMORE. Belligerents in Blue Helmets…, p. 96
[232] Weapons treaties are only open to "state parties" which does not include international organizations.
[233] TITTEMORE. Belligerents in Blue Helmets…, pp. 95-97
[234] SCHERMERS, BLOKKER. *International Institutional Law...,* p. 1004
[235] DAUGIRDAS. How and Why International Law Binds…, p. 332

agreements to which they are parties."[236] The binding force of customary law to international organizations has been criticized over the fact that the organizations have very limited possibilities in affecting the formation of the customary law.[237] However, that should not constitute unconquerable obstacle. To claim that organizations are not bound by customary law would mean that the organizations exercise their powers and conduct activities in a legal limbo unbound by any legal restrictions, which is clearly insufferable conclusion.[238] Similarly, it is not unheard of other entities being bound by general international law without being able to contribute to their formation, such as newly established states[239] or possibly non-state actors and individuals.[240]

Therefore, international organizations are bound by the customary IHL and general principles of law due to their legal personality and due to the fact that the organizations are part of the international community. However, the applicability of customary international law would be binding on international organizations is still limited by principle of functionality.[241] Generally, when the international organizations have powers to engage in military operations and resort to armed force the customary IHL would be applicable and binding to them.[242] But on the other hand, certain rules are not binding to them due the fact that organizations cannot fulfil the obligations that are largely irrelevant. Since TCSs keep exclusive criminal jurisdiction and international organizations do not exercise jurisdiction over their troop contingents, the rules regarding mandatory criminal proceedings against war criminals have little relevance.

However, the customary IHL is universally binding to all entities in international law. It generally only constitutes the minimum level of the legal obligations that everyone is bound by. It is possible that states', who are consistent objectors to customary IHL, contingents would be bound by increased legal obligations under the international organization's obligations, but such cases are relatively rare. On the other hand. TCSs who are bound by IHL treaties have increased IHL obligations on top of the customary law, meaning that the customary law standard is weaker and less strict than TCSs scope of obligations would be.

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[236] INTERNATIONAL COURT OF JUSTICE, Advisory Opinion of 20 December 1980. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*. Para. 37. Quoted in Ibidem.
[237] Ibidem. p. 334
[238] BLOKKER, Niels. International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously? International Organizations Law Review. 2017, Vol. 14, p. 11
[239] NAERT. International Law Aspects of EU's Security…, p. 252
[240] CLAPHAM, Andrew. *The Human Rights Obligations of Non-State Actors.* 2006, Oxford University Press, pp. 35-40
[241] SCHERMERS, BLOKKER. *International Institutional Law…,* p. 995
[242] FALCO, Valentina. The Internal Legal Order of the European Union as a Complementary Framework for its Obligations Under IHL. Israel Law Review. 2009, Vol. 42, No. 1, p. 186

4.2.2 TCSs and member states obligations binding to the international organization

Certain authors have claimed then that only the TCS' obligations would matter, and that the international organizations would be bound by the same obligations as the TCS would be.[243] The argument put forward is that TCSs would bring forward their scope of IHL obligations to the international organization and the organization is "transitively" bound by the TCSs' obligations.[244] The argument seems to come down to the justification of drawing parallels from successions of statehood to the founding of international organizations.[245] According to it, similarly to new states that are often bound by its predecessor's obligations, also international organization is bound by the founders obligations.[246] When the member states transfer powers to the organization it inherits their obligations.[247] Therefore, the TCSs should not be able to avoid their legal obligations by using international organizations to "do their dirty work."[248] If the TCS would not ensure similar standard of respect of their IHL obligations in organization's work, then the transfer of authority to the organization would be illegal.[249]

However, the obvious problem noted with that approach is that the international organization would be bound by international treaties without its consent,[250] going against fundamentals of law of treaties, which has also been codified in Vienna Convention on Law of Treaties between States and International Organizations.[251] Furthermore, it would face significant problems in practice. As international organizations often have developing memberships, the organization's obligations would be changing every time new member would join the organization with different legal obligations and every subsequent member would then limit the competence of the organization.[252]

Similarly, the international organization's separate legal personality means that they do have rights and legal obligations of their own, separate of their member states or TCS.[253]

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[243] MEGRET, Frederic, HOFFMANN, Florian. The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities. Human Rights Quarterly. 2003, Vol. 25, p. 318
[244] Ibidem
[245] SCHERMERS, BLOKKER. *International Institutional Law…,* p. 996
[246] Ibidem
[247] Ibidem
[248] Ibidem
[249] DANNENBAUM. Translating the Standard of Effective Control…, p. 139
[250] DAUGIRDAS. How and Why International Law Binds…, p. 335
[251] Vienna Convention on Law of Treaties between States and International Organizations, 1986, Article 34, mirroring Vienna Convention on Law of Treaties, 1969 Article 34, which, however, only speaks of states.
[252] DAUGIRDAS. How and Why International Law Binds…, pp. 349-50
[253] AMERASINGHE, C. F. *Principles of the Institutional Law of International Organizations.* 2nd edition. Cambridge University Press, 2005, p. 390;

Furthermore, the issue is dealt with in the DARIO which prohibits circumvention of member states' obligations through the international organization,[254] but it would require more than what would be considered an "*unintended result of member state's conduct.*"[255] Lastly, ECtHR has been refusing to apply the prohibition of circumventing obligations to the UN peace missions.[256] Therefore, such automatic transfer of TCS obligations to international organizations would not follow the legal principles nor the practice. The separate legal personality of the international organization must mean that the organization can and must have its separate legal obligations and not inherit its creators' obligations.

4.2.3 Agreements, declarations and institutional rules

Furthermore, there can be other sources of legal obligations applicable to the international organizations in the MMOs. Organizations can pass unilateral declarations that they will uphold IHL obligations, even beyond those of customary law. Similarly, the member states to the organization can bind the organization to higher standards of law than the mere customary law would obligate. Both UN[257] and NATO[258] has in numerous times stated that the IHL is applicable and that they shall uphold the rules of that body of law. The best example of UN's declarations is the Secretary-General's bulletin for observance by United Nations forces of international humanitarian law, which lists actual provisions from Geneva Conventions that UN are bound by.[259] However, such obligations are not without problems. Unsurprisingly, there have be questions regarding the binding legal force of such statements.[260] However, as an international legal person, the organizations must be able to bind themselves to unilateral acts they choose to make binding.[261]

Second question of the binding nature of the unilateral acts is that of who is entitled to demand respect of the unilateral binding acts of the organization? While it might not substantially change the content of the obligation, it is still important to note that it is possible

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[254] DARIO Article 61
[255] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 93
[256] European Court of Human Rights, Decision as to the Admissibility of 2 May 2007, *Application no. 71412/01 (Agim Behrami and Bekir Behrami against France) and Application no. 78166/01 (Ruzhdi Saramati against France, Germany and Norway)* (hereafter Behrami and Saramati cases). para. 147-149
[257] PALWANKAR, Umesh. Applicability of International Humanitarian Law to United Nations Peacekeeping Forces. International Review of the Red Cross. 1993, Vol. 75, No. 801, pp. 245-252; Also, UN Secretary-General. Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13 (Hereafter UNSG Bulletin)
[258] AARON, NAUTA. Operational Challenges of the Law…, p. 359
[259] UNSG Bulletin
[260] DANNENBAUM. Translating the Standard of Effective Control…, p. 135
[261] NAERT. International Law Aspects of the EU's Security…, p. 264

that the obligation is binding only internally in the organizations' legal order, i.e. *vis-à-vis* the organizations' member states, and not the state where the MMO is conducting its operations.[262] In that sense, the victim of the conduct could not claim for the applicability of the legal obligation. However, this study argues that those statements could be taken as unilateral binding declarations, similarly to those made by France and judged binding by ICJ in Nuclear Tests Case.[263] Therefore, unilateral statements of the organizations can impose legal obligations to the organizations as customary law, beyond those obligations that would arise from the universally binding customary law standards.[264]

Next, nothing prohibits the TCS from issuing the international organization higher standards of IHL than what customary IHL provides, either by rules of engagement[265] or other bilateral agreements done between the organization and the TCS.[266] Similarly, especially in peacekeeping missions Status of Force agreements between the host state (state where the MMO operates) and the MMO can issue further legal obligations to the international organization.[267] However, they are applicable only in cases where the foreign MMO is invited to intervene by the host state which does not necessarily cover all the possible situations.

However, while those agreements can bring forward higher standards of legal obligations to the organization, they often do not. Vast majority of the UN bulletin and other rules that UN binds to itself are relatively vague and hardly go beyond what is customary IHL already.[268] Similarly, Status of Force agreements and agreements between UN and TCS fail to be more specific.[269] Therefore, regarding treaty obligations of the TCS the international organizations obligations can hardly be the unifying point, for the obvious reason that the organization's obligations are the minimum standard that would be applicable to every TCS

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[262] UERPMANN, Robert. International Law as an Element of European Constitutional Law: International Supplementary Constitutions. Jean Monnet Working Paper, 24-27 February 2003, 9/03, p. 39
[263] International Court of Justice: Judgment of 20 December 1974, *Nuclear Test Case (Australia v. France)*. para. 49
[264] INTERNATIONAL LAW COMMISSION. Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto. 2006, A/61/10
[265] BURGER, James. Lessons Learned in the Former Republic of Yugoslavia. In FLECK, Dieter (ed.) *The Handbook of the Law of Visiting Forces.* Oxford University Press, 2005, pp. 512-3
[266] DANNENBAUM. Translating the Standard of Effective Control…, p. 130
[267] Ibidem
[268] UNSG Bulletin…, para 1.1. Using terminology of "The fundamental principles and rules of international humanitarian law" bulletin 1.1 and the provisions have been generally recognized as customary IHL in ICRC customary law study. See, HENCKAERTS, DOSWALD-BECK. *Customary International Humanitarian Law Volume...*
[269] Status of forces agreement in Rwanda stated that the MMO will respect "the principles and spirit of IHL." Agreement on the Status of the United Nations Assistance Mission for Rwanda (UNAMIR). 5th November 1993, New York. UN model memorandum of understanding includes statements like "We will comply with the Guidelines on International Humanitarian Law" UNGA. Sixty-sixth session Fifth Committee, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations. Annex H. 27th October 2011, A/C.5/66/8, p. 247

anyway. It is mostly the universally binding customary IHL section of the obligations. However, to limit organization's obligations to solely to the customary international law brings forward a difficult problem for the MMO unified obligations. The customary law is the bare minimum that would be applicable to every entity involved in the MMO. The minimum standard does not sit well with the TCS that are parties to other IHL treaties and have therefore more obligations under IHL.

Nothing obviously prevents TCS and the international organizations to impose higher standards of obligations but in the end, there would not be a legal obligation to do so, however attractive such possibility would be. On the other hand, regarding different interpretations and common but differentiated obligations, the international organization's standards might be stricter than the minimum standards for certain TCS. Indeed, NATO has for example developed its own standard for what constitutes proportional collateral damages during its Afghanistan operations.[270] Applicability of those standards might bring forward a higher and more usable standard for the whole coalition. However, it is not clear what happens to the TCS' obligations when they differ from the obligations of the organization that the states are contributing troops to. In the example at hand, the TCS who disagreed with NATO's interpretation refused to take part in the missions which they thought would have violated principle of proportionality.[271]

In the end, international organizations with legal personality, which would include all of the active organizations conducting MMOs, possess very least the customary IHL obligations, and unilateral declarations that are intended to be binding.

4.3 Attribution of conduct to international organization

The attribution of conduct is fundamental to the question of which legal obligations would be applicable to the multinational operation. Conduct of the MMO is attributable to the entity that is in effective control over it.[272] Logically the entity that the conduct is attributed brings the primary legal obligations that the whole MMO should conduct its hostilities.[273] If the operation's conduct would be attributed to the TCSs, then their legal obligations would be applicable and the MMO would be bound by different scopes of IHL obligations depending on their own state. However, if the conduct is attributable to the international organization, then

[270] COLE, Alan. Legal Issues in Forming the Coalition. International Law Studies US Naval War College. 2009, vol. 85, p. 147
[271] Ibidem
[272] DARIO Article 7
[273] KLEFFNER, Jann. Sources of the Law of Armed Conflict. In LIIVOJA, Rain, MCCORMACK, Tim (eds.). *Routledge Handbook of Law of Armed Conflict.* Routledge, 2016, p. 87

the international organization's obligations would be applicable and TCSs obligations would apply only if the obligations can be applied through different means, either by attributing responsibility over the military operations to the TCSs by TCSs' aid or assistance, direction or control, coercion or circumvention of obligations[274] or by separate clauses to bind the TCSs beyond rules of attribution.[275]

Otherwise the law would open up to possibilities where the conduct of the MMO is attributed to one entity (for example, the international organization), but the operation's conduct would breach legal obligations of another entity (that is the TCS). If the TCS obligations would then be applicable to the MMO, it would bring forward almost a paradox, giving rise to a question of who would be breaching their obligations. Certainly, the TCS obligations should not bring forward obligations to an international organization without its consent, as that going largely against general rules of international law, and especially Vienna Convention on Law of Treaties Article 34.[276]

Seemingly Leuven manual argues otherwise. It claims that since the troop contingents remain organs of their sending state, the TCSs standards of obligations will remain to be applicable.[277] However, closer look into the document reveals that the approach arrives from what the manual argues to be an incumbent obligation in all human rights treaties to ensure respect of human rights law in all circumstances, similar to Common Article 1 obligation in Geneva Conventions.[278] Therefore, without such clause or incumbent obligation the TCS obligations are not automatically applicable to the MMO framework.[279] However, the issue is not that simple. Firstly, wide array of treaties have different clauses that make it impossible for TCSs to escape their treaty obligations.[280] As such, the study argues that the question of applicable law is similar to the question of attribution of conduct and responsibility.

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[274] Especially circumvention is important notion for the issue which will be dealt later in chapter 5.3.
[275] Such examples are Common Article 1 which obligates states to "respect and to ensure respect for the present Convention in all circumstances." The clauses will be dealt later in chapter 5.1.
[276] Vienna Convention on Law of Treaties, Article 34. Stating that "A treaty does not create either obligations or rights for a third State without its consent."
[277] GILL, Terry D. et al. *Leuven Manual on the International Law Applicable to Peace Operations.* 2017, Cambridge University Press, p. 77
[278] Ibidem p. 82.
[279] However, many of IHL treaties have similar clauses that would impose their applicability to MMO setting beyond what rules of attribution would. See chapter 5.1.
[280] Such as Common Article 1 "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Geneva Convention 1 Article1, Ottawa Treaty Article 1(c) "To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." Convention on Cluster Munitions Article 1(3)(c) "Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention." Or even clauses obligating state parties to enforce treaty obligations by criminal law, such as "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present

While attribution of conduct can be seen as a different issue from applicable law or existence of legal obligation to MMO,[281] that is not the whole story. The study argues that attribution of conduct, or mirroring rules, would influence the personal scope of the legal obligations. Since the MMO is composed of troops contributed into it by TCSs, who conduct the operation under international organization's command and control, it is questionable from where the legal obligations can be derived to the operation. While it is true that attribution of conduct is a concept that determines whether one entity can be held responsible over the conduct of MMO, it would be logical if the rules of applicable law to the multinational military operation would mirror those of attribution of conduct. Since the troops in the MMO are placed to the disposal of the international organization, which command and controls the operation, the conduct of the operation would be the conduct of the international organization and not of the TCS.[282] Since the international organization is a separate legal personality, the applicable rules of its member states are not applicable to it and should not influence its conduct. As such, the rules binding to the MMO should be those of the international organization and not those of TCSs.[283] Otherwise there would be a possibility of attributing the conduct of the MMO to one entity that constitutes a breach of legal obligations of another entity.[284]

However, even if one would disregard the above-mentioned possibility and were to hold that the TCSs legal obligations are applicable to the MMO without attribution of responsibility, which in this case would arrive from the attribution of conduct, that applicability would be of merely abstract question. Regarding the questions at hand, it is sufficient to understand the application of law in a more concrete fashion. In other words, one can understand applicability of a legal norm in a sense that if there is no responsibility over the possible breaches of legal obligations, those obligations would not be applicable to the situation. Since the applicable law without responsibility would be indistinguishable from accepting legal norms as a matter of policy without legal relevance, and as such would not have any effect as a matter of law to the conduct of the MMO.[285] Consequently, it is justifiable to tie the two separate systems together.

Convention." In Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14th May 1954, Article 28. For further information, see chapter 5.2. Furthermore, the individual soldiers that partake in the multinational operation are still bound by their home states' domestic laws. While that is not precisely question of international law, one should note that the domestic norms regarding conduct of hostilities will limit the individual soldiers' possible actions in military operations. GREENWOOD. International Humanitarian Law and United Nations…, p. 18. Furthermore, the treaties themselves can obligate states to enforce the obligations by domestic laws, see chapter 5.2.4

[281] GREENWOOD. International Humanitarian Law and United Nations…, p. 18

[282] KLEFFNER. Sources of the Law of Armed…, p. 87

[283] Ibidem

[284] Ibidem

[285] LARSEN. *The Human Rights Treaty Obligations…,* pp. 105-107

Furthermore, authors have debated the terminology of attribution of conduct as secondary rules, arguing that the attribution of conduct gives the conditions when the primary norms apply and as such they "*provide elements of primary regulative rules, rather than secondary ones.*"[286] Both of the approaches above link the existence and applicability of the obligation with a legal consequence for a breach of the obligation. As such, the attribution of conduct is the link between act or omission and legal consequence unless the treaties provide alternative consequences without attribution of conduct. Accordingly, attribution of conduct is essential for application of legal obligations to the military operation. This study follows similar approach.

Therefore, when the TCS is lacking effective control over the MMO's conduct, it would not have its obligations applicable to the MMO or the troop contingents. To see which entity the conduct of MMO is attributable, one can look into the DARIO system. DARIO framework states that the question of attribution of conduct in multinational military operations comes down to Article 7, which attributes the conduct of the MMO to the entity that holds "effective control" over the it. [287] Indeed, the commentary claims that the MMOs are the most likely situation where the attribution of conduct through effective control is be applicable.[288] While arguments still exists over the attribution of conduct over the MMO automatically to the international organization, especially in the case of UN, due to the MMOs position as a subsidiary organ, this study argues against that approach.

However, neither the DARIO or its commentary fully explain what the term "effective control" refers to. It merely explains that the test is not based then on formal agreements or arguments but the de facto effective control of the MMO in actuality in the ground regarding specific instance where the violation happens.[289] Perhaps because of that it should not be taken as a surprise that there have been multiple different tests developed in academia and in practice. The following sub chapters aims to show the tests and bring forward arguments for their applicability and problems in practice.

[286] LINDERFALK, Ulf. State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System. Nordic Journal of International Law. 2009, Vol. 78, p. 62
[287] DARIO Article 7
[288] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 57
[289] Ibidem

4.3.1 MMOs as Subsidiary Organs of the international organizations

DARIO states that the conduct of international organization's organs and agents is attributable to the organization.[290] UN maintains that when the MMO is under its leadership and command and control, the military force is its subsidiary organ.[291] Therefore, under the DARIO rules the conduct of the MMO one could argue that the conduct would be attributable to the international organization (UN in that example) for its role as a subsidiary organ.[292] Indeed, UN accepts full liability over the conduct of their MMOs as a principle.[293] However, The UN's acceptance might not arrive from legal obligations, but from political considerations, as UN can, by arguing that it should be exclusively attributed the conduct of the MMO, shield the TCS' responsibility and without such shield TCSs might be less inclined to contribute troops to the UN MMOs.[294] While such actions can be interpreted as UN accepting the conduct of the MMO as UN's own per Article 9 DARIO.[295] However, that as such does not exclude the possibility of the conduct to still be attributed to the TCSs and therefore have the TCSs obligations applicable to the MMO.

However, the reality of multinational operations do not totally support the approach of holding the MMO as an subsidiary organ of the international organization. The TCS' troops are not ever fully seconded to the international organizations as their organs. TCS never give full control over their troops to the organization.[296] In specific terms, the TCSs keep the disciplinary powers and criminal jurisdictions over their troops,[297] and the right to decide on whether their troops will participate in the MMO and reserve the right to call their troops back at any moment.[298] Similarly the TCSs reserve certain degree of authority in deciding overall strategic goals of the MMO.[299] Therefore, the international organization only possess so called operational command and control, which refers to the command and control over the decisions

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[290] Ibidem Article 6
[291] BOUTIN, Berenice. SHARES Expert Seminar Report. Responsibility in Multinational Military Operations: A Review of Recent Practice. (16 December 2010, Amsterdam) Published December 2011, p. 4
[292] DARIO Article 6
[293] LECK. International Responsibility in United Nations…, p. 351. However, that can be also explained by policy reasoning, as the TCS might be less willing to contribute troops to the UN operations if UN would not shield the TCS responsibility by accepting the responsibility itself.
[294] DANNENBAUM. Translating the Standard of Effective Control…, p. 153
[295] DARIO Article 9
[296] FERRARO. The Applicability and Application…, p. 588
[297] LECK. International Responsibility in United Nations…, p. 349
[298] GILL, Terry D. Legal Aspects of the Transfer of Authority in UN Peace Operations. Netherlands Yearbook of International Law. 2011, Vol. 42, p. 46
[299] Ibidem

regarding deployment of the troops, assign tasks and missions to the MMO and delegate tactical command as seen necessary.[300]

Some claim that the DARIO is wrong in arguing that the attribution of conduct of troop contingents would always be determined on factual criteria based on DARIO Article 7.[301] In a sense, the question is whether troop contingents could ever be "fully seconded" and therefore have Article 6 applicable to the question of attribution of conduct. Arguments underline the possibility that the question of being fully seconded is one of a degree, not a principle, and there is no reason why Article 6 could not be applicable to UN MMOs.[302] Especially it highlights the fact that DARIO commentary's focus on criminal jurisdiction being left to TCS should not matter, since UN or any other organization would never have capacity to hold its personnel criminally responsible over their conduct and therefore they would always employ their member states criminal justice system for their needs.[303]

However, those arguments can be criticized. Firstly, if one were to look into the ARSIWA system, the threshold for when the organ would be fully seconded to another state is extremely high standard. ARSIWA commentary claims that in order to be fully seconded to another state, the organ must be acting "*with the consent, under the authority of and for the purposes of the receiving State*"[304] and it must "*act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State.*"[305] While it cannot directly be translated to the international organizations, it clearly shows very fundamental level of "seconding" the organ, where the organ is fully within the control of the organization.[306]

Therefore, one could argue that the criminal jurisdiction is indeed a fundamental to the question of whether the organ is being fully seconded or not. While it is true that international organizations do not have capabilities of having their own criminal justice system, placing them under TCSs exclusive criminal jurisdiction still causes problems. Organizations own organs and personnel, especially those of UN's, possess generally functional immunity from criminal prosecutions. The immunities given to organization's organs and personnel is fundamental in

[300] CATHCART. Command and Control…, pp. 261-2
[301] SARI, Aurel. UN Peacekeeping Operations and Article 7 ARIO: The Missing Link. International Organizations Law Review. 2012, Vol. 9, p. 79
[302] Ibidem
[303] Ibidem pp. 79-80
[304] INTERATIONAL LAW COMMISSION. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. 2011. A/56/10, p. 44
[305] Ibidem
[306] Of course, the organizations are under their member states' influence, which makes the concept difficult.

securing their autonomy and mitigating the threats of states unwanted interference with the organization's work.[307]

The troop contingents have dual status as organs of the international organization's and the TCS simultaneously and have not been fully seconded to the international organization.[308] Therefore, due to the dual status, the MMO cannot be then held fully as a subsidiary organ of the UN, or any other international organization in that matter for the question of attribution of conduct and its conduct does not automatically be attributed to the international organization. As such, the question of attribution of conduct must be based on the Article 7 and the question of which entity, international organization or the TCS possess effective control over the MMO.

