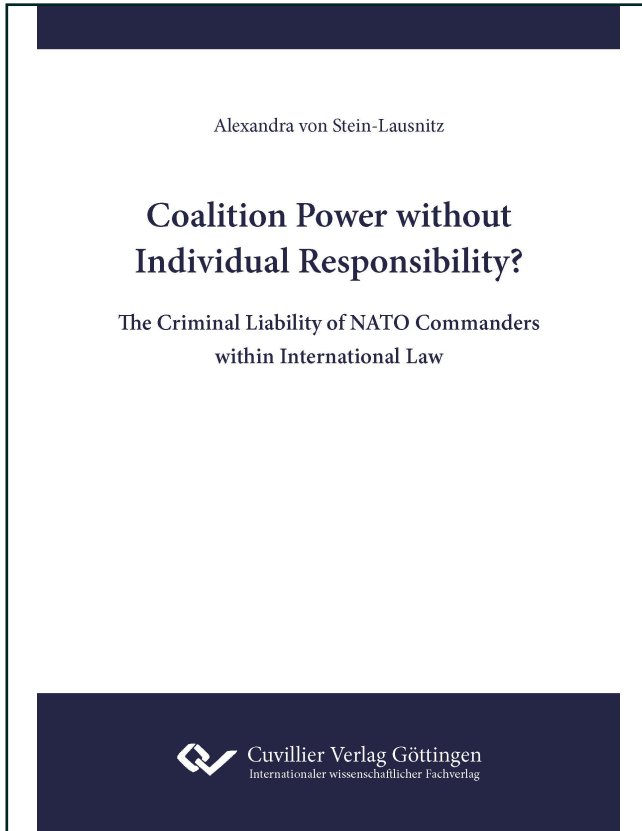




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Coalition Power without Individual Responsibility?

The Criminal Liability of NATO Commanders within
International Law



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INTRODUCTION

“The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.”

General Douglas MacArthur, commander of US forces in the Pacific during World War II

RESPONSIBILITY

Every person² is responsible for his actions and has to be aware of the possible consequences thereof. He has to be sensitive to the rules applicable in specific situations and comply with them. This is also of highest importance when engaged in something as serious and devastating as an armed conflict. Special precaution is needed, not only because prohibited behaviour may endanger the mission and entail a prosecution, but also because it can launch long lasting political implications.

This is valid for every single soldier, regardless of his rank or echelon. However, the actions of a person in a military leadership position can and will influence actions of others to a very strong degree, since it is the commander who induces attitude, reliable discipline and proper motivation. Ideally, a commander in a respected leadership position is able to inspire his soldiers to perform acts beyond rational thinking. He can motivate subordinates to overcome the natural instinct of self-preservation for a special cause and deter them by mere words to continue or start an act lead by personal emotions. In the worst case, this

² In the following, the masculine form shall be exemplary and include all genders.

power to influence can be used to transcend the limits of humanity and commit atrocities beyond the accepted violence during an armed conflict. This condition leads to an increased level of responsibility, Command Responsibility, which takes its place in between the mentioned options, i.e. when he does not use his power to prevent his soldiers from severe wrongdoing.

Command Responsibility reaches back to the beginnings of organized military and reached its point of culmination after World War II: The atrocities committed during World War II by the Axis Powers were so severe and widespread that the Tribunals of Nuremberg and Tokyo were created to convict the responsible leaders independently of their direct participation.

These trials of the International Military Tribunals (IMT) marked an important point in the development of international law: International law changed from a system of rules only applicable to states to a system also dealing with the individual in charge. Along with it came the need to develop rules applicable to individuals in their capacity as organs, agents of states and sometimes even in their private capacity. International responsibilities were placed upon superiors like national rules and regulations and gradually became customary international law.

