Cooperation of international organisations in peacekeeping operations and issues of international responsibility

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Photo on the Cover: UN Photo by Eskinder Debebe. Secretary-General Ban Ki-moon meets Jan Eliasson (left), Special Envoy of the Secretary-General for Darfur, and Salim Ahmed Salim (right), African Union Special Envoy for Darfur, at UN Headquarters in New York.

Cooperation of International Organisations in Peacekeeping Operations and Issues of International Responsibility

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Meinen Eltern in Liebe und Dankbarkeit

Propositions relating to the dissertation

COOPERATION OF INTERNATIONAL ORGANISATIONS IN PEACEKEEPING OPERATIONS AND ISSUES OF INTERNATIONAL RESPONSIBILITY

By Moritz Peter Moelle

1. The UN should stipulate an instrument prescribing in detail the dispositions of human rights law applicable to peacekeeping operations similar to the Secretary-General's Bulletin entitled "Observance by United Nations forces of international humanitarian law".

2. The UN and regional organisations should conclude agreements on the distribution of responsibility for each peacekeeping operation in which they operate and cooperate. On a wider scale, this issue raises the question of how to accommodate the interests and concerns of troop-contributing countries.

3. The turmoil and armed fights in Mali, South Sudan and the Central African Republic are proof of the need for the UN and regional organisations to increase their cooperation and their capabilities in the field of conflict prevention.

4. The high amount of cooperation between international organisations in peacekeeping operations requires the formulation of a specific criterion of attribution for the purpose of holding the involved organisations jointly responsible for violations of international law occurring during the deployment of the operation.

5. The fact that the international community is increasingly faced with problems transcending national boundaries which can only be addressed adequately by a multitude of actors such as states, international organisations, private entities through a variety of channels raises the question if for the purpose of attributing conduct the reliance on control over a specific conduct can still serve as a satisfactory criterion in the long-term perspective.

6. Syria and the Ukraine are recent examples that a blockade of the Security Council is still possible and they challenge anew the legitimacy of the Security Council. Whereas concepts such as humanitarian intervention and R2P have not been accepted yet under positive international law, it could be argued that regional organisations may be entitled to intervene militarily under a progressive interpretation of "enforcement action" in Article 53 (1) second sentence of the UN Charter should the Security Council fail to act on its own.

7. The UN should provide more suitable fora for the settlement of claims of compensation in peacekeeping operations. The amount of cases before national courts, e.g. regarding the cholera epidemic in Haiti, also with regard to the equivalent protection doctrine as it was developed by the European Court of Human Rights illustrate that the current system is unsatisfactory.

8. The concepts of universalism and regionalism are obsolete in the field of the maintenance of international peace and security and have been replaced by what one could call "cooperative multilateralism".

9. The changing nature of armed conflicts and the involvements of international organisations necessitates that international humanitarian law is completely revised.

10. The collection of “Big Data” by governments and companies alike and their (financial) exploitation is violating the core sphere of human rights of individuals and should be regulated in an international convention.

11. All good things must come to an end (lekker is maar een vinger lang).

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Abbreviations

ADB	African Development Bank
AICRC	African Immediate Crisis Reponse Capacity
AFISMA	African-led International Support Mission to Mali
AJOC	Abyei Joint Oversight Committee
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
AMU	Arab Maghreb Union
APF	African Peace Facility
APSA	African Peace and Security Architecture
ARIO	Articles on the Responsibility of International Organizations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASF	African Standby Force
AU	African Union
AUHIP	African Union High-Level Implementation Panel on Sudan
AU PSC	African Union Peace and Security Council
CAR	Central African Republic
CDI	Commission du droit international, see ILC
CENSAD	Community of Sahelo-Saharan States
CINCSOUTH	Commander-in-Chief, Allied Forces Southern Europe
CSDP	Common Security and Defence Policy
CFSP	Common Foreign and Security Policy
CONOPS	Concept of Operations
CPLP	Community of Portuguese-Speaking Countries
DPKO	Department for Peacekeeping Operations
DRC	Democratic Republic of Congo
ECCAS	Economic Community of Central African States

ECHR	European Convention on Human Rights
ECOMIL	ECOWAS Mission in Liberia
ECOWAS	Economic Community of West African States
EDC	European Defence Community
EDF	European Development Fund
EGOMOG	ECOWAS Cease-fire Monitoring Group
ESDP	European Security and Defence Policy
ESF	ECOWAS Standby Force
EU	European Union
EUFOR Chad/CAR	European Union Force Chad/CAR,
EUFOR Tchad/RCA	see EUFOR Chad/CAR
EUMC	EU Military Committee
EUMS	EU Military Staff
EU PSC	European Union Political and Security Committee
EUPT	EU permanent Planning Team
EUTM Mali	European Union Training Mission Mali
EUTM Somalia	European Union Training Mission for Somalia
FARDC	Forces Armées de la République Démocratique du Congo
GA	General Assembly
ICC	International Criminal Court
ICCPR	international Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDB	Islamic Development Bank
IFOR	Implementation Force

IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
ISAF	International Security Assistance Force
JEM	Justice Equality Movement
JSCM	Joint Support and Coordination Mechanism
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LRA	Lord's Resistance Army
MCPMRPS	Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security
MONUC	United Nations Mission in the Democratic Republic of Congo
MICIVIH	International Civilian Mission in Haiti
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MISAHEL	African Union Mission for Mali and the Sahel
MITF	Mali Integrated Task Force
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo
MTA	Military-Technical Agreement
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NMLA	National Movement for the Liberation of Azawad
NPFL	National Patriotic Front of Liberia
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OIC	Organisation of Islamic Cooperation
OIF	International Organisation of *La Francophonie*
ONUC	United Nations Operation in the Congo

OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PSOs	Peace Support Operations
RECs	Regional Economic Communities
SACEUR	Supreme Allied Commander Europe
SC	Security Council
SDN	Société des Nations, see League of Nations
SFOR	Stabilisation Force
SHAPE	Supreme Headquarters Allied Powers Europe
SLM/A	Sudanese Liberation Movement/Army
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
TCC	Troop-contributing country
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNAMID	African Union/United Nations Hybrid operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNEF	United Nations Emergency Force
UNHCR	United Nations High Commissioner for Refugees
UNISFA	United Nations Interim Security Force for Abyei
UNMIK	United Nations Interim Administration in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNMISS	United Nations Mission in the Republic of South Sudan
UNOCI	United Nations Operation in Côte d'Ivoire
UNOM	United Nations Office in Mali

UNOMIL	United Nations Observer Mission in Liberia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOWA	United Nations Office for West Africa
UNPROFOR	United Nations Protection Force
UNSOA	UN Support Office for AMISOM
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WEU	Western European Union
WTO	World Trade Organization
WWII	World War II

Introduction

Es gibt keine Handlung,
für die niemand verantwortlich wäre.

- Otto von Bismarck[1]

The purpose of this study is to contribute to the understanding of the regime of international responsibility as it is applicable to international organisations cooperating in matters of international peace and security and in particular in peacekeeping operations. This covers cooperation under Chapter VIII of the United Nations Charter which deals with "regional arrangements", as well as peacekeeping operations under Chapter VII of the United Nations Charter.[2]

Peacekeeping operations have been essential for maintaining international peace and security and they have evolved tremendously over the years. On 20 December 2012, the Security Council adopted Resolution 2085 on the situation in Mali. In this Resolution, the Security Council requested "that the Secretary-General, in close coordination with Mali, ECOWAS, the African Union, the neighbouring countries of Mali, (…) and all other interested bilateral partners and international organizations, continue to support the planning and the preparations for the deployment of AFISMA."[3] The Security Council also expressed its gratitude for the efforts in mediation by the Organisation of Islamic Cooperation (OIC) and to the European Union (EU) which started to plan for the deployment of a military training mission for Mali (EUTM Mali).[4]

Although Mali is only one example of a crisis in a country that calls for international action to guarantee the maintenance of international peace and security, it reflects the current reality of cooperation between international organisations.[5] Cooperation between international organisations is not only at the core of the maintenance of international peace and security, but it applies across all areas, starting with the planning of the mission, to the training of forces, and extending to the deployment of troops and putting boots on the ground. This increased cooperation is not a feature

[1] There is no deed for which not anybody would be responsible.
[2] In the practice of the Security Council concerning peacekeeping operations, Chapter VI of the Charter has lost its relevance and is – particularly in the recent practice – not invoked anymore.
[3] Security Council Resolution 2085, UN Doc. S/RES/2085 (2012), para. 11.
[4] *Ibid.*, Preamble and para.8.
[5] Cf. D. M. Tull, 'UN peacekeeping mission during the past two decades. How effective have they been?', in J. Krause, N. Ronzitti (eds.), *The EU, the UN and Collective Security. Making multilateralism effective* (2012), 117, 136.

unique to the maintenance of international peace and security, but it is generally a consequence of and a catalyst for globalisation;[6] international organisations are *fora* to deal and to cope with the increased interdependence between states while simultaneously accelerating the process.[7] It is therefore surprising that the term cooperation has never been defined by either an international treaty or in a resolution of an international organisation.[8]

As was stated by Mexico:

> Cooperation among states has become one of the most important factors – if not the key factor – in international relations. In that regard, the role of international organisations has assumed increasing significance.
>
> The most ordinary matters of daily life have an international dimension. No longer can we maintain the illusion that we can combat environmental threats or organised crime effectively from a purely national standpoint. States have come to realise that only through the joint and coordinated action made possible by international organisations can we confront these threats, while at the same time promoting ties of friendship and cooperation among peoples. Only through such action can we take full advantage of the benefits that globalisation offers.
>
> In keeping with this development, the legal and actual capacities of international organisations to take action have been strengthened. As a logical consequence, the likelihood that their conduct (whether actions or omissions) may generate international responsibility has also increased.[9]

These observations were made with regard to the Articles on the Responsibility of International Organizations (ARIO) as developed and adopted in second reading by the International Law Commission of the United Nations in 2011.[10] They capture the developments which have taken place in the past decades. On the one hand, an increased number of international organisations exist, and on the other hand, the powers and competences entrusted to these entities by their members has

[6] See, e.g., M. Hirsch, 'Compliance with international norms in the age of globalization: two theoretical perspectives', in E. Benvenisti, M. Hirsch (eds.), *The Impact of International Law on International Cooperation. Theoretical Perspectives* (2004), 166, 168-70. Hirsch concludes that states, and in particular developed states, are actually more likely to comply with international norms in the course of globalisation, *ibid.*, 193.

[7] B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen (2006)*, 1. Generally, on theories on international cooperation, cf. J. Klabbers, *An Introduction to International Institutional Law* (2009), 25-37.

[8] R. Wolfrum, 'Cooperation, International Law of', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008-), online edition, [www.mpepil.com], para.2. The Friendly Relations Declaration also starts from a "preconceived terminology", *ibid.*

[9] General Remarks of Mexico concerning the project of the International Law Commission on responsibility of international organisations, International Law Commission, Responsibility of international organizations, Comments and observations received from Governments, UN Doc. A/CN.4/547 (2004), 3-4.

[10] The articles and commentaries are contained in International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011).

grown. Their increased activity has raised questions concerning the lack of clear and established rules of accountability or responsibility, in particular under international law.

1. Codification projects on the responsibility of international organisations and the changing system of international law

The International Law Commission was not the only international body to engage intellectually and from a legal point of view with this development of the activities carried out by international organisations.

The *Institut de droit international*[11] and the International Law Association (ILA)[12] actively started addressing the topic in the mid-1990s, while the *Instituto Hispano-Luso-Americano de Derecho Internacional* engaged with the topic of responsibility of international organisations in the mid-1980s. The approach taken by these three bodies varied and the dates of adoption mirrored the changing debate on the topic. The Instituto Hispano-Luso-America focused on international organisations as bearers of rights and obligations.[13] The *Institut de droit international* added a new layer, realising that acts of international organisations can entail the responsibility of the member states of that organisation. Finally, the ILA chose a socio-political-legal approach, analysing the topic under the criterion of "accountability" which covers both legal and quasi-judicial and other forms of holding international organisations responsible for their actions.

It is often said of the relationship between International Humanitarian Law (IHL) and armed conflicts that the law always plays catch-up with the respective new forms of conflicts.[14] This statement holds

[11] *Institut de Droit Transnational*, Resolution (Session of Lisbonne – 1995), The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties, Articles 4-6.

[12] International Law Association, Berlin Conference (2004), Accountability of International Organisations, International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, Third Report consolidated and enlarged version of recommended rules and practices ("RRP-S"). Generally, on the project, cf. I. F. Dekker, 'Making Sense of Accountability in International Institutional Law. An analysis of the Final Report of the ILA Committee on Accountability of International Organizations from a conceptual legal perspective', in (2005) 36 *Netherlands Yearbook of International Law,* 83 – 118. See also the follow-up project of the ILA, International Law Association, Sofia Conference (2012), Study Group on the Responsibility of International Organizations.

[13] Instituto Hispano-Luso-Americano de Derecho Internacional , Las organizaciones internacionales y el Derecho de la responsabilidad, El XIV Congreso del Instituto Hispano-Luso-Americano de Derecho Internacional, San José 1985, 2-3, Preamble. The work of the Instituto is limited in its approach focusing on international organisations being bearers of rights and obligations and thus falling under the law of responsibility. It does however, discuss the possibility that an internationally wrongful act may be attributed to an international organisation or to the state on whose territory it operates, 3, para.5.

[14] Be it new means and methods of warfare or new types of conflicts such as "internationalised" internal armed conflicts.

true equally for the regulation of acts of international organisations. The common feature of these studies is the state-centric approach by which they are characterised. Their *modus operandi* is state-centric in the sense that the studies focus on the responsibility of international organisations *per se* and the responsibility of international organisations in connection with responsibility of their respective members. They therefore ignore the question of inter-organisational cooperation and consequently also responsibility of an international organisation with or for the acts of another international organisation.[15] In academic writing, most attention has been paid to the topic of the distribution of responsibility between international organisations and their member states excluding therefore "den Dritten im Bunde" (the third in the alliance)[16] which, in the conduct of peacekeeping or peace enforcement operations, is often another international organisation.

A major change emerged through the Articles of the International Law Commission on the Responsibility of International Organisations which contain dispositions regulating the responsibility of an international organisation in connection with the acts of another international organisation. [17] The key question is whether these articles reflect sufficiently the complexities of inter-organisational cooperation and whether they include the necessary flexibility and *marge de manoeuvre* in their interpretation which allows for the regulation of the highly complex field of peace-keeping operations.[18]

Whereas the Articles on State Responsibility[19] were the work of roughly 50 years, the Articles on Responsibility of International Organisations were finished within 8 years. As was observed by one member of the International Law Commission,

[15] The same critique was also formulated by L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 401-402.

[16] One has to emphasise that one of the reasons for the disregard of this particular angle is possibly the immunity of international organisations which has so far prevented the consideration of international and other courts and tribunals with that particular question, besides doing so incidentally in connection with acts of states. Another potential reason relates to the issue of judicial review of resolutions issued by the Security Council.

[17] Articles 7, 14-18, 48.

[18] Whether they actually reflect the law or whether they are an expression of *lege ferenda* will be analysed. There is a dichotomy between the idea of a multi-polar system with various actors, including more regional actors and the maintenance of international peace and security where the Security Council continues to play an incredibly prominent role if it cannot be seen as the center-piece. Nevertheless, in this area there have been cases of international organisations claiming more authority, especially by regional actors. The Articles on the Responsibility of International Organisations could be positioned in between the two categories as they account for various actors, but the presumption is the existence of one stronger player and one providing aid or assistance rather than participation on an equal level.