4.3.2 ECtHR's Ultimate Authority Test

The first test arrives from ECtHR's case law. In the Behrami and Saramati cases ECtHR had to rule on the attribution of Kosovo Force (KFOR), the UNSC mandated and NATO-led peacekeeping mission in Yugoslavia.[309] The case unified two separate instances of conduct of the KFOR. Firstly, in Behrami, the question was about KFOR's failure to sweep and mark undetonated explosives that KFOR was aware of.[310] Local children found and played with the explosives which then resulted into a death and injury of Mr. Behrami's sons.[311] Secondly, Saramati case dealt with KFOR arresting Kosovar man on suspicion of attempted murder and illegal possession of weapons.[312] However, the detention was done without due process and for excessive time and the arrestee, Mr. Saramati, claimed that his right to liberty and security and right to due process were violated.[313]

Both of the cases now came down to the issue of attribution of conduct. The acts were done by troops of the military contingents belonging to the NATO states, namely France in Behrami case and France, Germany, and Norway in Saramati case. However, they were done under NATO operational command of the KFOR operation and under Security Council mandate for the KFOR. The ECtHR was then tasked to rule on to whom is the conduct attributed to. In that case ECtHR decided to attribute the conduct to the UN, arguing that it had "ultimate authority" over the MMO in question.[314] The court based it in the following facts; firstly, under

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[307] SCHERMERS, BLOKKER. *International Institutional Law…,* pp. 258-9
[308] PALCHETTI, Paolo. The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations. International Review of the Red Cross. 2013, Vol 95, No. 891-892, p. 732
[309] Behrami and Saramati cases para. para. 2
[310] Ibidem para. 5-7
[311] Ibidem para. 5
[312] Ibidem para. 8
[313] Ibidem para. 11
[314] Ibidem para. 133-134

Chapter IV of the UN Charter UNSC can delegate powers to the member states and other international organizations and the attribution of conduct is based in such delegable power and it was explicitly provided by UNSC resolution authorising the operation.[315] Secondly, the delegation was done under sufficiently defined limits and fixed mandate and objectives.[316] Thirdly, the chain of command goes all the way to UNSC and requires contingents to report to it and UNSC was engaged in its role as the supervisory body of the MMO.[317]

The decision has been widely criticized. It failed to discuss the elements of UN's effective control over the KFOR. In other words, ECtHR ignored the DARIO rules of attribution. However, the ECtHR recognized the need for "effective control" test in the question of whether the conduct was attributable to the NATO or the TCS. The court argued that if the TCS would gain effective control of the KFOR conduct by acting outside the chain of command, then they would be attributed the responsibility instead of UN since the UN delegation of powers was done only to NATO and not to the individual TCS.[318] But The court based the attribution of conduct on UN institutional rules of UNSC rights to delegate powers to other entities.[319] However, the need for effective control has been long established principle of attribution of conduct, recognized by ICJ in its Nicaragua and Bosnian Genocide cases,[320] and ECtHR failed to provide legal basis for its ultimate authority test.[321]

In the case of KFOR, it seems obvious that the UN did not possess effective control over the conduct of KFOR. The chain of command ended at the level of NATO, and the KFOR was under NATO's North Atlantic Councils' direction and political control.[322] The UN control over the KFOR was limited to receiving reports from the KFOR and possibility to take away its mandate, although that would have been subject to veto procedure in the UNSC.[323] UNSC resolutions recognized that too and only authorized the representative of UNSG to "coordinate

[315] Ibidem para. 134
[316] Ibidem
[317] Ibidem
[318] MUJOZINOVIC LARSEN, Kjetil. Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test. European Journal of International Law. 2008, Vol. 19, No. 3, p. 523
[319] SARI, Aurel. Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases. Human Rights Law Review. 2008, Vol. 8, No. 1, p. 164
[320] DANNENBAUM. Translating the Standard of Effective Control…, p. 141
[321] MUJOZINOVIC LARSEN. Attribution of Conduct in Peace Operations…, p 521
[322] KRIEGER, Heike. A Credibility Gap: The Behrami and Saramati Decisions of the European Court of Human Rights. Journal of International Peacekeeping. 2009, Vol. 13, p. 168
[323] SARI. Jurisdiction and International Responsibility…, p. 164. Although the ECtHR recognized the possible limits that the veto procedure can give to the control and deemed it not to be relevant to the question of attribution. Also; Behrami and Saramati cases para. 134

closely" with the KFOR, instead of controlling it.[324] Therefore, UN lacked both practical means of controlling the conduct of KFOR and procedural rights to do so.

In short, the ECtHR's ultimate authority test would attribute the conduct of any MMO to the UN in every case where UN mandates the MMO.[325] However, the formal position of the operation should not be the basis of attribution of conduct.[326] Instead, it should be based on the actual activity of the troops on the ground, instead of what should be done on paper. Therefore, unsurprisingly the ECtHR's ultimate authority test has been widely disregarded and should not be used for establishing attribution of conduct in MMOs.

4.3.3 ICJ's Nicaragua "effective control" test

The next test to be analysed can be taken from the ICJ's Nicaragua case, where the court used "effective control" test to rule on the question attribution of Nicaraguan Contras' conduct to United States. The Nicaragua test shares the terminology with the DARIO rules as both DARIO and ICJ use the "effective control" term which could speak for its use regarding the international organizations too. However, the Nicaragua case was about attribution of a non-state actors' conduct to a state. Under the Nicaragua test the conduct would be attributable to a state when it is made clear that the state ordered or directed the conduct of the controlled entity.[327] Therefore, in the present case USA must have issued specific orders to commit specific actions to the Nicaraguan rebels, so called *contras*.[328]

However, the DARIO commentary recognized that it is unlikely that the test for state responsibility would mirror the test for responsibility of international organizations.[329] The Nicaragua case aimed to answer the question of whether or not the conduct was attributable to USA while the effective control test for attribution of conduct to an international organization tries to answer a question regarding to which entity, the organization or TCS, the conduct is attributable.[330] Furthermore, if the Nicaragua test for effective control would be adapted for the test for attribution of conduct to the organization, it could result into situation where the

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[324] UN Security Council. Resolution 1244, 10 June 1999, S/RES/1244
[325] SARI. Jurisdiction and International Responsibility…, p. 167
[326] PALCHETTI. The Allocation of Responsibility…, p. 730
[327] BOON, Kristen E. Are Control Tests Fit for the Future? The Slippering Problem in Attribution Doctrines. Melbourne Journal of International Law. 2014, Vol. 15, p. 8. International Court of Justice: Judgment of 27 June 1986, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)* (Hereafter Nicaragua Case). para. 115
[328] CASSASSE, Antonio. The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia. European Journal of International Law. 2007, Vol. 18, No. 4, p. 653
[329] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 57
[330] DANNENBAUM. Translating the Standard of Effective Control…, p. 155

organization would be not attributed the conduct almost always.[331] It is a tall order to prove the existence of such control by the international organization over the TCS troops.[332] The Nicaragua test also would automatically refuse to attribute the conduct to international organizations in cases of the troops acting *ultra vires*, since neither entity, TCS or the international organization, would have ordered them to do anything.[333]

The Nicaragua test gives valuable guidance for the effective control, but it cannot be fully mirrored to the test of attribution of conduct for organization. However, the "who gave the orders" style test arriving from Nicaragua can be taken as a starting point for the discussion of attribution.[334] But the answer is more complicated than that.

4.3.4 Netherlands courts' approach and assumption of effective control

Netherlands' courts took the next steps in the development of the adequate effective control test for the attribution of conduct to an international organization. The courts were asked to judge on the conduct of the Dutch soldiers during UN/NATO peacekeeping mission in Yugoslavia and specially during the Srebrenica genocide. The Netherlands troops, called DUTCHBAT, were stationed to the Srebreneca and were tasked with protecting the Bosnian Muslim population.[335] However, due to the lack of equipment and manpower the DUTCHBAT were largely overran by the Bosnian Serb paramilitary troops and were forced to abandon the protection of the civilians and furthermore they handed over the civilians who were in the UN established safe area under the direct protection of the DUTCHBAT troops.[336]

The court held that the MMO was generally under NATO command and control and that mere communication links between Netherlands government and the DUTCHBAT would not constitute effective control of the Netherlands, unless the government would give some sort of operational guidance and orders to the DUTCHBAT.[337] The court also focused specially on

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[331] PALCHETTI, Paolo. International Responsibility for Conduct for Conduct of UN Peacekeeping Forces: The Question of Attribution. In PALCHETTI, Paolo et al. (eds.) *Refining Human Rights Obligations in Conflict Situations.* Leiden: T.M.C Asser Press, 2014, pp. 15-16

[332] PALCHETTI. The Allocation of Responsibility…, p. 733

[333] DANNENBAUM. Translating the Standard of Effective Control…, p. 156

[334] MILANOVIC, Marko, PAPIC, Tatjana. As Bad as It Gets: The European Court of Human Rights's *Behrami* and *Saramati* Decisions and General International Law. International and Comparative Law Quarterly. 2009, Vol. 58, No. 2, p. 282

[335] BOUTIN, Berenice. Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanovic* and *Mustafic:* The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping. Leiden Journal of International Law. 2012, Vol. 25, p. 522

[336] Ibidem

[337] Mothers of Srebrenica vs The Netherlands, Hague District Court, para 4.53

the question of MMO troops acting *ultra vires* and without orders from either TCS or the international organization. In these situations, the court decided that the conduct *ultra vires* would be attributed to the entity which would be better equipped to stop the illegal activity.[338] Similarly, since during the Srebrenica genocide the Dutch troops were preparing total withdraw from the peacekeeping force the Netherlands government's influence was increased to prepare the troops for the withdraw.[339] The Netherlands government was implied fully at all decision making levels and were *de facto* acting jointly with UN as commanding entity over the DUTCHBAT and the Netherlands government exercised this control also in practice.[340] These facts were enough for the court (seemingly rightly so) to attribute the conduct to the Netherlands.

The effective control test that was employed there can be taken as to be one of assumption of effective control. Therefore, based on the command and control structure of the MMO one assumes that NATO would be in effective control of the MMO. However, the effective control test is not based on the control on paper but on actual control in field. Agreements, such as the command and control agreements between international organization and TCS cannot influence 3rd parties' rights by attributing the conduct to the organization instead of the TCS.[341] Therefore, the assumption can be rebutted when shown that the TCS has acted outside the ordinary chain of command and must be attributed the conduct based on its actions.[342] However, that is largely procedural tool for assessing the attribution of conduct and does not fully explain what the TCS must do to be judged acting outside the chain of command.

4.3.5 Conclusion

The effective control test has been varied by different international and domestic courts in practice. However, to look into the different tests one could start arranging an overall test to begin to answer to the question of effective control and attribution of conduct. It is important to note that in practice the command and control arrangements and the MMO conduct are complicated and a simple test could not possibly reflect the realities in the field to have accurate attribution of conduct.[343] It needs certain flexibility to take the complications in to account.

[338] ibidem para. 4.57
[339] BOUTIN. Responsibility of the Netherlands…, p. 530
[340] Ibidem.
[341] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, pp. 56-57
[342] PALCHETTI. The Allocation of Responsibility…, p. 734
[343] LECK. International Responsibility in United Nations…, p. 362

However, similarly one could look into the effective control test from the point of view of the practical solutions to actual cases.

The starting point could very well for the effective control to be the command and control arrangements, as certain authors would claim.[344] However, there is difference between the control on paper and the factual control in the actual situations on the field.[345] Therefore the two must be separated, although there is no need to completely ignore the command and control arrangements. But as per the Netherlands court's approach, when the command and control structure has not been violated one could assume that the conduct can be attributed per the chain of command.

This brings the question to the next part. Since the TCS do have influence even when the chain of command goes to the international organization's leadership, then that influence does not automatically attribute the conduct to them. Merely having criminal jurisdiction, training and education obligations and being in the administrative control of the contingents would not be enough to attribute the control to the TCS. Neither does the TCS powers to "accept" or "validate" the organization's chain of command orders. The TCS do have authority to call back their troops and can refuse orders coming down the chain of command,[346] which could be seen as "effective control" as the TCS could stop any illegal orders at any given time. However, that should not automatically be taken as a proof of "effective control" of the TCS over the conduct in question. Otherwise TCS would be attributed the conduct in every situation, as they would always be capable of calling off their troops and refuse the orders.[347]

Similarly, TCS control in the decision-making procedure of the international organizations would not constitute effective control. However, certain authors have argued that the voting in the organs of international organizations such as North Atlantic Council[348] is just the TCS acting through the international organization and are exercising governmental power in external domain.[349] As shown earlier, TCSs in NATO operations often do have significant

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[344] MONTEJO, Blanca. The Notion of 'Effective Control' Under the Articles on the Responsibility of International Organizations. In RAGAZZI, Maurizio (ed.) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie.* Martinus Mijhoff Publishers, 2013, p. 397

[345] BOUTIN. Responsibility of the Netherlands…, p. 528

[346] BARON. Command Responsibility in a Multinational Setting…, p. 142

[347] DIREK, Ömer Faruk. Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the 'Effective Control' Standard. Netherlands International Law Review. 2014, Vol. 61, No. 1, p. 16

[348] Especially in NATO where the TCS control is very influential, as the highest decision-making body of NATO sits the governmental representatives of its member states who do make the final decisions even in NATO operations.

[349] BARROS, Ana Sofia, RYNGAERT, Cedric. The Position of Member States in (Autonomous) Institutional Decision Making: Implications for the Establishment of Responsibility. International Organizations Law Review, 2014, Vol. 11, p. 70

influence otherwise too, due to their nationals' role in the NATO decision-making process. However, such an approach is not in line with Article 58(2) DARIO, which states that "*An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.*"[350] In addition, the DARIO commentary reiterates that normal conduct according to the rules of the organization by itself would not constitute attribution of responsibility to the Member State.[351] Similar approaches have been echoed also in academia[352] and in judicial decisions, such as the Westland helicopters arbitration.[353] Therefore, while it might be the TCS representative that makes decisions in the international organization's proceedings, it is still organization's organ that does it and therefore that would not count as acting outside the chain of command or otherwise attribute the conduct to the TCS. Even if the individuals do not follow the classical loyalty regime where the nationals of international organizations' member states would still own their loyalty to the organization and not to their own states.

However, in cases of UN and ECOWAS operations when the chain of command has been breached, the situation must be dealt differently. The effective control would then be on the TCS that breached the chain of command, especially if the troops then would have conflicting orders and would choose to follow their own government's orders over the official chain of command orders arriving from the international organization. Therefore, one could then arrange a test of "who gave the orders" or better yet, "which legal entity gave the orders" as a starting point.

That would also be applicable to situations where the actions were done without orders. Then the test would be of "who was better positioned to stop the violations" per Netherlands' courts approach. The acts *ultra vires* then would be then often attributed to TCS, as it is the training, education and penal jurisdiction that are best methods of stopping most violations of MMOs legal obligations. International organization's ability to stop violations not resulting from their orders are more limited. However, what about orders through chain of command that give discretion to the MMO troops on how to fulfil the goals? Some argue that often the MMO orders give plenty of discretion to TCS commanders which would make the troops on the

[350] DARIO Art. 58(2)
[351] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 91
[352] CORTES MARTIN, Jose Manuel. The Responsibility of Members Due to Wrongful Acts of International Organizations. Chinese Journal of International Law, 2013, Vol. 12, p. 704
[353] Ibidem p. 695

ground the main entity being responsible for following their IHL obligations.[354] This question is especially relevant for the questions of what weaponry to use in missions. If the decision on whether or not to use PGMs in the missions is left to the TCS engaging in the mission, it would be difficult to see how the international organization is in effective control on that decision and therefore it would not be international organizations' scope of "feasible precautions" regarding whether or not there is need to use smart weapons.[355] On the other hand, the discretion on how to complete the tasks given to the troop contingents by the MMO chain of command is not enough to make TCS being in effective control automatically. The chain of command still proclaims the limits of conduct. Otherwise there would be once again a situation where TCS would be in effective control of everything where they would have slightest possibility of influence.

Therefore, in cases where the orders have been left to the TCS discretion and are largely vague the effective control would be on the TCS. Such examples can be taken from NATO's Afghanistan ISAF operation, where questions of treatment of persons detained by the MMO have been left to the TCS themselves to conduct as they seem fit and ISAF commander had no authority over the decision making.[356] In that case the decision on how to treat the detained persons was with enough discretion to hold TCS to be in effective control over the situation.[357] On the other hand, in NATO operations the decisions on target selections are done through the North Atlantic Council, which has ultimate decision-making power to decide on targets.[358] Therefore, while TCS might participate in the process the effective control is with North Atlantic council.

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[354] MURPHY. United Nations Military Operations…, p. 193

[355] While the choice of munitions can be left to the discretion of the TCS commander, that is not always the case. In NATO's Yugoslavian operation the NATO chain of command gave recommendations on munitions to be used. In PETERS et al. *European Contributions to Operation Allied Force…,* p. 26. Similarly, NATO's ISAF operation put forward limitations on use of munitions that the TCS could use. In MUHAMMEDALLY, Sahr. Minimizing Civilian Harm in Populated Areas: Lessons from Examining ISAF and AMISOM Policies. International Review of the Red Cross. 2016, Vol. 98, No. 901, p. 232 and NATO HQ was overseeing the process of choosing specific aircraft with specific weapon system for specific targets; HOLST, Fredrik, FINK, Martin. A Legal View on NATO's Campaign on Libya. In ENGELBREKT, Kjell, MOHLIN, Marcus, WAGNSSON, Charlotte (eds.) *The NATO Intervention in Libya: Lessons Learned from the Campaign.* Routledge, 2014. p. 83

[356] OLSON. A NATO Perspective…, p 655. However, that does not mean that all MMOs follow similar approach and even NATO had different procedure in KFOR detentions where the NATO operated the detention faculties and the judicial bodies around it and had MMO-wide detention policy and rules, see HIRSCHMANN, Gisela. NATO Peacekeeping and the Protection of Due Process Rights: The OSCE and Council of Europe as Advocates for the Rights of Detainees. In HEUPEL, Monika, ZURN, Michael (eds.) *Protecting the Individual from International Authority: Human Rights in International Organizations.* Cambridge University Press, 2017, pp. 222-4

[357] FERRARO. The Applicability and Application…, p. 594

[358] NATO. Allied Joint Doctrine for Joint Targeting…, p. 3.1.

When MMO troops act *ultra vires*, the TCS are more often better positioned in stopping the violations. One of the examples of this are the UN peacekeepers engagement in sexual violence in their peacekeeping operations.[359] While the MMO is under UN chain of command, the troops acted without any orders. But since TCS control the criminal jurisdiction of their contingents, their training and their education they are better positioned in stopping such breaches of law. On the other hand, UN in those examples had very limited capabilities of preventing the sexual abuse of the peacekeepers. Hence logically the conduct must be attributed to the TCS.

The question of how much discretion is needed to attribute the conduct to the TCS is quite difficult. Some argue that is very rare that an international organization would leave it to the TCS discretion to breach obligations.[360] Even vague commands from the central command should be read as not to allow breaches of international law.[361] However, regarding whose interpretations of the IHL obligations would the MMO follow the question goes further. If the international organization's command is not closely connected in the decision-making process and they fail to agree on common policies on the interpretations of legal rules, it would probably mean that the TCS would follow their own interpretations. It would be easy enough to state that the TCS contingents must follow the rules of engagement and, for example, not to breach principle of proportionality and only target military objectives. However, if such abstract principles are not defined by common policies it might mean that TCS will follow their own scopes of IHL obligations.

4.4 Conclusion

The international organization's scope of obligations can be taken as a MMO wide obligations when the international organization is attributed the conduct of the MMO, is a party to the armed conflict and can possess the obligations. However, because international organizations cannot join the treaty regimes of IHL, organization obligations are generally the lowest common standard of the MMO. Similarly, it is important to note that seemingly the practice of the MMOs suggest that the TCSs with higher scopes of obligations often are unwilling to conduct their hostilities contrary to their own obligations.[362]

[359] ANDERLINI, Saram Naraghi. *UN Peacekeepers' Sexual Assault Problem – How to End it Once and for All.* Foreign Affairs, 9th June 2017 [cit. on 1st October 2018]. Available at: <https://www.foreignaffairs.com/articles/world/2017-06-09/un-peacekeepers-sexual-assault-problem>
[360] DANNENBAUM. Translating the Standard of Effective Control…, p. 165
[361] Ibidem
[362] Issue will be dealt in Chapter 5.1.

But that does not mean that there is no value in holding international organization's obligations as the common MMO wide standard. There are two different obligations that the international organization's scope of IHL obligations can unify for the MMO standards of obligations. Firstly, in MMOs where the organization's chain of command is in closer connection in the decision-making process and does not merely authorize TCS contingents to do something, organization can issue interpretations of IHL that would unify their standards. The question then is that would the unified standard be legal obligation or merely a policy decision. Arguably the international organization could not let certain too far fetching interpretations to stand through their decision-making process. The interpretation of legitimate military objective or proportionality should be done MMO-wide in cases where the targeting decisions are done in international organization's organs, such as NATO operations and NAC decision making process. However, it takes certain political will for the international organization to establish common standards for the interpretations of IHL. Certainly, it would be possible to delegate the decision making to the TCS contingents and allow them to conduct the missions with their individual understandings of IHL obligations.

Secondly, when the international organization is in effective control in the decision of which weaponry to use in the military missions, it can bring forward MMO wide standard for common but differentiated obligations, namely when to use smart weapons. As seen in certain NATO operations where the NAC was very closely connected in the deciding which type of munitions to use and therefore in deciding when it would be feasible to use smart weapons. Furthermore, it could be advantageous if the international organization, that is controlling and commanding the military operation, would provide the standard of what constitutes feasible precautions. The organization would have best vision how and when the limited resources must be spent or saved. However, similarly when the choice of types of munitions would be left to the discretion of TCS, the international organization standards could not be applicable.

However, same is not necessarily true for the common but differentiated obligations. Even if the TCS itself would have higher scope of what are feasible precautions in the situation, that does not mean that same would be feasible in the multinational setting. Indeed, it could be deemed unfeasible to go through limited stacks of PGMs when the MMO might need them in later missions.

It comes down to the question of what the term "feasible" means in the common but differentiated obligations. Especially regarding the possibility of saving PGMs for situations where they are most needed. The term "feasible" is interpreted during codification by some delegates as to refer to doing "*everything that was practicable or practically possible, taking*

into account all the circumstances at the time of the attack, including those relevant to the success of military operations."[363] Certainly, holding onto PGMs in MMO setting would be relevant to the success of military operation. Similarly, the term "feasible" seem to incorporate wider perspective of considerations to be taken into account. There is no reason to limit it only to the TCS itself or TCS' stocks of PGMs and ignore the wider reasoning of the MMO stocks of PGMs. If such interpretation of the feasibleness of the common but differentiated obligations would be accepted, it would mean that the international organization in charge of the military operation would be capable to offer its own the scope of what is considered feasible regarding the choice of munitions.

The overall goals of the operation could require saving of certain resources that the MMO as a whole could run out, and therefore limit the usage of those resources by the TCSs that might be better equipped and more liberal in spending those resources. That could allow unified standard of the MMO as a whole, but seemingly only in cases where the organization under which auspices the operation is conducted would provide the common standard. Otherwise the individual TCSs might take into account the whole operation's capabilities but would still operate under their individual, and possibly different, scopes of feasible precautions. But unlike many other IHL obligations, there are no legal obstacles from adopting a standard for feasible precautions that might be lower than the highest standard of an individual TCSs within the MMO.

The international organization scope of obligations can also be adopted as common standard as policy decisions. One example of this is the NATO's Libyan intervention which was done with 100% smart weapons and with an aim of zero collateral damages.[364] Those standards go beyond legal requirements and are merely political constrains to escape bad publicity either on international plane or to "win the hearts and minds" but can be taken as illustrations of organization-issued MMO wide standards.

Therefore, regarding treaty obligations the international organization's obligations, when applicable, are more of "lowest common standard" of the MMO and the practice seems to suggest that TCS often refuse to abandon their own standards of obligations. Therefore, the international organization's scope of IHL obligations is not the answer for finding common standard of IHL application to the MMO. However, it can assist in the process especially if the international organization is able to take more detailed role in the decision-making process for the MMO. In those cases, it should very least be able to decline worst derogations from the

[363] PILLOUD et al. Commentary on the Additional Protocols…, pp. 681-2
[364] OLSON. Letter to Judge Kirsch..., p. 3

accepted interpretations of IHL. However, it does very little for different treaty obligations as the international organizations cannot be part of IHL treaties and states are always bound by the customary law that the organizations are bound.

The next question that one could ask regarding the unified standards of IHL application is from where do TCS obligations come into play in situations where international organization is in effective control of the MMO and the conduct of MMO is attributed to it? Following that, can the MMO then be bound by highest standard of IHL from its group of TCS? If it indeed is so that TCS troops cannot conduct its missions with lower standards than their own, the only method to get unified standards would be to take the highest applicable standard as the common denominator.

5 TCS’s obligations in MMOs under international organizations’ command and control and possible dual standard of obligations

The following chapter will deal with the question of what will happen to the TCSs scopes of IHL obligations in situations where the international organizations’ standards are the primarily applicable scope of obligations. While the organizations’ scope of IHL obligations are binding to the whole MMO, TCS’s troops might not be able to escape their (higher) scopes. Practice seems to suggest that it is indeed commonplace, and commentators have claimed that the TCSs obligations continue to be relevant to the MMO conduct.[365] In such circumstances the MMO would be bound by the international organization’s scope of IHL obligations and simultaneously the MMO troop contingents are still bound by their home states’ scope of obligations. Therefore, the troop contingents of the MMO would have two different standards of IHL applicable to them simultaneously, their home state’s obligations and the organization’s obligations.

This chapter starts of showing the TCSs’ practice in the MMO framework that suggests that the TCSs are unwilling to let their troop contingents to conduct operations with less strict standards of law. Afterwards, the chapter aims to look into legal basis for the practice. The chapter will analyse the possibility of holding TCS to their obligations by analysing firstly the clauses in the treaty law to see whether how far the clauses obligate TCS’ to carry out their scope of IHL obligations beyond rules of attribution of conduct. Secondly, the chapter looks into the possibility of dual attribution of conduct to see if and when both TCS and international organization can be attributed the conduct and therefore have their scope applicable to the MMO. Thirdly, there is a need to investigate the prohibition of circumvention TCS’ obligations by acting through an organization and lastly to find out the restrictions that might arrive from the obligations of the state parties to incorporate the treaty obligations into state party’s domestic law, which would continue to bind to their troops.

5.1 Practice of TCSs in accepting international organization’s scope of IHL obligations as unified standard

While earlier chapter showed that in principle, the international organization could bring its obligations to be the unifying standard of obligations, there are questions how the practice of TCSs looks regarding that possibility. Short answer is that TCSs often refuse to accept their

[365] ZWANENBURG. International Humanitarian Law Interoperability…, p. 683

troops to follow lower standards of law than their own obligations would provide, even when they would not be attributed the conduct.[366] Therefore, there are significant issues with the international organization scope of IHL obligations as the MMO-wide unified standard. First issue is that the organization obligations are mostly minimum standard. If the international organizations would be bound only by customary international law,[367] the TCSs would all mirror those obligations and almost always have further treaty obligations that the organization cannot join. There are strong implications that even when the conduct is attributable to the organization the TCS obligations will not disappear and will continue to be applicable to their troops. In many MMOs the TCS contingents have so called "red card holder" who can refuse orders from the chain of command when they might conflict with TCS legal obligations or national policies.[368] Therefore, even if the conduct is attributable to the international organization the TCS refuse taking part in the missions if they seem it breaching their legal obligations.