This thesis elaborates on the criminal responsibility of NATO commanders under international law, for crimes committed by their subordinates. In this context, the explanation of the difference between the terms accountability, responsibility and liability is important. Though it is very complex, it shall be explained only succinctly here. Accountability is the broadest of the three terms and also the most difficult to explain for the author as a German, since the term cannot be translated into German, French or Spanish. Though the term by itself does not possess an exact meaning, a good attempt at a definition is „the need of powerholders to account for the exercise of their powers in order to provide legitimacy to their actions.“³ Accountability is, therefore, linked to the relation between an agent and an outcome and often reflects the primary need to attribute

³ Rebasti, Emanuele, NGOs and Intergovernmental Organizations, in: Dupuy, Pierre-Marie / Vierucci, Luisa (Eds.), NGOs in International Law – Efficiency in Flexibility, 68.

certain activities to an actor as precondition for imposing legal responsibility.⁴ Here, the distinction from liability comes into play: liability is not dependent on the mentioned relation but has the aim of a compensation, be it material or personal. Responsibility is in this connection broader and can be considered as a form of accountability, but on legal terms.⁵ It can be clearly defined as “the legal consequences of non-compliance with an international obligation by conduct that is attributable to the actor”⁶ and is therefore the central element of this thesis.

A superior/commander is defined for this thesis as a soldier or civilian person with authority over troops or a geographical area in which soldiers are stationed or operating.⁷ This broad definition was chosen because it includes from a general commanding an army group, to a corporal commanding a section, as well as anyone – careless of the echelon – in a position of authority, even the head of state.⁸ It is a complex theme, which requires special attention because the doctrine of Command Responsibility based its development on the clear chains of command of Germany and Japan during World war II. NATO, however, works differently: When deploying into an armed conflict the military presence of NATO consists of a combination of several national forces with differing domestic command structures that merge into one military body led by an international organisation with its own chain of command. Not only a profound understanding of the doctrine of Command Responsibility is necessary, but also of NATO’s role and legal responsibilities in the international arena, and most importantly its command structure.

⁴ Hafner, Gerhard, Accountability of International Organizations, 97 American Society of International Law 236-240 (2003), 237.

⁵ Nollkaemper, André, Multi-level Accountability: Case Study of Accountability in the Aftermath of the Srebrenica Massacre, in: Broude, Tomer / Shany, Yuval (Eds.), The Shifting Allocation in International Law – Considering Sovereignty, supremacy and Subsidiarity, 348.

⁶ Hafner, Gerhard, Accountability of International Organizations, 97 American Society of International Law 236-240 (2003), 236.

⁷ See Ministry of Defence of the United Kingdom, The Queen's Regulations for the Army 1975, 2/1-1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826092/The_Queen_s_Regulations_for_the_Army_1975.pdf [Rev. 12.06.2021].

⁸ Green, Leslie, The Contemporary Law of Armed Conflict, 333.

NATO

The importance of this topic lies in NATO's changing role. NATO has been the most important defence alliance⁹ of the West for over 50 years. Founded in 1949, it was created as a collective defence organization for the protection of the West against the Warsaw Pact and the Soviet Union. With the end of the Cold War in 1989¹⁰, there was no antagonist to justify such a collective defence and questions on the relevancy of this Alliance¹¹ were raised on many sides. Duties and responsibilities had to be defined anew. Since the Soviet Union retained the largest military power in Europe¹² and the Warsaw Pact, still, existed, NATO became responsible for preparing the West for a quick military reaction in case of a sudden Soviet intervention. Therefore the changes NATO underwent in 1989 were minor. When the Soviet Union and the Warsaw Pact collapsed in July 1991 a totally new purpose had to be found.

In the years until 2001, NATO redefined its *raison d'être* and self-conception many times until the terrorist attack on the World Trade Centre on September 11th 2001 created a new threat to the international environment and therewith to western security. Reacting, NATO then focused on the war on terrorism, which entailed many changes for the organization: It had to change its points of concentration, expand and reorganize to fill the growing military capabilities gap, while adjusting to new demands in international law. In several steps NATO mutated to "an association of constitutional democracies committed to the common defence of democracy itself."¹³ With this came the willingness to act as a mandate recipient of the UN or the OSCE, and, if necessary, to intervene without a UN mandate.¹⁴ At the same time, the Alliance began to focus on cybersecurity.¹⁵ The traditional margins were trespassed. NATO increasingly changed to a military-political organization to actively ensure comprehensive security through the defence of the

⁹ Alliance has become a set expression for NATO in English military language.