[19] For the articles and commentaries, see Yearbook of the International Law Commission, Volume II Part Two, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001), 20-143.

> The topic currently under consideration was much more complex, for while relations between States and international organizations were, in the last analysis, fairly limited, those between international organizations themselves continued to evolve, particularly in the area of peacekeeping, where their functions and *modus operandi* were increasingly often called into question."[20]

Furthermore, the forces of globalisation, interconnectivity and interdependence have also moved the system of international law further away from being self-contained and applicable exclusively to states towards "an intricate network of laws governing a myriad of rights and duties that stretch across and beyond national borders."[21] While, in the 1940s, Kelsen's view of the *Reine Rechtslehre* might have been suitable[22], the current understanding of international law can only be that one cannot grasp the nature of international law if one limits one's attention to this specific field. Non-legal arguments and considerations are equally important. It is particularly true for the context of the present study insofar as cooperation between international organisations in the maintenance of international peace and security touches not only upon international law, but also upon essential, geopolitical, strategic, economic and other interests of states and international organisations which necessitates a broadening of the perspective – and while applying the law – to take duly into account policy-induced arguments and considerations.[23] In addition, "[t]he more essential interests are for politics, the more politics are opposed to the penetration of the legal system with its principles of legality and equality."[24] Following two disastrous world wars, states and the wider international community consider the maintenance of international peace and security to be one of their main concerns. Accordingly, the contentions between international law and politics can be particularly harsh – one may only think of the Iraq war in 2003 or the current crisis in Syria. One can therefore

[20] International Law Commission, Provisional Summary Record of the 2963rd meeting, UN Doc. A/CN.4/SR.2963 (2008) (Mr. Al-Marri), 16-17. See also Condorelli who says that "les doutes quant à ce que j'ai appelé la répartition des charges se compliquent remarquablement lorsqu'on est aux prises – comme il arrive de plus en plus de nos jours – avec des agissements susceptibles d'être attribués non seulement à un Etat (ou plusieurs et à une organisation internationale, mais aussi à diverses organisations internationales (ONU, OTAN, Union européenne,…)", L. Condorelli, 'Conclusions générales', in Société française pour le droit international/Institut International des droits de l'homme, *Journée d'études de Strasbourg. La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (2009), 127, 130.

[21] Cf. e.g., T. M. Franck, *Fairness in International Law and Institutions* (1998), 5-6.

[22] "It is impossible to grasp the nature of law if we limit our attention to the single isolated rule. The relations who link together the particular rules of a legal order are also essential to the nature of law." H. Kelsen, *General Theory of Law and State* (1945), 3.

[23] The understanding of the notions of "peace and security" has also evolved: The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and eco-logical fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters", Security Council, Note by the President of the Security Council, UN Doc. S/23500 (1992).

[24] R. Kolb, G. Porretto, S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoires* (2005), 8.

duly speak of an ”increasingly politicized legal landscape” and this trend is also reflected in jurisprudence which relies heavily on policy documents.[25]

2. The proliferation of international organisations and the multiplication of tasks (in peacekeeping operations)

The bar is further raised by the very nature of international organisations and their organs of which the Security Council (SC) of the United Nations is the most apposite example. Their respective constituent instruments, for example, the Charter of the United Nations,[26] form the legal basis of their existence and their activities. However, the organisations and their organs act through various forms of diplomacy and policy; they are political “animals” with a legal skeleton. The Security Council is the beacon of the system of global collective security and although a political body *per se*, its actions often have legal consequences.[27] Generally speaking, the whole area of international peace and security lies at a crossroad between international politics and international law.

An important area of the activities of international organisations is the maintenance of international peace and security. In the past few decades, a plethora of regional and sub-regional, non-universal international organisations have been created and evolved of which many have taken over tasks previously carried out by universal organisations or they act conjointly with such. This rise of regionalism is a global phenomenon and not limited to the area of peace and security,[28] but is especially true for the field of peacekeeping operations. Notwithstanding the prohibition of the use of force which is enshrined in Article 2 (4) of the Charter of the United Nations, armed conflicts still occur regularly in various regions around the globe. Of the 68 peace operations conducted under the

[25] P. Koutrakos, *The EU Common Security and Defence Policy* (2013), 80 ; C-91/05, *Commission of the European Communities v Council of the European Union [*2005], Judgment of the Court (Grand Chamber) of 20 May 2008.
[26] United Nations Charter (1945).
[27] As Gowlland-Debbas also points out “[o]ne is highly aware of the political nature of the Security Council which may make a legal analysis of its activities sound derisory. It is unquestionable that the mechanisms instituted under Chapter VII of the United Nations Charter grant extensive, discretionary powers to an elitist, political organ whose primary responsibility is the maintenance of a political conception of international ordering, i.e. the maintenance of international peace and security”, V. Gowlland-Debbas, *The Security Council and Issues of Responsibility under International Law*, Recueil des cours de l’Académie de La Haye, Volume 535 (2012), 185, 206. Boutros-Ghali once remarked that the Security Council is a place where international law and international policy “happily mix”, as cited in D. Türk, Impact of International Humanitarian Provisions on the Decision-making Process in Crisis Management: The Practice of the Security Council, in S. Kolanowski, Y. Salmon (eds.), *Proceedings of the Bruges Colloquium. The Impact of International Humanitarian Law on current security policy trends* (2001), 97, 97, 100.
[28] As *infra* 1.3 and 1.5 will consider, the rise of regionalism has been problematic in the field of maintenance of international peace and security as the legal framework under the Charter of the United Nations is an area of conflict between universalism and regionalism.

auspices of the UN in the period of 1945 and 2013, 45 have taken place in the period of 1991 – 2013.[29]

The increased number of peacekeeping operations in the recent decades has been accompanied by a multiplication of tasks and functions exercised by those forces which reach from classic peacekeeping operations as neutral troops between two opposing states to multifaceted operations including military and civil components, amounting even to operations which administer complete territories as was seen in Cambodia, East Timor and in Kosovo.[30] The UN operation in the DRC lists no less than 45 different tasks to be exercised by the operation.[31]

3. An increasing network of cooperation

In recent years a number of other important developments have taken place in the organisation and the conduct of peace operations. The opening paragraph of this study illustrated that cooperation has increasingly become common in the planning and implementation of peacekeeping operations. The United Nations rely regularly on regional organisations to carry out peace-keeping operations under a mandate by the Security Council although the legal framework is not always very clear. [32]

Indeed, it was held by the AU-UN panel:

> The *complexity of modern peacekeeping means that no single organization is capable of tackling the challenge on its own*. More than ever, security threats require a collective approach premised on a range of partnerships which should seek to establish coordination both at the strategic and

[29] This figure includes operations authorised by the Security Council. All figures and facts are drawn from the United Nations homepage, see, e.g. the homepage of the United Nations Peacekeeping department, http://www.un.org/Depts/dpko/dpko/ and www.un.org/events/peacekeeping60; see also. S. R. Lüder, 'Responsibility of States and International Organisations in Respect to United Nations Peace-keeping Missions', (2008) 12 *International Peacekeeping*, 83, 84; Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/57/767 (2003), 6, para. 42; R. Murphy, K. Månsson, 'Perspectives on Peace Operations and Human Rights', in (2006) 13 *International Peacekeeping*, 457, 457.

[30] According to Berdal, this development is explained by "these changes in operational (focus on intra-state conflict) and normative context (emphasis on 'humanitarian' issues broadly conceived)", M. Berdal, 'The Security Council and Peacekeeping', in V. Lowe, A. Roberts, J. Welsh (eds.), *The United Nations Security Council and War* (2008), 175, 190. A position paper of the Secretary-General at that time, Boutros-Ghali traces in a sublime fashion the developments, General Assembly/Security Council, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1 (1995), 3-5.

[31] Department of Peacekeeping Operations and Department of Field Support, A New Partnership Agenda. Charting a New Horizon for UN Peacekeeping (2009), 10.

[32] Peacekeeping was created by the United Nations and has developed through practice alone. The relevant chapters of the UN Charter for peacekeeping operations and cooperation with regional organisations are Chapters VI, VII and VIII.

> programmatic levels. They should also take maximum advantage of the strengths that respective organizations, especially regional organizations, can contribute[33] [Emphasis added].

Other reports go further still, and suggest that "hybrid peace operations and other innovative approaches to peacekeeping (…) are the way of the future as the strength of such joint ventures draws from the universal character of the UN and the advantages embedded in regionalism."[34]

International organisations are generally complex structures, which act through their member states, and in turn act through individuals, thereby creating three layers of responsibility. In addition, and adding to the complexity, they rarely act on their own, but often in cooperation with other organisations and increasingly also with private actors, impeding upon the application of the law of responsibility: "[E]ven, in those rare cases where most would agree that some wrongful act has taken place, it is by no means self-evident to whom the wrongfulness can be attributed."[35]

The Security Council is responsible for the maintenance of international peace and security under Chapters VI and VII of the Charter. Chapter VIII of the Charter of the United Nations, entitled "Regional Arrangements", regulates the relationship between regional arrangements or agencies[36] and the UN for the settlement of local disputes. Cooperation in the area of the maintenance of international peace and security may take various forms, for example, the "dual key" arrangements between the UN and NATO in Yugoslavia[37] for the authorisation of air-strikes or the establishment of the hybrid peacekeeping operation between the UN and the AU, UNAMID in Darfur. In the past few years the UN has started to enhance inter-mission cooperation by redeploying troops from one

[33] Report of the African Union-United Nations panel on modalities for support to African Union peacekeeping operations, UN Doc. A/63/666-S/2008/813 (2008), 7, para. 10. Cf. also Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security. Towards Greater Strategic and Political Coherence, PSC/PR/2.(CCCVII) (2012), 3, para. 8. See also the Statement of the Secretary-General in the meeting of the Security Council on cooperation with the EU in maintaining international peace and security, Security Council 7112th meeting, UN Doc. S/PV.7112 (2014), 2.

[34] Report of the Chairperson of the Commission, *ibid.*, 33, para. 105. The Ad Hoc Working Group on Conflict Prevention and Resolution in Africa had made a similar suggestion in 2002, recommending that the "Security Council may consider, where possible or desirable, the dispatch of joint Security Council/African Union missions to the field", Annex to the letter dated 29 August 2002 from the Permanent Representative of Mauritius to the United Nations addressed to the President of the Security Council, Recommendations of the Ad Hoc Working Group on Conflict Prevention and Resolution in Africa to the Security Council, UN Doc. S/2002/979 (2002), 3, para. 2 (g).

[35] J. Klabbers, 'Self-Control: International Organisations and the Quest for Accountability', in M. Evans, P. Koutrakos (eds.), *The International Responsibility of the European Union* (2013), 75, 97-98; Also Klabbers, *supra* note 7, 280; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010) 353; A. Tzanakopoulos, *Disobeying the Security Council. Countermeasure against Wrongful Sanctions* (2011), 18-19.

[36] In this present study, the generic term of "regional organisation" will be utilised when possible.

[37] Comprehensive review of the whole Question of Peace-keeping Operations in all their Aspects: Command and Control of United Nations peace-keeping operations, Report of the Secretary-General, UN Doc. A/49/681 (1994), 7, para.25

peacekeeping operation to another if an urgent need arises or by authorising cross-border inter-mission activities.[38] These activities are also a reaction to the current economic climate and tight financial budgets.[39] Private military and security contractors have also become more influential in the context of peacekeeping operations, being charged with important tasks as well as being involved even in the training and planning of UN peacekeeping operations. [40]

It is against this background that the present thesis will set out to examine the scope and content of the international responsibility of international organisations cooperating in matters of international peace and security[41], especially peacekeeping operations. The approach taken and the method of

[38] See e.g., Report of the Secretary-General on inter-mission cooperation and possible cross-border operations between the United Nations Mission in Sierra Leone, the United Nations Mission in Liberia and the United Nations Operation in Côte d'ivoire, UN Doc. S/2005/135 (2005), especially, 2, paras. 5-7; Security Council Resolution 1609 UN Doc. S/RES/1609 (2005), 5, para. 6; Security Council Resolution 1657, UN Doc. S/RES/1657 (2006), para. 1, Letter dated 1 February 2006 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2006/71 (2006); Security Council Resolution 1497, UN Doc. S/RES/1497 (2003), paras. 3-4. Inter-mission cooperation can be quite extensive, a budget performance report for UNAMID lists the following activities as being closely coordinated or being accomplished with UNMIS: "joint situational analysis and brainstorming meetings on the referendum on the status of South Sudan (…), bimonthly joint UNAMID/UNMIS video-telephone conferencing with the headquarters Integrated Mission Task Force (…), the areas of security management, assessment of public information activities on subjects of mutual interest or endeavour, support to the national disarmament, demobilization and reintegration programme, capacity-building and other activities involving the police, judiciary corrections institutions, human rights, child protection and gender activities. Common services, including space/office utilization, security management, air and ground transport services and fleet management, joint movement control operations, property management and medical services continued to be shared with UNMIS. Particularly on air transportation, while no aircraft were shared with UNMIS, air asset support to UNMIS was provided when requested and when UNAMID commitments allowed for such support", Budget performance of the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/66/596 (2011), 9, para.34.

[39] Statement by Major General Iqbal Asi, Security Council 6987th meeting, UN Doc. S/PV.6987 (2013), 5.

[40] ECOWAS relies on PMSCs to rectify the lack of capabilities of its members in certain given areas, UNAMSIL and MONUC used PMSCs for logistical support and demining is nearly completely sourced out by the UN, R. Buchan, H. Jones, N.D. White, 'The Externalization of Peacekeeping: Policy, Responsibility and Accountability', (2011) 15 *Journal of International Peacekeeping*, 281, 286. Although the treaties concluded by the UN specify that the employees of these companies will not in any form be considered as agents of the UN and it also appears highly unlikely that the UN will exercise "effective control" over them, the issue *per se* is problematic ibid., 293-296). For an excellent overview of how private companies are also influencing training and planning of UN peacekeeping operations, see, A.G. Østensen, 'In the Business of Peace: The Political Influence of Private Military and Security Companies on UN Peacekeeping', in, (2013) 20 *International peacekeeping*, 33-47. Kofi Annan proposed to hire a private security company to control the camps in Rwanda in 1994, S. Brayton, 'Outsourcing War: Mercenaries and the Privatization of Peacekeeping', in (2002) 55 *Journal of International Affairs*, 303, 317. In June 2013, MONUSCO decided to run a selection process for a contractor to run the deployment of unmanned aerial vehicles (UAVs) for the whole operation. So far there are no plans to arm the drones, but there are requests for further high technology weaponry and other equipment, Briefing by Lieutenant General dos Santos Cruz, Force Commander MONUSCO to the UN Security Council, Security Council 6987th meeting, *ibid*., 2-3.

[41] The terms "peace and security" refer to two different, but overlapping concepts: "security" may encompass measures necessary to maintain peace. See generally, R. Wolfrum, 'Chapter I Purposes and Principles. Article 1', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 107, 109 mn. 8 – 112 mn, 17. From a formal perspective, it has a broader meaning under Article 24

analysis are multipolar, focusing not on one particular organisation, but examining several and their interplay.