There are numerous examples of this in the practice. Firstly, during NATO's Kosovo operation in one instance the rules of engagement authorized the use of tear gas.[369] However, many of the TCS deemed tear gas as a chemical weapon on par with Chemical Weapon Convention, and refused the rules of engagement.[370] Therefore, the commander had to ask those TCS troops who deemed that they were allowed to use tear gas in their operations.[371] Similarly, during the later stages of the Afghanistan operation there were major disagreements between certain TCSs regarding what constituted legitimate military objective and certain TCSs refused to take part in missions that went beyond what they deemed was legal under the laws of targeting.[372] Similar issues existed with the principle of proportionality, where some TCSs took a stricter interpretation of what would be deemed proportional collateral damages than NATO's policy and refused to take part in missions which would be done according to the NATO's standard of proportionality.[373] Such practice of national caveats and red card procedure has been

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[366] TONDINI, Matteo. Coalitions of the Willing. In NOLLKAEMPER, Andre, PLAKOKEFALOS, Ilias (eds.) *The Practice of Shared Responsibility in International Law.* 2017, Cambridge University Press, p. 726

[367] In situations where the organization would not have declared higher standards of IHL and is not a party to any bilateral or multilateral agreements with TCSs or host states.

[368] BARON. Command Responsibility in a Multinational Setting…, p. 142

[369] Ibidem p. 138

[370] Ibidem

[371] Ibidem

[372] COLE. Legal Issues in Forming the Coalition…, pp. 146-7; BREAU. A Single Standard for Coalitions…, p. 88

[373] Ibidem p. 147

recognized to be a commonplace among MMO conduct,[374] and the TCSs might even keep their own rules of engagement and interpretations on what and when they can target.[375] But the practice is not completely unanimous. During NATO's KFOR peacekeeping operation NATO's European member states accepted common rules regarding detention that were less strict than those arriving from the European Convention of Human Rights (ECHR).

However, that can be explained by the specific clauses in the treaties that would make them applicable even in cases where the conduct is attributable to the international organization. Such clauses regarding the applicability of the legal obligations in MMOs and can go beyond rules of attribution of conduct.[376] States seem to agree with that and interpret their treaty obligations as prohibiting using or requesting weapons prohibited by their treaty obligations, but allowing their participation in MMOs where other TCSs might still engage in prohibited actions.[377] Therefore, in situations where the TCS' legal obligations differ from those of international organization and the treaty obligations do not have such clauses, the practice can be different. Similarly, the individual troops are still bound by the domestic law of the TCS which keeps exclusive criminal and administrative jurisdiction over its troop contingents. As such, the individual soldier's conduct is still limited by their home state's obligations when those are enforced by individual criminal responsibility.

However, in ECtHR case law the court seemingly refuses to apply the standards of ECHR to a MMO operations under UN framework when it would "*interfere with the fulfilment of the UN's key mission.*"[378] However, whether such approach can be taken as an overall approach or just specifically to UN missions upholding international peace and security is questionable. Furthermore, as this chapter will show, most of the IHL treaties do in fact have such clauses to bind the state parties to respecting the obligations beyond attribution of conduct justifying the TCSs refusal to apply less strict standards and moreover endangering the unified standard of IHL obligations to a MMO.

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[374] OLSON. A NATO Perspective…, p 656, also SAIDEMAN, Stephen M, AUERSWALD, David P. Comparing Caveats: Understanding the Sources of National Restrictions upon NATO's Mission in Afghanistan. International Studies Quarterly. 2012, Vol. 56, p. 70. NOVOSSELOFF, Alexandra. *No Caveats Please? Breaking a Myth in UN Peace Operations* [online]. Global Peace Operations, 12th September 2016 [cit. on 1st October 2018]. Available at: <http://peaceoperationsreview.org/thematic-essays/no-caveats-please-breaking-a-myth-in-un-peace-operations/>
[375] CATHCART. Command and Control in Military Operations…, p. 267
[376] For example, Ottawa Treaty, Convention on Cluster Munitions, and Common Article 1 of Geneva Conventions discussed in chapter 5.2.2
[377] WATKIN, Kenneth W. Coalition Operations: A Canadian Perspective. International Law Studies US Naval War College. 2008, Vol. 84, p. 254, regarding Canadian approach.
[378] Behrami and Saramati cases para. 149

5.2 Treaty clauses

Generally, in international law treaties do not bring forward obligations to third parties,[379] and therefore would not be applicable to conduct that would be attributable to an entity not bound by those treaties. However, many of the IHL treaties have clauses that can obligate states' troops to follow the rules of the conventions beyond of the rules regulating the attribution of conduct. Therefore, even when the conduct of the MMO would be attributable to the international organization, the TCS' troops cannot disregard their own states' obligations. This chapter aims to clarify those rules. If such obligations exist, that would mean that the MMO would not be able to operate under international organization's standard of law in case that standard is lower than the TCS' scope of obligations would be, especially regarding the treaty obligations.

As a general rule, the entity that the conduct is attributed to would have its obligations being applicable to the MMO, and other entities obligations would not be applicable to the MMO. As explained earlier, the reasoning behind it is the fact that as the responsibility over the conduct is based on the attribution of conduct, it could bring forward scenarios where the entity would be responsible over the conduct of a MMO which would not breach its obligations but might breach obligations of other entities involved in the MMO. Such would not be desirable. However, there is a subtle but fundamental difference between the conduct of the MMO that is attributable to the international organization and the conduct of the TCS inside the organization's framework. The TCS's conduct in the decision-making process within the international organizations' process, and therefore in the decision-making process of the MMO, is still attributable to the TCS even if the actual conduct that the MMO engages in would be attributable to the international organization.

That approach gains support from ICJ in its case between Macedonia and Greece.[380] In the case the court was asked to judge whether Greece has violated its obligations under interim agreement of 1995 which obligated Greece not to block Macedonian membership of different international organizations over the dispute of the name "Macedonia", which both countries feel like belonging to themselves.[381] When NATO unanimously decided not to accept Macedonia as a member, Macedonia sued Greece claiming that Greece had violated its obligations. Greece argued that since the decision has been made in NATO's organs according

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[379] Vienna Convention on Law of Treaties, Article 34

[380] KLABBERS, Jan. Responsibility of States and International Organizations in the Context of Cyber Activities with Special Reference to NATO. In ZIOLKOWSKI, Katharina (ed.) *Peacetime Regime for State Activities in Cyberspace.* 2013, NATO CCD COE, p. 496

[381] Ibidem

to the NATO decision making procedures and rules, the decision should therefore be attributed to NATO and not to Greece, and therefore Greece should not be responsible over NATO's conduct.[382] However, the court highlighted the difference between the NATO's decision itself, which would be attributable to the NATO, and Greece's role in NATO's organs and decision making procedure in making that decision.[383] The court then argued that the latter was attributable to the Greece.[384] Similar approach must be taken to certain treaty clauses, under which the conduct of the MMO is attributable to the international organization and therefore guided by the international organization's obligations, but TCS conduct in the decision making process of the international organization regarding the conduct of the MMO can still be attributed to the TCS regarding certain treaty clauses dealt in this chapter. Therefore, the TCSs obligations are still applicable to the MMO in actuality as there is responsibility link from TCS obligations and its obligation to ensure that personnel under its jurisdiction will not breach the obligations and its conduct in decision making process of the international organization.

The chapter is divided into four parts. Firstly, it deals with Common Article 1 of the Geneva Conventions and its possible customary status. The clause obligates state parties to ensure respect of the convention in all circumstances.[385] It widely has been interpreted as to mean that the obligations of Geneva Conventions are binding beyond the rules of attribution and that TCS troops in MMO framework must observe the obligations even when their conduct would be attributable to another entity.[386] Furthermore, the Common Article 1 can be regarded as customary IHL, which would make it binding over all IHL treaties and customary law, not only to those that have specific clauses to regulate it. However, the customary status is not clear.

Secondly, Ottawa Treaty clause prohibits state parties "*to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.*"[387] Thirdly, Cluster munition convention has almost identical clause,[388] but further states that "*Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.*"[389] That clause is followed by the next subparagraph

[382] Ibidem
[383] Ibidem
[384] International Court of Justice, Judgment of 5 December 2011, *Application of Interim Accord of 13 September 1995 (The Former Yugoslavian Republic of Macedonia v. Greece).* para. 42
[385] Geneva Convention 1 Art. 1
[386] DÖRMANN et al. *Commentary on the First Geneva Convention…,* pp. 40-41
[387] Ottawa Treaty Article 1(c)
[388] Convention on Cluster Munitions Article 1(1)(c)
[389] Ibidem Article 21(3)

that specifically prohibits states "*To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.*"[390] The specifics of what those clauses mean is unclear and has been debated. First question is what constitutes as "assist, encourage or induce" in the articles 1(c) of the treaties. The fact that the clauses are almost identical in the treaties raises the question should they be interpreted the same way and does the extra clause in cluster munitions convention add something new to the equation or is it just a clarifying or an explanatory clause. Last part deals with clauses obligating the state party to ensure that all personnel under its jurisdiction will comply with the rules of the treaty.

5.2.1 Common Article 1 of Geneva Conventions and its customary status

Common Article 1 to the Geneva Conventions states that "*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.*"[391] The focus here is especially in the *ensure respect in all circumstances.* That has been generally interpreted as to obligate state parties to ensure that every individual within their jurisdiction respects the Geneva Conventions.[392] Since TCS contingents that are contributed to the MMO are still within TCS jurisdiction, the TCS is bound to ensure that those individuals respect the Geneva Conventions in their conduct of multinational operations. The Commentary to Geneva Convention I recognizes this and states that "*Irrespective of attribution, the High Contracting Parties remain bound to respect and to ensure respect for the Conventions during multinational operations.*"[393]

The TCS troops are then unable to escape their legal obligations that arise from Geneva Conventions or Additional Protocol I. Even if the international organization, which would be hypothetically attributed the conduct of MMO, would not be bound by the rules of Geneva Conventions and Additional Protocol I the TCS troops would still be. This influences especially the treaty obligations *per se* but also the interpretations of those obligations. If the TCS deem MMO conduct to breach the obligations, they could not allow their troops to take part in that conduct. However, as pointed out earlier, it could be possible for TCSs to lower their scope of feasible precautions in MMO settings when it would serve the MMO wide criteria of what is feasible.

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390 Ibidem Article 21(4)(d)
391 Geneva Convention 1 Article1
392 DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 37
393 Ibidem p. 40

The next point of analysis for the Common Article 1 is its status as customary IHL. Without it, it would only cover the Geneva Conventions and Additional Protocol I. However, if it would be customary law, it would also cover customary IHL that is not codified in those treaties and possibly treaty law binding on TCS that is not a treaty with such clause. Prime example of later one would be Additional Protocol II regarding internal armed conflicts, which lacks the Common Article 1 clause and is far from universally accepted.

ICJ has claimed that the Common Article 1 is recognized part of the customary IHL.[394] Similarly, the ICRC study on customary law supports the claim.[395] However, that has been criticized elsewhere over the sparse state practice of states committing to taking measures to ensure respect of other entities of IHL.[396] But those arguments are seemingly pointed more to excessive interpretation of Common Article 1[397] and it can hardly be claimed that the state practice is scarce regarding the TCS owning up to their own obligations regardless of rules of attribution, indeed that seems to be more of the general rule.

But there still is doubt regarding whether the customary character mean that it obligates TCS to ensure respect of their obligations regarding their troops who are seconded to an international organization which have not ratified such obligations. That would be running counter to general rules of law of treaties regarding treaty obligations and 3rd parties.[398] Similarly, the ICJ's Nicaragua decision does not share light to the question as it dealt with situation where both entities were bound by the same obligations.[399] However, Additional Protocol I commentary suggests that the TCS would be bound by their obligations whether the organization shares those obligations or not. It even claims that the TCS are obligated to ensure their troops respect of IHL "*by opting out of specific operations if there is an expectation that these operations may violate the Conventions*"[400] and that "*In the event of multinational operations, common Article 1 thus requires High Contracting Parties to opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would*

[394] International Court of Justice. Nicaragua case. para. 220

[395] HENCKAERTS, DOSWALD-BECK. *Customary International Humanitarian Law Volume 1…,* pp. 495-497, 509-512

[396] BOUTRUCHE, Theo, SASSÓLI, Marco. *Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions* [online]. Nrc.no 20 Jan 2017 [cit. 30 January 2018]. Available at: <https://www.nrc.no/resources/legal-opinions/third-statesobligations-vis-a-vis-ihl-violations-under-international-law> pp. 12-13

[397] I.e. obligation to ensure that other entities will not breach their obligations, see chapter 6.3

[398] Vienna Convention on Law of Treaties Article 34

[399] The Nicaragua case concerned about Common Article 3 of the Geneva Conventions which is also recognized as customary IHL and universally binding.

[400] DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 41

violate the Conventions…"[401] Additional Protocol I is not fully crystallized as customary IHL and the international organization's in command of the MMO cannot be parties to Additional Protocol I. That clearly speaks of fundamental obligation of ensuring that their troops respect IHL regardless if those obligations are binding to the entity which is attributed the conduct. Therefore, if the customary IHL obligation mirrors that of Additional Protocol I, then the legal rules applicable to the TCS would be also applicable to their troops seconded to the organization. However, the customary law status of Common Article 1 is not an obvious or self-evident conclusion.

It also binds the TCSs to ensure respect of private individuals within their jurisdiction to respect the IHL, regardless if the individuals' conduct is attributable to the TCS.[402] Since TCS's troops remain under TCS's jurisdiction, logically the TCS is then bound to ensure that their troops uphold their legal obligations, regardless of the international organization's obligations or the attribution the conduct of the MMO.

5.2.2 Ottawa Treaty

Second clause that might bring forward obligations to TCS' beyond rules of attribution is specific to the weapons treaties, starting off with the Ottawa Treaty. To large extent, the question becomes moot when considering that the treaty prohibits stockpiling mines and to destroy existing mines in member states' possession.[403] Therefore, the TCS and their troops who are bound by the treaties should not possess the mines to use, regardless of the attribution of conduct. Furthermore, Ottawa Treaty also has a clause similar to the Common Article 1, which obligates state parties to "*to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.*"[404] Therefore, the treaty includes an obligation to state parties to prevent persons under their jurisdictions. Therefore, similarly to Common Article 1, since TCS troops are within their exclusive jurisdiction they are prohibited from engaging in any activities prohibited by the treaty. The clause goes beyond the rules of attribution and prohibit TCS troops from engaging in prohibited activities regardless whether their conduct is attributable to the international organization or the TCS itself.

[401] Ibidem p. 51
[402] Ibidem p. 45
[403] Ottawa Treaty Article 1(1)(a) & Article 1(2)
[404] Ibidem Article 9

However, regarding interoperability, there are still certain questions left unanswered. Mainly, the question of can TCS troops ask or take advantage of mines deployed by other TCS troops that are not bound by the conventions? To answer that question, both Ottawa Treaty and Cluster Munitions Conventions have similar clauses in them, with certain differences. This sub-chapter first focuses on the Ottawa Treaty, which states in Article 1(c) that state parties are prohibited "*To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.*"[405] That can be interpreted as to prohibit troops belonging to a state party from asking others to deploy mines even when the rules of attribution would attribute their conduct to another entity, not bound by the treaty. That would again bring different standards of what the different TCS troops could do within the MMO framework.

UK has stated during ratification of the Ottawa Treaty that their forces have been instructed not to seek benefit from mines that have been deployed by allied troops who are not bound by the treaty.[406] However, on the other hand Norway gave an understanding of the prohibition as that they are allowed to partake in MMOs which may involve use of mines and may take advantage of those mines, but may not strengthen or renew the mining.[407] Indeed, the commentary finds the state practice and statements to be contradictory and seemingly it is impossible to find confirmation of the rule.[408]

Originally NGOs and certain states had very tough stance on the Ottawa Treaty and what constitutes as "assistance". Indeed, International Campaign to Ban Landmines stated that state parties to the Ottawa Treaty are prohibited from participating in military operations where landmines might be used.[409] Similarly Brazil interpreted the clause as banning joint operations totally with non-members which might be using landmines.[410] Dutch foreign minister had similar statements, calling that landmines cannot have any role in NATO operations anymore.[411] However, the stances have been diluted to an extent. Generally, many states interpret as prohibiting the Ottawa Treaty signatory state from requesting the landmines and

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[405] Ibidem Article 1(c)
[406] CASEY-MASLEN, Stuart. *Commentaries on Arms Control Treaties Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and their Destruction.* 2nd Edition, 2005, Oxford University Press, pp. 82-83
[407] Ibidem p. 83
[408] Ibidem p. 83
[409] JACOBS, Christopher W. Taking the Next Step: An Analysis of The Effects The Ottawa Convention May Have on The Interoperability of United States Forces With The Armed Forces of Australia, Great Britain, and Canada. Military Law Review. 2004, Vol. 180, p. 60
[410] CASEY-MASLEN. *Commentaries on Arms Control Treaties...,* p. 96
[411] *Landmine Monitor Report 2000: Towards a Mine-Free World.* [online]. Human Rights Watch. August 2000 [cit. on 2nd October 2018]. Available at <https://www.hrw.org/reports/2000/landmines/LMWeb-01.htm>

prohibiting their troops participation in activities prohibited by the treaty and would make their military personnel unable to follow orders to employ landmines.[412] However, it does not seem that there would be a total ban for MMOs to use mines when one of the participating states is not a member-state to Ottawa Treaty.[413] But the Ottawa Treaty clearly binds the TCSs and prohibits their use of mines even when the conduct of the MMO would not be attributable to the TCSs themselves.

5.2.3 Cluster Munitions convention

Cluster Munitions convention has almost identical clause to Ottawa Treaty Article 1(1)(c), prohibiting state parties to "*Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.*"[414] While the Cluster Munitions Convention lacks the "in any way" that was present in Ottawa Treaty, they are largely mirroring clauses and not too much should be read into that.[415] Similarly, the convention mirrors Ottawa Treaty's obligation to prevent persons under state party's jurisdiction from engaging in prohibited activities.[416] Therefore, logically cluster munition convention imposes similar restrictions to TCS engaging in MMOs.

However, it does develop the other question, namely what constitutes assistance, encouragement or inducement. Cluster Munition Convention has an extra clause not found in other weapons conventions regarding interoperability, found in Article 21(3) which states that "*Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.*"[417] Now this is clearly new development from Ottawa Treaty, and the question has to be asked whether it is an exception clause or mere explanatory clause for the specifics of the general prohibition of Article 1(1)(c)?

At the first sight it seems to give greater freedom for MMOs and interoperability than the Ottawa Treaty.[418] Now on the first sight the term "notwithstanding" in Article 21(3) seems to suggest that it would be indeed an exception to the general rule, therefore suggesting that

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[412] CASEY-MASLEN. *Commentaries on Arms Control Treaties…,* p. 98
[413] Ibidem
[414] Convention on Cluster Munitions Article 1(3)(c)
[415] NYSTUEN, Gro, CASEY-MASLEN, Stuart. *The Convention on Cluster Munitions: A Commentary.* Oxford University Press, 2010, p. 127
[416] Convention on Cluster Munitions Article 9
[417] Ibidem Article 21(3)
[418] GROSS, HENDERSON. Multinational Operations…, pp. 365-7

without such exception Article 1(1)(c) would indeed be an obstacle for interoperability for state parties to operate alongside non-member states in MMOs that might engage in prohibited activity.[419] However, the Commentary to the Cluster Munition Convention suggests that the broad wording of Article 21(3) and the need to limits to it that were laid out in Article 21(4) mean that it merely specifies the general prohibition of Article 1.[420] That would also make more sense taking into account that the states pressing for Article 21 claimed it was necessary to guarantee the possibilities for interoperability, and those states were largely the same states that already interpreted largely similar Article 1(1)(c) of the Ottawa Treaty clause as already allowing interoperability without having separate exception to that prohibition.[421] Therefore, as the commentary suggests, Article 21 can have guiding value in interpreting Article 1(1)(c) and similar clauses in other weapons treaties.[422]

If one were to induce from those analysis that there is a common approach to the treaty obligations, at least in weapons conventions, then what does it mean to the unified standards of IHL application to MMOs? Certainly, attributing MMO conduct to an international organization does not release the TCS from their obligations under the treaties. Therefore, there are dual standards of law especially for the treaty obligations. But furthermore, they do prohibit the TCS that are state parties to the treaties from gaining an advantage from prohibited activities. Definitely the expressly requesting mines or cluster munitions would be prohibited by the treaties. However, what about less straight forward cases? Especially since it is very rare that the choice of munitions would be exclusively under the control of a TCS.[423]

5.2.4 Applicability of domestic law

Last issue with the international organization's scope of IHL obligations as common standards to the MMO arrives from the domestic laws of the individual troops that have been contributed to the MMO. Since those soldiers remain under their own states' jurisdiction, their own states' legal rules would be applicable to the troops. That would uphold constrains on the troops to conduct their military missions with less strict rules of IHL. Even if international law would allow the state as an entity to have less strict standard of IHL in its conduct of hostilities

[419] NYSTUEN, CASEY-MASLEN. *The Convention on Cluster Munitions…,* p. 545, 573
[420] Ibidem p. 573
[421] Ibidem pp.556-564, 573
[422] Ibidem p. 547
[423] Also, if it would be exclusive decision of the TCS bound by the treaty it would come dangerously close to circumventing obligations by acting through an international organization, which is prohibited in DARIO (chapter 5.c.)

in MMOs, the individual soldiers in the military operation themselves might not be able to do so.

However, obviously domestic laws can be changed and there are plenty of examples where the soldiers have been able to conduct their military missions with impunity and where the domestic actors have had completely lost their will to hold any standards to the troops.[424] Therefore, the domestic rules might not be too relevant to the question at hand. But on the other hand, the international treaties might have clauses specifically state that state party must ensure respect of the treaty obligations of all persons in their jurisdiction. Since the MMO troops stay within the TCS' exclusive jurisdiction, the TCS would carry an obligation to ensure that those personnel would uphold the norms even when they are under international organization's command and control. In that case the TCS would fail to uphold its obligations under the treaties and international law if it fails to ensure that the troops it contributed to the MMO would uphold the obligations set out in such treaties. These include earlier listed examples of Common Article 1,[425] Ottawa Treaty[426] and Cluster Munitions convention.[427] Similarly, Hague convention on cultural property and its Protocol II have related clauses.[428] As does Article 38 of the Convention on Rights of the Child regarding to child soldiers and UN Convention on environmental modifications.[429] Therefore, even if Common Article 1 has not been crystallized as customary IHL, majority of the treaties would have clauses that would provide their applicability to the MMO even without attribution of conduct to the TCSs. Generally, Hague conventions (which could be part of the customary IHL) and Additional Protocol II seem to lack any clauses.

5.3 Multiple attribution of conduct

The TCS obligations might be applicable to the MMO simultaneously with the international organization obligations if the MMO conduct would be attributable to both entities

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[424] See for example GILES, Shayna Ann. Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict Through their Own Misconduct. American University International Law Review. 2017, Vol. 33, No. 1, p. 150; FERSTMAN, Carla. Criminalization of Sexual Exploitation and Abuse by Peacekeepers. United States Institute of Peace. 2013, p. 335; Amnesty International. Culture of Impunity and Human Rights Abuses by Peace-keepers Must End. 29 May 1997; KAMARA; Patrick Jaiah, *CARL Supports Litigations Against Human Rights Violations by ECOMOG Forces* [online]. Concord Times. June 27, 2018 [cit. on 26th August 2018]. Available at <http://slconcordtimes.com/carl-supports-litigations-against-human-rights-violations-by-ecomog-forces/>

[425] DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 45

[426] Ottawa Treaty Article 9

[427] Convention on Cluster Munitions Article 9

[428] Convention for the Protection of Cultural Property, Article 28; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26th March 1999, Article 16(1)(b)

[429] Convention on Rights of the Child. 1990. Article 36

at the same time. In those situations, similar to the organization's obligations, the MMO for at least the TCS' troops would be bound by the TCS obligations. The thesis earlier dealt with the question when the conduct of the MMO would be attributable to the international organization. However, this sub-chapter adds to that by analysing the possibility of attributing the conduct of the MMO to the both entities, the organization and the TCS.

The ILC's DARIO commentary does not outright rebuff the possibility of dual attribution of conduct.[430] The attribution of conduct does not have to be exclusive and the conduct can be attributed to multiple entities at the same time at least in theory. Academics have been supportive of the idea of attributing MMO conduct to both the international organization and the TCS simultaneously.[431] Some even claim that the threshold of Article 7 effective control is too high for applying it in most cases and therefore the organization and TCSs should both be attributed the conduct for their role in managing the MMO.[432] However, it is unclear how the organization would be attributed the conduct without having effective control, since the MMO troops would then be TCS' organ and therefore attributable to the TCS. Furthermore, as noted earlier the threshold of effective control is not extremely high and international organizations should be able to fulfil it in most scenarios where they conduct military operations. Similarly, such approach seemingly misunderstands the point of the effective control standard. According to the ILC commentary:

> "*In the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity — the contributing State or organization or the receiving organization — conduct has to be attributed.*"[433]

Therefore, the test is more about determining whether the TCS or the international organization is better positioned to be attributed the MMO conduct, not to have high threshold test for attributing the conduct to either of the entities.

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[430] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 54

[431] DIREK. Responsibility in Peace Support Operations…; LOPEZ, Maria Canto. Towards Dual or Multiple Attribution: The Strasbourg Court and the Liability of Contracting Parties' Troops Contributed to the United Nations. International Organizations Law Review. 2013, Vol. 10

[432] FRY, James D. Attribution of Responsibility. In NOLLKAEMPER, Andre, PLAKOKEFALOS, Ilias (eds.) *The Practice of Shared Responsibility in International Law.* 2017, Cambridge University Press, p. 94, 10 LECK. International Responsibility in United Nations…, pp. 359-40

[433] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 57

Authors claim that it takes more than attributing effective control to international organization to undo the attribution of conduct to the TCS too.[434] Indeed, for Article 7 effective control to be attributing the conduct exclusively to organization then the institutional link must be shattered between TCS and the transferred organ.[435] However, the claims that Article 7 attribution of conduct to organization would be rare and that the threshold of its application are not necessarily well founded. While the whole practice regarding attribution of conduct to international organizations is scarce, there are multiple cases where the organization has been attributed the conduct over MMO actions. Similarly, the actual cases where the attribution of conduct has been shared have been relatively rare.[436] However, it is good to remember that often judicial bodies are unable to rule over attribution of conduct to the international organizations as they lack jurisdiction over the organizations. That might explain to an extent the lack of judicial decisions where dual attribution has been confirmed.