¹⁰ The formal reconciliation was 21 November 1990.

¹¹ The word Alliance shall be used as a synonym to NATO.

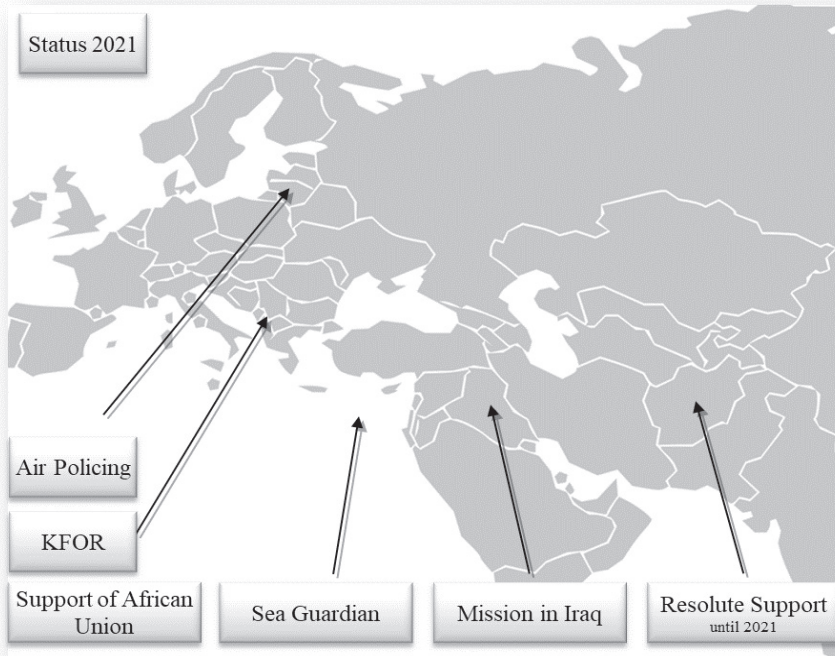
¹² Necas, Pavel, *Beyond Tradition: New Alliance's Strategic Concepts*, 12.

¹³ Magstadt, Thomas M., *Flawed Democracies: The Dubious Political Credentials of NATO's Proposed New Members*, 297 *Policy Analysis* 1(1998), 1.

¹⁴ Varwick, Johannes, *NATO in (Un-) Ordnung*, 49.

¹⁵ Varwick, Johannes, *NATO in (Un-) Ordnung*, 51.

Alliance area and stability projection, which includes military crisis management outside the Article 5 area.¹⁶ This is also the political reason which led NATO to the involvement beyond its original area of responsibility into the Balkans, Afghanistan, Iraq, Dafur, the Mediterranean, Somalia and the Horn of Africa, Libya and Turkey. Since the annexation of Crimea in 2014, NATO responded again to a changed political situation by reorienting itself to more towards Article 5 and the collective alliance obligations it entails – beside its other tasks.



Overview current NATO missions

NATO's Missions in the Balkans in 1992 marked the turning point, when the organization first moved beyond its Cold War mission of defending members states' territories. It

¹⁶ Varwick, Johannes, NATO in (Un-) Ordnung, 41, 42.

entered with military forces into Bosnia, Herzegovina and Kosovo, stopped the conflicts and deployed more soldiers to hinder a return to hostilities and support the peace process.¹⁷ After Kosovo's independence, NATO continued the mandate given by the UN Security Council Resolution 1244¹⁸ to supervise the dissolution of the Kosovo Protection Corps and help to create the Kosovo Security Force.¹⁹

The Alliance has played a key role in Afghanistan since 2001. Of special importance was the Afghanistan Compact between the Afghan government and the international community focusing a five-year plan on security, governance and economic development. Within this international engagement plan NATO was responsible for three points: (i) The assistance of Afghan authorities by the International Security Assistance Force (ISAF) to extend government authority and increase the government's influence in order to foster stabilisation and reconstruction, (ii) the support of the political-military aspects of its commitment to the country through the Senior Civilian Representative and (iii) the assistance to the government regarding the implementation of a defence reform, defence institution-building and a security sector reform – as far as it concerned military aspects.²⁰ From 2014 to 2015 the ISAF mission came to an end and was replaced by Resolute Support, focusing on training and assistance of the Afghan security forces until 2021.