4. Research questions of the study and methodology

The central research question of the present study is whether international organisations cooperating in peacekeeping operations can be jointly responsible for internationally wrongful acts committed by peacekeeping forces. It can be divided into three main questions. The first is: Are there internationally wrongful acts which can be attributed to more than one international organisation? This involves an examination of the forms and methods of cooperation between the involved organisations, first, *in abstracto*, under the framework of the UN Charter – in particular, Chapters VII and VIII – as well as on an inter-organisational level. The legal framework of the UN Charter determines the "playing field" on which regional organisations and the UN interact in order to maintain international peace and security. In other words, the UN Charter assigns the general roles of the UN and regional organisations in this field of international law. The mechanisms and arrangements of cooperation as developed on an inter-institutional level further define and develop the role of each organisation and the framework of cooperation between the UN and regional organisations. They serve simultaneously as the foundation and as the interface for cooperation, *in concreto*, within a specific operation. The analysis of the attribution of conduct operates on the basis of an examination of the command and control arrangements in a given scenario. Therefore, any analysis of the attribution of conduct of acts arising in the context of international organisations cooperating in peacekeeping operations needs to address and examine the inter-institutional and in-mission cooperation mechanisms existing between the UN and regional organisations.

The attribution of conduct presupposes the violation of an international legal norm, so the second question concerns the applicable legal framework for peacekeeping operations. The present study

which corresponds to "primary responsibility [of the Security Council] for the achievement of the general purpose of the United Nations", H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (1950), 282-83. In practice, it has been also reached a broader interpretation by the Security Council since the end of the Cold war, i.e. Note by the President of the Security Council, *supra* note 23, 3; A. Peters, 'Functions and Powers. Article 24', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), The Charter of the United Nations. A Commentary. Volume I (2012), 761, 771-772, mn. 33-34. The broad interpretation as "'positive' peace (as opposed to the mere absence of military violence) and of 'human' security (…) is crucial for (…) the Council's exercise of its responsibility" (*ibid.*); also E. de Wet, 'The United Nations Collective Security System in the 21st Century: Increased Decentralization through Regionalization and Reliance on Self-Defence', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1553, 1554-55. Franck suggests that not only the list of threats to the maintenance of international peace and security has changed but equally their character. They are now transboundary, international threats which can only be answered by a new interpretation of the global system of security, beyond action by the Security Council alone, T. M. Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible', in (2005-2006) 6 *Chicago Journal of International Law*, 597, 600-602.

does not analyse the application of IHL or human rights law to specific circumstances during the deployment of an operation because the focus of this study does not include the application of primary norms to peacekeeping operations. Nevertheless, the analysis of the applicable legal framework is important for two principal reasons. This being said, the analysis of the applicable legal framework is important for two principal reasons. First of all, it underlines the complexity of the application of IHL and human rights to international organisations and it also allows shedding some light on many specific issues whose legal regulation is not sufficiently explored yet. Secondly, the applicable legal framework has to be seen as part of the wider picture of a breach of an international obligation and it may have repercussions for the attribution of conduct. As the present study will also explore further legal bases for a breach of an international obligation, it may be possible that the United Nations and one or several organisations might be bound by different legal obligations which entail their responsibility under international law.

The analysis of the applicable legal framework of this study is limited to the conduct of international organisations, which – in contrast to states - are not bound by international human rights and international humanitarian law treaties and conventions. Customary international law is less developed than treaty law and its application to the conduct of international organisations is particularly difficult for various reasons, including that most of the customary rules were developed on the basis of state practice alone so that they can only be applied *mutatis mutandis* to international organisations. Similar issues are raised by the application of international humanitarian law, particularly in the exact nature of the relationship between these two bodies of law.

Thirdly, against the background of questions 1 and 2, one has to ask whether the Articles on the Responsibility of International Organisations by the ILC, by which the current study will be principally guided, are appropriate for the specific context of regulating conduct of international organisations cooperating in peacekeeping operations or whether a *sui generis* regime would be more appropriate. As the law of responsibility has developed in the context of bilateral relations of states and the predominant view still adheres to the idea that cases of joint responsibility are rare, it might, indeed, be necessary to rely upon a *lex specialis* rule of attribution for the specific context of peacekeeping operations.

Such an analysis is particularly relevant because of the pending accession of the EU to the European Convention on Human Rights which will have implications on many levels.[42] It makes provision for

[42] The EU and the Council of Europe have finalised the draft accession agreement which has been transferred to the EU Court of Justice for its view on 5 April 2013, Press Release – DC041 (2013) – Milestone reached in negotiations on accession of EU to the European Convention on Human Rights. See generally, G. Gaja,

the EU to be held legally responsible and therefore will not only prompt a change in analysis in cases, but will also equally contribute to the elucidation and clarification of the applicable legal framework to international organisations. It might further encourage the implicit judicial review of acts of other international organisations than the EU and it will put pressure on those organisations to submit themselves to judicial review. Moreover, the application of another criterion for the attribution of conduct by the court in Strasbourg in its case-law in the context of peacekeeping operations, as well as the attribution of conduct by a UN authorised operation to the UN, will likewise lead to a new discussion of the appropriate criterion of attribution. It will also generally spark a new debate on the legal framework applicable to determining the responsibility of international organisations in the context of peacekeeping operations.[43]

Furthermore, the Articles on State Responsibility and on International Responsibility of International Organisations provide a similar legal framework containing references to the other set of articles, but they both deal with cases of mutual responsibility in specific cases only. Depending on the cooperation arrangements and agreements between the involved international organisations, it is not unlikely that cases of mutual international responsibility are feasible for enforcement action under Chapter VIII of the Charter. According to Article 53 of the UN Charter, enforcement action can either occur through regional arrangements or agencies under the authority of the Security Council, or under regional arrangements or by regional agencies with the authorisation of the Security Council. These two possibilities allow for command and control by either the United Nations or by the respective organisation.

5. Objectives and scope of the present study

The study will examine the applicable legal framework for peacekeeping operations. But reaching beyond the legal debate, it seeks to provide practical guidance to relevant practitioners in the field. As peace operations operate in difficult areas, and even under conditions of armed conflict in which law and order break down, the violation of fundamental rights of individuals by peacekeepers is not

'Accession to the ECHR', in A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon* (2012), 180 – 195. Among the implications, one could mention, e.g. the limited competences of the EU which will affect its rights and obligations under the Convention. So, the EU may have competences to promote human rights externally under Article 21 (2) TEU, but it will not be able to promote some of these rights internally, cf., *ibid.*, 184.

[43] The first and highly criticised case concerning conduct arising in the context of a peacekeeping operation of an international organisation by the European Court was *Agim Behrami and Bekir Behrami against France, Ruzdhi Saramati against France, Germany and Norway,* Decision on Admissibility, 2 May 2007.

imaginary, but a simple fact.[44] All evidence suggests that the cooperation between international organisations will increase in the future, thus also increasing the potential for the occurrence of cases of internationally wrongful acts which could be attributed to multiple international organisations. The overall objective is to arrive at conclusions which take into account the different materials, the specific features of individual organisations, and allow for the proposition of a reasonable responsibility regime for cases of cooperation of international organisations in peacekeeping operations, also including a point of view of *de lege ferenda*.

The study focuses on the following international organisations: the European Union (EU), the North-Atlantic Treaty Organisation (NATO), the African Union (AU), the Economic Community of West African States (ECOWAS) and the United Nations (UN).

Limiting the discussion to these five organisations is for the following reasons. Firstly, it is necessary to find a balance between a comprehensive approach towards the issue and an in-depth analysis of the topic. An analysis of all international organisations which are involved in peacekeeping activities risks a superficial analysis of the subject. Secondly, some organisations are less active than others and thereby also less relevant for the present study. The Organisation of Southeast Asian Nations (ASEAN), for example, has only been involved in one peacekeeping operation.[45] A third factor is the geographic distribution of conflicts and peacekeeping operations. Africa unfortunately remains the continent with the highest number of conflicts and is consequently particularly interesting for the purposes of this study. Finally, the organisational arrangement of the different organisations is also a feature relevant to this study as it has a direct bearing on the existing cooperating mechanisms, and thereby incidentally on the law of international responsibility.

The European Union is a supranational organisation,[46] an organisation *sui generis*, and has been involved in roughly 20 military and civil operations since the implementation of the European Defence and Security Policy in 2003. The EU not only sends its own troops and people, but it also

[44] C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after Behrami', in (2012) 45 *Israel Law Review*, 151, 152.

[45] This was the surveillance mission in Aceh, Réseau francophone de recherché sur les opérations de paix, http://www.operationspaix.net/ANASE. See the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/MoU_Aceh.pdf .

[46] Supranational organisations are characterised by the following criteria: (1) "The organization should have the power to take decisions binding on the member states", (2) "The organs takin the decisions should not be entirely dependent on the cooperation of all the member states", (3) "The organization should be empowered to make rules that directly bind the inhabitants of the member states", (4) "The organization shall have the power to enforce its decisions. Enforcement should be possible even without the cooperation of the governments of the states concerned", H.G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 56, para. 61.

holds a prominent role in cooperation with other organisations, particularly, for peace operations on the African continent.

The African Union is, next to the European Union, a major regional organisation engaged in activities concerning peace and security. This is also due to the high number of conflicts on the African continent and it is therefore significant to this study.[47] The same assumption applies to the Economic Community of West African States (ECOWAS).

NATO was founded as a military alliance between certain Western states and is by its mandate a "military" international organisation and therefore one of the major players in all matters concerning peace and security and peacekeeping operations.

The comparative methodology used throughout this study has several advantages. Firstly, it allows the identification of similarities and differences among the legal frameworks of these organisations, in their relations with another, and in the cooperation arrangements during peacekeeping operations. Regarding the framework of the UN Charter, the analysis is conducted both on the basis of Chapters VII and VIII. [48] Secondly, on the basis of these findings, it is possible to determine and to pinpoint the applicable legal rules of international responsibility to peacekeeping operations in the context of cooperation therein by international organisations. Thirdly, general conclusions can be drawn, providing an outlook for the future and recommendations.

6. Structure of the study

This study is divided in six chapters and follows a top-down approach. Chapter I introduces the legal framework applicable under the United Nations Charter for the maintenance of international peace and security and for cooperation with international organisations. The argument made is that the compromise solution under the UN Charter between universalism and regionalism is inspiring cooperation between the UN and regional organisations. In Chapter II, the relations between the United Nations and NATO, the EU, the AU and ECOWAS are traced in peacekeeping and peace

[47] For example, between 1963 and 1998, 28 armed conflicts erupted in Africa affecting 61% of the continent's population; 75 to 80 conflicts were recorded since 1945, Africa, our common destiny, Guideline Document (2004), 11.

[48] It is moreover necessary because enforcement action under Chapter VII and enforcement activities under Chapter VIII may also be intertwined, cf., for example, Security Council Resolution 787, UN Doc. S/RES/787 (1992), para. 12, in which it is written as follows: "Acting under Chapter VII and Chapter VIII of the Charter of the United Nations, [the Security Council] calls upon States, acting nationally or through regional arrangements or agencies, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of resolutions 713 (1991) and 757 (1992)."

enforcement activities of the United Nations and between these organisations. This analysis allows for the formulation of general conclusions regarding the potential distribution of roles amongst international organisations as well as the consequences for responsibility arising from wrongful conduct. Chapter III analyses the material law applicable to military contingents deployed in peacekeeping operations.

Chapter IV deals specifically with the law of international responsibility as applied to international organisations. It specifically analyses the compatibility of the ARIO with the scenario of international organisations cooperating in peacekeeping operaitons. It further refines and clarifies the methodology used in Chapter V which consists of various case-studies.

Chapter V contains a comparative analysis of case-studies to ascertain and verify the findings of Chapters I – IV as well as developing the proposed special criterion of attribution (*lex ferenda)*. Finally, Chapter VI provides the conclusions reached of the analysis in the present study, as well as recommendations for the future, addressed in particular to practitioners and legal scholars.

Chapter I: Cooperation in Peacekeeping and Peace Enforcement Activities under the United Nations Charter

> The architects of the United Nations Charter were visionary in foreseeing a world where the United Nations and regional organizations worked together to prevent, manage and resolve crises. However, it is hard to imagine that they could have anticipated the interconnected nature of the threats we face today or the range of cooperation between the United Nations [sic] regional and subregional organizations.
>
> - Secretary-General Ban Ki-moon[1]

The central research question of this study is the question if international organisations cooperating in peacekeeping operations can be jointly responsible under international law. The primary foundation for cooperation between the UN and regional organisations is Chapter VIII of the UN Charter. In practice, however, the Security Council increasingly resorts solely to Chapter VII to mandate peacekeeping operations by regional organisations. This first and introductory Chapter therefore traces several developments within the field of collective security as established under the United Nations Charter. First of all and to put it into perspective, it analyses the general evolution of the system of collective security from the League of Nations and the Dumbarton Oaks conference to developments after the end of the Cold War.

The second part introduces the concept of peacekeeping. It attempts to circumscribe peacekeeping and peace enforcement activities. In practice the distinction between both concepts has become increasingly blurred, although a distinction is essential as the following third part will illustrate. Depending on the qualification of an international military operation as a peacekeeping or peace enforcement operation, an authorisation of the Security Council for the deployment of such an operation may or may not be necessary. Consequently, the qualification of an international military operation as either a peacekeeping or peace enforcement operation may also have a direct bearing upon the question of international responsibility.

[1] During the debate on cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security, Security Council, 7015th meeting, UN Doc. S/PV.7015 (2013), 3.

An analysis of practice shows that a certain division of labour between the UN and regional organisations with regard to the deployment of military forces is emerging as will be also highlighted in the second part of this Chapter.

1.1. Cooperation under the United Nations Charter – between Universalism and Regionalism

1. The emergence of international organisations and the regulation of international peace and security

Throughout the history of mankind, peoples have cooperated for military purposes, such as, to defend their territory. Early incidences of these cooperation arrangements between peoples are evidenced by the Delian League, founded in 477 B.C., the Auld Alliance and the Catholic League in the Middle Ages, while more recent examples include the Triple Alliance or the Allied Powers in WWII.[2] The emergence of international organisations as independent legal entities indicates the next level of increased cooperation among states and it has fundamentally altered the system of international law.[3] Beginning as permanent secretariats, with a mandate to monitor the implementation of treaty regimes, they have developed into fully-fledged independent international organism. States were increasingly confronted with global and complex challenges that transcended national borders. As a result it is unsurprising that cooperation between international organisations[4] has been recognised as an important tool since the first modest steps were taken in this direction within the framework of the League of Nations.[5]

Mechanisms for the establishment of peace and justice have also been debated in other areas of social science, such as philosophy for example. Kant constructed an international system based on the ideas of justice and reason, in which peace is not a natural condition of humanity, but rather an

[2] In the 12th Century, P. Dubois, who was the advisor to the French King Philip the Fair suggested cooperation with other Christian states in matters of collective security, including the possibility of collective self-defence against external threats and collective enforcement measures against members of the coalition who violated the rules of the pact, J. P. Lorenz, *Peace, Power and the United Nations. A Security System for the Twenty-First Century* (1999), 9. See also N. Tsagourias, N. D. White, *Collective Security. Theory, Law and Practice* (2013), 3-5.

[3] A. A. Cançado Trindade, *International Law for Humankind : Towards a New* Jus Gentium. *General Course on Public International Law*, Collected courses of the Hague Academy of International Law, Volume 316 (2005), 12, 274-275.

[4] *Ibid.,* 220.