Continuing from that, other authors claim that because of the command structures of certain MMOs (namely NATO operations) which allow TCS to be represented in all levels of command and control and their close connection in the decision-making process the MMO conduct should be simultaneously attributed to both the international organization and its TCS.[437]

There is some support in practice for the dual attribution. Firstly, in so called Nissan case in 1969 the UK house of lords found that British soldiers conduct can be attributed to UK and UN at the same time.[438] The case concerned UK soldiers conduct in Cyprus, where the troops requisitioned a hotel in Nicosia during their peace keeping mission.[439] When sued in English courts, the state argued that the troops conduct was firstly attributable to the Cyprus (who invited UK peace keepers) and later to the UN (who took over the peace keeping mission.[440] However, the House of Lords found that

> "*From the documents it appears further that, though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces*

[434] MILANOVIC, Marko. Al-Skeini and Al-Jedda in Strasbourg. The European Journal of International Law. 2012, Vol. 23, No. 1, p. 135; FRY. Attribution of Responsibility…, pp. 92-94
[435] Ibidem p. 94
[436] SHARES Expert Seminar Report…, p. 7; However, afterwards the Netherland's court decision found dual attribution possible. However, the said case did not in fact find the conduct of the MMO attributable to both entities, just that it did not need to establish lack of attribution of conduct to international organization before attributing the conduct to the TCS, Netherlands.
[437] FERRARO. The Applicability and Application…, pp. 593-4
[438] UK House of Lords. Attorney General v. Nissan case, quoted in FRY. Attribution of Responsibility…, p. 85
[439] Ibidem
[440] Ibidem

continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national States in respect of any criminal offences committed by them in Cyprus."[441]

Therefore, the conduct could have been simultaneously attributed to UN and to UK based on their status as UK's exclusive criminal jurisdiction and their status as organs of the UK. However, arguably later there has been change away from holding MMO conduct attributable to TCS based on such low criteria.[442]

Later case law to support the dual attribution can be found in Dutch courts in earlier cited cases of Mothers of Srebrenica case.[443] Later, Netherlands Supreme Court also confirmed this approach.[444] In that case the court claimed that because of the possibility of dual attribution, the court does not need to investigate or rule on the attribution of the peace keeping force's conduct to UN.[445] Authors have taken said cases as a proof for the dual attribution[446] or even as proof of dual attribution being the prevailing stance.[447]

However, the basis for the courts' decisions is not fully convincing. It refers to Article 48 of DARIO, claiming that it expressly opens up the possibility of dual attribution of conduct.[448] Indeed, on the first glance it might look logical to think that Article 48 would be pointless without dual attribution of conduct. Article 48 reads 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.*"[449]

However, the court mixes attribution of conduct and attribution of responsibility. Seemingly, article 48 deals mostly with dual attribution of responsibility, not about attribution of conduct. TCS can be attributed responsibility over international organization's conduct in specific cases without the conduct itself being attributed to it, namely DARIO Articles 58 aid and assistance, 59 direction and control, 60 coercion, 61 circumvention and 62 accepting responsibility.[450] Therefore the responsibility is separate from attribution of conduct, but that

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[441] UK House of Lords. Attorney General v. Nissan case. Quoted in ibidem p. 85
[442] Argued in chapter 2.2
[443] Mothers of Srebrenica vs The Netherlands…, para.4.45
[444] Supreme Court of Netherlands. *The State of the Netherlands v. Hasan Nuhanović, 12/03324*. para. 3.9.4
[445] Mothers of Srebrenica vs The Netherlands…, para.4.45
[446] GROSS, HENDERSON. Multinational Operations…, pp. 353
[447] FRY. Attribution of Responsibility…, p. 96
[448] Nuhanović case. para. 3.9.4
[449] DARIO Article 48(1)
[450] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, pp. 88-89

does not necessarily mean that Article 48 automatically provides basis for dual attribution of conduct.

Furthermore, the DARIO commentary on Article 7 seems to support relatively scarce applicability of dual attribution. The statement that the effective control is about finding out "*to which entity — the contributing State or organization or the receiving organization — conduct has to be attributed.*"[451] suggests that it should usually be exclusive attribution of conduct. The possibility of dual attribution might be in practice more useful for courts to apply the effective control in practice. Because of the possibility of dual attribution, the courts are not obligated to investigate the possible attribution to an entity the court has no jurisdiction over. This was noticed by Netherlands' district court of Hague too in its analysis on Mothers of Srebrenica case.[452]

Therefore Article 7 of DARIO seemingly does not have a high threshold for application to MMO situations. Indeed, it is the framework where attribution of conduct should be settled for MMOs. The dual attribution would then happen in extremely rare cases where both, international organization and TCS, would fulfil the criteria of effective control as discussed earlier. However, confirming the earlier statements, the usual control that TCS possess over their troops when they are under organization's command and control is not enough to fulfil the effective control threshold.[453] Otherwise the dual attribution would be present in every instance of MMO conduct.[454] Therefore, as noted in other sources, it is difficult to see when the dual attribution would be possible.[455] It is difficult to see when both the international organization and TCS could issue orders that both caused the MMO troops to act in certain way. In practice, it would often seem as TCS agreeing or accepting the orders arriving down the chain of command. Possibly if both the organization and TCS would be well equipped in stopping illegal activity, especially that of *ultra vires*, they could both be said to have effective control over the conduct, but how that would happen in practice in the field remains difficult to see.

5.4 Prohibition of circumventing obligations

The next issue is when the TCS can be said to be circumventing their obligations by acting through an international organization. In such situations, the TCS can take an advantage of the separate legal personality of the organization, which would be attributed the conduct of

[451] Ibidem p. 57
[452] Mothers of Srebrenica vs The Netherlands…, para.4.45
[453] See chapter 4.3
[454] DIREK. Responsibility in Peace Support Operations…, p. 16
[455] SHARES Expert Seminar Report…, p. 7

the MMO in question and therefore would be the starting point for the legal obligations applicable to the MMO. The TCS can then escape its legal obligations by acting from the behind where the conduct would not be attributable to it. The circumvention has been codified in DARIO Article 61,[456] which states that:

> "*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*"[457]

Following that, when the TCS can be said to be circumventing its obligations it would still bear responsibility over the MMO conduct beyond the rules regarding attribution of conduct. Therefore, even when the conduct of the military operation is attributable to an organization, the TCS would still be held responsible based on their own (and separate from the host organization's) obligations. That responsibility can arise even if the organization does not breach any of its obligations. The circumvented legal obligations would still be applicable to the MMO based on the TCS responsibility.

The circumvention as codified needs four criteria. The organization must have competence in the subject matter where the TCS' obligation is being circumvented.[458] Secondly, the TCS must cause the international organization to act in certain way[459] and as the term "circumvent" implies, TCS must have certain intent to circumvent its obligations.[460] The specifics of those requirements are not fully clarified and can be problematic also for the case studies presented. Last criterion is regarding the breach of the obligation of the TCS. Therefore, even the conduct is legal and legitimate for the international organization, the TCS might still acquire responsibility over the conduct based on the prohibition of circumvention. The main issues regarding the applicability of the circumvention to the MMO settings are the intent requirement and TCS causation requirement. Due to those, the circumvention would be rare to be applicable to the MMO settings but not completely impossible.

First question to be risen here is the possible need for intent for the TCS to circumvent its obligations. The DARIO commentary recognizes that there is a need for subjective element

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[456] DARIO Article 61
[457] Ibidem
[458] MÖLDNER, Mirka. Responsibility of International Organizations – Introducing the ILC's DARIO. Max Planck Yearbook of United Nations Law. 2012, Vol. 16, p. 321
[459] Ibidem
[460] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 93

for circumvention. It claims that circumvention would not include cases where the circumvention is only "*unintended result of the member State's conduct.*"[461] But on the other hand, it confirms that the circumvention is not limited only to the cases where the TCS would be abusing its rights.[462] It is somewhere in-between the two extremes. However, the commentary fails to be more specific than that.

Some authors have been critical towards any subjective standard of circumvention, claiming that it is both too high standard to adequately managing the responsibility gap and furthermore does not have basis in the international law.[463] Alternatively authors argue that the DARIO commentary claim that the intent to circumvent can be obtained from circumstances and not from hard evidence proving intent hints for "constructed knowledge test", where the TCS would face responsibility in case it fails to inquire whether the international organization's standards of law are dissimilar to those of the TCS.[464] That approach is supported by the ECtHR case law. Gasparini case of ECtHR rules that the MS are under an obligation to see that the organization has "equivalent protection" of legal obligations as the MS do.[465] Indeed, the Gasparini case fails to even analyse the intention for the MS to circumvent their obligations but merely attaches a positive duty to ensure that the protection is equivalent. Therefore, the standard for intent could be, on par with ECtHR case law, a "constructive knowledge", or in other words the TCS might be circumventing their obligations if they have failed to inquire whether the international organization's standards were adequately similar to those of TCS.[466]

However, that approach seems too lenient for the DARIO and it runs largely counter to the commentary. Completely objective standard would mean that TCS would be responsible over international organizations' actions in every situation where they would have different legal obligations.[467] That clearly goes too far. However, even the constructed knowledge test could run against the requirement for intent. Merely failing to ensure that the standards are

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[461] Ibidem

[462] Ibidem

[463] YEE, Sienho. 'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations. In RAGAZZI, Maurizio (ed.) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie.* Martinus Nijhoff Publishers, 2013, p. 332

[464] RYNGAERT, Cedric. The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations. International and Comparative Law Quarterly. 2011, Vol. 60, p. 1013

[465] European Court of Human Rights. Decision of 12 May 2009, *Application no. 10750/03 Gasparini v. Italy and Belgium*, issued in French. Cited in INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 95

[466] RYNGAERT. The European Court of Human Rights' Approach…, p. 1013

[467] PAASIVIRTA, Esa. Responsibility of a Member State of an International Organization: Where Will it End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations. International Organizations Law Review. 2010, Vol. 7, p. 53

similar does not mean that the TCS would have had the intent to circumvent its obligations by acting through an organization. Failure to ensure the equivalent protection could still seemingly be "unintended result of member-state's action". To require such standard could endanger the effective chain of command and cause too much TCS interference with the MMO conduct.[468]

Therefore, while the DARIO commentary cites the ECtHR case law, it should not necessarily be directly translated to the MMO framework and DARIO system. DARIO approach and the ECtHR approach have fundamental differences from each other. Therefore, while the DARIO commentary cites the ECtHR case law of Bosphorus and Gasparini, one should not necessary take it as a proof that those cases are directly mirroring the DARIO interpretation of what constitutes circumvention. Much of the ECtHR case law seems to be more related to the primary obligations arising from the ECHR instead of the secondary obligations of the responsibility of international organizations.[469] The applicable parts of the Bosphorus case that DARIO commentary quotes reflect more overall rule confirming the necessity to not to allow MS to escape their obligations by acting through an organization, not to claim mirroring standard for the criteria for circumvention in DARIO and ECtHR case law.[470] That is not to say that ECtHR case law would have no bearing to the DARIO system or to the specific question of TCS circumvention in MMO framework, just that they do not automatically mirror each other. The ECtHR case law can be taken as a precedence for stricter standard for member-state responsibility in conduct related to ECHR specifically. Together with the reluctance of ECtHR to attribute responsibility to TCS in military operations the approach's effect on the question of TCS circumvention in MMO framework is seemingly then very limited.

However, on the other hand hard proof of intent of states is very difficult to attain in practice.[471] Therefore, it is perhaps unsurprising that the intent requirement has been lowered throughout the ILC's drafting of the circumvention system in DARIO.[472] Currently the intent to circumvent can seemingly be delivered from the circumstances without hard evidence of specific intent to circumvent.[473] Even then, the criteria would not be fulfilled often. Definitely, in NATO cases it would be difficult to argue otherwise. For example, in the KFOR situation

[468] D'ASPREMONT, Jean. The Limits to the Exclusive Responsibility of International Organization. Human Rights and International Legal Discourse, 2007, Vol. 1, No. 2, p. 223
[469] Ibidem pp. 1015-1016
[470] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 94
[471] MÖLDNER. Responsibility of International Organizations…, p. 321
[472] STURMA, Pavel. Drawing a Line Between the Responsibility of an International Organization and Its Member States under International Law. Czech Yearbook of International Law. 2011, Vol. 2, pp. 10-11
[473] RYNGAERT. The European Court of Human Rights' Approach…, p. 1013

one could claim that NATO states were circumventing their obligations by avoiding their obligations, such as ECHR. However, the NATO's common policy on detention it was done by the overall KFOR commander, a NATO personnel in NATO chain of command.[474] If TCSs were to impose a different standard, they would have needed to actively seek for it. The intent requirement could not impose such a positive duty to seek a change in the MMO policies. The situation is less clear for the other part of the legal case, where the TCS personnel failed to clear or mark unexploded munitions. But similarly, it could be seen as merely unintended result of the TCS conduct in a framework of the MMO for the conduct not to be attributed to the TCS but to the international organization. But on the other hand, perhaps the ECOMOG operation and Nigerian conduct during it could be seen as fulfilling the required standard of intent to circumvent. It could be difficult to see how it would be merely unintended result if Nigeria decides to shield its responsibility and judicial review of its troops conduct by acting through ECOWAS established ECOMOG under its de facto command.

Certainly, a possible motive for TCS to circumvent obligations could serve as a starting point of proving intent. Similarly, TCS influence it can exercise could assist in delivering the possible proof of intent. If TCS ability to influence the MMO conduct is very limited, it could be more easily seen as unintended result and not as circumvention of obligations. Also carrying out conduct knowingly that it would be illegal if done by the state, while alone would not fulfil the intent requirement, could serve as further claims for intent to circumvent. But it is important to note that a high standard for proving intent could easily make it near impossible to hold TCS to be circumventing their obligations through international organization.

However, the intent is merely the first step regarding circumvention. It alone is not enough for TCS to be intentionally circumventing its obligations. The next issue is the standard of causing the organization to act certain way. The causation is fundamental to the question of circumventing obligations in military operations since the TCS reserve certain rights in all situations. The question then comes how much influence must the TCS have in order for it to be circumventing obligations by acting through international organization in MMO framework. However, the standard practice in MMOs should also give limits to the question. Since TCS practically always keep the right to call back their troops and decline orders from international organization's chain of command, along with criminal and administrative jurisdiction over their troop contingents, merely accepting orders is not enough to fulfil the threshold of causing the

[474] HONG IP, Kwai. PSOs: Establishing the Rule of Law Through Security and Law Enforcement Operations. In ARNOLD, Roberta, KNOOPS, Geert-Jan Alexander (eds.) *Practices and Policies of Modern Peace Support Operations under International Law.* Transnational Publishers, 2006, p. 26

MMO to act in certain way. Otherwise, once again the causation link would be filled in almost every foreseeable scenario.[475]

The DARIO commentary claims for need for a "significant link" between the TCS's conduct and international organization act, and that the act must be caused by the TCS.[476] However, it is unclear whether the TCS must be in a dominant position and being able to overpower the mission to its own will, or if it also covers situations where the causation is less obvious, such as situations where the TCS could stop the violation but does not do so. However, the commentary language takes a quite strong stance, stating that "*The act of the international organization has to be caused by the member State.*"[477] That seemingly speaks for more of necessity of dominant position of a member state. Furthermore, it is also supported by the ECtHR's Behrami and Saramati case's precedence of refusing to apply the circumvention to the UN MMO framework. The ECtHR justified its refusal by claiming that to do otherwise could endanger the effective conduct of the UNSC peace operations over TCS intervention.[478] However, such threats would not be present in cases where the TCS are in a dominant position in influencing the conduct of the MMO as in case of ECOMOG example. The organization does not need such protection against dominant TCS that already controls the organization and acts through it.[479] Therefore, when a TCS is in dominant position it seems reasonable not to protect the international organization's autonomy against TCS interventions, for the simple reason that the organization already has lost its autonomy over the dominant TCS control.[480] High standard for fulfilment of the criteria for circumvention is also necessary to justify the presence of the DARIO regime regarding circumvention as a customary law. Jurisprudence, in International Tin Council litigation and Westland Helicopters arbitration, has generally confirmed that member states do not bear responsibility over the conduct of an international organization when it has a separate legal personality.[481] However, since the justification for such separation of legal personalities arises from the need to safeguard the autonomy of the organization against the member states' interference, it is reasonable to assume that the limits

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[475] PAASIVIRTA. Responsibility of a Member State…, p. 59; also, D'ASPREMONT. The Limits to the Exclusive Responsibility of International Organizations…, p. 224
[476] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 95
[477] Ibidem
[478] RYNGAERT. The European Court of Human Rights' Approach…, p. 1010
[479] BLOKKER, Niels. Member State Responsibility for Wrongdoings of International Organization: Beacon of Hope or Delusion? International Organizations Law Review. 2015, Vol. 12, p. 324
[480] D'ASPREMONT. The Limits to the Exclusive Responsibility of International Organizations…, pp- 227-8
[481] SADURSKA, Romana, CHINKIN, C.M. The Collapse of International Tin Council: A Case for Responsibility? Virginia Journal of International Law. 1990, Vol. 30, No. 4, pp. 845-890 regarding Tin Council litigation. Also; SCHERMERS, BLOKKER. *International Institutional Law…,* pp. 1011-13 regarding Westland Helicopters arbitration and general approach to the responsibility of member states for acts of international organization.

of the separation of legal personalities can be established to situations where the goals of that justification are no longer presented. Therefore, under customary law the separation of legal personalities should not present obstacles of TCS's responsibility and applicability of their legal obligations to the MMO framework when the TCS already dominates the decision-making process and overcame the autonomy of the organization in effective control of the operation.

The NATO chain of command goes up to the North Atlantic Council, which sits the representatives of the member states. Similarly, the positions lower in the chain of command are also filled with TCS personnel. Certain authors argue that this would be enough to consider the TCS to cause the military operation action regarding circumvention. However, the causation link seems to speak about dominant position of a TCS in a MMO framework, not a simple international organization's decision-making process where TCS hold much influence over the organization collectively as a group, such as in NATO.[482] Similarly, seemingly such domination must arrive outside the institutional rules of the organization.[483] Therefore it is quite rare to have such dominance of a TCS in MMO to fulfil the threshold. Perhaps the best example of possible domination would come from the ECOMOG example, which have been criticized for Nigeria's domination while the military operation was under at least theoretically ECOWAS chain of command,[484] and could therefore be considered as possible situations for circumvention.

That shows quite high requirement for TCS causation of international organization's conduct for the circumvention. It could come considerably close for the TCS to be also in effective control of the MMO conduct in cases where it could be said to be in such a position that it could be circumventing its obligations. However, in cases where the TCS influence happens in the organization's decision-making process (possibly strong arming or otherwise using extra-legal influencing during the organization's process) the effective control is still within the organization, as it is the organization's organs making the decisions, but the *de facto* domination of a TCS is enough to the TCS possibly be circumventing its obligations. Therefore, the ECOMOG conduct could still be held attributable to the ECOWAS but Nigeria to be considered avoiding enforcement of its legal obligations by acting through the ECOWAS framework. But outside ECOMOG, the situations where the TCS could be said to be

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[482] D'ASPREMONT. The Limits to the Exclusive Responsibility of International Organizations…, pp. 223-4
[483] Ibidem.
[484] WALRAVEN. *Containing Conflict in the Economic Community…,* p. 4. However, it is not clear whether the conduct of the ECOMOG operation should have been generally attributed to Nigeria too and if the Nigerian defence ministry was the entity that was de facto at the top of the chain of command of the operation.

circumventing their obligations are really rare. The threshold of causing international organization to act in certain way is seldom achieved in other MMOs.

5.5 Conclusion

It seems clear from the legal rules and from the practice that the international organization scope of IHL obligations cannot be the unifying standard for the MMO in all circumstances. Simply put, the TCS are unable to escape their own (higher) scopes of obligations even in situations where the organization is attributed the conduct and would therefore be the primary source of obligations. Similarly, state practice supports that conclusion. However, the reason for the two-tier system of IHL obligations is mostly based on the specific treaty clauses in the treaty law. Those clauses either obligate states to ensure respect of their troops in all circumstances,[485] prohibit assistance, encouragement or inducement for anyone to engage prohibited activities, [486] or simply obligation to ensure that all persons under the state party's jurisdiction follow the obligations. Since both the prohibition of circumvention and multiple attribution of conduct are such rare occurrences, it seems that there are no universal rules that TCS must respect their legal obligations beyond the rules of attribution in all circumstances. The general rule that applicable law to MMO is to an extent bound to the attribution of conduct or responsibility still holds true. Nevertheless, it seems that majority, although not all,[487] of IHL is covered by the clauses.

That is especially relevant to different treaty obligations and different interpretations of the legal obligations amongst the TCSs and international organization. The common but differentiated obligations of taking feasible precautions are not covered by the treaty clauses. Indeed, the term "feasible" refers to "*everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations.*"[488] The overall amount of PGMs for the whole MMO would be relevant to take into account. Therefore, a single TCS with higher technological capabilities would not be obligated to concern only its own technological possibilities in deciding weaponry for its air strikes. The capabilities of the other TCS and the MMO as a whole are also relevant to the considerations.

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[485] DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 40
[486] Ottawa Treaty Article 1(c)
[487] Prime example of this would be the Additional Protocol II.
[488] PILLOUD et al. Commentary on the Additional Protocols…, pp. 681-2

6 Highest scope of obligations as common standard

The chapter analyses about the possibility of having the highest scope of IHL obligations among the TCSs in the MMO providing the common standard to the MMO. Therefore, in cases where TCS would have unequal scopes of IHL obligations amongst themselves and cannot conduct their operations under the international organization's scope as common standard, the only possible way of getting a unified standard is to have highest available standard as the common standard. Firstly, this has been happening under political guidance in MMO framework in the past, such as the NATO's Libyan operation attempting zero civilian casualties, going long way beyond what would be required as feasible precautions and principle of proportionality by any of the TCS' standards. However, such decisions are completely voluntary and are not based on legal obligations or necessity. Therefore, they are outside the study's scope.

The question then is whether there are possibilities of having legal obligations to use the highest standard as a common standard for MMO conduct. Firstly, the TCSs could be unable to contribute troops to a MMO unless the MMO has equivalent standard of protection as the contributing state. If the international organization's (under which auspices the MMO operates and is attributed the conduct of the MMO) standards are lower, then the TCS would breach its obligations by transferring the authority of its troop contingents over to the international organization. Secondly, there are claims that the weapons treaties prohibition "*to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention*" could bring forward an obligation to accept rules of engagement allowing the MMO to engage in prohibited activities or prohibit state parties from joining MMOs that might use the prohibited methods of warfare. However, this chapter argues against both above-mentioned approaches as too strict and not being on par with the treaties. Following that, there is a possibility of having Common Article 1 and its equivalent customary law obligation to be interpreted extensively. Extensive interpretation would mean that TCS would not only need to ensure that their troop contingents would respect IHL in all circumstances, but also that they must ensure respect of IHL by other entities.[489] In such situations, different interpretations might be seen as too flexible and permissible and might go outside the limits what other TCS deem legal. Therefore, TCS might be obligated to attempt to influence the conduct of the MMO as a whole so the MMO or any part of the MMO would not engage in such activities.

[489] GEISS. Common Article 1…, p. 425

6.1 MMO bound by TCS obligations

The first question is whether the MMO would be bound automatically by the TCSs' legal obligations. In such cases, the MMO, or the international organization controlling it, would have the highest standard available as its own standard and would therefore bind the whole MMO to the highest standard available. While the study earlier debunked the theory of international organization being automatically bound by its member states' obligations, another question is whether the troop contributing states can transfer its authority over its troops to an international organization without the organization having equivalent standards of protection without the transfer of authority being illegal.[490] However, as noted earlier in the study, the obvious problem noted with that approach is that the international organization would be bound by international treaties without its consent.[491] But on the other hand, the legal obligations would not be in reality binding on the international organization. In fact, the obligations would be binding to the member state and it limits the possibilities of transferring authority to the international organization regarding the conduct of the MMO. It would seem logical that the transfer of authority to an organization would be limited by the powers of the entity granting the authorization.[492]

That approach can find support from ECtHR case law. In Gasparini decision the court stated that member states to an international organization cannot escape their obligations by transferring their competence to an organization which fails to adequately uphold their legal obligations.[493] In cases where there is fundamental structural deficit in upholding the legal obligations, the member states would then be responsible over the conduct of the international organization.[494] That approach differs greatly from the DARIO system of prohibition of circumvention, which requires TCS action to dominate the international organization to act according to its wishes and intent to circumvent obligations through the organization, while ECtHR in Gasparini would hold member states responsible by allowing the deficit to exist. However, it remains an open question whether the ECtHR understands that approach to arise

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490 DANNENBAUM. Translating the Standard of Effective Control…, p. 138
491 DAUGIRDAS. How and Why International Law Binds…, p. 335
492 DE SCHUTTER, Oliver. Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility. In WOUTERS, Jan et al (eds.) *Accountability for Human Rights Violations by International Organizations.* 2010, Intersentia Publishing, pp. 67-68
493 RYNGAERT. The European Court of Human Rights' Approach…, p. 1005
494 LOCK, Tobias. *The European Court of Justice and International Courts.* 2015, Oxford University Press, p. 210

from the primary norms of ECHR or whether the court sees it as a more general principle of international law, possibly oversighted by DARIO.