From 2003 until 2011 the Alliance trained military personnel and supported the development of security institutions to strengthen the Iraq government and security in the country.²¹ The project was called NTM-I. However, NATO had neither a direct role in the International Stabilization Force²² nor did it take part in combat. The training and capacity-

¹⁷ Peace support operations in Bosnia and Herzegovina, https://www.nato.int/cps/en/natolive/topics_52122.htm [Rev. 02.05.2021].

¹⁸ United Nations Security Council, Resolution 1244 (1999) - [on the deployment of international civil and security presences in Kosovo], UN Doc. S/RES/1244 from 10 June 1999 (here Resolution 1244).

¹⁹ North Atlantic Treaty Organization, NATO's Role in Kosovo, https://www.nato.int/cps/ru/natohq/topics_52060.htm?selectedLocale=en [Rev. 02.05.2021].

²⁰ North Atlantic Treaty Organization, ISAF's mission in Afghanistan, https://www.nato.int/cps/en/natohq/topics_69366.htm [Rev. 02.05.2021].

²¹ North Atlantic Treaty Organization, NATO's assistance to Iraq, https://www.nato.int/cps/en/natohq/topics_51978.htm [Rev. 02.05.2021].

²² This stabilization force is a US-led mission sponsored by the UN to help Iraq build a national police force and a reconstruction corps, while closing the US bases and turning the occupation headquarters over to the Iraqi government. It also includes a project to clean up land mines and depleted uranium.

building “NATO Mission Iraq” was launched in 2018 to support against ISIS.²³ The Alliance also supported the African Union Mission in Sudan (AMIS) from summer 2005 with logistics and training in order to speed up the end of violence and improve the humanitarian situation. The assistance ended in 2007 with the transfer of AMIS to the United Nations/African Union Mission in Darfur (UNAMID). Because of the ongoing severe humanitarian crisis NATO answered the request of the AU for support to the new UN-AU hybrid peacekeeping mission in June 2007.²⁴ NATO also provided airlift support assisting the AU Mission in Somalia (AMISOM).²⁵ In 2011 NATO directed Operation Unified Protector in Libya to enforce an embargo on weapons, a no-fly-zone for civilian protection and to protect civilians against military attacks and since 2014 “NATO Air Policing is a peacetime mission, which aims to preserve the security of Alliance airspace.”²⁶

NATO was also engaged in solely maritime operations: Operation Active Endeavour against terrorist activities in the Mediterranean and the protection of civilian and commercial vessels focusing through the Strait of Gibraltar. Operation Allied Protector was a counter-piracy operation leading to Operation Ocean Shield and focusing on the safety of commercial maritime routes at the Horn of Africa.²⁷ Operation Active Endeavour was succeeded 2016 by Sea Guardian focusing on security tasks.

The continuously high number of deployed soldiers and the expansion over several continents reflects the political importance of NATO operations and the organization itself. With this importance comes an increased responsibility for its actions. Military operations²⁸ where severe fighting takes place have to meet many conditions in order to

²³ North Atlantic Treaty Organization, NATO Operations and Missions, https://www.nato.int/cps/ru/natohq/topics_52060.htm?selectedLocale=en [Rev. 02.05.2021].

²⁴ North Atlantic Treaty Organization, Assisting the African Union in Darfur, Sudan, https://www.nato.int/cps/ru/natohq/topics_49194.htm [Rev. 02.05.2021].

²⁵ North Atlantic Treaty Organization, NATO Operations and Missions, https://www.nato.int/cps/ru/natohq/topics_52060.htm?selectedLocale=en [Rev. 02.05.2021].

²⁶ North Atlantic Treaty Organization, NATO Air Policing: Securing NATO Airspace, https://www.nato.int/cps/en/natohq/topics_132685.htm [Rev. 09.08.2021].

²⁷ North Atlantic Treaty Organization, NATO Operations and Missions, https://www.nato.int/cps/ru/natohq/topics_52060.htm?selectedLocale=en [Rev. 02.05.2021].