[5] It is important to underline that facing these problems, cooperation not only between states, but also between international organisations is the key to success: "It is, therefore, critical that regional organizations be encouraged and empowered to take actions to restore peace and security in conflicts and areas under their respective purview. These actions, however, cannot be viewed in isolation as many actors have a part to play in attaining overall global security", Report of the Secretary-General on the relationship between the United Nations and regional organizations, in particular the African Union, in the maintenance of international peace and security, UN Doc. S/2008/186 (2008), 5, para.3.

ideal that must be construed. Kant can be seen as an inspiration in the establishment of the League of Nations, writing that

> [t]here is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. (…) [T]hey must (…) form an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (…) the positive idea of a *world republic* cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.[6]

Woodrow Wilson, a pre-eminent figure in the promotion of idealism, was clearly influenced by these Kantian ideals when he called for the establishment of the League of Nations.[7] The Covenant of the League of Nations stipulates in Article 21 that "[n]othing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace." This article, although not introducing a framework for cooperation, nevertheless recognises the importance of regional arrangements, as they existed at that period, in the area of international peace and security. It is significant that, at the founding of the League of Nations, no such disposition on the legitimacy of regional arrangements was foreseen.

On the contrary, President Wilson was opposed to any recognition of regional organisations in the Covenant, declaring that "there can be no leagues or alliances or special covenants and understandings within the general and common family of the League of Nations."[8]This characterizes Wilson's general opposition to cooperation in the form of regional arrangements, and indeed it was a "Wilsonian tendency to identify regionalism with war-breeding competitive alliances".[9] Based on a centralist view of the international community, within and outside the League of Nations, this view

[6] I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795) in the edition of H.S. Reiss (ed.), *Kant: Political Writings* (1992), 105.

[7] Cf. C. Lemke, *Internationale Beziehungen. Grundkonzepte, Theorien und Problemfelder* (2008), 14; further, J. Kane, 'Democracy and world peace: the Kantian dilemma of United States foreign policy', (2012) 66 *Australian Journal of International Affairs*, 292, 296-7, 301-4, D.-E. Khan, 'Drafting History', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1, 2-3.

[8] President Wilson Five Needs of Permanent Peace (September 27, 1918), Address to Public Meeting in New York, Opening the Fourth Liberty Loan, in A. Bushnell Hart (ed.), *Selected Addresses and Public Papers of Woodrow Wilson* (2002), 275, 279; U. Villani, *Les Rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix*, Recueil des cours de l'Académie de La Haye, Volume 290 (2001), 225, 239 ; C. Walter, 'Chapter VIII Regional Arrangements. Article 52', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1429, 1435 mn. 4.

[9] I. Claude, *Swords into Plowshares: The Problems and Progress of International Organizations* (1965), 113.

excluded any form of regionalism.[10] In the end, it was President Wilson who gave up his opposition and who proposed the construction that became Article 21.[11] However, the Covenant failed to define any of these possibilities in Article 21 and the anti-regionalist tendency of the Covenant is furthermore illustrated by the fact that the scope of Article 21 is limited to establishing the compatibility of alliances with the Covenant.[12] Notwithstanding these difficulties underlying the opportunities for institutionalised cooperation, once incorporated into the Covenant, the League of Nations tolerated and supported the conclusion of regional assistance treaties.[13]

2. The creation of the United Nations – regionalism vs. universalism

The Dumbarton Oaks proposals for the United Nations Charter had already envisioned the framework of the Charter as it exists today.[14] They were concerned with the legitimacy of regional arrangements or organisations to deal with issues of international peace and security on an appropriate regional level, provided that they conformed to the legal obligations under the Charter.[15] The proposed principles further included the authorisation for the Security Council to use regional

[10] Another factor was the awareness that WW1 had also been provoked by the tension between two alliances of states, Villani, *supra* note 8, 225, 239 – 40. Generally on regionalism, cf. E. Griep, *Regionale Organisationen und die Weiterentwicklung der VN-Friedenssicherung seit dem Ende des Kalten Krieges* (2012), 40-44.

[11] Villani, *supra* note 8, 225, 240. This was however, also due to domestic opposition within the Senate which refused to ratify the Covenant of the Society of Nations without a clause preserving the autonomy of the so-called Monroe Doctrine, L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 160.

[12] Villani, *supra* note 8, 225, 241. These difficulties, which already existed during the establishment of the Society of Nations were an initial precursor of a difficult relationship between the Society of Nations and regional alliances, as rightly observed by Boisson de Chazournes: "D'un côté, en se présentant comme la solution exclusive pour la sécurité internationale dans l'ordre mondial, la SDN ne laissait pas d'espace à d'autres initiatives en matière de maintien de la paix et de la sécurité internationales. D'un autre côté, l'échec du système de sécurité collective de la Société (inefficacité du système de garanties de sécurité et d'imposition de sanctions, impossibilité d'attendre l'objectif du universalité) ne laissait qu'une option : la décentralisation du système de la sécurité collective", Boisson de Chazournes, *ibid.*, 79, 161. This limitation to a mere compliance clause of regional alliances with the Covenant also explains the variety of regional initiatives launched, cf. also Boisson de Chaournes, *ibid.*, 162.

[13] Villani, *supra* note 8, 225, 242. Thus, for example, the special Security Committee created by the Conference on Disarmament recommended the conclusion of regional agreements of mutual assistance and a European pact of security. Nevertheless, a veritably efficient cooperation could never be formed as the Covenant only recognised regional alliances in an exemplary manner which prevented it from using these alliances for the maintenance of international peace and security, *ibid.,* 242-43. Article 21 was also only one way in which to remedy at least party the lack of universality of the League of Nations due to its limited circle of members, and there were a series of specific agreements of assistance concluded that existed – autonomously and outside of the League of Nations, cf. Boisson de Chazournes, *supra* note 11, 79, 241.

[14] For a comprehensive review of the drafting history of the United Nations, see, Khan, 'Drafting History', *supra* note 7, 1 – 23.

[15] As a conclusion from the history of the Society of Nations, one can record that "une conception trop rigide de l'universalisme, couplée avec une attitude de mépris à l'égard du phénomène régional, n'a pas renforcé l'autorité de l'organisation universelle", Boisson de Chazournes, *supra* note 11, 79, 163. Consequently, "les rédacteurs de la Charte n'ont jamais eu pour ambition d'anéantir le phénomène des ententes particulières/régionales", *ibid*.

arrangements and organisations for coercive measures, and the obligation for the latter to inform the Security Council of enforcement measures taken. [16]

One of the most significant aspects of these propositions, which were only altered slightly before they became part of the United Nations Charter in Chapter VIII, is that cooperation with regional organisations, as well as the integration of these organisations into universal organisations, became legitimate;[17] and therefore this integration became the norm rather than the exception. Nevertheless, regionalism was placed at a disadvantage by the imposed supremacy of the Security Council and its primary responsibility for maintaining international peace and security. The Charter also established that the Security Council should act in the name of all members of the organisation while exercising its duties, so that it consequently confirms and reasserts the universalist approach favoured by the great powers.[18] Regionalist efforts include the conclusion of the Australian-New Zealand Agreement 1944, which stipulated the following:

> Pending the re-establishment of law and order and the inauguration of a system of general security, the two Governments hereby declare (…) that it would be proper for Australia and New Zealand to assume full responsibility for policing or sharing in policing such areas in the South West and South Pacific as may from time to time be agreed upon.[19]

Reacting to and rebutting of the proposals of Dumbarton Oaks, Australia proposed an amendment to the proposals, anticipating the propositions made approximately 5 years later in the *Uniting for Peace* Resolution. It said the following:

> Si le Conseil de sécurité ne prend pas de mesures lui-même et ne permet pas que des mesures soient prises en vertu d'un arrangement ou d'un mécanisme régional en vue de maintenir ou rétablir la paix internationale, aucune disposition de la présente Charte ne sera considérée comme abrogeant le droit des parties à contacter tout arrangement compatible avec la présente Charte ou d'adopter toutes

[16] United Nations, Documents de la Conférence des Nations Unies sur l'Organisation Internationale, San Francisco, 1945, Tome IV, Propositions de Dumbarton Oaks, Commentaires et Projets d'Amendements (1945), pp. 17 – 18.

[17] Villani, *supra* note 8, 225, 244. Churchill and some other realists remained unsuccessful with their idea of independent regional agencies for the preservation of peace, Khan, 'Drafting History', *supra* note 7, 1, 15, marginal number (henceforth : nm), 40.

[18] Villani, *supra* note 8, 225, 244. This preference was clearly visible in the conclusions drawn in a debate of the U.S. Senate, according to which the UN could have judged an organisation as dangerous and it could have prohibited the constitution of the concerned organisation as "illegal". Furthermore, the Security Council could have established if the areas in which a regional organisation operates merited or did not deserve regional action, *ibid*., 246; cf. also P.-M. Dupuy, 'Les grands secteurs d'intérêt des organisations internationales', in R.-J. Dupuy (ed.), *Manuel sur les organisations internationals – A Handbook on International Organizations* (1998), 563, 598-9.

[19] Australian-New Zealand Agreement of 21 January 1944, available at: http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/7E1F98EB7E415F0ECA256B7E001E5C8B , para. 15.

> mesures paraissant justes et nécessaires pour maintenir au rétablir la paix et la sécurité internationales en vertu de cet arrangement.[20]

The Latin-American countries, relying heavily on their tradition of Pan-Americanism, went a step further and adopted a Resolution containing the Act on Reciprocal Assistance and American Solidarity.[21] The treaty stipulated not only the authorisation for the use of coercive measures and even military measures in order to defend an American state, but also to prevent an attack, contravening consequently Article 51 of the United Nations Charter.[22] The supporters of the universalist approach, *inter alia*, the Netherlands, argued that "rien ne semble plus dangereux pour la paix mondiale que des groupements régionaux qui, si bonnes que soient les intentions qui les ont suscités, pourraient à tout moment se dresser l'un contre l'autre ou contre un Etat donné, faute d'une coordination appropriée."[23]

The results of the San Francisco conference can be seen either as a compromise between the universalist, centralist approach favoured by the great powers and the regionalist, decentralised approach,[24] or as a clash between two opposing doctrines, the wartime Churchillian view calling for

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[20] The documents of the conference are published in either French or English, the latter version of this particular volume is not available online. United Nations, Tome IV, *supra* note 16, Amendements aux Propositions de Dumbarton Oaks présentés par l'Australie, 773, 783.

[21] Further opposition came, *inter alia,* from France and the Arab States, Villani, *supra* note 8, 225, 252. In a similar fashion, the Arab States created the Arab League, *ibid.*, whose Pact stipulates in Article 6 that "In case of aggression or threat of aggression by a State against a member State, the State attacked or threatened with attack may request an immediate meeting of the Council. The Council shall determine the necessary measures to repel this aggression." See also for further details, Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1437 mn. 10 – 1438 mn. 14.

[22] The Act says the following: "That during the war, and until the treaty recommended in Part II hereof is concluded, the signatories of this Act recognize that such threats and acts of aggression, as indicated in paragraphs Third and Fourth above, constitute an interference with the war effort of the United Nations, calling for such procedures, within the scope of their constitutional powers of a general nature and for war, as may be found necessary, including: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; breaking of postal, telegraphic, telephonic, radio-telephonic relations; interruption of economic, commercial and financial relations; use of armed force to prevent or repel aggression.", Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), 06 March 1945, available at: http://avalon.law.yale.edu/20th_century/chapul.aspThere has been a debate especially since the attacks of 11 September 2001 whether self-defense can include "preventive measures", the traditional understanding, which is based on the wording of the article, is that self-defence presupposes the existence and occurrence of an armed attack. The High-Level Panel accepted self-defence if "the threatened attack is *imminent*, no other means would deflect it and the action is proportionate." This notion seems, in the understanding of the Panel, also to include self-defence against a proximate threat. The Panel did not take a stance on anticipatory self-defence, but recommended that in such a case, the Security Council should be informed and could authorise "such action if it chooses to", Report of the High-Level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565 (2004), 54-55, paras. 188-191; T. M. Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible', in (2005-2006) 6 *Chicago Journal of International Law*, 597, 605-608.

[23] United Nations, Tome IV, Suggestions du Gouvernement des Pays-Bas sur les Propositions de Dumbarton Oaks, *supra* note 16, 448, 461.

[24] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1434; Griep, *supra* note 10, 60.

regional councils and the centralist Wilsonian view.[25] The concessions made to the regionalist proponents concern primarily the peaceful settlement of disputes,[26] but whereas the Dumbarton Oaks proposals did not contain any disposition regarding a right of (collective) self-defense, the conference of San Francisco led to the adoption of Article 51.[27] The procedure under the Charter for the adoption of decisions by certain organs is another element that prompted an effort towards regionalism. In order for states to achieve the necessary majority vote to adopt a decision in a UN organ, a certain number of votes have to be mobilised by states, which is easier within a group containing common ties.[28]

The Cold War and the opposition of the two blocs in the Security Council and on the international stage were partly beneficial and partly detrimental for regional organisations and cooperation. Whereas the block construction led to the establishment of new regional organisations with the objective to secure the sphere of interest, as well as the creation of possible defence mechanisms such as NATO, the opposing veto powers in the Security Council also prevented all efforts for cooperation, including on a regional basis. Consequently, the end of the Cold War also constituted a veritable break for international cooperation between organisations,[29] but the Cold War itself – somewhat ironically – allowed regional organisations to emancipate themselves "from any

[25] Claude, *supra* note 9, 113.

[26] Either by the parties under Article 33 or by regional organisations under Article 52 (2).

[27] Under the Dumbarton Oaks proposals, the Security Council had, consequently, absolute authority in the area of the maintenance of international peace and security. The risks included that the Security Council could be blocked due to a veto or that it would interfere in certain geographic areas, not to mention taking too long to react in cases requiring urgent action, Villani, *supra* note 8, 225, 254. As underlined by the Turkish government, the immediate reaction triggered by the automatic mechanisms of regional arrangements is important as procedural hurdles would be disastrous for the attacked country, United Nations, Tome IV, Suggestions du Gouvernement Turc relativement aux propositions adoptees à la Conférence des quatres Puissances de Dumbarton Oaks, en vue de maintenir la Paix et la Sécurité, *supra* note 16, 670, 674.The insertion of Article 51 is due to the insistence of the Latin-American and the Arab States, C. Schreuer, 'Regionalism v. Universalism', (1995) 6 *European Journal of International Law*, 477, 478. These states also pushed heavily for the distinction in the Charter between regional arrangements and organisations of collective defence leading to the inclusion of Chapter VIII, D. L. Tehindrazanarivelo, 'The African Union's Relationship with the United Nations in the Maintenance of Peace and Security', in A. A. Yusuf, F. Ouguergouz (eds.), *The African Union: Legal and Institutional Framework* (2012), 375, 375; See also Claude, *supra* note 9, 106; C. Walter, 'Hybrid Peacekeeping: Is UNAMID a new Model for Cooperation between the United Nations and Regional Organizations?', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1327, 1328; A. Abass, 'Extraterritorial Collective Security: The European Union and Operation ARTEMIS', in M. Trybus, N. D. White, *European Security Law* (2007), 134, 148-49.

[28] M. Virally, *L'Organisation Mondiale* (1972), 281. The general practice of the UN has moved to achieving common position within a certain regional group, e.g. the EU is already based on a compromise between members of this group and thus, more likely, to find support in the wider round of the GA. Consensus in an organ of the UN – if it incorporates elements of opinion making on a regional level, can therefore be seen as a compromise between universalism and regionalism as well.