However, there are certain obstacles to upholding such system of limiting the transfer of authority. Firstly, the prohibition of circumvention, as codified in DARIO, is lot stricter than what is argued by the academics. The reasoning behind it is clear too, as the international organization must defend its autonomy from external influence. If the member states would start being responsible over the actions of the international organization, they would interfere with the organization's conduct and threaten the autonomy. Secondly, if the member states would automatically be responsible over the conduct of the international organization when the organization is breaching the member states' obligations, many of the clauses regarding interoperability would be redundant.[495] Therefore, without any clauses in the treaty law telling otherwise, the TCS obligations would be applicable to the MMO conduct attributable to the organization only in cases where the TCS can be said to be circumventing its obligations on par with DARIO Article 61.

6.2 Treaty clauses

Notwithstanding earlier chapter regarding the treaty obligations applicability beyond rules of attribution, there still have been claims that the same clause would go further still. Originally NGOs and certain states had very tough stance on the Ottawa Treaty clause of "*to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.*"[496] Indeed, International Campaign to Ban Landmines stated that state parties to the Ottawa Treaty are prohibited from participating in military operations where landmines might be used.[497] Similarly Brazil interpreted the clause as banning joint operations totally with non-members which might be using landmines.[498] Dutch foreign minister had similar statements, calling that landmines cannot have any role in NATO operations anymore.[499]

If one were to interpret the clauses in such fashion, then they would bring highest common standard of TCS obligations into the MMO. If the TCS could not join MMOs where

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[495] Prime example being the Convention on Cluster Munitions clause stating that "Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party." Article 21(3)

[496] Ottawa Treaty Article 1(c)

[497] JACOBS. Taking the Next Step…, p. 60

[498] CASEY-MASLEN. *Commentaries on Arms Control Treaties…,* p. 96

[499] *Landmine Monitor Report 2000…*

mines could be used, then the MMO would either have to conduct its operations without mines or without TCS that are state parties to the Ottawa Treaty. However, the stances have been diluted to an extent.[500] Generally, many states interpret as prohibiting the Ottawa Treaty signatory state from requesting the landmines and prohibiting their troops participation in activities prohibited by the treaty and would make their military personnel unable to follow orders to employ landmines.[501] Therefore, it does not seem that there would be a total ban for MMOs to use mines when one of the participating states is not a member-state to Ottawa Treaty.

That approach has been strengthened by the Cluster Munitions Convention. As mentioned earlier, it has similar Article 1(1)(c) as the Ottawa Treaty, prohibiting state parties to "*Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.*"[502] While the Cluster Munitions Convention lacks the "in any way" that was present in Ottawa Treaty, they are largely mirroring clauses and not too much should be read into that.[503] However, Cluster Munition Convention also has an additional clause, Article 21(3), which states that "*Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.*"[504] Now this is clearly new development from Ottawa Treaty, and the question has to be asked whether it is an exception clause or mere explanatory clause for the specifics of the general prohibition of Article 1(1)(c)?

At the first sight it seems to give greater freedom for MMOs and interoperability than the Ottawa Treaty.[505] The term "notwithstanding" in Article 21(3) seems to suggest that it would be indeed an exception to the general rule, therefore suggesting that without such exception Article 1(1)(c) would indeed be an obstacle for interoperability for state parties to operate alongside non-member states in MMOs that might engage in prohibited activity.[506] However, the Commentary to the Cluster Munition Convention suggests that the broad wording of Article 21(3) and the need to limits to it that were laid out in Article 21(4) mean that it merely specifies the general prohibition of Article 1.[507] That would also make more sense taking into account that the states pressing for Article 21 claimed it was necessary to guarantee the

[500] JACOBS. Taking the Next Step…, p. 60
[501] CASEY-MASLEN. *Commentaries on Arms Control Treaties*…, p. 98
[502] Convention on Cluster Munitions Article 1(3)(c)
[503] NYSTUEN, CASEY-MASLEN. *The Convention on Cluster Munitions…*, p. 127
[504] Convention on Cluster Munitions Article 21(3)
[505] GROSS, HENDERSON. Multinational Operations…, pp. 365-7
[506] NYSTUEN, CASEY-MASLEN. The Convention on Cluster Munitions…, p. 545, 573
[507] Ibidem p. 573

possibilities for interoperability, and those states were largely the same states that already interpreted largely similar Article 1(1)(c) of the Ottawa Treaty clause as already allowing interoperability without having separate exception to that prohibition.[508] Furthermore, as the commentary suggests, Article 21 can have guiding value in interpreting Article 1(1)(c) and similar clauses in other weapons treaties.[509] Therefore, the current approach the issue at hand seems to be that states can take part in the MMOs which might engage in prohibited actions.

6.3 Extensive interpretation of Common Article 1

Last possibility for having highest TCS scope of IHL obligations as common standard would arise from Common Article 1. The study argues that the clause "*respect and to ensure respect for the present Convention in all circumstances*"[510] has developed further than the original obligation to respect IHL as analysed above to an obligation to take measures to ensure that other entities follow IHL. The terminology of "ensure respect" especially speaks of extensive interpretation of the obligation.

6.3.1 Development of Common Article 1

Originally the Common Article 1 did not require states to ensure respect of IHL by other entities. The drafting history of Common Article 1 does not support the extensive interpretation and that the provision was to be understood as referring to only internal actors under the States' jurisdiction.[511] Only the ICRC commentaries claimed that the article should be interpreted extensively.[512] However, the commentaries failed to cite the drafter's intent or practice for that assessment.[513] Indeed, the discussion on the extensive interpretation of Common Article 1 was very limited during the original drafting phase.[514]

There are certain justifications for the extensive interpretation raised. A statement of Italy during the drafting of the 1949 Geneva Conventions claimed the Common Article 1 is either unnecessary or introducing "*a new concept into international law.*"[515] Since Common

[508] Ibidem pp.556-564, 573
[509] Ibidem p. 547
[510] Geneva Convention I Article 1
[511] KALSHOVEN, Frits. The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit. Yearbook of International Humanitarian Law, 1999, Vol. 2, p. 14
[512] Ibidem
[513] FOCARELLI. Common Article 1…, p. 133
[514] Ibidem
[515] DÖRMANN, Knut, SERRALVO, Jose. Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations. International Review of the Red Cross. 2014, Vol. 96, No. 895/896, p. 714

Article 1 was adopted as it is, one could argue that it has to be understood as offering such new concept to international law for otherwise it would have been deleted as redundant clause.[516] Similarly it can be argued that the restrictive interpretation[517] would already be covered by the mere "respect" part of Common Article 1, making the "ensure respect" part either repetitive or unnecessary.[518] There would be no need to repeat *pacta sunt servanda* principle in the substantive articles of the conventions. Therefore, under the principle of *ut res magis valet quam pereat* (or the "effet utile"), the law should be in doubtful circumstances interpreted as meaningful legislation instead of void and meaningless, possibly justifying the extensive interpretation.[519]

However, as stated earlier chapter, it is possible to regard the "ensure respect" part of the obligation as referring to the State´s duty to ensure that all of its organs and individuals under its jurisdiction follow IHL.[520] Furthermore, the obligation to ensure respect for the Geneva Conventions States might require States to take action before an armed conflict exist, such as educating population or ensuring training of the military regarding the IHL obligations.[521] Similarly, the Article 89 of Additional Protocol I stating that "*in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.*"[522] The differences in the language and wordings between Article 89 and Common Article 1 clearly do not support states' intention to make Common Article 1 an obligation for States to ensure respect of Geneva Conventions of other state parties. [523]

But even if the original intent and the meaning of Common Article 1 would not refer to an extensive interpretation and bring forward the obligations for TCSs to ensure the respect of IHL by the whole MMO, the understanding of the obligations might have developed later

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516 Ibidem

517 Only obligating state parties to ensure that their troop contingents and personnel under their jurisdiction would uphold their obligations under IHL, argued in chapter 5.1.1.

518 FOCARELLI. Common Article 1…, p. 128

519 Ibidem p. 138

520 KALSHOVEN. The Undertaking to Respect…, pp. 11-12

521 DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 41 (Art. 1 of the Convention)

522 Additional Protocol I, Article 89

523 ZYCH, Tomasz. The Scope of the Obligation to Respect and Ensure Respect for International Humanitarian Law. Windsor Yearbook of Access to Justice, 2009, Vol. 27, p. 260

through state practice establishing an agreement between the High Contracting Parties,[524] as stated in Vienna Convention on Law of Treaties Article 31(3)(b).[525]

There are indeed numerous sources that confirm the consequent practice of extensive interpretation. Firstly, one can look into the outcomes of the International Conference on Human Rights, taken place in Tehran and attended by representatives of 88 states and numerous UN organs and regional human rights organizations.[526] The conference resolution stated that contracting parties "*sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves involved in an armed conflict*."[527] The statement can be understood as showing states' acceptance of the extensive interpretation of Common Article 1.[528] Others, however, claim that the language in Tehran conference resolution with wordings such as "fail to appreciate", "responsibility" and "take steps" are only a merely pointing out that other States have a right, not an obligation, to try to stop belligerent parties breaching their obligations under IHL instead of imposing legally binding obligation to ensure that the IHL is followed.[529]

However, similarly there has been a rising trend among international organizations and judicial bodies to claim for the extensive interpretation of Common Article 1. The UN General Assembly, Security Council and Human Rights Council have all preached for extensive interpretation.[530] However, one must be careful in assessing their legal weight and not to jump into conclusions. The "ensure respect" terminology can be claimed to refer merely to a political recommendation for others to take action to ensure respect, not to a legal obligation to do so.[531] Similarly, in the context of the United Nations military operations, the troop contributing States would be bound to ensure respect of IHL based on the binding effect of the resolutions, not on Common Article 1.[532] Similar statement from the European Union has been claimed by some authors to support the legal obligation to ensure respect,[533] although that document could

[524] GEISS. Common Article 1…, p. 425
[525] Vienna Convention on Law of Treaties. Art. 31(3)(b)
[526] AZZAM, Fateh. The Duty of Third States to Implement and Enforce International Humanitarian Law. Nordic Journal of International Law, 1997, vol. 66, p. 62
[527] FOCARELLI. Common Article 1…, p. 135
[528] AZZAM. The Duty of Third States…, p. 62
[529] KALSHOVEN. The Undertaking to Respect…, p. 43
[530] Especially regarding Israel and Palestine, see FOCARELLI. Common Article 1…, pp. 154-156
[531] Ibidem p. 157
[532] Ibidem
[533] DÖRMANN, SERRALVO. Common Article 1…, p. 720

similarly be taken as only referring to political ideas of promoting humanitarian law instead of stipulating actual legal obligations.[534]

However, the extensive interpretation of Common Article 1 has also been recognized also in the jurisprudence of the ICJ, showing that it has not been all merely political promotion of IHL. In the Nicaragua Case, the ICJ held that despite the United States was not a party to the armed conflict, it was still obligated to ensure respect of IHL of contras the US was supporting in the Nicaraguan conflict..[535] However, the Court ruled that the obligation consists mostly of negative obligations not to encourage or assist the contras in violations of IHL as United States had distributed a manual on psychological warfare including advises and encouragement for conduct that would breach the IHL norms to contras.[536] But on the other hand, the ICJ widened its view of the extensive interpretation in its Wall Advisory opinion[537] by stating 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*"[538] although without specifying the measures it obligated states to take.

The last, and undoubtedly the most crucial point for subsequent practice, is the practice of States regarding the interpretation of Common Article 1. The fact that the international organizations and especially ICRC have been using Common Article 1 as basis for states' obligations to ensure respect of IHL of other High Contracting Parties and the fact that such ICRC and international organizations´ statements have gained little to no critique from states can be taken as evidence of their acceptance of the extensive interpretation.[539] However, the critics to it claim, that despite declarations the states have not in reality fulfilled their obligations to ensure respect for third states in majority of situations.[540] Since IHL violations continue to occur without majority of states' interference or reaction, it is difficult to claim that the

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[534] EUROPEAN UNION. Updated European Union Guidelines on Promoting Compliance with International Humanitarian. Official Journal of European Union, 15th December 2009, C 303/06. Statements like "European Union's commitment to promote such compliance in a visible and consistent manner" and "There is therefore a political, as well as a humanitarian interest, in improving compliance with IHL throughout the world" hardly suggest that EU is imposing legal obligation for the member states to ensure respect of IHL

[535] International Court of Justice. Nicaragua case. para. 220

[536] ZYCH. The Scope of the Obligation…, p. 266

[537] International Court of Justice: Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Hereafter Wall Advisory Opinion). para 158

[538] Ibidem. Separate opinions of Judges Kooijmans and Higgins did challenge such extensive interpretation, but these separate opinions merely questioned the bases for the courts interpretations of the law and did not deny the possibility of extensive interpretation or the extent of practice pointing to that outcome. See BOUTRUCHE, SASSÓLI. *Expert Opinion*…, pp. 10-11

[539] KESSLER, Birgit. The Duty to 'Ensure Respect' Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts. German Yearbook of International Law, 2001, Vol. 44, p. 504, FOCARELLI. Common Article 1…, p. 128

[540] KALSHOVEN. The Undertaking to Respect…, p. 58-59

Common Article 1 has developed into an obligation to exercise influence on other states participating in the MMO in order to ensure their respect for IHL[541]. However, the reality is less black and white and while not constantly taken, states do take measures to ensure other entities respect of IHL at times.[542]

Furthermore, the lack of *widespread* practice of TCSs does not necessarily prevent the extensive interpretation of Common Article 1 to be established by subsequent practice. The Article 31(3)(b) of the Vienna Convention on Law of Treaties states that "*Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*"[543] can develop the obligations. However, that does not mean that all state parties must active participate in the subsequent practice. It is enough that parties have accepted the development of the obligations, even if by silent acceptance.[544] Consequently, the lack of disapprovals or critique seems to point out to the fact that High Contracting Parties have accepted the extensive interpretation.[545]

Similarly, the selectivity of State practice can be explained partly by the fact that TCSs often wish to act in secrecy in their attempts to influence the conduct of other States participating in the MMO.[546] Open naming and shaming might not serve the MMO's goals and might not be as effective as measures taken in secrecy within the MMO's framework. Moreover, lack of state practice can be justified by the fact that states are only bound to take measures that have chances of success, and since in most cases their possibilities to influence transgressors are very limited it is not surprising that the state practice is sparse.

The TCS in a MMO setting are obligated to try to use their influence into ensuring that the MMO as a whole and other TCS within the MMO would respect IHL. However, it would

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[541] Selectivity of State practice raises here similar questions as in the context of Article 89 of Additional Protocol I, which has more clearly developed obligation for states to "*jointly or individually, in co-operation with the United Nations and in Conformity with the United Nations Charter*" to act in cases where there are serious violations of the Geneva Conventions.

[542] Such measures included e.g. diplomatic protests, as listed in HENCKAERTS, DOSWALD-BECK. *Customary International Humanitarian Law Volume 1…,*: protest of Spain in 1988 regarding Iraq-Iran war intentionally targeting civilians (p. 41); Croatian letter to UN Security Council in 1992 regarding Yugoslavia-Bosnia war intentionally targeting civilians (p. 153); German parliament protest in 1991 regarding Sudanese forces bombing of Red Cross and UN aid depots (p. 632)

[543] Vienna Convention on Law of Treaties, Art." 31(3)(b)

[544] DÖRR, Oliver, SCHMALENBACH, Kristen. *Vienna Convention on Law of Treaties: A Commentary.* Springer-Verlag Berlin Heidelberg, 2012. p. 557

[545] A parallel with the practice of the Genocide Convention supports such conclusion. In practice, States do not undertake all measures to stop genocides, but generally do not challenge the view that measures must be taken. The examples from Srebrenica and Rwandan genocides show that not every State party to Genocide convention is willing to take extreme measures in every case, similarly to Common Article 1 obligation to ensure respect of third parties.

[546] KESSLER. The Duty to 'Ensure Respect'…, p. 505

not bring forward obligations to ensure that the other entities would follow legal obligations that are not binding to them. Therefore, it is more relevant to the question of different interpretations of the legal obligations. If a TCS would believe that another TCS is breaching their IHL obligations, it would be obligated to try to intervene and ensure respect of the obligations.

6.3.2 Scope of the Common Article 1

Following the establishment of the extensive interpretation of Common Article 1, the question arises of what the actual scope of the obligation is. Certain authors claim that it only brings forward obligation to take negative measures to refuse cooperation and assist violations of IHL.[547] The ICJ jurisprudence can also be understood as supporting that approach. In the Nicaragua case the court condemned US actions only when US were actively assisting the Nicaragua's contras in violating IHL,[548] but did not condemn the lack of positive measures taken by US to ensure that the contras would respect IHL.[549]

Similar arguments have been claimed with regard to ICJ's statement in the Wall Advisory Opinion.[550] While the Court states 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*"[551], it continues to list measures to be taken as obligation, such as not recognizing the illegal situation and not rendering aid and assistance to Israel for building the wall.[552] Yet the court states in the same paragraph that States are under the obligation to ensure respect of Geneva Convention IV *in addition* to the negative obligations of not to aid and assist or recognize illegal situation.[553] That speaks for broader understanding of Common Article 1 obligations, going beyond the mere negative obligations listed above. Furthermore, since Common Article 1 obligates High Contracting Parties to take positive measures to ensure respect of individuals within their jurisdiction of IHL,[554] there is no logical

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[547] IMSEIS, Ardi. Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion. The American Journal of International Law, 2005, vol. 99, p. 115, KALSHOVEN. The Undertaking to Respect…, p. 56
[548] International Court of Justice. Nicaragua Case. para. 220
[549] ZYCH. The Scope of the Obligation…, p. 265
[550] Ibidem p. 266
[551] International Court of Justice. Wall Advisory Opinion. para. 158
[552] Ibidem, para. 159
[553] Ibidem
[554] SASSOLI, Marco. State Responsibility for Violations of International Humanitarian Law. International Review of the Red Cross, 2002, Vol.84, No.846, p. 412

reason why the same would not be true for the obligations to ensure respect of other (troop contributing) States.

On the other hand, understanding Common Article 1 as bringing only negative obligations could be attractive interpretation to explain the irregular state practice for taking measures to ensure respect of transgressors. However, there are fundamental problems with such claims. The terms "ensure" and "undertake" are more likely to refer to an obligation instead of right to take measures.[555] Moreover, since it is clear that Common Article 1 issues binding obligations to TCS to ensure that their armed forces and personnel under their jurisdiction follow IHL, it is difficult to see why the same would not then be true for the external dimension of Common Article 1, i.e. the obligation to ensure respect for IHL of other States participating in the MMO.[556]

It would be better to explain the lack of State practice by interpreting the Common Article 1 as an obligation that binds the States only when they have legitimate chances of success. It would be a logical consequence of Common Article 1 being a due diligence obligation.[557] High Contracting Parties are not bound by the outcome of their actions but are obligated to try to achieve to goal, and failure to employ measures would be a violation of the due diligence obligation of Common Article 1.[558] However, it does not mean, unlike some claim, that High Contracting Parties are bound to "make every effort" to achieve the goal in every case.[559] One could now expect states to take measures that have very limited chances of achieving anything purposeful but might still hurt their interests and cost political and diplomatic capital.

Therefore, a better standard for what and when to take measures would be a standard reasonable expectations and feasibleness. ICJ followed similar approach to due diligence obligations in the Bosnian Genocide Case[560] regarding the 1948 Genocide Convention, where the Court used Serbia's special relationship with the perpetrators of the genocide and therefore increased capacity to influence the perpetrators to justify increased obligations of Serbia to prevent the genocide in question.[561] As such, capabilities must be taken into account when determining the scope of measures a State is obligated to take. States are thus obliged to adopt

[555] GEISS. Common Article 1…, p. 420, DÖRMANN, SERRALVO. Common Article 1…, p. 723
[556] BOUTRUCHE, SASSÓLI. *Expert Opinion*…, p. 12
[557] Ibidem p. 15, DÖRMANN, SERRALVO. Common Article 1…, p. 724
[558] BOUTRUCHE, SASSÓLI. *Expert Opinion*…, p. 15
[559] DÖRMANN, SERRALVO. Common Article 1…, p. 724
[560] International Court of Justice. Bosnian Genocide case. para. 430
[561] Ibidem; BREHM, Maya. The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law. Journal of Conflict & Security Law, 2008, Vol. 12, No. 3, pp. 374-375

measures, which appear reasonable to ensure respect. Moreover, "appropriate measures" to ensure respect of others cannot obligate states to take measures that have no reasonable chance to achieve the goal, i.e. to ensure that another state will fulfil its IHL obligations. The ICJ followed such approach by taking the specific relationship between Serbia and the Bosnian Serb forces for Serbian into account when considering the Serbian obligation to stop the Genocide in Bosnia.[562] The ICJ stated that "*responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide*."[563] The reference to a due diligence principle, where States are obligated to take measures that "*might have contributed to preventing the genocide*", is fundamental here. In cases of Common Article 1, if TCSs do not have capacity to adopt measures that would contribute to ensuring respect of other States or entities, they are not under an obligation to "make every effort".

However, the ICJ confirmed in its Bosnian Genocide Case that the due diligence obligations (i.e. in that case the obligation to prevent genocides) are not dependable to certainty or likelihood of success.[564] Certainly, the ICJ held that Serbia breached its obligation to prevent genocide because Serbia "did nothing to prevent" the genocide in question.[565] As such, the terminology "did nothing to prevent" could be understood as argument for general obligation to take all available measures to achieve the goal in every case. However, the court also noted that there must be a causal link between the failure to take measures and the harmful event in order for an entity to be breaching its due diligence obligations.[566] Even if international law lacks a clearly defined legal standard on the exact percentage of likelihood of success required, it must still be clear that the Common Article 1 cannot obligate States to take measures beyond what have reasonable chances of success. However, if the High Contracting Party has the capacity to influence the transgressor, then it has a legal obligation to take both positive and negative measures to ensure respect of IHL of the other entity.

6.3.3 Measures under the Common Article 1

Therefore, TCS must take reasonable measures with legitimate chance of success to ensure that the MMO as whole and other TCS in the MMO respect IHL. As such, when the

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[562] ICJ, *Bosnian Genocide Case*, para. 430; BREHM. The Arms Trade…, pp. 374-375
[563] Ibidem
[564] Ibidem para. 461
[565] Ibidem para 438
[566] GATTINI, Andrea. Breach of Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. *European Journal of International Law*. 2007, Vol. 7, No. 4, p. 709

TCS can influence the MMO conduct it is possible that their interpretation of their IHL obligations could become applicable to the MMO as a whole. The TCS would be under a legal obligation to ensure that the rest of the MMO would follow its standard of interpretations. However, such situations would be more presented in a closely connected MMOs instead of loosely build missions where the TCS lack methods of influencing the conduct of the operation.

Common Article 1 is especially applicable to situations where the TCSs' have considerable influence in the official decision-making process of the organization in control of the MMO. As noted earlier, member states and TCSs do often have possibilities of substantially shape the organizations' actions. This is particularly true in highly formalised decision-making processes, such as the NATO system. In the case of NATO, the targeting decisions and approvals for selected targets have been done unanimously in the North Atlantic Council seating the representatives of all of the NATO member states.[567] Similarly the rules of engagement for NATO operations have to be agreed unanimously in the North Atlantic Council.[568] Therefore, often every Troop Contributing State (or at least member states) of NATO can veto rules of engagement or targeting approval if it is felt necessary. In such cases the TCSs can use their veto power to ensure respect of the IHL by the NATO MMOs, not only by vetoing their own contingents' orders but also not allowing the MMO as a whole to conduct operations violating IHL. Under the obligations arising from Common Article 1 the States participating on the particular MMO would be obligated to refuse targets that they do not deem legal under international humanitarian law. As such, the standard for the whole MMO would be the highest standard among the NATO member states and TCSs.[569]

However, such approach has not always been taken in practice of NATO operations. NATO often allows their TCSs to deploy national "caveats" when their TCSs' legal obligations are deemed different.[570] The TCS that would refuse to target certain targets or standards of rules of engagement would then only except their participation in the operations and let other TCSs' contingents to carry out the mission. One example of this is the famous Serbian Radio and TV Headquarters that NATO bombed during its Operation Allied Force. The attacks were highly controversial and even France, one of the main troop contributing states to the NATO operation questioned the legality of the attacks.[571] However, despite their doubts, the French did not veto

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[567] NATO. Allied Joint Doctrine for Joint Targeting…, p. 3.1.
[568] See chapter 2.2
[569] However, it is important to note that TCSs that are not member states to NATO do not always have similar powers as they do not sit in all the political bodies of NATO
[570] OLSON. A NATO Perspective…, p. 656
[571] *The Crisis in Kosovo* [online]. Human Rights Watch. 2000 [cit. on 12th April 2018] Available at: <https://web.archive.org/web/20141022190610/http://www.hrw.org/reports/2000/nato/Natbm200-01.htm>

the targeting decision and the attacks were carried out, killing between 10 and 17 people.[572] It should be noted that should France have vetoed their own participation in that specific mission, it would have fulfilled its obligations not to allow persons under its jurisdiction to violate IHL.[573] However, as explained above, it would not suffice to fulfil France´s obligation to "ensure respect" part of extensive interpretation of Common Article 1. However, there are reports of numerous cases where the TCS were able to veto targeting decisions, which they deemed illegal despite other troop contributing states accepting them,[574] making it possible that in the end of the negotiations regarding the TV station strikes the French were just ensured of their legitimacy. Certainly, there could be other reasons for France to veto their own participation in the mission, such as political risks or unpopularity of possible journalists becoming collateral damages.[575]

On the other hand, when the most obvious possibility to influence the MMO conduct is taken away, the obligated measures will obviously change as well. It could mean that the applicability of highest standards of IHL obligations would not be an obvious conclusion. However, it does not mean that TCSs would not need to attempt to influence the conduct at all. Indeed, during NATO's International Security Assistance Force (ISAF) operation in Afghanistan the targeting procedure was quite different. TCSs were only able to veto their own participation in the missions that they deemed to breach their obligations but the review process of the NATO conduct did not include the political bodies sitting the representatives of the states.[576] However, even in ISAF and its different target selection procedure, the TCSs have been able to exercise their influence to change the operational conduct in some cases. Example of this can be taken from Supreme Allied Commander in Europe, US General John Craddock's guidance stating that ISAF can target Afghanistan's opium farmers directly without presenting proof that the opium farmers are connected with enemy combatants and would therefore constitute legitimate military targets.[577] Certain NATO states, among them Germany, challenged the guidance and with their strong opposition managed to get the order withdrawn

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[572] ICTY. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*. Para. 71

[573] As noted in chapter 5.1.1

[574] PETERS et al. *European Contributions to Operation Allied Force…,* pp. 28-29

[575] ""In some societies, the idea of killing journalists – well, we were very nervous about that," said a French diplomat." In PRIEST, Dana. *France Played Sceptic on Kosovo Attack* [online]. Washington Post. 20th September 1999 [cit. on 24th May 2018] Available at <https://www.washingtonpost.com/wp-srv/national/daily/sept99/airwar20.htm>

[576] COLE. Legal Issues in Forming…, p. 147

[577] ZWANENBURG. International Humanitarian Law Interoperability…, p. 694

showing a prime example of the influence that TCS can have to their MMO partners in military operations.[578]

The obligations to influence the conduct of the operation once again goes beyond the rules of attribution. The TCSs conduct within the framework of the MMO, including their voting practice, is attributed to the organization itself and not to the TCSs. That is supported by DARIO Article 58(2) which states that "*An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.*"[579] In addition, the ILC's Commentary to the DARIO further supports the approach by stating that normal conduct according to the rules of the organization by itself would not constitute attribution of responsibility to the Member State.[580] Similar approaches have been echoed also in academia[581] and in judicial decisions, such as the Westland helicopters arbitration.[582]

But the Common Article 1 and the rules of attribution are separate and independent from each other and Common Article 1 goes further than the rules of attribution of conduct or responsibility by aiding and assisting breaches of international law.[583] Since Common Article 1 already imposes obligation to attempt to influence the conduct of other entities that are not the TCS itself or attributable to the TCS, there is no reason why they should not use all available means to do so, especially by using veto powers or general voting powers within the established decision-making process in the MMO. Just because the act would not be attributable to the entity does not mean that it is not an effective and appropriate way to ensure respect of IHL. Common Article 1 obligates the national governments into using their influence on the international organization's organs, such as the North Atlantic Council of NATO, to ensure respect of IHL by the international organization itself and all TCS contingents.