²⁸ The discussion on the applicability of the Law of Armed Conflict to situations other than war will be held in Chapter 1.

comply with the laws applicable in such situations: The Law of Armed Conflict (LOAC)²⁹ is a tense net of rules.

THESIS / OVERVIEW

Violations of international law are not unlikely to occur during operations – be it out of negligence or on purpose emerging out of massive stress situations. Such acts should entail the disciplinary and legal consequence for the perpetrator, but in some situations it is impossible to filter the acting person out of many soldiers operating in the same area and time or even together. Still, impunity is not a solution to this practical problem. International law has, therefore, developed the doctrine of Command Responsibility to handle some of these situations. With this construct a superior may be held liable for breaches committed by his subordinates.³⁰ The doctrine responds to the extremely difficult burden of prove in combat situations, the need to avoid impunity and the cognition after World War II that careless leaders are breaking the law as well.

Until now this doctrine has never been applied to western commanders by an international tribunal and has the reputation of being Victor's Justice. Here it will be analysed whether it could also be successfully applied to NATO. Command Responsibility for a command structure in multilateral operations raises numerous questions, such as: Which part of international law applies to NATO and why? Who is the commander? What is the chain of command? Do commanders control only their national troops or also foreign ones? These and other related questions build the basis for this thesis.

This dissertation is structured in four chapters leading to a final conclusion on the applicability of the doctrine of Command Responsibility to the NATO chain of command. Since Command Responsibility is incorporated in LOAC, it is first analysed in Chapter

²⁹ Also referred to as the Law of War or Humanitarian Law.

³⁰ Rogers, A.P.V., *Command Responsibility under the Law of War*, 1999, 6, https://corregidor.org/refdoc/Reference_Reading/rogers/Command-Responsibility-Under-The-Law-of-War/index.html [Rev. 15.04.2021].

one whether compliance to this part of international law is mandatory for NATO. For this the legal nature of NATO in international law is examined, since LOAC can only be applied to entities of international law. Concluding that NATO has a juridical personality, the grounds for the application of the law are examined. There are various possible reasons which could bind an international organisation; the most common of these will be explained and projected onto the case of NATO. The Chapter closes with the insight, to which parts of LOAC NATO is bound by treaty law, its constituent instrument or solely by customary international law. Important obligations under LOAC are also described in detail, such as the principles of distinction and proportionality, as well as internationally wrongful acts.

Having set the standards for the actions of a NATO commander and soldier, the doctrine of Command Responsibility is broken down to its actus reus and mens rea requirements; focusing on the jurisdiction from post World War II to the current international tribunals and courts. Joint Criminal Enterprise will be explained. Before an excursus on military justice, the impunity by immunity as well as excuses and justifications, like superior orders, necessity, duress and mistake, are highlighted.

The third Chapter lays the firmament for the subsumption by scrutinizing the NATO chain of command. After an overview on the history of transformation within NATO, the command structure is reflected. The political, strategic, operational and tactical levels are explained in detail including the rights and duties of the commanders. Therefore, the terms of full command, operational command, operational control, tactical command and tactical control have to be understood. The Chapter differentiates between *de iure* and *de facto* as well as between operational and executive command and includes excursus on administrative command and support. It also explains the development of NATO intelligence and its different methods: The Communication and Information System, classical intelligence, surveillance and reconnaissance as well as open source information and its use in multilateral operations.

The fourth Chapter deals with the application of the above mentioned requirements to NATO. It focuses on the attribution of a commander's action to NATO taking into consideration the role of the Troop Contributing Nations. After an analysis of the

jurisprudence regarding attribution, effective control and other forms of C2 as well as different methods of conferral of power are explained. An empirical analysis on the de facto power of NATO agents gives an indication to superior-subordinate relationship for Command Responsibility within a NATO operation. This Chapter ends with the subsumption of the relevance of the NATO intelligence to the doctrine of Command Responsibility.

In the subsequent conclusion the findings of all chapters are summarized and put into relation to each other leading to the general applicability of the doctrine of Command Responsibility to a commander acting within the NATO chain of command.