[29] It is also suggested that the "failure of imperfect implementation of the security system set up by the United Nations was prompting some regional organizations to fill the vacuum" by changing their original aims, International Law Commission, Summary record of the 2755h meeting, UN Doc. A/CN.4/SR.2755 (2003) (Mr. Kateka referring to a previous remark of Mr. Brownlie), para. 59; See also, Griep, *supra* note 10, 30.

unwelcome assertion of controlling authority by the Security Council."[30] Notwithstanding the identification of a need for greater regional cooperation in the maintenance of peace and security its usefulness persisted throughout the Cold War, and particularly in the latter years of this conflict. In 1988, the General Assembly adopted a Declaration in which it recommended that states who were members of regional arrangements or agencies use these mechanisms for the settlement of local disputes. Furthermore, significant recommendations were introduced which suggested that the Security Council, the General Assembly and the Secretary-General should encourage and endorse efforts at the regional level to prevent or remove a conflict or situation.[31]

3. The end of the Cold War and the rebirth of the Security Council - what role for regional organisations?

After the end of the Cold War[32] and the apparent rejuvenation the Security Council,[33] concerns arose on the hand that the Security Council was becoming too active, and on the other hand that it was being sidelined by its inability to take enforcement action on its own and, therefore having to rely on

[30] Claude, *supra* note 9, 116. However, this was often due to one of the two great powers, thus the US has consistently resisted the submission of the OAS under the United Nations Charter within the Security Council, *ibid.*

[31] General Assembly, Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, UN Doc. A/RES/43/51 (1988) Annex, paras. 4, 13, 17 and 24. Interestingly, the Declaration stipulates that "States party to regional arrangements or members of agencies (…) should make every effort to prevent or remove local disputes *or situations* through such arrangements and agencies" (para.4). Thus, on the first look, this Declaration seems to enlarge the competences of regional arrangements and agencies as existing under Chapter VIII where the Charter only mentions "local disputes", by borrowing the language of Chapter VI, but that regional arrangements and agencies can act in other circumstances than in local disputes can be inferred from Article 52 which states simply that the existence of such arrangements and agencies "dealing with such matters relating to international peace and security" is not precluded: T. Rensmann, 'Reform', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 25, 34, mn. 30-31; 50, nm. 87 – p. 51 mn. 90.

[32] The end of the Cold War was a turning-point in international relations, the break-up of the Soviet Union and the dissolution of the Warsaw Pact led to the creation of new states, decentralisation in an increasingly globalised world with other entities gaining influence and powers, such as MNCs and even NGOs. The US was left as the hegemonic super-power. Ethnic conflicts which were oppressed in the time of the Cold War erupted and the thrive for (regional) power and influence and economic prosperity by states also required ad called for new framework conditions for security policy on a global level, Griep, *supra* note 10, 26, 68-70; W. Hummer, M. Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2002), 807, 831.

[33] Of the 477 Chapter VII Resolutions adopted until 2009, 456 have been adopted since the end of the Cold War, P. Johansson, 'The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions', in (2009) 78 *Nordic Journal of International Law*, 309, 327. As noted by the Secretary-General in 2008, "[u]ntil 1990, there were no references in Security Council resolutions to regional organizations", Report of the Secretary-General on the relationship, *supra* note 5, 6, para. 4; A study of resolutions of the Security Council of 1988 stated that references to regional organisations were, indeed, rare and it only cites two examples in the entire period since the foundation of the UN, R. Sonnenfeld, *Resolutions of the United Nations Security Council* (1988), 103-4. See also Rensmann, 'Reform', *supra* note 31, 25, 52, mn. 92.

the so-called "coalition of the willing".[34] The form of a coalition serves two main purposes: the sharing of costs and the provision of some form of legitimisation.[35] The early 1990s were a period in which the United Nations struggled to find its identity, being as it was inhibited by the compromise in its Charter.

Thus, in his *Agenda for Peace*, Secretary-General Boutros-Ghali declared that "[t]he adversarial decades of the cold war made the original promise of the Organization impossible to fulfill", continuing that

> [i]n these past months a conviction has grown among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter – a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom'. This opportunity must not be squandered. The Organization must never again be crippled as it was in the era that has now passed.[36]

In his view, there was the necessary time frame to recommend and to push for the conclusion of the agreements under Article 43 of the Charter and for the provision of armed forces, assistance and

[34] C. Gray, 'The Charter Limitations on the Use of Force: Theory and Practice', in V. Lowe, A. Roberts, J. Welsh (eds.), *The United Nations Security Council and War* (2008), 86, 90. The SC increased its control over those authorised organizations after operation Desert Storm, now requesting regular reports as well as including time limits for operations, *ibid*. The High-Level Panel recommended in its report five criteria as guidelines regarding the use of force; seriousness of threat, proper purpose, last resort, proportional means and balance of consequences which were supported by the Secretary-General in his note, Report of the High-Level Panel, *supra* note 22, 13, 85-86 Recommendation 56; Secretary-General, Note by the Secretary-General, UN Doc. A/59/565 (2004), 2, para. 10. However, this effort was in vain, when the states at the UN World Summit in 2005 were not willing to adopt these criteria. Gray, *ibid.*, 86, 90. The General Assembly declared in the World Summit Outcome Resolution "[w]e reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security", General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), para. 79; cf. G. Abi-Saab, 'The Security Council *Legibus Solutus?* On the Legislative Forays of the Council', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowlland-Debbas* (2010), 23, 26. In this context, the concepts of peacekeeping and authorisations given to coalitions of the able and willing were not always fully distinguishable, N. Blokker, 'The Security Council and the Use of Force: On Recent Practice', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality. A Need for Change?* (2005), 1, 15.

[35] A. J. Bellamy, P.D. Williams, 'Who's Keeping the Peace? Regionalization and Contemporary Peace Operations', in (2005) 29 *International Security*, 157

[36] Secretary-General, An Agenda for Peace, UN Doc. A/47/277 & S/24111 (1992), paras. 2-3; cf. also Thematic evaluation of cooperation between the Department of Peacekeeping Operations/Department of Field Support and regional organizations, Report of the Office of Internal Oversight Services, UN Doc. A/65/762 (2011), 6-7, para. 15. The General Assembly, in its response to the report presented by the Secretary-General also emphasised the importance of cooperation between the United Nations and regional arrangements and agencies, but limited rather to the field of preventive diplomacy, the peaceful settlement of disputes, early-warning and confidence-building measures, General Assembly, An Agenda for Peace: preventive diplomacy and related matters, UN Doc. A/RES/47/120 (1993), Preamble, I. para.4, II. para. 1, IV. Preamble.

facilities to the United Nations and "not only on an ad hoc but on a permanent basis."[37] This latter proposition did not bear fruit, but the United Nations managed to conclude "stand-by arrangements with member states simplifying the provision of troops to the UN."[38] But his agenda had a broader aim than simply to boost the capacities of the UN. Part of the vision for the maintenance of international peace and security in this new era was the promotion of the role of regional organisations. He wrote in the Agenda that "regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs."[39] The Secretary-General consequently took a middle course between a universal – a strong United Nations with its own troops at its disposal – and a regional approach – cooperation with regional organisations – for maintaining international peace and security. This approach can be seen as holistic and comprehensive, addressing the issue through various actors, but it also reflects the limitations of the Charter by which the United Nations is bound.

His successor in office, Kofi Annan, took a more accentuated approach. He argued for an increased involvement of regional organisations, saying that

> [a] considerable number of regional and subregional organizations are now active around the world, making important contributions to the stability and prosperity of their members, as well as of the broader international system. The United Nations and regional organizations should play complementary roles in facing the challenges to international peace and security.[40]

[37] Secretary-General, An Agenda for Peace, *supra* note 36, 12, para. 43.

[38] A. Roberts, 'Proposals for UN Standing Forces: A Critical History', in V. Lowe, A. Roberts, J. Welsh et al (eds.), *The United Nations Security Council and War* (2008), 99, especially 100-105, 114; Standby-Arrangements for Peace-keeping, Report of the Secretary-General, UN Doc. S/1994/777 (1994).

[39] Secretary-General, An Agenda for Peace, *supra* note 36, 18, para. 64. The Security Council itself issued a presidential statement in early 1993 acknowledging the role regional organisations can play, Note by the President of the Security Council, UN Doc. S/25184 (1993); See also, Report of the Secretary-General on the Work of the Organization, Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Improving preparedness for conflict prevention and peace-keeping in Africa, UN Doc. A/50/711 – S/1995/911 (1995), 2, para. 4. Another important feature of Boutros-Ghali's Agenda was that he questioned the necessity of consent (of the government of the host state) for peacekeeping operations with "potentially huge implications regarding what peacekeepers might be asked to do.", K. Annan (with N. Mousavizadeh), *Interventions. A Life in War and Peace* (2012), 35.

[40] Secretary-General, In larger freedom: towards development, security and human rights for all, UN Doc. A/59/2005 (2005), 52, para. 213. The very same idea is put forward also in Security Council Resolution 1809, UN Doc. S/RES/1809 (2008), para. 9. A similar view was expressed by the Security Council in its resolution 1631, Security Council Resolution 1631, UN Doc. S/RES/1631 (2005), preamble. Cf also General Assembly, Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security", UN Doc. A/RES/49/57 (1994) Annex. The advantages of cooperating with regional organisations were further stressed by the report of the Secretary-General on the relationship between the UN and regional organisations: "There are compelling underlying reasons to encourage and support the role of regional organizations in peacekeeping. These include their proximity to the crisis and their familiarity with the actors and issues involved in a particular crisis. More importantly, regional

This idea of a geographic and multipolar distribution of responsibility concerning the maintenance of international peace and security is not new. Churchill advocated strongly for "a collective security system organized around several geographic regions, which would have resulted in a multi-polar infrastructure for dealing with threats to international peace and security."[41]

However, Kofi Annan went even further in his report, entitled *In larger freedom*, in which he said clearly that "the time is now ripe for a decisive move forward: the establishment of an interlocking system of peacekeeping activities that will enable the United Nations to work with relevant regional organizations in predictable and reliable partnerships."[42] Consequently, an argument is made for synergy between peacekeeping activities, which are based on ad hoc agreements, and cooperation with regional organisations.[43] This approach conflates the previously proposed standing United

organizations have a keen interest in resolving crises that erupt in their backyard. Nevertheless, regional organizations may be caught up in and made less effective because of the complex dynamics of regional conflicts. They may also lack substantive political and diplomatic leverage, and/or economic and military capacities, to successfully address peace and security challenges, especially in conflicts involving multiple stakeholders within and outside the region.", Report of the Secretary-General on the relationship, *supra* note 5, 7, para.9. In another report, he expressed himself similarly "[t]he scope for optimizing the resources and stimulating the political will of the international community in serving peace and security through an effective operational partnership between the United Nations and regional and subregional organizations is vast; and the time is also ripe. That is why we agreed upon the vision of a regional-global security partnership at the fifth high-level meeting. (…) Overall, it means that the international community stands to benefit in the maintenance of peace and security from a balance between the intimate knowledge of a conflict situation possessed by a regional organization and the global legitimacy and authority of the Security Council. More specifically, it might mean two things. First, that the global security mechanism of the future rests on a balanced distribution of capacity and resources across all regions around the world. This will relieve certain regions and alliances of the burden they face at present, financial and human, and the risks they confront, political and military, in undertaking the principal responsibility for maintaining peace and security. Secondly, the Security Council must always retain primary responsibility for that task, but, within that context, it should be able to rely upon, and should seek, a willing and capable subsidiary role on the part of regional and other intergovernmental organizations in peace and security from every region of the world, without exception.", A regional-global security partnership: challenges and opportunities, Report of the Secretary General, UN Doc. A/61/204–S/2006/590 (2006), 18, paras. 87-88.

[41] D. Doktori, 'Minding the Gap: International Law and Regional Enforcement in Sierra Leone', (2008) 20 *Florida Journal of International Law*, 329, 330

[42] Secretary-General, In larger freedom, *supra* note 40, 31, para. 112. One has to note in this context that question whether final decisions concerning peace and security are taken on a universal or rather a regional level was a source of controversy during the negotiations leading up to the establishment of the League of Nations as well as during the San Francisco conference in 1945, Hummer, Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', *supra* note 32, 807, 813 – 15; the rising acknowledgment of relations between the UN and regional organisations is also witnessed in another, later report of the Secretary-General, where it is said "[w]ith the increase in the interface and synergies between the United Nations and regional organizations, particularly the African Union, there appears to be recognition that regionalism as a component of multilateralism is necessary and feasible.", Report of the Secretary-General on the relationship, *supra* note 5, 1.

[43] Another argument submitted is that regarding the complexity of attributed tasks to international forces and the insufficient means they have at their disposal; indeed, it became difficult for states to carry out the new multidimensional operations, which led the Security Council to authorise member states or international organisations to come to the help of UN forces, R. Kolb, G. Porretto, S. Vité*, L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoires* (2005), 39.

Nations forces, on the basis of agreements concluded under Article 43 of the UN Charter, with the practice and structure of peacekeeping as developed in practice throughout the existence of the United Nations, and the cooperation with regional organisations. A clear expression of this policy can also be found in the Report of Secretary-General Ban Ki-moon on the relationship between the United Nations and regional organisations in the maintenance of international peace and security.[44] He points out that

> [t]he past decade has witnessed a strengthened relationship, at different levels, between the United Nations and regional organizations. Resolutions and presidential statements adopted by the Security Council signal a deepening recognition of the growing role and influence of regional organizations in international peace and security (…) This has yielded interesting perspectives and fruitful cooperation between the United Nations and regional organizations. It is, therefore, critical that regional organizations be encouraged and empowered to take actions to restore peace and security in conflicts and areas under their respective purview. These actions, however, cannot be viewed in isolation as many actors have a part to play in attaining overall global security.[45]

The proposition of the conclusion of agreements under Article 43 and the vision of standing United Nations forces with enforcement capacity failed to receive the necessary support by states. As Higgins says

> it remains baffling that (…) the Secretary-General (…) suggest[ed] that the UN should establish a rapid reaction force (..), when the establishment of what he terms 'the Security Council's strategic reserve' required exactly all those commitments of political will that the member states are so manifestly unwilling to make.[46]

This lack of will by states was unsurprising, as states have started to rely on regional organisations with their more advanced military capabilities for peace-keeping and peace enforcement purposes

[44] This holistic approach is still valid for the relations of the United Nations with regional organisations, see, *infra* 1.3, 1.6. – 1.9.

[45] Report of the Secretary-General on the relationship, *supra* note 5, 5, para. 3. Contrary, "[u]ntil 1990, there were no references in Security Council resolutions to regional organizations. From 1991, references to regional organizations' engagement in prevention and resolution of conflicts became common. The period that followed saw resolutions expressly recalling Chapter VIII of the Charter; conveying appreciation of regional efforts aimed at the settlement of conflicts; supporting cooperation between the United Nations and regional organizations or endorsing regional efforts (see S/25184). While most of the references pertained to attempts at peaceful settlement of disputes, in 1992 the Security Council for the first time authorized the use of force by a regional organization. Since 2004, the Council's relationships with respect to regional organizations have grown." Ibid., para. 4.