Therefore, in cases where the decision-making process is done in a manner where TCS are able to influence the outcomes, the MMO as a whole should refuse interpretations of IHL by TCS that go beyond the allowed conduct under IHL.[584] This is especially applicable to

[578] Ibidem
[579] DARIO Art. 58(2)
[580] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 91
[581] CORTES MARTIN. The Responsibility of Members Due to Wrongful…, p. 704
[582] Ibidem p. 695
[583] BOUTRUCHE, SASSÓLI. *Expert Opinion*…, p. 21, HENCKAERTS. Commentary on the First Geneva Convention…, pp. 40-41
[584] While it is difficult to say in abstract terms when the line would be crossed, but one recognizes it when it happens. As an example of such interpretations can be taken from US understanding of "Military objective" as "war sustaining targets", which is something which is deemed illegitimate by most states. See more in TURNS, David. Targets. In WHITE, Nigel D, HENDERON, Christian (eds.) *Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum.* Edward Elgar Publisher, 2013, p. 266

situations such as NATO, which decision-making process is done by unanimous voting. It would not be enough to allow TCS to decline taking part in the missions, which they deem illegal under international law, but to attempt to enforce their interpretations and standards of law to the whole MMO. However, in MMOs where the TCSs abilities to influence the overall conduct of the MMO and not only their own troop contingents' conduct are more limited, one could see Common Article 1 as less relevant. In such situations the highest standard of interpretations would not necessarily be applicable to the MMO as a common standard.

The last question is that when would TCS be bound to exercise their influence to ensure respect of IHL by the MMO. In other words, when should the TCS deem the conduct of the MMO illegal. Surely when the different interpretations of the legal obligations go too far, the TCS must apply pressure and influence not to allow the MMO follow those interpretations. One example of such practice can be seen from US targeting standards in NATO ISAF operation targeting drug fields without proven nexus to the conflict as economic targets. In that case the disparity in the interpretations of legal obligations went too far that other TCS must have seen it as a breach of law.

However, what about situations where the conduct is not as clear. One could argue that whenever the TCS have different interpretations of legal obligations, the more lenient interpretation should be deemed illegitimate by the TCS with stricter interpretation. In an essence, states interpret the law as giving the limits to their military conduct, and in cases where other TCS might allow more freedom in conducting hostilities those should be deemed then breaches of law. It is obviously difficult to say who is correct since the international law lacks centralized authority to issue "correct" interpretations. However, based on Common Article 1 TCS should interfere and ensure that others would not allow more leniency than what they deem is correct. Whether or not the TCS in the end would breach the Common Article 1 obligation to ensure respect depends on whether or not the conduct is a breach of the IHL obligations. But the TCS own interpretation should at least in theory be deemed the correct one by the TCS, as why else would a state limit its conduct further than necessarily as a question of law?

6.4 Conclusion

While the weapons treaties do not obligate states to impose their obligations to the whole MMO, Common Article 1 might give out such obligation. However, that would be only for different obligations arising from different interpretations of the common obligations. When a TCS would have more lenient interpretations of common obligations, other TCS might deem

those as breaches of the obligation. In such situations, the other TCS to the MMO would be obligated to ensure that the leniently interpreting state would not breach the obligations. If the MMO framework would provide enough influence for the other TCS to ensure that, they would be obligated to do so. However, not all MMOs have such framework. Therefore, the Common Article 1 obligation to ensure respect is especially relevant to MMOs that are conducted in similar fashion to NATO, where the TCS are highly engaged into the common decision-making process. On the other hand, MMOs similar to UN would not allow most TCS to influence the conduct and could not therefore impose obligations to ensure that the MMO as a whole would follow their interpretations.

However, when the MMO framework allows TCSs to influence the conduct to the extent that they obtain the obligation to ensure respect of the whole MMO of respect of IHL, the MMO would then gain a single unified standard of interpretations of the IHL obligations. Yet, there are still clear issues with that approach. IHL lacks a central authority that could issue binding interpretations of the legal obligations. Therefore, it would be largely impossible to know which interpretation among the TCSs would be the correct one. As such, not all differences of the interpretations would mean that one TCS is breaching the common obligations and by extension the other TCSs would be breaching Common Article 1 obligations to ensure respect of IHL. However, logically if TCS would interpret the legal rules in a stricter fashion, it should deem more lenient ones as breaches and therefore try to use its influence to ensure that the MMO would not apply such standards. Whether or not the TCS would be breaching its obligations under Common Article 1 would be decided by the answer to the question of whether or not the original act would be a breach of the obligations.

7 Conclusion

The study explored the applicable legal obligations to a MMO and whether the military operation can have a single unified standard of IHL applicable to the whole MMO instead of having multiple separate standards for each TCS and international organization being applicable simultaneously. The study focused on multinational military operations under the command and control of international organization where states contribute the troop contingents to the operation, which participate in more intense armed conflicts where the threshold of IHL application is breached and the whole range of IHL obligations becomes relevant. For examples of the mentioned operations, the study focused on UN, NATO and ECOWAS operations. All of the operations share certain similarities. Firstly, they are conducted under nominal international organization's operational command and control and under the organization's chain of command. Similarly, in all of the operations the TCSs do not forfeit full and exclusive authority over their troop contingents to the international organization but keep very least criminal and administrative jurisdictions over their contingents and are responsible over their pay and training. However, organizations and their operations differ fundamentally from the TCSs role in decision-making process, the effectiveness of the operational command of the organization and possible breaches of the TCSs of the MMO chain of command. Those facts are then applied to the legal regime to show their effect on the legal obligations of the MMOs.

The entities in the MMO (the TCSs and the international organization under which command and control the MMO operates) are bound by different standards of IHL obligations. IHL is not fully homogenous regime of law. The entities can be bound by different treaty obligations, as some TCSs might be parties to a treaty and others would not. Similarly, the international organizations are not parties to any IHL treaties and indeed none of the IHL treaties allow organizations to join them all together.[585] While some of the different treaty obligations might have status of customary international law binding to all entities regardless of their membership, not all of the IHL treaty regime has been crystallized as customary law.

However, even when the entities are bound by the same treaties or customary law, they can interpret those differently from each other. Since IHL lacks centralized authority to give standardized interpretations, it is difficult to know what the objectively "correct" interpretation is. Similarly, so called so called common but differentiated obligations arises differences in the IHL obligations binding to the entities. That group derives from the obligation to take "feasible"

[585] TITTEMORE. Belligerents in Blue Helmets…, pp. 95-97

precautions to protect civilians.[586] The term feasible refers to everything possible, meaning that states that have greater technological advancements, especially precision guided munitions, would be required to do use the technology when feasible, but the obligations would not require states to do the impossible. As such, the scope of the obligations differs depending on technological capabilities. All of the types of obligations have a different outcome regarding the possibility of having or scope of the common standard applicable to the MMO.

The study started the analysis on the common standard of IHL obligations from the international organization's standard. Therefore, the organization must be able to be bound by IHL rules. First requirement is that the organization has an international legal personality, which all the active organizations conducting military missions would possess. Secondly, it must be able to become a party to the armed conflict. The study argued that the most suitable test for party to an armed conflict would be similar to ICTY's Tadic judgment, under which the criteria is whether the entity "*has a role in organising, coordinating or planning the military actions of the military group...*"[587] Being party to the conflict is fundamental, as much of the IHL is only applicable to parties to the conflicts.

After establishing the *prima facia* possibility of international organizations to being capable of possessing obligations under IHL, the sources of international organizations' legal obligations must be established. Since organizations are unable to join IHL treaties, the sources other than the treaties must be explored. The organization with its separate legal personality must have its own obligations and would not be fully constrained by only its member states obligations. Therefore, those obligations are mostly arriving from customary international law and possible status of force agreements concluded between the organization and host state or TCSs. However, the obvious problem with that is the fact that such agreements and customary IHL does usually not go beyond the minimum standard applicable to all entities.

Following the international organization's legal obligations and its possibility of being bound by IHL, the next question is whether it is the organization's or the TCSs' scope of obligations that is applicable to the MMO. The study argued that the legal obligations of the entity which the conduct of MMO is attributable to will be applicable to the military operation. If the international organization under which command and control the MMO operates would be attributed the conduct over the MMO conduct, its standard of legal obligations would be applicable to the whole MMO. Therefore, firstly one must establish the scope of IHL obligations for the international organization.

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[586] Additional Protocol I Article 57(a) & (b), also mirrored in customary IHL
[587] ICTY Tadic appeals chamber. para. 137

For that, the international organization would need to have effective control over the conduct of the military operation. While there have been multiple different proposals for the actual test when international organization would possess effective control, the study argued that the most suitable one is similar to Netherlands' courts interpretation of the test. Under that test the entity that was better positioned to stop the violations would be attributed responsibility. In ordinary course of action, one would assume that the chain of command has not been breached and the attribution of conduct would be determined according to organization of the military mission. However, in cases where the chain of command would have been breached then the entity that gave the orders, or in case of *ultra vires* acts did not give orders prohibiting the conduct even when it was better positioned to do so, that lead into the conduct would be attributed the conduct.

However, using international organization's scope of IHL obligations as a common standard is problematic. Organizations are not bound by treaties and majority of the sources of their obligations arise from customary IHL, which is binding to all entities. Therefore, the organization's scope is often the lowest common denominator. Unsurprisingly, state practice has shown that TCSs are often unable or unwilling to allow their contingents to conduct hostilities with the lowest denominator. Only the common but differentiated obligations could be legally and in practice done with international organizations' issued standards. The term "feasible" includes considerations "*relevant to the success of military operations*"[588] to the determination of feasible precautions. The success of military operations can involve the need to prioritize the precision guided technology in situations where its most needed, even if it would mean that states with most precision capabilities would then need to lower their standards of when to use their resources.

The TCSs unwillingness to subject their contingents to international organizations' minimal standards of IHL has clear legal reasonings behind it. While when the conduct of the MMO would be attributable to the international organization and therefore the organization's obligations would be the primary applicable obligations, the TCSs obligations can be applicable due to other sources. As such, the IHL does not always follow the primary rule.

Many of the IHL treaties have clauses that obligate TCS's contingents to uphold the standards even when the conduct would not be attributable to the TCS. Nevertheless, not all treaties have such clauses.[589] However, even in absence of similar clauses it is possible to have their legal obligations applicable in certain, although rare, cases. Firstly, there are possibilities

[588] PILLOUD et al. Commentary on the Additional Protocols…, pp. 681-2
[589] Prime example would be Additional Protocol II of Geneva Conventions

of attributing the conduct of the MMO to the TCS and the international organization simultaneously. However, dual attribution of conduct must be held as an extremely rare instance and the effective control test clearly suggests of generally applying the conduct to one entity only. Secondly, the TCSs are prohibited from circumventing their obligations by actin through international organizations. But there is very high threshold for applying the prohibition of circumvention to the MMO settings. It could only be applicable if there is clear TCS domination over international organization in effective control of the MMO. Such cases are very rare in practice, as the TCS must be dominating the international organization's conduct to an extent that there is no need to protect the autonomy of the international organization because the organization's autonomy is already dismantled.

Accordingly, often the MMO would be often bound by two different scopes of IHL obligations, that of the international organization and the TCS. Consequently, the different troop contingents inside the MMO would be having separate and different scopes of legal obligations and their interpretations from each other. Therefore, when the TCSs are being unable to escape their higher standards, the only possibility of having unified standard of IHL application to the MMO would be to have highest TCS's standard as the common standard. Obviously, nothing prevents from MMO to politically decide to adopt such standards or go even beyond the legal requirements.[590] IHL only provides minimum standard of conducting hostilities.

But legally, Common Article 1, when interpreted extensively, could obligate the MMO to establish the highest standard of different interpretations as a unified common standard for the whole MMO. By obligating TCSs to ensure respect of other entities, namely the international organization and other TCSs, of IHL.[591] If their interpretations are more flexible than what is accepted under the IHL, other entities should then ensure that those standards are not followed, when possible. The Common Article 1 is especially applicable to NATO system, which has unanimous decision-making process and deeply involves member states in the decision-making, can allow the TCSs to have enough influence to ensure the respect of IHL of NATO MMOs. Lastly, there are very limited possibilities of having unified standard of treaty obligations. Unless the international organization has highest standard of treaty law, which is

[590] Indeed, that has happened, such as in NATO's Libyan operation where NATO adapted extremely high standard for feasible precautions, aiming for zero collateral damages and obligated TCSs to 100% use of precision guided munitions going beyond what IHL would require. See OLSON. NATO Legal Adviser, Letter to…, p. 3

[591] Geneva Convention I Article 1

unlikely due organizations' inability to join the treaties, it is rare for TCSs to be able to ignore their treaty obligations.

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Summary

Práce analyzuje možnost existence jednotného standardu závazků vyplývajících z mezinárodního humanitárního práva (MHP) aplikovatelných na více-národnostní vojenskou operaci (VVO). V situacích, kdy vojenská operace zahrnuje jednotky několika přispívajících států a je konána pod vedením mezinárodní organizace, musí být vzato v potaz vícero entit při identifikaci pravidel, která se na danou operaci aplikují.

Jednotný standard pro VVO jako celek může být založen rozsahem povinností dané mezinárodní organizace, která VVO vede. V tomto směru musí mezinárodní organizace naplnit určitá kritéria, zejm. být nositelkou právní subjektivity, být stranou konfliktu, být vázána normami MHP a vedené vojenské akce jí musí být přičitatelné. Nicméně ani v tomto případě nemusí vojáci tvořící kontingent operace nutně uniknout povinnosti řídit se závazky MHP dopadajících na jejich vlastní stát. Úmluvy MHP často obsahují doložky, které znemožňují možnost vyhnout se těmto povinnostem a které navíc multiplikují přičitatelnost jednání současně na mezinárodní organizaci i na vojáky přispívající státy. Zákaz obcházení potom může představovat další překážku.

Tato studie dochází k závěru, že neexistují povinnosti, které by zajistily, že VVO bude regulována jednotnými standardy vyplývajícími z mezinárodních smluv a že na rozličné entity se budou aplikovat různé mezinárodní smlouvy. Nicméně tato studie zastává pozici, že zejména společný článek 1 přináší povinnost zajistit jednotný výklad společných povinností. Společný článek 1 zahrnuje pozitivní závazek zajistit dodržování MHP ze strany ostatních států a entit. Podle tohoto přístupu nejsou sice státy povinny zajistit dodržování povinností vyplývajících z mezinárodních smluv ze strany ostatních entit, nicméně vojáky přispívající státy by nemohly umožnit VVO akce s benevolentnější interpretací společných povinností než jakou aplikují na své vlastní povinnosti. Obdobně by VVO mohla mít jednotné standardy tzv. společných, ale diferenciovaných povinností, např. povinnosti učinit proveditelná preventivní opatření, které mají rozdílný rozsah podle možností dotčených entit. Termín „proveditelná“ (v anglickém jazyce „feasible“) zahrnuje posouzení měřítka „relevance k úspěchu vojenských operací,“ což může znamenat například upřednostnění přesně naváděné munice v situacích, kdy je to potřeba.

The thesis analyses the possibility of having a single standard of IHL obligations applicable to a multinational military operation. When the military operation consists of troops contributed by states and is conducted under the leadership of an international organization,

multiple entities must be considered when determining what rules apply to the operation. There is great disparity in legal obligations of the different entities (i.e. international organizations and troop contributing states) because disparity in being parties to different IHL treaties among the entities. However, even while states accept that they are bound by same legal obligations, either treaty law or customary law, they often interpret the obligations differently or have otherwise different scopes of obligations.

Firstly, the unified standard for MMO as a whole can be established by the international organization's scope of obligations when the operation is conducted under its leadership. To that end, international organization must fulfil certain requirements, namely possessing legal personality, being a party to armed conflict, having IHL norms binding to it, and the conduct of the operation is attributable to it. However, even in that case the participating troop contingents cannot necessarily escape the IHL obligations binding to their own states. IHL treaties often have clauses in them that would deny the possibility and similarly multiple attribution of conduct to both organization and troop contributing states and the prohibition of circumvention can bring obstacles to it in some cases.

As such, often the only possibility to have unified standard applicable would be the highest available scope of obligations applicable to the operation. The study argues that especially Common Article 1 brings forward such obligation regarding different interpretations. Common Article 1 includes a positive duty to interfere and ensure respect of IHL of other states and entities. While that approach would not obligate states to ensure that other entities would uphold treaty obligations that are binding to them, the troop contributing states could not allow the MMO as a whole to conduct hostilities with less strict interpretations of common obligations than what they deem are proper. As such, it would bring highest standard of interpretations to the military operation. However, the study concludes that there are no obligations to have highest available standard of different treaty obligations available to the MMO as unified standard, and the military operation would continue to have disparate obligations applicable to it

Keywords: International Humanitarian Law, Multinational Military Operations, International Organizations

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The Unified Standard of Application of International Humanitarian Law in Multinational Military Operations

Summary of the doctoral dissertation

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1. Introduction

The study analyses whether every troop contributing state (TCS) and their troop contingents in the multinational military operation (MMO) have separate scope of IHL obligations based on the individual TCS' legal obligations or if it is possible to have unified standard of IHL obligations applicable to the whole MMO. Especially problematic for the MMOs are the questions regarding what legal obligations must the multinational operation follow. When the military operations consist of troops contributed by states and is conducted under the leadership of an international organization, multiple entities must be considered when determining under what rules the operation must conduct its hostilities. Since there is great disparity in legal obligations of the different entities it brings up the question of which scope of obligations the operation must uphold. The study aims to bring forward arguments for applicability of a single unified standard of legal obligations applicable to the MMO in certain cases instead of multitude of different scopes of IHL obligations of each actor involved in the operation.

The study uses the secondary rules of international responsibility to solve the question of unified standard. While they can be seen as completely separate issues, the study claims TCSs must ensure that their legal obligations are applicable to the MMO in case they would be responsible over a failure to do so. Furthermore, arguably applicable law without responsibility would be of merely abstract question and largely indistinguishable from accepting legal norms as a matter of policy without legal relevance, and as such would not have any effect as a matter of law to the conduct of the MMO.[592] As such, it is justifiable to analyse the responsibility regime closely.

[592] LARSEN, Kjetil Mujezinovic. *The Human Rights Treaty Obligations of Peacekeepers*. Cambridge University Press, 2012, pp. 105-107

2. Overview of the military operations

The MMOs in the study have been defined as a military force which consist of the troop contingents of the troop contributing states (TCS) but is conducted within international organization's framework and under international organization's chain of command. Therefore, those MMOs that are done under leading state or as coalition of the willing by states only are not part of the study. The MMO itself is not a legal person and is not therefore capable of possessing rights or obligations, but the applicable legal framework to it emerges either from the international organizations' obligations, the TCSs' obligations or possibly from both sets of legal obligations.

The thesis studies examples of three different international organizations' and their MMOs. Those selected are NATO, UN and ECOWAS. Reasoning behind the choices is their engagement in high-intensity armed conflicts which allows the study of the IHL obligations better. Especially NATO and ECOWAS have partaken in military operations as a proper combatant party in an armed conflict, such as NATO's Yugoslavian and Libyan operations and ECOWAS' ECOMOG operations in Liberia and Sierra Leonne. Similarly, certain UN operations, although often called "peacekeeping", clearly go beyond the classical peacekeeping missions and have forced UN to engage into the armed conflicts as a combatant party.[593]

While the organization is in theory in control of the troops of the MMO, the transfer of authority over the TCSs troops to the organization is never full.[594] TCSs keep criminal and administrative jurisdiction over their troops and the organization has very limited authority over the punishment of the individual soldiers in their military operations.[595] Often in reality the command and control that international organization possesses over the MMO is operational command and control.[596]

However, the military missions are not completely the same. NATO has seemingly strongest chain of command and highly developed interoperability regarding their operations. TCSs rarely act outside the chain of command or avoid orders from the NATO personnel. However, as seen in certain examples of UN operations, their TCSs are not always willing to

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[593] HILLEN, John. *Blue Helmets: The Strategy of UN Military Operations.* 2nd Edition, Potomac Books, 2000, pp. 22-23

[594] FERRARO, Tristan. The Applicability and Application of International Humanitarian Law to Multinational Operations. International Review of the Red Cross. 2013, Vol. 95, No. 891/892, p. 588

[595] LECK, Christopher. International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct. Melbourne Journal of International Law. 2009, Vol. 10, p. 349

[596] CATHCART, Blaise. Command and Control in Military Operations. In GILL, Terry D, FLECK, Dieter (eds.) *The Handbook of the International Law of Military Operations.* 2nd Edition. Oxford University Press, 2015. pp. 261-2

respect the chain of command and the TCSs governments can interfere with the chain of command of the military operation.[597] ECOWAS operations can be taken as an extreme example where the organization's command and control over the MMO is extremely limited due to the TCSs interference and neglect of the chain of command.[598] Furthermore, seemingly TCSs have more powers in influencing the NATO's decisions due to the unanimous rule in the decision-making process.

[597] HILLEN. Blue Helmets…, p. 182
[598] ZWANENBURG, Marten. *Accountability of Peace Support Operations.* Martinus Nijhoff Publishers, 2005, pp. 40-41, which presents examples of UN operations in Somalia, Former Yugoslavia and Sierra Leone.

3. Sources of different obligations

Next, it is important understand that while IHL is built around the idea that it is fully homogenous system of legal obligations which are the same for every entity that is bound by them, in reality that is often not the case. Indeed, there are major differences how states and international organizations are bound by IHL or even how different states are bound by the rules or how the different entities understand their binding obligations. Firstly, obviously not all of the entities in the MMO are bound by the same treaties or equivalent customary IHL.[599] As such, there is disparity in their legal obligations. However, even when the entities have mirroring treaty obligations or are bound by equivalent customary law they often interpret those obligations diversely.[600] While in a perfect world the interpretations of the common obligations should be the same among the entities, the reality does not reflect that.[601] As such, the distinct interpretations cause issues to interoperability of the MMO. Similar issues arrive from so called common but differentiated obligations, namely obligations to take feasible precautions in attacks.[602] The term "feasible" refers to the fact that states are obligated to do what they can but are not obligated to do the impossible.[603] Based on the premises that different TCSs have different technological capabilities to conduct warfare, the TCSs then have different understandings of what constitutes feasible precautions for example in choice of (precision guided) munitions or certainty of the military character of the intended target. As such, it is inherent to the obligations to take feasible precautions that they differ from entity to entity due to the disparity of their technological capabilities.

[599] International organizations cannot become parties to majority of IHL treaties. Similarly, while Geneva Conventions have universal acceptance, Additional Protocols do not and states, especially U.S. does not accept customary status of all of the rules of the additional protocols, see LEVIE, Howard S. The 1977 Protocol I and United States. International Law Studies US Naval War College. 1993, Vol. 70, pp. 340-346. Similarly, Ottawa Mine Treaty and Cluster Munitions Convention have not gained universal membership.