[46] R. Higgins, 'Peace and Security Achievements and Failures', in (1995) 6 *European Journal of International Law,* 445, 451. The Security Council also reacted to Boutros-Ghali's Proposal for UN Rapid Reaction Force for Peacekeeping Operations, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1 (1995), 11, para. 44; Statement by the President of the Security Council, UN Doc. S/PRST/1995/9 (1995), 2, final paragraph.

(*infra*. 1.2). In this context, the High-level Panel report welcomed the decision of the European Union "to establish standby high readiness, self-sufficient battalions that can reinforce United Nations missions" and also mentioned the African Union favourably.[47] Arguably, one can speak of the establishment of standing UN forces through "outsourcing" to regional organisations which might have united proponents of regional organisations and supporters of standing UN forces. The Panel also recognised that "in recent years, decisions to authorize military force for the purpose of enforcing the peace have primarily fallen to multinational forces" and that

> there has been a trend towards a variety of regional- and sub-regional based peacekeeping missions (…) [which] poses a challenge for the Security Council to work closely with each other and mutually support each other's efforts to keep the peace and ensure that regional operations are accountable to universally accepted human rights standards.[48]

Boutros-Ghali's proposal was thus abandoned in favour of more modest ideas and cumulative ameliorations, including regional initiatives.[49] Consequently, throughout the 1990s the United Nations remained unable to deploy forces quickly and effectively on the ground. The Brahimi Report stated clearly that "few of the basic building blocks are in place for the United Nations to rapidly acquire and deploy the human and material resources required to mount any complex peace operation in the future." It also highlighted other arguments brought forward by Member States against standing UN forces, stating that

> [m]any Member States have argued against the establishment of a standing United Nations army or police force, resisted entering into reliable standby arrangements, cautioned against the incursion of financial expenses for building a reserve of equipment or discouraged the Secretariat from undertaking planning for potential operations prior to the Secretary-General having been granted specific, crisis-driven legislative authority to do so. Under these circumstances, the United Nations cannot deploy operations "rapidly and effectively" within the timelines suggested.[50]

The increased support for regional organisations by Member States was interconnected with traditional troop contributors decreasing their support to peacekeeping operations.[51] This

[47] Report of the High-Level Panel, *supra* note 22, 35-36, para. 94; 58, para. 210.
[48] *Ibid.*, 58, para. 210; 60, para. 220.
[49] Roberts, 'Proposals for UN Standing Forces', *supra* note 38, 99, 120.
[50] Panel on United Nations Peace Operations, Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 and S/2000/809 (2000), 15, paras. 85, 90.
[51] "Examples of non-UN multilateral peace-support operations include various NATO-led missions to the Balkans since 1995; the Italian-led operation in Albania in 1997 (Operation Alba); the 1997 Mission Interafricaine de Surveillance des Accords de Bangui (MISAB) in the Central Africa Republic; the ECOWAS Monitoring Group (ECOMOG) in Sierra Leone from 1998 to 2000; the International Force in East Timor (INTERFET) between 1999 and 2000; the Peace-Truce Monitoring Group in Bougainville (BELISI) from 1998 to

development was more initiated by the end of the Cold War and the omission of the conflict between the West and the East than by the report of the Secretary-General and his plea.

Whereas the Charter preserves a compromise between a universalist and regionalist approach regarding the maintenance of international peace and security, the practice of the 1990s demonstrates that this task could not be fulfilled differently than through a multilateral, decentralised construction in which the Security Council acts primarily as the authorising entity. In the new era of cooperation with regional organisations there are new problems and challenges to face which necessitate a professional, concerted approach to peacekeeping. The Secretary-General said frankly that "the real challenge for the Security Council is to replace the improvised, at times selected, resource-skewed approach with more planned, consistent and reliable arrangements."[52]

The different organisations introduced in this part are all, in one way, *sui generis* organisations, as they were all created under different political circumstances and considerations and with an individual legal framework. This part focused on the framework as well as on the development of the broader area of maintenance of international peace and security by the United Nations and regional organisations. Thus, the effect of these developments on the applicable legal framework for peacekeeping and peace enforcement operations as well as in practice (*infra* 1.2., 1.3), and in the legal framework applicable in the domain of cooperation between the United Nations and regional organisations (*infra* 1.3), are analysed in the following parts. Chapter II will then focus exclusively on the cooperation between the United Nations and regional organisations, and will in particular trace the developments since the beginning of this millennium.

1.2. The legal framework of peacekeeping and peace enforcement operations – Chapters VI and VII of the UN Charter

Chapters VI and VII of the United Nations Charter set out the legal framework applicable to the peaceful settlement of disputes as well as to action with respect to threats to the peace, breaches of the peace and acts of aggression. The United Nations Charter, which was drafted after the atrocities of the Second World War, was also conceived with the intention "to save succeeding generations

2003; the European Union Mission in the FYROM (Operation Concordia) in 2003; the EU Mission in the Democratic Republic of Congo (Operation Artemis) in 2003; the African Mission in Burundi (AMIB) in 2003; and the (US-, South African-, and Moroccanled) ECOWAS mission to Liberia in 2003.", M. Berdal, 'The Security Council and Peacekeeping', in V. Lowe, A. Roberts, J. Welsh et al (eds.), *The United Nations Security Council and War* (2008), 175, 198 fn. 75. For the development of contributions to peacekeeping operations, see D. B. Bobrow, M. A. Boyer, 'Maintaining System Stability: Contributions to Peacekeeping Operations', (1997) 41 *The Journal of Conflict Resolution*, 723, 735 – 41 .

[52] Report of the Secretary-General on the relationship, *supra* note 5, 7, para. 12.

from the scourge of war, which twice in our life has brought untold sorrow to mankind."[53] In order to achieve this goal, the drafters of the United Nations Charter, firstly, laid down the prohibition of the unilateral use of force by states which is stipulated in Article 2 (4) and, secondly, centralised the control of the use of force under the Security Council through Chapter VII of the Charter.[54]

The blockade within the Security Council during the Cold War led to the failure of the implementation of the agreements under Article 43 (cf., *infra* 1.1.).[55] Nevertheless, "the UN system proved sufficiently flexible to allow the Security Council to take force measures not expressly provided for in the Charter."[56] As the Security Council could not order the use of force using its own standing army, it resorted to either "authorising" or "calling upon" Member States to use force.[57] The establishment of the concept of peacekeeping was therefore a reaction to both the blockade in the Security Council and the lack of agreements under Article 43, "even though there was no express basis for peacekeeping operations in the Charter scheme."[58]

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[53] Preamble of the Charter of the United Nations, first paragraph.

[54] C. Gray, *International Law and the Use of Force* (2008), 254; Gray, 'The Charter Limitations on the Use of Force', *supra* note 34, 86, 86.

[55] Virally, *supra* note 28, 469-70 ; Gray, *supra* note 54, 254; N. Krisch, 'Chapter VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. Introduction to Chapter VII: The General Framework', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.*), The Charter of the United Nations. A Commentary. Volume II* (2012), 1237, 1241 mn. 7. Another reason was more generally the lack of the possibility to reach unanimity of the permament members, M. Bothe, 'Peacekeeping', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1171, 1175 mn. 2; General Assembly, Forty-ninth Session, 48th meeting, UN Doc. A/49/PV.48 (1994), statement of Malaysia, 6.

[56] Gray, 'The Charter Limitations on the Use of Force', *supra* note 34, 86, 88. As the first Secretary-General of the UN Trygve Lie, noted in his memoirs: "During the spring of 1948, when it was already evident that there would be no possibility of implementing Article 43 in the foreseeable future, I cast about with my advisers for a new approach that might provide the Security Council with some sort of armed force. The outbreak of hostilities in Palestine gave urgency to such thinking, and after much consideration I decided on at least floating a trial balloon for the idea of a small internationally recruited force which could be placed by the Secretary-General at the disposal of the Security Council", T. Lie, *In the Cause of Peace: Seven Years with the United Nations* (1954), 98. Generally regarding UN standing forces, see, Roberts, 'Proposals for UN Standing Forces', *supra* note 38, 99 – 130.

[57] Gray, 'The Charter Limitations on the Use of Force, *supra* note 34, 86, 88.

[58] Ibid. 86, 88. The Legality of Peacekeeping Operations was confirmed in the Certain Expenses Case by the ICJ and is now not disputed. The very same reasoning should apply for authorisations of peace enforcement operations and it is now widely accepted. Furthermore, it is supported by UN practice N. Krisch, 'Article 42', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1330, 1337 mn. 11; N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', in (2000) 11 *European Journal of International Law*, 541, 547-49; E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 260-63; T. M. Franck, *Recourse to Force. State Action Against Threats and Armed Attack* (2002), 24-31; A. Orakhelashvili, *Collective Security* (2011), 223-26; against, i.e. B. H. Weston, 'Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy', in (1991) 85 *American Journal of International Law*, 516; 518-22; M. Bothe, 'Les limites des pouvoirs du Conseil de Sécurité', in R.-J. Dupuy (ed.), *Le développement du rôle du Conseil de sécurité* (1993), 67, 73-74 ;J. Quigley, 'The "Privatization"' of Security Council Enforcement Action: A Threat to Multilateralism, (1995-1996) 17 *Michigan Journal of International Law*, 249, especially 261-83; other authors give a more cautious, policy-oriented view such as Chesterman who considers the delegation

Throughout its existence, the Security Council has relied only on the determination of a situation as a "threat to international peace and security" or sometimes a "breach of the peace" as the trigger for the application of Chapter VII of the Charter. [59] The term "threat to the peace" in particular involves wide powers of discretion as

> il s'agit en effet d'une hypothèse très vague et élastique qui, contrairement à l'agression et à la rupture de la paix, n'est pas nécessairement caractérisée par des opérations militaires ou en tout cas impliquant l'utilisation de la force, et qui par conséquent peut correspondre aux comportements les plus variés des Etats.[60]

A determination of an act of aggression would also entail the responsibility of the aggressor state under international law, and even individual criminal responsibility[61] and both reasons explain the political preference of the Security Council to rely on the concept of a "threat to the peace" to mandate peacekeeping or peace enforcement operations.

1. The evolution and definition of peacekeeping – peacekeeping vs. peace enforcement

An analysis of peace-keeping operations necessitates a definition of peacekeeping and an exploration of its origin.[62] There is no comprehensive definition of peacekeeping which would comprise all operations and functions exercised within an operation, as each operation has its specific mandate

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of enforcement powers at least partially to be based on national interests by states, S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), 163-218. Dinstein considers that the authorisation to use force amounts to a mere recommendation under Article 39, Y. Dinstein, *War, Aggression and Self-Defence* (2005), 310. This authorisation has no other qualifying elements for regional organisations under Chapter VIII (*ibid.*, 311). For a critique of Dinstein's view, Orakhelashvili, *ibid.* 225-226; See also Report of the High-Level Panel, *supra* note 22, 57, para. 203; 58, para.210; cf. N. Krisch, 'Article 42', *ibid.*, 1330, 1337 mn. 12 – 1338 mn. 13; T. M. Franck, *Fairness in International Law and Institutions* (1998), 299-300.

[59] J. Allain, 'The True Challenges to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', (2004) 8 *Max Planck Yearbook of United Nations Law*, 237, 245.

[60] B. Conforti, 'Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression', in R. J. Dupuy (ed.), *The Development of the Role of the Security Council* (1993), 51, 53 ; see also N. Krisch, 'Article 39', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), The Charter of the United Nations. A Commentary. Volume II (2012), 1272, 1278 mn. 12 – 1293 mn. 39.

[61] Individual criminal responsibility of the involved soldier and possibly the commanding officer(s) either on the basis of customary international law or domestic criminal law. Subject to a decision to be taken after 1 January 2017 by a two-third majority of States Parties to the Rome Statute and subject to the ratification of the amendment to the Rome State by thirty States Parties, the ICC will have effective jurisdiction over the crime of aggression. See also, Allain, *supra* note 59, 237, 245.

[62] It is not necessary for the purposes of the present study to delve into the abyss of the origins of peace-keeping, but rather to focus on some key developments. For the development of peacekeeping and its problems and challenges, see i.e. Annan (with Mousavizadeh), *supra* note 39, especially pp. 29 – 78; J. P. Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict', in (2001) 50 *Air Force Law Review*, 1, 6-32

and nature,[63] despite good arguments made for such an agreed definition.[64] Likewise, there has been an evolution in the conceptual understanding, as well as in the organisational implementation, of peacekeeping operations since the creation of the first mission.[65] According to the United Nations itself, peacekeeping operations are,

> [o]perations involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation (…) [achieving] their objectives not by force of arms, thus contrasting (…) with the 'enforcement action' (…) under Article 42.[66]

Peacekeeping operations can be separated into two broad categories; "observer missions which consist largely of officers who are almost invariably unarmed and peace-keeping forces, which consist of lightly armed infantry units, with the necessary logistic support elements."[67] Peacekeeping operations are traditionally based on the principles of consent of the host-state, neutrality, impartiality of the force and non-intervention in the state's internal affairs and the non-use of force,

[63] As correctly observed by Higgins: "To some, peacekeeping is a broad concept, referring to the entire role of the UN in maintaining, or restoring, international peace. According to this definition any book on peacekeeping must refer not only to UN Forces, but to investigation committees, special representatives of the Secretary-General and diplomacy within the UN system. Others have suggested that peacekeeping is a term which has come to refer to UN Forces and observer groups which are operational on a territory with the consent of the government. Yet others have insisted that the term peacekeeping cannot include UN observers. There is, of course, no one 'correct' definition", R. Higgins, *United Nations Peacekeeping 1946 – 1967: Documents and Commentary, Vol I: The Middle East* (1969), ix.

[64] As the former UN Assistant Secretary-General for Legal Affairs wrote: "Insistence on clarifying the nature and meaning of peacekeeping is not merely a lawyer's obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution", Ralph Zacklin, 'Managing Peacekeeping from a Legal Perspective', in D. Warner (ed.), *New Dimensions of Peacekeeping* (1995), 159, 159. This is, in addition to the wish of the ILC to follow the pattern of the articles on State Responsibility, also the reason why the ILC decided not to include a specific rule for the attribution of conduct in peacekeeping operations in the articles on the responsibility of international organisations, G. Gaja, Second Report on responsibility of international organizations, UN Doc. A/CN.4/541 (2004), 16, para.34. The absence of a universally agreed definition has also been criticised as giving states carte blanche: "no single definition of "peacekeeping" is accepted by the international community. The absence of one specific definition has resulted in the term being used to describe almost any type of behavior intended to obtain what a particular nation regards as "peace." Moreover, there can be even discrepancies within national practice; there are even slight inconsistencies within U.S. doctrine and other publications that define peacekeeping and related terms.", A. Gillman, W. Johnson (eds.), Operational Law Handbook, The Judge Advocate General's Legal Center & School (2012), 56, para. III A. For a general overview, cf. M. W. Doyle, N. Sambanis, 'Peacekeeping Operations', in T. Weiss, S. Daws (eds.), *The Oxford Handbook on the United Nations* (2007), 323, 323- 34.

[65] For a good overview, see e.g. S. Chesterman, 'The Use of Force in UN Peace Operations', External Study, UN Peacekeeping Best Practices (2004).

[66] United Nations, *The Blue Helmets: A Review of United Nations Peacekeeping* (1990), 4; K. E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping & the Use of Force', (1998-1999) 27 *Denver Journal of International Law and Policy,* 239, 244.