[600] Prime example of this is U.S. interpretation of Military Objective, which includes economic targets and other "war sustaining targets", which has been criticized widely, see HENDERSON, Ian. *Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I.* Martinus Nijhoff, 2009, pp. 142–143

[601] OLSON, Peter M. A NATO Perspective on Applicability and Application of IHL to Multinational Forces. International Review of the Red Cross. 2013, Vol. 95, No. 891/892, p. 656

[602] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I), Article 57(2)(a)(I) & 57(2)(a)(II)

[603] SCHMITT, Michael. The Principle of Distinction In 21st Century Warfare. Yale Human Rights and Development Journal. 2014, Vol. 2, No. 1, p. 170

4. International organization's scope of obligations as unified standard

After establishing the problems of different scopes of IHL obligations, the study looks into the possibilities of having unified standard to the military operation. The study firstly explores international organizations' obligations as the base for the unified standards for the whole MMO. When the MMO is conducted under the auspices and leadership of an international organization, it would then be the international organizations' obligations that could provide the unified standard.

For an international organization to provide the unified standard, it must fulfil certain qualifications which are analysed in the chapter. Firstly, the organization must be able to possess legal obligations. To that end, the organization must have legal personality[604] and be able to be a party to an armed conflict.[605] Secondly, since the organizations cannot be parties to the IHL treaties,[606] the obligations binding force must be established from other sources. Lastly, the conduct of the MMO must be attributable to the international organization. Without the attribution, the organization's legal obligations would not come into effect and the MMO would be based on primarily on the obligations of the TCS that the conduct of the MMO is attributable.[607]

4.1 International organization's capability of possessing legal obligations

The organization must firstly have an international legal personality to generally make it possible for the organization to possess international rights and obligations. The legal personality must be distinct and separate from the member states.[608]

Regarding to the question of how international organizations gain the international legal personality there are two dominant theories, namely objective and subjective theories. While ICJ has endorsed the subjective legal personality in its reparations advisory opinion, in practice

[604] DANNENBAUM, Tom. 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. Harvard International Law Journal. 2010, Vol. 51, No. 1, p. 129

[605] AARON, Marvin R., NAUTA, David R. D. Operational Challenges of the Law on Air Warfare. The Example of Operation Unified Protector. Military Law and Law of War Review. 2013, Vol. 52, No. 2, p. 357

[606] TITTEMORE, Brian D. Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations. Stanford Journal of International Law. 1997, Vol. 33, pp. 95-97

[607] Draft Articles on the Responsibility of International Organizations. 2011 ILC 63rd session (DARIO), Article 4

[608] DANNENBAUM. Translating the Standard of Effective Control…, p. 129

the theoretical framework is not as important as generally the status of international organizations' legal personality does not change too much regarding which theory is followed.[609] The member states could still be in control regarding whether the international organization fulfils the objective criteria or not. However, analysis of most active organization who conduct military operations have been affirmed to have international legal personality.[610]

UN legal personality has been confirmed in numerous situations, such as in the earlier stated Reparations advisory opinion and in the Convention on Privileges and Immunities of the United Nations.[611] Generally there is no doubt left that UN is an international legal person.[612] Similarly there is little doubt that ECOWAS possesses international legal personality due to its explicit clause in its constituent treaty.[613]

More controversial question is the possible legal personality of NATO. Former senior NATO legal officer Peter M. Olson claimed that NATO would not be a "free standing entity differentiated from its member states"[614] which could be taken as to argument against NATO possessing distinct will, or *volonté distincte*, which has been argued to be a requirement for legal personality.[615] Indeed, it can be difficult to see where the NATO's distinct will is, considering the close control its member states have over the organization.[616] However, the distinct will does not need to be completely removed from the member states. The representatives of the member states in the international organization have a dual role in the organization, to represent their own states and to also pursue in good faith the aims of the organization.[617] Similarly, overwhelming evidence and academic opinions support the arguments for the legal personality of NATO.[618]

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[609] Ibidem

[610] FERRARO, Tristan. IHL Applicability to International Organizations Involved in Peace Operation. Proceedings of the Bruges Colloquium: International Organizations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011, p. 17

[611] Convention on Privileges and Immunities of the United Nations, 1946, Article 1

[612] DANNENBAUM. Translating the Standard of Effective Control…, p. 129

[613] Revisited Treaty of the Economic Community of West African States. 24th July 1993. Article 88(1)

[614] OLSON. A NATO Perspective…, p 654

[615] WHITE, Nigel. *The Law of International Organizations.* 2nd edition, Juris Publishers, 2005, p. 30-31. Some argue that the relationship between legal personality and distinct will not the same as far as sources and normative framework goes, as the distinct will is based on institutional rules and decision-making process while legal personality is a question of general international law. However, even then it would be difficult to produce independent legal personality without distinct will. See BRÖLMANN, Catherine. *Institutional Veil in Public International Law: International Organizations and the Law of Treaties.* Hart Publishing, 2007, p. 76

[616] GAZZINI, Tarcisio. NATO Coercive Military Activities in the Yugoslavian Crisis (1992-1999). European Journal of International Law. 2001, Vol. 12, No. 3, p. 425

[617] SCHERMERS, Henry G., BLOKKER, Niels M. *International Institutional Law: Unity Within Diversity.* Martinus Nijhoff Publishers, 2003, 4th edition, p. 1211

[618] ZWANENBURG. *Accountability of Peace Support…,* p. 67; STUMER, Andrew. Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections. Harvard International Law Journal. 2007, Vol. 48, No. 2, p. 557; Also, Italian courts have recognized the NATO legal personality based on its

Secondly, the international organization must be able to become a party to an armed conflict in order to its IHL obligations can become applicable. Entity must be able and be party to the armed conflict before most of its IHL obligations can be applicable to the conflict.[619] If it is the TCS and not the organization that is party to the armed conflict, the organization could not have its IHL obligations to be applicable *ratione personae*.[620]

The study argues that the test for international organization to become a party to an armed conflict would be mirroring that of ICTY Tadic judgment "overall control" test. While the 2016 Commentary to Geneva Conventions recognizes that the test is linked to attribution of conduct and effective control,[621] the ICTY overall control test seems more suitable. The possibility has also been recognized by ICJ that the tests of attribution of conduct and being party to an armed conflict can be, and probably is, indeed different.[622]

As such, under the Tadic test the international organization's control "may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)"[623] and the test might be fulfilled when the organization has a "role in organising, coordinating or planning military actions of the military group"[624] which would refer to more stable control and overall control over the MMO, which would be better suited for determining parties to the conflict.[625]

That does not mean that both, the international organization and the TCS cannot be parties to the conflict simultaneously, as long as they would both fulfil the criteria set out in Tadic "overall control" test.[626] However, TCS would not become party to an armed conflict

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international legal personality, see SCHERMERS, BLOKKER. *International Institutional Law...,* p. 1010; Similarly, ICTY case law recognized NATO as separate entity from its member states and capable of possessing rights and obligations by ordering SFOR (for which NATO was responsible authority) to disclose documents. ICTY. Prosecutor v. Simic, Decision on the Motion for Judicial Assistance to be Provided by SFOR and Others. 18th October 2000, IT-95-9-PT, para. 48. Quoted in ZWANENBURG. *Accountability of Peace Support...,* p. 68; Arguably if the court would not have treated NATO as separate legal personality it would have addressed the order to the individual member states. See LARSEN. *The Human Rights Treaty Obligations...,* p. 96

619 AARON, NAUTA. Operational Challenges of the Law…, p. 357

620 ZWANENBURG, Marten. International Organizations vs Troop Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict During Peace Operations? Proceedings of the Bruges Colloquium: International Organizations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011, p. 26

621 DÖRMANN, Knut et al. *Commentary on the First Geneva Convention.* International Committee of the Red Cross, 2016, p. 91

622 International Court of Justice: Judgment of 26 February 2007, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Hereafter Bosnian Genocide Case). para. 403-407

623 ICTY. Prosecutor v Dusko Tadic Appeals Chamber judgment. 15th July 1999, IT-94-1-A. para. 137

624 Ibidem

625 ENGDAHL, Ola. Multinational Peace Operations Forces Involved in Armed Conflict: Who Are the Parties? In. MUJEZINOVI LARSEN, Kjetil et al.(eds.). Searching for a 'Principle of Humanity' in International Humanitarian Law. Cambridge University Press, 2012, p. 255

626 DÖRMANN. *Commentary on the First Geneva Convention*…, p. 91

automatically merely by the fact that "it is their armed forces are taking part in the conflict" as has been argued.[627] While the military of the state are engaged in the armed conflict, that does not mean that the state is automatically party to the conflict when its troops have been seconded to an international organization who exercises control over them while the TCS's control has been diminished. But when the TCSs would fulfil the criteria for being a party to the conflict it would become a party, possibly together with the international organization.

4.2 Sources of international organizations' IHL obligations

The next question is to find the actual sources of legal obligations that the organization would possess. When the international organizations have legal personality and can become parties to armed conflict, they must still be bound by IHL obligations. As international organizations are not parties to the humanitarian treaties, the obligations cannot be found in treaty law. Only states can join the Geneva Conventions and its Additional Protocols.[628] Similarly the Weapons conventions are not open to international organizations.[629] At the present no international organization is a party, or can be a party, to any of the IHL treaties.[630] Therefore, one would need look elsewhere for the legal obligations.

Arguably primary source of international organizations' IHL obligations are the rules that have been crystallized into customary IHL. Customary law applicability to the organizations has been generally recognized by the academia.[631] This approach has further support from ICJ's WHO-Egypt advisory opinion,[632] stating that "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[633] The binding force of customary law to international organizations has been criticized over the fact that the organizations have very limited possibilities in affecting the formation of the customary law.[634] However, that should not constitute unconquerable obstacle. To claim that organizations are not bound by customary law would mean that the organizations exercise their powers and conduct activities in a legal limbo

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[627] AARON, NAUTA. Operational Challenges of the Law…, p. 358
[628] TITTEMORE. Belligerents in Blue Helmets…, p. 96
[629] Weapons treaties are only open to "state parties" which does not include international organizations.
[630] TITTEMORE. Belligerents in Blue Helmets…, pp. 95-97
[631] SCHERMERS, BLOKKER. *International Institutional Law…,* p. 1004
[632] DAUGIRDAS, Kristina. How and Why International Law Binds International Organizations. Harvard Journal of International Law. 2016, Vol. 57, No. 2, p. 332
[633] International Court of Justice, Advisory Opinion of 20 December 1980. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*. Para. 37. Quoted in Ibidem.
[634] Ibidem. p. 334

unbound by any legal restrictions, which is clearly insufferable conclusion.[635] Similarly, it is not unheard of other entities being bound by general international law without being able to contribute to their formation, such as newly established states[636] or possibly non-state actors and individuals.[637]

However, the applicability of customary international law would be binding on international organizations is still limited by principle of functionality.[638] Generally, when the international organizations have powers to engage in military operations and resort to armed force the customary IHL would be applicable and binding to them.[639] But on the other hand, certain rules are not binding to them due the fact that organizations cannot fulfil the obligations that are largely irrelevant. Since TCSs keep exclusive criminal jurisdiction and international organizations do not exercise jurisdiction over their troop contingents, the rules regarding mandatory criminal proceedings against war criminals have little relevance.

Certain authors have claimed then that only the TCS' obligations would matter, and that the international organizations would be bound by the same obligations as the TCS would be.[640] The argument put forward is that TCSs would bring forward their scope of IHL obligations to the international organization and the organization is "transitively" bound by the TCSs' obligations.[641] The argument seems to come down to the justification of drawing parallels from successions of statehood to the founding of international organizations.[642] According to it, similarly to new states that are often bound by its predecessor's obligations, also international organization is bound by the founders obligations.[643] When the member states transfer powers to the organization it inherits their obligations.[644]

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[635] BLOKKER, Niels. International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously? International Organizations Law Review. 2017, Vol. 14, p. 11

[636] NAERT, Frederik. International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights. Thesis for Doctor in Laws in Catholic University Leuven. 2008, p. 252

[637] CLAPHAM, Andrew. *The Human Rights Obligations of Non-State Actors.* 2006, Oxford University Press, pp. 35-40

[638] SCHERMERS, BLOKKER. *International Institutional Law…,* p. 995

[639] FALCO, Valentina. The Internal Legal Order of the European Union as a Complementary Framework for its Obligations Under IHL. Israel Law Review. 2009, Vol. 42, No. 1, p. 186

[640] MEGRET, Frederic, HOFFMANN, Florian. The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities. Human Rights Quarterly. 2003, Vol. 25, p. 318

[641] Ibidem

[642] SCHERMERS, BLOKKER. *International Institutional Law…,* p. 996

[643] Ibidem

[644] Ibidem

However, the international organization's separate legal personality means that they do have rights and legal obligations of their own, separate of their member states or TCS.[645] They do not automatically become bound by their member states obligations. Furthermore, that approach would face significant problems in practice. As international organizations often have developing memberships, the organization's obligations would be changing every time new member would join the organization with different legal obligations and every subsequent member would then limit the competence of the organization.[646] Therefore, the approach of binding international organizations by their member states legal obligations must be denied.

Lastly, Organizations can pass unilateral declarations that they will uphold IHL obligations, even beyond those of customary law. Similarly, the member states to the organization can bind the organization to higher standards of law than the mere customary law would obligate. Both UN[647] and NATO[648] has in numerous times stated that the IHL is applicable and that they shall uphold the rules of that body of law. Unsurprisingly, there have be questions regarding the binding legal force of such statements.[649] However, as an international legal person, the organizations must be able to bind themselves to unilateral acts they choose to make binding.[650] However, this study argues that those statements could be taken as unilateral binding declarations, similarly to those made by France and judged binding by ICJ in Nuclear Tests Case.[651]

Therefore, unilateral statements of the organizations can impose legal obligations to the organizations as customary law, beyond those obligations that would arise from the universally binding customary law standards.[652] As such, international organizations with legal personality, which would include all of the active organizations conducting MMOs, possess very least the customary IHL obligations, and unilateral declarations that are intended to be binding.

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[645] AMERASINGHE, C. F. *Principles of the Institutional Law of International Organizations.* 2nd edition. Cambridge University Press, 2005, p. 390;

[646] DAUGIRDAS. How and Why International Law Binds…, pp. 349-50

[647] PALWANKAR, Umesh. Applicability of International Humanitarian Law to United Nations Peacekeeping Forces. International Review of the Red Cross. 1993, Vol. 75, No. 801, pp. 245-252; Also, UN Secretary-General. Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13 (Hereafter UNSG Bulletin)

[648] AARON, NAUTA. Operational Challenges of the Law…, p. 359

[649] DANNENBAUM. Translating the Standard of Effective Control…, p. 135

[650] NAERT. International Law Aspects of the EU's Security…, p. 264

[651] International Court of Justice: Judgment of 20 December 1974, *Nuclear Test Case (Australia v. France)*. para. 49

[652] INTERNATIONAL LAW COMMISSION. Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto. 2006, A/61/10

4.3 Attribution of conduct to international organization

Conduct of the MMO is attributable to the entity that is in effective control over it.[653] The attribution of conduct is fundamental to the question of which legal obligations would be applicable to the multinational operation. Logically the entity that the conduct is attributed brings the primary legal obligations that the whole MMO should conduct its hostilities.[654] If the operation's conduct would be attributed to the TCSs, then their legal obligations would be applicable and the MMO would be bound by different scopes of IHL obligations depending on their own state. However, if the conduct is attributable to the international organization, then the international organization's obligations would be applicable in principle.

While attribution of conduct can be seen as a different issue from applicable law or existence of legal obligation to MMO,[655] that is not the whole story. The study argues that attribution of conduct, or mirroring rules, would influence the personal scope of the legal obligations. Since the MMO is composed of troops contributed into it by TCSs, who conduct the operation under international organization's command and control, it is questionable from where the legal obligations can be derived to the operation. While it is true that attribution of conduct is a concept that determines whether one entity can be held responsible over the conduct of MMO, it would be logical if the rules of applicable law to the multinational military operation would mirror those of attribution of conduct. Since the troops in the MMO are placed to the disposal of the international organization, which command and controls the operation, the conduct of the operation of the international organization and not of the TCS.[656] As such, the rules binding to the MMO should be those of the international organization and not those of TCSs.[657]

However, even if one would disregard that approach and were to hold that the TCSs legal obligations are applicable to the MMO without attribution of conduct, that applicability would be of merely abstract question. Regarding the questions at hand, it is sufficient to understand the application of law in a more concrete fashion. In other words, the applicable law without responsibility would be indistinguishable from accepting legal norms as a matter of policy without legal relevance, and as such would not have any effect as a matter of law to the

[653] DARIO Article 7
[654] KLEFFNER, Jann. Sources of the Law of Armed Conflict. In LIIVOJA, Rain, MCCORMACK, Tim (eds.). *Routledge Handbook of Law of Armed Conflict.* Routledge, 2016, p. 87
[655] GREENWOOD, Christopher. International Humanitarian Law and United Nations Military Operations. Yearbook of International Humanitarian Law. 1998, Vol. 1, p. 18
[656] KLEFFNER. Sources of the Law of Armed…, p. 87
[657] Ibidem

conduct of the MMO.[658] Consequently, it is justifiable to tie the two separate systems together. As such, the attribution of conduct is the link between act or omission and legal consequence unless the treaties provide alternative consequences without attribution of conduct. Accordingly, attribution of conduct is essential for application of legal obligations to the military operation. This study follows similar approach.

However, neither the DARIO or its commentary fully explain what the term "effective control" refers to. It merely explains that the test is not based then on formal agreements or arguments but the de facto effective control of the MMO in actuality in the ground regarding specific instance where the violation happens.[659] The study argues that the effective control test would be rooted to an extent in the command and control arrangements.[660] While there is difference between the control on paper and the factual control in the actual situations on the field,[661] there is no need to completely ignore the command and control arrangements. Similarly, to an approach developed in the Netherlands court's,[662] when the command and control structure has not been violated one could assume that the conduct can be attributed per the chain of command. As such, the standard TCS control mechanisms in military operations, such as having criminal jurisdiction, training and education of the troops and being in the administrative control of the contingents would not be enough to attribute the control to the TCS. Neither does the TCS powers to "accept" or "validate" the organization's chain of command orders. The TCS do have authority to call back their troops and can refuse orders coming down the chain of command,[663] which could be seen as "effective control" as the TCS could stop any illegal orders at any given time. However, that should not automatically be taken as a proof of "effective control" of the TCS over the conduct in question. Otherwise TCS would be attributed the conduct in every situation, as they would always be capable of calling off their troops and refuse the orders.[664] Similarly, TCS control in the decision-making procedure of the

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[658] LARSEN. *The Human Rights Treaty Obligations…,* pp. 105-107

[659] Ibidem

[660] MONTEJO, Blanca. The Notion of 'Effective Control' Under the Articles on the Responsibility of International Organizations. In RAGAZZI, Maurizio (ed.) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie.* Martinus Mijhoff Publishers, 2013, p. 397

[661] BOUTIN, Berenice. Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanovic and Mustafic: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping. Leiden Journal of International Law. 2012, Vol. 25, p. 528

[662] Ibidem p. 530

[663] BARON, Wiebe. Command Responsibility in a Multinational Setting: How to Deal with Different Interpretations of International (Humanitarian) Law. Some Experiences from Practice. Military Law and Law of War Review. 2005, Vol. 44, p. 142

[664] DIREK, Ömer Faruk. Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the 'Effective Control' Standard. Netherlands International Law Review. 2014, Vol. 61, No. 1, p. 16

international organizations would not constitute effective control. While, certain authors have argued that the voting in the organs of international organizations such as North Atlantic Council[665] is just the TCS acting through the international organization and are exercising governmental power in external domain,[666] it would not be enough. Such an approach is not in line with Article 58(2) DARIO, which states that "*An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.*"[667]

However, in cases of UN and ECOWAS operations when the chain of command has been breached, the situation must be dealt differently. The effective control would then be on the TCS that breached the chain of command, especially if the troops then would have conflicting orders and would choose to follow their own government's orders over the official chain of command orders arriving from the international organization. Therefore, one could then arrange a test of "who gave the orders" or better yet, "which legal entity gave the orders". That would also be applicable to situations where the actions were done without orders. Then the test would be of "who was better positioned to stop the violations" per Netherlands' courts approach.[668] The acts *ultra vires* then would be then often attributed to TCS, as it is the training, education and penal jurisdiction that are best methods of stopping most violations of MMOs legal obligations. International organization's ability to stop violations not resulting from their orders are more limited.

5 TCS's obligations in MMOs under international organizations' command and control and possible dual standard of obligations

While the organizations' scope of IHL obligations are binding to the whole MMO, TCS troop contingents might not be able to escape their home states' (higher) scope of obligations. In such circumstances the MMO would be bound by the international organization's scope of IHL obligations and simultaneously the MMO troop contingents are still bound by their home states' scope of obligations. Therefore, the troop contingents of the MMO would have two

[665] Especially in NATO where the TCS control is very influential, as the highest decision-making body of NATO sits the governmental representatives of its member states who do make the final decisions even in NATO operations.
[666] BARROS, Ana Sofia, RYNGAERT, Cedric. The Position of Member States in (Autonomous) Institutional Decision Making: Implications for the Establishment of Responsibility. International Organizations Law Review, 2014, Vol. 11, p. 70
[667] DARIO Art. 58(2)
[668] Hague District Court, Mothers of Srebrenica vs The Netherlands, 13 April 2012, No. 10/04437, para 4.57

different standards of IHL applicable to them simultaneously. Practice seems to suggest that this is the case and TCSs are unable to follow less strict standard of obligations in most circumstances. Similarly, the study concludes in its analysis that the approach is obligated by the IHL rules in many cases. Reasoning for the dual standard can be derived from the treaties themselves, multiple attribution of conduct and prohibition of circumvention of obligations.

However, the study argues that especially the common but differentiated obligations can have a unified standard based on the international organization's standard. Even if the TCS itself would have higher scope of what are feasible precautions in the situation, that does not mean that same would be feasible in the multinational setting. Indeed, it could be deemed unfeasible to go through limited stacks of PGMs when the MMO might need them in later missions. It comes down to the question of what the term "feasible" means in the common but differentiated obligations. Especially regarding the possibility of saving PGMs for situations where they are most needed. The term "feasible" is interpreted during codification by some delegates as to refer to doing "*everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations.*"[669] Certainly, holding onto PGMs in MMO setting would be relevant to the success of military operation. As such, there is no reason to limit it only to the TCS itself or TCS' stocks of PGMs and ignore the wider reasoning of the MMO stocks of PGMs.

5.1 Treaty clauses

Firstly, the IHL treaties themselves often have clauses that would obligate TCSs to follow them even in situations where the conduct of the troop contingents is not attributable to them. Most prominent of those clauses is the Common Article 1 of the Geneva Conventions and Additional Protocol 1. Common Article 1 to the Geneva Conventions states that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[670] The focus here is especially in the *ensure respect in all circumstances.* That has been generally interpreted as to obligate state parties to ensure that every individual within their jurisdiction respects the Geneva Conventions.[671] Since TCS contingents that are contributed to the MMO are still within TCS jurisdiction, the TCS is bound to ensure that those

[669] PILLOUD et al. Commentary on the Additional Protocols…, pp. 681-2
[670] Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 12th August 1949 (Geneva Convention 1), Article1
[671] DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 37

individuals respect the Geneva Conventions in their conduct of multinational operations. The Commentary to Geneva Convention I recognizes this and states that "Irrespective of attribution, the High Contracting Parties remain bound to respect and to ensure respect for the Conventions during multinational operations."[672]

The TCS troops are then unable to escape their legal obligations that arise from Geneva Conventions or Additional Protocol I. Even if the international organization, which would be hypothetically attributed the conduct of MMO, would not be bound by the rules of Geneva Conventions and Additional Protocol I the TCS troops would still be. This influences especially the treaty obligations *per se* but also the interpretations of those obligations. If the TCS deem MMO conduct to breach the obligations, they could not allow their troops to take part in that conduct.

Furthermore, ICJ has claimed that the Common Article 1 is recognized part of the customary IHL.[673] Similarly, the ICRC study on customary law supports the claim.[674] As such, the Common Article 1 and the obligations to ensure that troop contingents would not breach their home state's treaty obligations would cover all the IHL treaties as a customary law, even when those treaties would lack similar clause. Prime example of treaties lacking such clause would be Additional Protocol II regarding internal armed conflicts, which lacks the Common Article 1 clause and is far from universally accepted. However, that has been criticized elsewhere over the sparse state practice of states committing to taking measures to ensure respect of other entities of IHL.[675] Customary law status of Common Article 1 is not an obvious or self-evident conclusion.

Second clause that might bring forward obligations to TCS' beyond rules of attribution is specific to the weapons treaties, starting off with the Ottawa Treaty. To large extent, the question becomes moot when considering that the treaty prohibits stockpiling mines and to destroy existing mines in member states' possession.[676] Therefore, the TCS and their troops who are bound by the treaties should not possess the mines to use, regardless of the attribution of conduct.

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[672] Ibidem p. 40

[673] International Court of Justice: Judgment of 27 June 1986, Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits) (Nicaragua case). para. 220

[674] HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise. *Customary International Humanitarian Law: Volume I: Rules.* International Committee of the Red Cross, 2005, pp. 495-497, 509-512

[675] BOUTRUCHE, Theo, SASSÓLI, Marco. *Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions* [online]. Nrc.no 20 Jan 2017 [cit. 30 January 2018]. Available at: <https://www.nrc.no/resources/legal-opinions/third-statesobligations-vis-a-vis-ihl-violations-under-international-law> pp. 12-13

[676] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. 18 September 1997 (Ottawa Treaty) Article 1(1)(a) & Article 1(2)

However, regarding interoperability, there are still certain questions left unanswered. Mainly, the question of can TCS troops ask or take advantage of mines deployed by other TCS troops that are not bound by the conventions? To answer that question, both Ottawa Treaty and Cluster Munitions Conventions have similar clauses in them, with certain differences.

Ottawa Treaty states in Article 1(c) that state parties are prohibited "To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."[677] That can be interpreted as to prohibit troops belonging to a state party from asking others to deploy mines even when the rules of attribution would attribute their conduct to another entity, not bound by the treaty. That would again bring different standards of what the different TCS troops could do within the MMO framework. Whether that interpretation is correct or not is up to a debate and the commentary finds the state practice and statements to be contradictory and seemingly it is impossible to find confirmation of the rule.[678] However, it does not seem that there would be a total ban for MMOs to use mines when one of the participating states is not a member-state to Ottawa Treaty.[679] But the Ottawa Treaty clearly binds the TCSs and prohibits their use of mines even when the conduct of the MMO would not be attributable to the TCSs themselves.