[67] United Nations, *The Blue Helmets, ibid.*, 8.

except in cases of self-defense.[68] Consent of the host-state is necessary as long as the peacekeeping mission is not established under Chapter VII of the Charter.[69]

Traditionally, the major difference from peace enforcement operations is that the right to the use of force is limited to self-defense.[70] Some confusion has been inserted by the use of certain terminology such as "robust" or "muscled or muscular peacekeeping". The High-Level Panel gave a very good definition of the distinction between peacekeeping and peace enforcement which is noteworthy here:

> [The] Discussion of the necessary capacities has been confused by the tendency to refer to peacekeeping missions as "Chapter VI operations" and peace enforcement missions as "Chapter VII operations" – meaning consent-based or coercion-based, respectively. This shorthand is often also used to distinguish missions that do not involve the use of deadly force for purposes other than self-defence, and those that do.
>
> Both characterizations are to some extent misleading. There is a distinction between operations in which the robust use of force is integral to the mission from the outset (e.g., responses to cross-border invasions or an explosion of violence, in which the recent practice has been to mandate multinational forces) and operations in which there is a reasonable expectation that force may not be needed at all (e.g. traditional

[68] M. Zwanenburg, *Accountability of Peace Support Operations* (2005), 13, cf. A. Ryniker, 'Quelques commentaires à propos de la Circulaire du Secrétaire général des Nations Unies du 6 août 1999', (1999) 836, *Revue internationale de la Croix-Rouge*, 795, available online at : http://www.icrc.org/web/fre/sitefre0.nsf/html/5FZFPQ . The Peace Support Operations Doctrine of the AU only lists consent and impartiality as criteria distinguishing peace support operations from war, Headquarters of the African Union, African Standby Force, Peace Support Operations Doctrine (2006), Chapter 3, para. 3, 3-10 – 3-14; paras. 35-47.

[69] Zwanenburg, *ibid.*, 14, 18; D. Zaum, 'The Security Council, the General Assembly, and War: The Uniting for Peace Resolution' in V. Lowe, A. Roberts, J. Welsh et al (eds.), The United Nations Security Council and War (2008), 154, 171; The Report of the Secretary-General, An Agenda for Peace also implicitly says that consent may not always be necessary, *supra* note 36. In 2005 Eritrea's demand to withdraw UN peacekeepers of certain nationalities was condemned by the Secretary-General and considered to contravene "Eritrea's obligation under the United Nations Charter to respect the exclusively international character of the United Nations staff. (…) The request is inconsistent with the authority of the Secretary-General, in whom command of the peacekeeping operation has been vested by the Security-Council, as well as with the international responsibilities of the Secretary-General and the staff of the Organization", Department of Public Information, Secretary-General Condemns Eritrea's Decision to Expel Peacekeepers, UN Doc. SG/SM/10250 AFR/1298 (2005), available at: http://www.un.org/News/Press/docs/2005/sgsm10250.doc.htm

[70] Cox, *supra* note 66, 239, 248. The Secretary-General of the United Nations Dag Hammarskjöld already warned in a report in 1958 that a wide interpretation of the right of self-defence would blur the distinction between peacekeeping and peace-enforcement, Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary-General, UN Doc. A/3943 (1958), 31, para. 179. The Capstone Doctrine was not helpful to clarify the distinction, for example, it speaks of "proactively using force in defense of their mandates." Furthermore, it elaborates upon the difference between peacekeeping and peace enforcement "[w]hile robust peacekeeping involves the use of force at the tactical level with the consent of the host authorities and/or the main parties to the conflict, peace enforcement may involve the use of force at the strategic of international level, which is normally prohibited for Member States under Article 2(4) of the Charter unless authorised by the Security Council", United Nations Peacekeeping Operations, Principles and Guidelines (2008), 34-35, 19, para.2.2

> peacekeeping missions monitoring and verifying a ceasefire or those assisting in implementing peace agreements, where blue helmets are still the norm).
>
> But both kinds of operations need the authorization of the Security Council (Article 51 self-defence cases apart), and in peacekeeping cases as much as in peace-enforcement cases it is now the usual practice for a Chapter VII mandate to be given (even if that is not always welcomed by troop contributors). This is on the basis that even the most benign environment can turn sour – when spoilers emerge to undermine a peace agreement and put civilians at risk – and that it is desirable for there to be complete certainty about the mission's capacity to respond with force, if necessary. On the other hand, the difference between Chapter VI and VII mandates can be exaggerated: there is little doubt that peacekeeping missions operating under Chapter VI (and thus operating without enforcement powers) have the right to use force in self-defence – and this right is widely understood to extend to 'defence of the mission'.[71]

Self-defence in peacekeeping operations covers both cases of individual and collective self-defence and may also include "resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council."[72] The right of collective self-defence in the peacekeeping context could also serve to delimit peacekeeping from peace enforcement operations. Should it be raised as an argument by a state, it indicates – albeit implicitly – that this given operation is to be considered as a peacekeeping operation.

2. Peacekeeping post-Cold War – The ambiguous practice of the Security Council: blurring the lines between peacekeeping and peace enforcement

The end of the Cold War and the new possibilities for action by the Security Council transformed peace-keeping as it had been conceived up until then. As Kofi Annan wrote:

> Only with the end of the Cold War did the proliferation in peacekeeping really begin (…) In these changed circumstances, the principles and practices which had evolved in the Cold War period suddenly seemed needlessly self-limiting. Within and outside the UN, there is now increasing support for peacekeeping with teeth. When lightly-armed peacekeepers were made to look helpless in Somalia and Bosnia, member

[71] Report of the High-Level Panel, *supra* note 22, 58, paras. 211 – 13; cf. also R. Zacklin, 'The Use of Force in Peacekeeping Operations', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force*, 91, 94; Cf. C. Tomuschat, 'The European Court of Human Rights and the United Nations', in A. Føllesdal, B. Peters, G. Ulfstein (eds.), *The European Court of Human Rights in a National, European and Global Context* (2013), 334, 344.

[72] United Nations Security Council, Report of the Secretary-General on the Implementation of Security Council resolution 340 (1973), UN Doc. S/11052/Rev.1 (1973) ; United Nations, Memorandum to the Senior Political Adviser to the Secretary-General, 1993 *United Nations Judicial Yearbook*, 371, 371-2.

> states and public opinion supported more muscular action; an increasing number of situations seem to require it, and the Charter of the United Nations provides the legal authority for it."[73]

In addition to "peacekeeping with teeth", post 1990 peacekeeping operations were often complex and multidisciplinary, including "civilian police, electoral personnel, human rights experts (…) involving nothing less than the reconstruction of an entire society and state."[74] The multiplication of tasks was attended by a more extensive interpretation of the right to use force in self-defence, especially in the so-called "third-generation peacekeeping operations", allowing the use of force under Chapter VII of the United Nations for other specified purposes than self-defence.[75] It can also be argued that the penetration of international law by human rights law has contributed to the changing nature of peacekeeping operations.[76] This increasing complexity and the increasing demands on a peacekeeping operation and peacekeepers since the end of the Cold War have led to missions blurring the previously comparatively clear line between peacekeeping and peace enforcement;[77] indeed, in this vein, one author refers to these operations as "militarised peacekeeping" operations.[78] Gray specifically mentions the cases of Yugoslavia and Somalia when peacekeeping forces were endowed with functions that went beyond the concept of peacekeeping

[73] K. Annan, 'UN Peacekeeping Operations and Cooperation with NATO', (1993) 47 (5) *Nato Review*, 3-7.

[74] B. Boutros-Ghali, 'Beyond Peacekeeping', (1992-1993) 25 *New York University Journal of International Law & Politics*, 113, 115. "In a few exceptional cases, the UN has governed an area under an interim or transitional administration mandate, as in (…) Kosovo (Serbia and Montenegro) and Timor-Leste (formerly East Timor). In addition to the functions fulfilled by other multidimensional peacekeeping operations, a UN interim or transitional administration has authority over the legislative, executive and judicial structures in the territory or country.", Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, Handbook on United Nations Multidimensional Peacekeeping Operations (2003), 20.

[75] Zwanenburg, *supra* note 68, 19. This is also referred to as "robust peacekeeping" or "peacekeeping with muscle". It is argued in the literature that an expansion of the concept of self-defence or a re-interpretation as including the defence of the mandate for the purposes of peacekeeping would be incorrect, N. Krisch, 'Article 42', *supra* note 58, 1330, 1336 fn. 35. As Cox points out the confusion about the notion of use of force in self-defence in peacekeeping operations is linked to the blurring of the distinction between peace-keeping and peace-enforcement operations, Cox, *supra* note 66, 239, 258.

[76] The prime example of the "humanisation", if one wants to designate it as such, of peacekeeping operations is the increased reliance on the protection of civilians and especially women and children in peacekeeping operations as well as the various resolutions and statements regarding the application of human rights law, *infra*, 2.3. and 2.4. Cf. also Franck, *supra* note 22, 597, 600-601; J. Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (2011), 3. Another explanation is the tension between the traditional non-intervention principle of peacekeeping and the quest for the effectiveness of the operation.

[77] T. D. Gill, 'Characterization and Legal Basis for Peace Operations', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 135, 136. See also L. Condorelli, 'Pertinence du DIH pour les organisations internationales et les alliances', in S. Kolanowski, Y. Salmon (eds.), *Proceedings of the Bruges Colloquium. The Impact of International Humanitarian Law on current security policy trends* (2001), 25, 28; Zacklin, 'The Use of Force in Peacekeeping Operations', *supra* note 71, 91, 91 – 100. For the fluidity of the distinction between peace-keeping and peace enforcement, see Headquarters of the African Union, *supra* note 68, Chapter 3, 3-2, Figure 1-3.

[78] Sloan, *supra* note 76, 3.

as it had been previously understood.[79] However, even during the Cold War, the essential characteristics of traditional peacekeeping, such as consent, impartiality, neutrality and the use of force being limited to self-defence, were stretched or ignored when the Security Council acted as it saw fit: "[I]nvolvement of the United Nations in internal conflicts made the strict adherence to these characteristics less feasible and less compatible with the Council's objectives in various situations."[80]

The vague language of mandates prescribed by the Security Council in particular peacekeeping operations does not shed light upon the distinction between peacekeeping and peace enforcement as well.[81] While, on the one hand, this practice might be appropriate and necessary to allow the troops to react to unforeseen circumstances, on the other hand, it simultaneously further obscures the vital difference between peacekeeping and peace enforcement.

This practice is also dubious as it might have a direct impact on the question of international responsibility. Convoluted and vague mandates without clear and defined roles for the involved actors may lead to the authorising entity being considered as responsible for violations of international law. The application of substantive law to peacekeeping forces is also affected. These unclear mandates impede a determination as to whether international humanitarian law is applicable to a peacekeeping operation.[82] This being the case, peacekeepers would fall under the regime of international humanitarian law, would be bound by these rules and could be attacked from the moment of their participation as combatants.[83]

Yet another aggravating factor is that whereas traditional operations were often regarded as being established under Chapter VI rather than under Chapter VII, the new tasks also mean that the Security Council is now relying exclusively on Chapter VII for mandating purposes. [84] Some criticism

[79] Gray, *supra* note 54, 282, also 310. The distinction between peacekeeping and peace enforcement forces was also blurred "through the establishment of both peacekeeping and enforcement forces to operate at the same time." (*ibid.*, 289).

[80] M. J. Matheson, *Council Unbound. The Growth of UN Decision Making in Conflict and Post-Conflict Issues after the Cold War* (2006), 119, 127-28.

[81] The authorisation to use military force given to UN peacekeeping operations is often equally formulated in broader terms, for instance: "Authorizes UNOCI to use all necessary means to carry out its mandate within its capabilities and its areas of deployment", Security Council Resolution 1528, UN Doc. S/RES/1528 (2004), para.8; also Security Council Resolution 1769, UN Doc. S/RES/1769 (2007), para. 15; Security Council Resolution 1996, UN Doc. S/RES/1996 (2011), para.4.

[82] It is of course correct to argue that classification as peace-keeping or peace enforcement is of limited use as the application of IHL depends on factual circumstances, but an unclear mandate makes this process more difficult. See, C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', in (1998) 1 *Yearbook of International Humanitarian Law*, 3, 11.

[83] The application of international humanitarian and human rights law to peacekeeping operations is examined in, *infra*, 2.3. and 2.4.

[84] Cf. Kolb, Porretto, Vité, *supra* note 43, 38. Pellet considers Chapter VII also to be "safer legal ground", with the qualification "that it must be read in a dynamic perspective and in the light of the development of the law

has been made which suggests that the Security Council is now also blurring the distinction between Chapters VII and Chapters VIII and, indeed, there are resolutions which cannot be fitted either into the category of peacekeeping or peace enforcement nor be considered as mandated under Chapter VII *or* Chapter VIII:

> Acting under *Chapter VII* of the Charter of the United Nations, (…) authorizes Member States participating in the ECOWAS forces in accordance with *Chapter VIII* together with the French forces supporting them to take the necessary steps to guarantee the security and freedom of movement of their personnel and to ensure, without prejudice to the responsibilities of the Government of National Reconciliation, the protection of civilians immediately threatened with physical violence within their zones of operation, using the means available to them, for a period of six months after which the Council will assess the situation on the basis of the reports referred to in paragraph 10 below and decide whether to renew this authorization.[85]

These developments all increase the complexity and the difficulty in legally analysing the phenomenon of peacekeeping operations in the context of the United Nations,[86] a phenomenon which exists only in unwritten law.[87] In addition, this particular cited example illustrates that the practice of the Security Council is also problematic with regard to the application of Chapter VIII of the UN Charter.[88] Moreover, they conflate the established practice of the Security Council, which distinguished between peacekeeping operations under United Nations command and control, and enforcement action or peace enforcement operations as authorised by groups of states or regional organisations.[89]

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since 1945", A. Pellet, 'The Road to Hell is Paved with Good Intentions - The United Nations as Guarantor of International Peace and Security: a French Perspective', in C. Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective* (1995), 113, 130. The wording of Article 42 does not exclude peace-keeping operations, cf. Orakhelashvili, *supra* note 58, 291.

[85] Security Council Resolution 1464, UN Doc. S/RES/1464 (2003), para.9. Generally, it seems correct to say that the system of delegated enforcement action which developed within the United Nations due to the lack of implementation of the foreseen agreements and mechanisms under Article 43 and the Charter "brings military enforcement action under Article 42 (…) very close to the system envisaged for regional organisations under Chapter VIII.", N. D. White, 'Towards Integrated Peace Operations: The Evolution of Peacekeeping and Coalitions of the Willing', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 1, 2.

[86] So it is argued that "Some UN operations have consisted of a "combination of traditional peacekeeping, peacekeeping for enforcement purposes, multifunctional peacekeeping, as well as the delegation of the power to use force to member states or regional organisations", G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 197.

[87] Meaning that it was developed in practice and that it is seen as derived from the implicit powers of the Security Council under the Charter.

[88] It will be dealt with more extensively in *infra*, 1.3.

[89] On the practice of the United Nations in this field and international responsibility, see *infra*, 2.5.

As such, it is not very surprising that, in practice, there has been a great deal of criticism from within[90] and outside the United Nations regarding these ambiguous, ambivalent, and unclear mandates handed out by the Security Council which blur the difference between peacekeeping and peace enforcement.