Cluster Munitions convention has almost identical clause to Ottawa Treaty Article 1(1)(c), prohibiting state parties to "Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention."[680] However, it does develop the other question, namely what constitutes assistance, encouragement or inducement. Cluster Munition Convention has an extra clause not found in other weapons conventions regarding interoperability, found in Article 21(3) which states that "Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party."[681] Now this is clearly new development from Ottawa Treaty, and the question has to be asked whether it is an exception clause or mere explanatory clause for the specifics of the general prohibition of Article 1(1)(c)?

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[677] Ibidem Article 1(c)
[678] CASEY-MASLEN, Stuart. *Commentaries on Arms Control Treaties Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and their Destruction.* 2nd Edition, 2005, Oxford University Press, p. 83
[679] Ibidem
[680] Convention on Cluster Munitions. 2008. Article 1(3)(c)
[681] Ibidem Article 21(3)

At the first sight it seems to give greater freedom for MMOs and interoperability than the Ottawa Treaty.[682] Now on the first sight the term “notwithstanding” in Article 21(3) seems to suggest that it would be indeed an exception to the general rule, therefore suggesting that without such exception Article 1(1)(c) would indeed be an obstacle for interoperability for state parties to operate alongside non-member states in MMOs that might engage in prohibited activity.[683] However, the Commentary to the Cluster Munition Convention suggests that the broad wording of Article 21(3) and the need to limits to it that were laid out in Article 21(4) mean that it merely specifies the general prohibition of Article 1.[684] That would also make more sense taking into account that the states pressing for Article 21 claimed it was necessary to guarantee the possibilities for interoperability, and those states were largely the same states that already interpreted largely similar Article 1(1)(c) of the Ottawa Treaty clause as already allowing interoperability without having separate exception to that prohibition.[685] Therefore, as the commentary suggests, Article 21 can have guiding value in interpreting Article 1(1)(c) and similar clauses in other weapons treaties.[686]

Last issue with the international organization’s scope of IHL obligations as common standards to the MMO arrives from the domestic laws of the individual troops that have been contributed to the MMO. Since those soldiers remain under their own states’ jurisdiction, their own states’ legal rules would be applicable to the troops. That would uphold constrains on the troops to conduct their military missions with less strict rules of IHL. Even if international law would allow the state as an entity to have less strict standard of IHL in its conduct of hostilities in MMOs, the individual soldiers in the military operation themselves might not be able to do so.

Common Article 1 also binds the TCSs to ensure respect of private individuals within their jurisdiction to respect the IHL, regardless if the individuals’ conduct is attributable to the TCS.[687] Since TCS’s troops remain under TCS’s jurisdiction, logically the TCS is then bound to ensure that their troops uphold their legal obligations, regardless of the international organization’s obligations or the attribution the conduct of the MMO. Ottawa Treaty also has a clause similar to the Common Article 1, which obligates state parties to “to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on

[682] GROSS, Richard C., HENDERSON, Ian. Multinational Operations. In CORN, Geoffrey S. et al. (eds) U.S. Military Operations: Law, Policy, and Practice. Oxford University Press, 2016, pp. 365-7
[683] NYSTUEN, CASEY-MASLEN. *The Convention on Cluster Munitions…,* p. 545, 573
[684] Ibidem p. 573
[685] Ibidem pp.556-564, 573
[686] Ibidem p. 547
[687] DÖRMANN et al. *Commentary on the First Geneva Convention…,* p. 45

territory under its jurisdiction or control."[688] Therefore, the treaty includes an obligation to state parties to prevent persons under their jurisdictions.

Similarly, Hague convention on cultural property and its Protocol II have related clauses.[689] As does Article 38 of the Convention on Rights of the Child regarding to child soldiers and UN Convention on environmental modifications.[690] Therefore, even if Common Article 1 has not been crystallized as customary IHL, majority of the treaties would have clauses that would provide their applicability to the MMO even without attribution of conduct to the TCSs. Generally, Hague conventions (which could be part of the customary IHL) and Additional Protocol II seem to lack any clauses.

5.2 Multiple attribution of conduct

The TCS' scope of obligations could be applicable to the MMO simultaneously with the international organization's scope if the conduct of the MMO would be attributable to both entities at the same time. In those situations, similar to the organization's obligations, the MMO for at least the TCS' troops would be bound by the TCS obligations. The earlier part dealt with the question when the conduct of the MMO would be attributable to the international organization. However, there is a need to further analyse the possibility of attributing the conduct of the MMO to the both entities, the organization and the TCS.

The ILC's DARIO commentary does not outright rebuff the possibility of dual attribution of conduct.[691] The attribution of conduct does not have to be exclusive and the conduct can be attributed to multiple entities at the same time at least in theory. Academics have been supportive of the idea of attributing MMO conduct to both the international organization and the TCS simultaneously.[692]

There is some support in practice for the dual attribution. Firstly, in so called Nissan case in 1969 the UK house of lords found that British soldiers conduct can be attributed to UK and UN at the same time.[693] The House of Lords found that "*The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to*

[688] Ottawa Treaty Article 9
[689] Convention for the Protection of Cultural Property, Article 28; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26th March 1999, Article 16(1)(b)
[690] Convention on Rights of the Child. 1990. Article 36
[691] INTERNATIONAL LAW COMMISSION. Draft Articles on the Responsibility of International Organizations, with Commentaries. Sixty-third session, 2011, p. 54
[692] DIREK. Responsibility in Peace Support Operations…
[693] UK House of Lords. Attorney General v. Nissan case, quoted in FRY, James D. Attribution of Responsibility. In NOLLKAEMPER, Andre, PLAKOKEFALOS, Ilias (eds.) The Practice of Shared Responsibility in International Law. 2017, Cambridge University Press, p. 85

the exclusive jurisdiction of their respective national States in respect of any criminal offences committed by them in Cyprus."[694] Later case law to support the dual attribution can be found in Dutch courts in Mothers of Srebrenica case.[695] Later, Netherlands Supreme Court also confirmed this approach.[696] In that case the court claimed that because of the possibility of dual attribution, the court does not need to investigate or rule on the attribution of the peace keeping force's conduct to UN.[697] Authors have taken said cases as a proof for the dual attribution[698] or even as proof of dual attribution being the prevailing stance.[699]

However, the basis for the Netherlands' courts decisions is not fully convincing. It refers to Article 48 of DARIO, claiming that it expressly opens up the possibility of dual attribution of conduct.[700] Indeed, on the first glance it might look logical to think that Article 48 would be pointless without dual attribution of conduct. Article 48 reads 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."[701]

However, the court mixes attribution of conduct and attribution of responsibility. Seemingly, article 48 deals mostly with dual attribution of responsibility, not about attribution of conduct. TCS can be attributed responsibility over international organization's conduct in specific cases without the conduct itself being attributed to it, namely DARIO Articles 58 aid and assistance, 59 direction and control, 60 coercion, 61 circumvention and 62 accepting responsibility.[702] As the responsibility is separate from attribution of conduct, that does not necessarily mean that Article 48 automatically provides basis for dual attribution of conduct.

Furthermore, the DARIO commentary on Article 7 seems to support relatively scarce applicability of dual attribution. The statement that the effective control is about finding out "to which entity — the contributing State or organization or the receiving organization — conduct has to be attributed."[703] suggests that it should usually be exclusive attribution of conduct. The possibility of dual attribution might be in practice more useful for courts to apply the effective control in practice. Because of the possibility of dual attribution, the courts are not obligated to

[694] UK House of Lords. Attorney General v. Nissan case. Quoted in ibidem p. 85
[695] Mothers of Srebrenica vs The Netherlands…, para.4.45
[696] Supreme Court of Netherlands. *The State of the Netherlands v. Hasan Nuhanović, 12/03324*. para. 3.9.4
[697] Mothers of Srebrenica vs The Netherlands…, para.4.45
[698] GROSS, HENDERSON. Multinational Operations…, pp. 353
[699] FRY. Attribution of Responsibility…, p. 96
[700] Nuhanović case. para. 3.9.4
[701] DARIO Article 48(1)
[702] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, pp. 88-89
[703] Ibidem p. 57

investigate the possible attribution to an international organization that the court has no jurisdiction over. As such, the dual attribution of conduct must be held as a rare case.

5.3 Prohibition of circumventing obligations

The next issue is when the TCS can be said to be circumventing their obligations by acting through an international organization. In such situations, the TCS can take an advantage of the separate legal personality of the organization, which would be attributed the conduct of the MMO in question and therefore would be the starting point for the legal obligations applicable to the MMO. The TCS can then escape its legal obligations by acting from the behind where the conduct would not be attributable to it. The circumvention has been codified in DARIO Article 61,[704] which states that:

"*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*"[705]

Therefore, there are two points that need analysis. Firstly, as the term "circumvent" implies, TCS must have certain intent to circumvent its obligations.[706] Furthermore, the TCS must cause the international organization to act in certain way.[707]

Starting with the need for subjective element for circumvention. It would not include cases where the circumvention is only "*unintended result of the member State's conduct.*"[708] But on the other hand, it confirms that the circumvention is not limited only to the cases where the TCS would be abusing its rights.[709] It is somewhere in-between the two extremes.

Firstly, it must be more than merely ensuring that the organization would have equivalent level of protection. failing to ensure that the standards are similar does not mean that the TCS would have had the intent to circumvent its obligations by acting through an organization. Failure to ensure the equivalent protection could still seemingly be "unintended result of member-state's action". To require such standard could endanger the effective chain

[704] DARIO Article 61
[705] Ibidem
[706] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 93
[707] Ibidem
[708] Ibidem
[709] Ibidem

of command and cause too much TCS interference with the MMO conduct.[710] It takes more to show intent for circumvention.

However, the intent is merely the first step regarding circumvention. It alone is not enough for TCS to be intentionally circumventing its obligations. The next issue is the test for causing the organization to act certain way. However, the standard practice in MMOs should also give limits to the question. Since TCS practically always keep the right to call back their troops and decline orders from international organization's chain of command, along with criminal and administrative jurisdiction over their troop contingents, merely accepting orders is not enough to fulfil the threshold of causing the MMO to act in certain way. Otherwise, the causation link would be filled in almost every foreseeable scenario.[711]

The DARIO commentary claims for need for a "significant link" between the TCS's conduct and international organization act, and that the act must be caused by the TCS.[712] The commentary language takes a quite strong stance, stating that "*The act of the international organization has to be caused by the member State.*"[713] That seemingly speaks for more of necessity of dominant position of a member state. Furthermore, it is also supported by the ECtHR's Behrami and Saramati case's precedence of refusing to apply the circumvention to the UN MMO framework. The ECtHR justified its refusal by claiming that to do otherwise could endanger the effective conduct of the UNSC peace operations over TCS intervention.[714] However, such threats would not be present in cases where the TCS are in a dominant position in influencing the conduct of the MMO. The organization does not need such protection against dominant TCS that already controls the organization and acts through it.[715] Therefore, when a TCS is in dominant position it seems reasonable not to protect the international organization's autonomy against TCS interventions, for the simple reason that the organization already has lost its autonomy over the dominant TCS control.[716] High standard for fulfilment of the criteria for circumvention is also necessary to justify the presence of the DARIO regime regarding circumvention as a customary law. Jurisprudence, in International Tin Council litigation and Westland Helicopters arbitration, has generally confirmed that member states do not bear responsibility over the conduct of an international organization when it has a separate legal

[710] D'ASPREMONT, Jean. The Limits to the Exclusive Responsibility of International Organization. Human Rights and International Legal Discourse, 2007, Vol. 1, No. 2, p. 223
[711] Ibidem p. 224
[712] INTERNATIONAL LAW COMMISSION. Draft Articles Commentary…, p. 95
[713] Ibidem
[714] RYNGAERT. The European Court of Human Rights' Approach…, p. 1010
[715] BLOKKER, Niels. Member State Responsibility for Wrongdoings of International Organization: Beacon of Hope or Delusion? International Organizations Law Review. 2015, Vol. 12, p. 324
[716] D'ASPREMONT. The Limits to the Exclusive Responsibility of International Organizations…, pp- 227-8

personality.[717] However, since the justification for such separation of legal personalities arises from the need to safeguard the autonomy of the organization against the member states' interference, it is reasonable to assume that the limits of the separation of legal personalities can be established to situations where the goals of that justification are no longer presented.

[717] SCHERMERS, BLOKKER. *International Institutional Law…,* pp. 1011-13

6 Highest scope of obligations as unified standard

Following from the earlier it seems clear that in most cases the TCSs are unable to escape their higher scope of IHL obligations. As such, in cases where TCS would have unequal scopes of IHL obligations amongst themselves and cannot conduct their operations under the international organization's scope as common standard, the only possible way of getting a unified standard is to have highest available standard as the common standard.

6.1 MMO bound by TCS obligations

The first question is whether the MMO would be bound automatically by the TCSs' legal obligations. In such cases, the MMO, or the international organization controlling it, would have the highest standard available as its own standard and would therefore bind the whole MMO to the highest standard available. While the study earlier debunked the theory of international organization being automatically bound by its member states' obligations, another question is whether the troop contributing states can transfer its authority over its troops to an international organization without the organization having equivalent standards of protection without the transfer of authority being illegal.[718] The legal obligations would not be in reality binding on the international organization. In fact, the obligations would be binding to the member state and it limits the possibilities of transferring authority to the international organization regarding the conduct of the MMO. It would seem logical that the transfer of authority to an organization would be limited by the powers of the entity granting the authorization.[719]

However, there are certain obstacles to upholding such system of limiting the transfer of authority. Namely, the need to protect the autonomy of the organizations. This can be seen from the prohibition of circumvention, as codified in DARIO, which has quite high threshold. The reasoning behind it is clear too, as the international organization must defend its autonomy from external influence. If the member states would start being responsible over the actions of the international organization, they would interfere with the organization's conduct and threaten the autonomy. Especially since the organization would not be bound by the same legal obligations. Furthermore, one could argue that if the member states would automatically be responsible over the conduct of the international organization when the organization is

[718] DANNENBAUM. Translating the Standard of Effective Control…, p. 138
[719] DE SCHUTTER, Oliver. Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility. In WOUTERS, Jan et al (eds.) *Accountability for Human Rights Violations by International Organizations.* 2010, Intersentia Publishing, pp. 67-68

breaching the member states' obligations, many of the clauses regarding interoperability would be redundant.[720]

6.2 Treaty clauses

Originally NGOs and certain states had very tough stance on the Ottawa Treaty clause of "*to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.*"[721] Indeed, International Campaign to Ban Landmines stated that state parties to the Ottawa Treaty are prohibited from participating in military operations where landmines might be used.[722] Similarly Brazil interpreted the clause as banning joint operations totally with non-members which might be using landmines.[723] Dutch foreign minister had similar statements, calling that landmines cannot have any role in NATO operations anymore.[724]

However, the stances have been diluted to an extent.[725] Generally, many states interpret as prohibiting the Ottawa Treaty signatory state from requesting the landmines and prohibiting their troops participation in activities prohibited by the treaty and would make their military personnel unable to follow orders to employ landmines.[726] Therefore, it does not seem that there would be a total ban for MMOs to use mines when one of the participating states is not a member-state to Ottawa Treaty.

That approach has been strengthened by the Cluster Munitions Convention, which states in Article 21(3) that "*Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.*"[727] Therefore, the current approach the issue at hand seems to be that states can take part in the MMOs which might engage in prohibited actions.

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[720] Prime example being the Convention on Cluster Munitions clause stating that "Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party." Article 21(3)
[721] Ottawa Treaty Article 1(c)
[722] JACOBS, Christopher W. Taking the Next Step: An Analysis of The Effects The Ottawa Convention May Have on The Interoperability of United States Forces With The Armed Forces of Australia, Great Britain, and Canada. Military Law Review. 2004, Vol. 180, p. 60
[723] CASEY-MASLEN. *Commentaries on Arms Control Treaties…,* p. 96
[724] *Landmine Monitor Report 2000: Towards a Mine-Free World. [online]. Human Rights Watch. August 2000 [cit. on 2nd October 2018]. Available at <https://www.hrw.org/reports/2000/landmines/LMWeb-01.htm>*
[725] JACOBS. Taking the Next Step…, p. 60
[726] CASEY-MASLEN. *Commentaries on Arms Control Treaties…*, p. 98
[727] Convention on Cluster Munitions Article 21(3)

6.3 Extensive interpretation of Common Article 1

Last possibility for having highest TCS scope of IHL obligations as common standard would arise from Common Article 1. The study argues that the clause "*respect and to ensure respect for the present Convention in all circumstances*"[728] has developed further than the original obligation to respect IHL as analysed above to an obligation to take measures to ensure that other entities follow IHL. The terminology of "ensure respect" especially speaks of extensive interpretation of the obligation. However, it would not bring forward obligations to ensure that the other entities would follow legal obligations that are not binding to them. Therefore, it is more relevant to the question of different interpretations of the legal obligations. If a TCS would believe that another TCS is breaching their IHL obligations, it would be obligated to try to intervene and ensure respect of the obligations.

The Common Article 1 as an obligation that binds the States only when they have legitimate chances of success. It would be a logical consequence of Common Article 1 being a due diligence obligation.[729] High Contracting Parties are not bound by the outcome of their actions but are obligated to try to achieve to goal, and failure to employ measures would be a violation of the due diligence obligation of Common Article 1.[730] However, it does not mean, unlike some claim, that High Contracting Parties are bound to "make every effort" to achieve the goal in every case.[731] One could now expect states to take measures that have very limited chances of achieving anything purposeful but might still hurt their interests and cost political and diplomatic capital.

Therefore, a better standard for what and when to take measures would be a standard reasonable expectations and feasibleness. ICJ followed similar approach to due diligence obligations in the Bosnian Genocide Case[732] regarding the 1948 Genocide Convention, where the Court used Serbia's special relationship with the perpetrators of the genocide and therefore increased capacity to influence the perpetrators to justify increased obligations of Serbia to prevent the genocide in question.[733] As such, capabilities must be taken into account when

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[728] Geneva Convention I Article 1

[729] BOUTRUCHE, SASSÓLI. *Expert Opinion…*, p. 15, DÖRMANN, Knut, SERRALVO, Jose. Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations. International Review of the Red Cross. 2014, Vol. 96, No. 895/896, p. 724

[730] BOUTRUCHE, SASSÓLI. *Expert Opinion…*, p. 15

[731] DÖRMANN, SERRALVO. Common Article 1…, p. 724

[732] Bosnian Genocide Case para. 430

[733] BREHM, Maya. The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law. Journal of Conflict & Security Law, 2008, Vol. 12, No. 3, pp. 374-375

determining the scope of measures a State is obligated to take. States are thus obliged to adopt measures, which appear reasonable to ensure respect. Moreover, "appropriate measures" to ensure respect of others cannot obligate states to take measures that have no reasonable chance to achieve the goal, i.e. to ensure that another state will fulfil its IHL obligations. The ICJ followed such approach by taking the specific relationship between Serbia and the Bosnian Serb forces for Serbian into account when considering the Serbian obligation to stop the Genocide in Bosnia.[734] The ICJ stated that "*responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide*."[735] The reference to a due diligence principle, where States are obligated to take measures that "*might have contributed to preventing the genocide*", is fundamental here. In cases of Common Article 1, if TCSs do not have capacity to adopt measures that would contribute to ensuring respect of other States or entities, they are not under an obligation to "make every effort".

There must be a causal link between the failure to take measures and the harmful event in order for an entity to be breaching its due diligence obligations.[736] Even if international law lacks a clearly defined legal standard on the exact percentage of likelihood of success required, it must still be clear that the Common Article 1 cannot obligate States to take measures beyond what have reasonable chances of success.

Common Article 1 is especially applicable to situations where the TCSs' have considerable influence in the official decision-making process of the organization in control of the MMO. As noted earlier, member states and TCSs do often have possibilities of substantially shape the organizations' actions. This is particularly true in highly formalised decision-making processes, such as the NATO system. In the case of NATO, the targeting decisions and approvals for selected targets have been done unanimously in the North Atlantic Council seating the representatives of all of the NATO member states.[737] Similarly, as mentioned earlier, the rules of engagement for NATO operations have to be agreed unanimously in the North Atlantic Council. Therefore, often every Troop Contributing State (or at least member states) of NATO can veto rules of engagement or targeting approval if it is felt necessary. In such cases the TCSs can use their veto power to ensure respect of the IHL by the NATO MMOs, not only by vetoing their own contingents' orders but also not allowing the MMO as a whole to conduct

[734] Ibidem pp. 374-375
[735] Ibidem
[736] GATTINI, Andrea. Breach of Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. *European Journal of International Law*. 2007, Vol. 7, No. 4, p. 709
[737] NATO. Allied Joint Doctrine for Joint Targeting. April 2016 AJP-3.9, p. 3.1.

operations violating IHL. Under the obligations arising from Common Article 1 the States participating on the particular MMO would be obligated to refuse targets that they do not deem legal under international humanitarian law. As such, the standard for the whole MMO would be the highest standard among the NATO member states and TCSs.[738]

[738] However, it is important to note that TCSs that are not member states to NATO do not always have similar powers as they do not sit in all the political bodies of NATO

7 Conclusion

The study analysed the possibility of having unified standard of IHL obligations to a MMO. Firstly, it established a possibility of using the leading international organization's scope of obligations as unified standard. However, that approach is often problematic. Organizations are not bound by treaties and majority of the sources of their obligations arise from customary IHL, which is binding to all entities. Therefore, the organization's scope is often the lowest common denominator. Unsurprisingly, state practice has shown that TCSs are often unable or unwilling to allow their contingents to conduct hostilities with the lowest denominator. Only the common but differentiated obligations could be legally and in practice done with international organizations' issued standards. The term "feasible" includes considerations "*relevant to the success of military operations*"[739] to the determination of feasible precautions. The success of military operations can involve the need to prioritize the precision guided technology in situations where its most needed, even if it would mean that states with most precision capabilities would then need to lower their standards of when to use their resources.

Accordingly, often the MMO would be often bound by two different scopes of IHL obligations, that of the international organization and the TCS. Consequently, the different troop contingents inside the MMO would be having separate and different scopes of legal obligations and their interpretations from each other. Therefore, when the TCSs are being unable to escape their higher standards, the only possibility of having unified standard of IHL application to the MMO would be to have highest TCS's standard as the common standard.

Common Article 1, when interpreted extensively, could obligate the MMO to establish the highest standard of different interpretations as a unified common standard for the whole MMO. By obligating TCSs to ensure respect of other entities, namely the international organization and other TCSs, of IHL.[740] If their interpretations are more flexible than what is accepted under the IHL, other entities should then ensure that those standards are not followed, when possible. The Common Article 1 is especially applicable to NATO system, which has unanimous decision-making process and deeply involves member states in the decision-making, can allow the TCSs to have enough influence to ensure the respect of IHL of NATO MMOs. Lastly, there are very limited possibilities of having unified standard of treaty obligations. Unless the international organization has highest standard of treaty law, which is

[739] PILLOUD et al. Commentary on the Additional Protocols…, pp. 681-2
[740] Geneva Convention I Article 1

unlikely due organizations’ inability to join the treaties, it is rare for TCSs to be able to ignore their treaty obligations.

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Summary

Práce analyzuje možnost existence jednotného standardu závazků vyplývajících z mezinárodního humanitárního práva (MHP) aplikovatelných na více-národnostní vojenskou operaci (VVO). V situacích, kdy vojenská operace zahrnuje jednotky několika přispívajících států a je konána pod vedením mezinárodní organizace, musí být vzato v potaz vícero entit při identifikaci pravidel, která se na danou operaci aplikují.

Jednotný standard pro VVO jako celek může být založen rozsahem povinností dané mezinárodní organizace, která VVO vede. V tomto směru musí mezinárodní organizace naplnit určitá kritéria, zejm. být nositelkou právní subjektivity, být stranou konfliktu, být vázána normami MHP a vedené vojenské akce jí musí být přičitatelné. Nicméně ani v tomto případě nemusí vojáci tvořící kontingent operace nutně uniknout povinnosti řídit se závazky MHP dopadajících na jejich vlastní stát. Úmluvy MHP často obsahují doložky, které znemožňují možnost vyhnout se těmto povinnostem a které navíc multiplikují přičitatelnost jednání současně na mezinárodní organizaci i na vojáky přispívající státy. Zákaz obcházení potom může představovat další překážku.

Tato studie dochází k závěru, že neexistují povinnosti, které by zajistily, že VVO bude regulována jednotnými standardy vyplývajícími z mezinárodních smluv a že na rozličné entity se budou aplikovat různé mezinárodní smlouvy. Nicméně tato studie zastává pozici, že zejména společný článek 1 přináší povinnost zajistit jednotný výklad společných povinností. Společný článek 1 zahrnuje pozitivní závazek zajistit dodržování MHP ze strany ostatních států a entit. Podle tohoto přístupu nejsou sice státy povinny zajistit dodržování povinností vyplývajících z mezinárodních smluv ze strany ostatních entit, nicméně vojáky přispívající státy by nemohly umožnit VVO akce s benevolentnější interpretací společných povinností než jakou aplikují na své vlastní povinnosti. Obdobně by VVO mohla mít jednotné standardy tzv. společných, ale diferenciovaných povinností, např. povinnosti učinit proveditelná preventivní opatření, které mají rozdílný rozsah podle možností dotčených entit. Termín „proveditelná“ (v anglickém jazyce „feasible“) zahrnuje posouzení měřítka „relevance k úspěchu vojenských operací,“ což může znamenat například upřednostnění přesně naváděné munice v situacích, kdy je to potřeba.

List of Publications of the author

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