A better criterion to distinguish between peacekeeping and peace enforcement operations would be "consent of the host-state"; an operation based on consent is not – *per se* – violating international law, whereas an operation without consent of the host-state is justified by the power and authority of the Security Council under the United Nations Charter. The lack of consent would thereby be an indicator that the operation holds an enforcement character. Nevertheless, the practice of the Security Council is not absolutely consistent and Secretary-General Boutros-Ghali and the Security Council acknowledged that in some cases the consent of all parties to the conflict might not be necessary.[91]

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[90] The Special Committee on Peacekeeping Operations was highly critical:
"*United Nations peacekeeping operations are frequently deployed into volatile environments with lingering sporadic violence and where the potential for relapse into resumed conflict is high.* Multiple parties to a conflict, including non-State actors and armed militias, increase the possibility of challenges to a peace process (…)

The complexity of today's peacekeeping mandates also demands more of missions. Tasks such as disarming and demobilizing former combatants, supporting the restoration and maintenance of public security, helping Governments to exercise their authority throughout their territory, (…) and taking deterrent action to decrease levels of violence and crime *all demand a level of activity and capability, or robustness, that traditional static peacekeeping forces do not provide*.

Although troop- and police-contributing countries frequently call for better guidance and capabilities to perform these tasks, no shared understanding exists as to what robust peacekeeping means in scope and in practice. As a result, efforts to equip missions with the guidance, capabilities and support they require to carry out such tasks remain insufficient.

(…) *First, robust peacekeeping is not a military issue alone*. It is a political and operational strategy to signal the determination of a peacekeeping operation to implement its mandate and, where necessary, to deter threats to an existing peace process, in the face of resistance from spoilers. It therefore involves all components of the mission, directed and coordinated by the senior mission leadership.

(…)*Third, robust peacekeeping is not peace enforcement. It operates within the principles of United Nations peacekeeping: consent by the host Government, impartiality and the non-use of force except in self-defence or defence of the mandate. Where a robust approach necessitates the use of force by peacekeeping operations, it takes place at the operational, tactical level, on a case-by-case basis, and in full adherence to these principles*." [Emphasis added], Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/64/573 (2009), 5-6, paras. 20-26.

[91] Boutros-Ghali was realistic and acknowledged the blurring of peace enforcement and peacekeeping in his Agenda for Peace. This development was attenuated by his suggestion that peacekeeping would not always need the consent of all parties concerned, *supra* note 36, paras. 20, 45. See. H.G. Schermers, N. M. Blokker, International Institutional Law (2011), 945, para. 1495; 947-954, paras. 1501-1512; Verdirame, *supra* note 86, 197; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 199-200; Rensmann, 'Reform', *supra* note 31, 25, 53-54, mn. 96; K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und*

3. Lessons learned from Bosnia and Somalia; the restoration of traditional UN Peacekeeping

As mentioned previously, (*infra* 1.1), plans to activate the mechanisms foreseen under Article 43 of the Charter and the establishment of United Nations standby forces failed and, in contrast, cooperation among regional organisations was strengthened. This development has also to be set against the background of United Nations operations in Somalia and Yugoslavia, which led to major criticism and a crisis in United Nations peacekeeping. The slaughters in Somalia as well as the massacre at Srebrenica gave rise to the question as to why the United Nations had not acted to prevent these atrocities from happening. Criticism fell upon the lack of an imperative mandate to allow peacekeepers to react with force, as well as a lack of equipment. Higgins, referring to Bosnia and the mandate of UNPROFOR, stated that peacekeepers were put in a place, with a mandate to deliver humanitarian aid and therefore "all realistic prospect of 'enforcing the peace' has [sic] gone. The enforcement of the peace of the victims of violations of Article 2(4) had already effectively been put aside by this selection of method of UN operation."[92] In fact, the United Nations troops found themselves in a highly adversarial environment and partly engaged in activities going beyond peacekeeping. Tharoor explains that these activities included, *inter alia*, the establishment of "no-fly zones" and "safe areas", punitive actions against warlords, "acquiescence in NATO declared 'exclusion zones", and "peacekeepers mount[ing] anti-sniping patrols and call[ing] in air strikes."[93] The reaction within the United Nations was a readjustment of the policy by the Secretary-General and the return to more traditional peace-keeping operations regarding the use of force. It is worth quoting from the *Supplement to the Agenda for Peace*:

Territorialverwaltungen (2004), 170; United Nations Peacekeeping Operations, Principles and Guidelines (2008) ("Capstone Doctrine"), *supra* note 70, 18, para. 2.2. In a presidential note, the Security Council elaborated some operational principles for peace-keeping operations which take into account this development. They comprise "the consent of the government and, where appropriate, the parties concerned, *save in exceptional cases*", the "readiness of the Security Council to take *appropriate measures* against parties which do not observe its decisions" and also "the right of the Security Council to authorize all means necessary for United Nations forces to carry out their mandate", Note by the President of the Security Council, UN Doc. S/25859 (1993), 1.

[92] Higgins, *supra* note 46, 445, 457. Higgins argues that the more muscular mandates including the protection of safe havens under Security Council Resolution 836 were only given out in "sole consideration" of the safety of peacekeeping troops, *ibid.* This seems rather doubtful as the general practice of the Security Council and also the infiltration of international law by and the proliferation of human rights law rather point to an explanation of this particular mandate. However, it goes without saying that the protection of peace-keepers was and always has been of concern for the United Nations as is also illustrated by the Convention on the Safety of United Nations and Associated Personnel; See also Zacklin, 'The Use of Force in Peacekeeping Operations', *supra* note 71, 91, 94-95.

[93] S. Tharoor, 'The Changing Face of Peace-keeping and Peace-Enforcement', (1995) 19 *Fordham International Law Journal*, 408, 414.

> The United Nations can be proud of the speed with which peace-keeping has evolved in response to the new political environment resulting from the end of the cold war, but the last few years have confirmed that respect for certain basic principles of peace-keeping are essential to its success. Three particularly important principles are the consent of the parties, impartiality and the non-use of force except in self-defence. Analysis of recent successes and failures shows that in all the successes those principles were respected and in most of the less successful operations one or other of them was not.
>
> There are three aspects of recent mandates that, in particular, have led peace-keeping operations to forfeit the consent of the parties, to behave in a way that was perceived to be partial and/or to use force other than in self-defence. These have been the tasks of protecting humanitarian operations during continuing warfare, protecting civilian populations in designated safe areas and pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept. The cases of Somalia and Bosnia and Herzegovina are instructive in this respect.
>
> In both cases, existing peace-keeping operations were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties, impartiality and the non-use of force. It was also not possible for them to be executed without much stronger military capabilities than had been made available, as is the case in the former Yugoslavia. In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.[94]

This return to the traditional values of peacekeeping was welcomed by both the General Assembly and the Security Council.[95] Consequently, these policy intentions led the Security Council to further institutionalise relations with regional organisations[96], establishing a general division of labour insofar as the Council would mandate regional organisations to conduct operations which take the nature of enforcement operations.[97] Nevertheless, peacekeeping operations have kept their

[94] Supplement to an Agenda for Peace, *supra* note 46, 8-9, paras.33-35; More substantiated critique in, B. Boutros-Ghali, *Unvanquished: A U.S.-U.N. Saga* (1999), 239.

[95] Statement by the President of the Security Council (1995), *supra* note 46, 2. Cf. also Higgins, *supra* note 46, 445, 459-60; P. Schori, 'UN Peacekeeping', in A. F. Cooper, H. Heine, R. Thakur (eds.), The Oxford Handbook on Modern Diplomacy (2013), 779, 794; Also Roberts, *supra* note 38, 99, 127; S. Tharoor, 'Should UN Peacekeeping Go 'Back to Basics?'', in (1995-1996) 37 *Survival*, 52, 52-53.

[96] *Infra*, 1.3. and 1.4.-1.9. Cf. also generally A. F. Douhan, *Regional Mechanisms of Collective Security. The New Face of Chapter VIII of the UN Charter?* (2013).

[97] This will be analysed more extensively in 1.2.4 as well as in Chapter II. One has to take into account that "[o]perating environments and mandates of such operations have varied considerably, and no standard

integrated structures and mandates covering all different kinds of areas and many potential conduits for problems to arise. The problem of imprecise mandates has only been displaced by this shift of practice by the Security Council from UN operations to UN-mandated operations.[98] The recent practice of the Security Council underlines the clear separation between peacekeeping and peace enforcement. Reacting to the ongoing security and humanitarian crisis and activities of armed groups in the DRC, the Security Council adopted Resolution 2098 on 28 March 2013 in which it

> decides that MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, on an exceptional basis and *without creating a precedent or any prejudice to the agreed principles of peacekeeping*, include an "Intervention Brigade" consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities[99] [Emphasis added].

division of labour between the UN and other actors involved in peace operations has emerged.", K. E. Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 45, 49; In other words, member states also preferred acting through regional organisations and alliance for the implementation of post—Westphalian peacekeeping operations, T. F. Weber, *Die Zusammenarbeit zwischen den Vereinten Nationen und Regionalen Organisationen bei Peacekeeping-Einsätzen: Interessengegensätze und ihr Management (unter besonderer Berücksichtigung von Co-Deployment)* (2007), 5.

[98] Kritsiotis suggests that Operation Alba in Albania falls also under this "new concept of peace-keeping, which involves a mutation between traditional peace-keeping and peace-enforcement operations.", D. Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania', in (1999) 12 *Leiden Journal of International Law*, 511, 538-39; Cf. also Dinstein, *supra* note 58, 309. It should be noted, however, that the resolution contained only an authorisation for a multinational operation, but that it was not *per se* a United Nations operation, Security Council Resolution 1101, UN Doc. S/RES/1101 (1997), paras. 3, 8-9.

[99] Security Council Resolution 2098, UN Doc. S/RES/2098 (2013), para.9. The very same formulated as highlighted was reiterated in Security Council Resolution 2147, UN Doc. S/RES/2147 (2014), 5, para. 1. Para. 12 (b) of Resolution 2098 reads as follows: "In support of the authorities of the DRC, on the basis of information collation and analysis, and taking full account *of the need to protect civilians* and mitigate risk before, during and after any military operation, carry out *targeted offensive operations* through the Intervention Brigade referred to in paragraph 9 and paragraph 10 above, either unilaterally or jointly with the FARDC*, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights* due diligence policy on UN-support to non-UN forces (HRDDP), *to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities*." [Emphasis added] See also the statement of the Russian Federation following the adoption of Security Council Resolution 2100 on Mali, Security Council, 6952nd meeting, UN Doc. S/PV.6952 (2013), 2. While renewing and modifying the mandate of UNAMID, the Security Council followed along the lines of the mandate of MONOSCU and encouraged "UNAMID to move to a more preventive and pre-emptive posture in pursuit of its priorities and in active defence of its mandate (…) without prejudice to the agreed basic principles of peacekeeping", Security Council Resolution 2148, UN Doc. S/RES/2148 (2014), 4, para. 9.

Although the Resolution emphasises the exceptional character of this extension of the mandate, it nevertheless proves again that the threshold between peacekeeping and peace enforcement is marginal at most[100] and that the application of international humanitarian law is independent from the classification as a peacekeeping or peace enforcement operation, and is rather based on factual circumstances.[101] The preparatory report by the Secretary-General for a United Nations peacekeeping operation in Mali likewise adopts a traditional understanding of peacekeeping:

> At the same time, it is critical that *a clear distinction be maintained between the core peacekeeping tasks of an envisaged United Nations stabilization mission and the peace enforcement and counter-terrorism activities of the parallel force* that will necessarily need to be established to preserve the hard-won security gains achieved so far. *Any blurring of this distinction* would place severe constraints on the ability of United Nations humanitarian, development and human rights personnel to safely do their work. If this were to happen, the United Nations would find it difficult to mount the kind of comprehensive system-wide response required to address the political, social and economic root causes of the multifaceted crisis in Mali[102] [Emphasis added].

[100] The mandate is congruent with the definition of peace enforcement given in the Peace Support Operations Doctrine of the AU which defines these operations as follows: "*They are coercive in nature* and are conducted when the consent of all parties has not been achieved or might be uncertain. *They are designed to maintain or re-establish peace or enforce the terms specified in the mandate*. (…) *It is important to emphasise that the aim of the PE operation will not be the defeat or destruction of factions or belligerents, but rather to compel, coerce and persuade the parties to comply with a particular course of action, i.e. to desist from abusing the basic right to life and dignity, and to support the peace process (…)* the long term demands of peace will require that coercive techniques are used with restraint and in conjunction with other techniques designed to promote co-operation and consent (…) the military component must be organised, equipped, trained and deployed to enforce compliance whilst also conducting a 'hearts and minds' campaign and providing support to the longer-term peace building process. *Should the conflicting parties not be deterred or persuaded and fail to comply with the mandate, the military component must be able to react in an appropriate manner, based upon ROE compatible with mission accomplishment* "[Emphasis added], Headquarters of the African Union, *supra* note 68, Chapter 3, 3-6, paras. 13-14. The statement of the Special Representative of the Secretary-General for the DRC and Head of MONUSCO, Mr. Martin Kobler, before the Security Council also suggests strongly that it is a peace enforcement operation. He said that "[w]e have been able to conduct more robust military operations. We have made it clear that there would be no cohabitation with armed groups – any of them. Our position is clear. We are in the [DRC] not to react, but to act, we are there not to deter, but to prevent (…) all armed groups are aware now that we have the will and means to take robust action at any time (…) Our rules of engagement are clear. Our mandate is clear. Our determination is clear", Security Council, 7094th meeting, UN Doc. S/PV.7094 (2014), 3. See also his Statement in Security Council 7137th meeting, UN Doc. S/PV.7137 (2014), particularly p. 3.

[101] Paragraph 12 (b) of Security Council Resolution 2098 does not only refer specifically to compliance with international humanitarian law but also speaks of steps normally taken as preparatory steps in military operations before an assault such as information collation and analysis, precautions to protect civilians. The most interesting fact is, however, that – following this Resolution – self-defence in the meaning of defence of the mandate can now include fully-scaled military operations to which IHL applies.

[102] Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/189 (2013), 19, para.100; Also Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/338 (2013), 18, para.83.

This quote is also particularly relevant as it highlights the professionalisation[103] and diversification that has taken place in peacekeeping since the end of the Cold War. Part of this development has been economy-driven due to the lack of sufficient funds by the United Nations and the holding back of payments by certain states.[104] The UN has also developed extensive financial and accountability mechanisms for its activities which have contributed further to the professionalisation of peacekeeping.[105] Notwithstanding, it cannot be emphasised enough how important it is that the Security Council adopts resolutions with precise mandates.[106] Problems can also arise if the mandate

[103] Since 2007 the UN relies on its Integrated Missions Planning Process (IMPP) as part of the wider 'Peacekeeping 2010' reform. The IMPP provides a coherent and unified framework for the planning of all multidimensional UN operations covering three stages: advance planning (pre-mission planning), operational planning after authorisation by the SC, review and transition planning. In the advance stage, the Integrated Mission Task Force (IMTF) relies also on In-country planning and consultation with regional and other actors and partners, S. Wiharta, 'Planning and deploying peace operations', in *SIPRI Yearbook 2008: Armaments, Disarmament and International Security*, 97, 98, 102.

[104] As the New Horizon Report states:
"This new phase may help create the necessary space to realize difficult but all-important transformations required to strengthen the effectiveness and efficiency of UN peacekeeping. This includes putting into practice a new strategy for field support, shifting peacekeeping toward a more capability-driven approach, and bolstering systems for identifying and sustaining the range of – often highly specialized – capabilities required to implement complex peacekeeping mandates. In this context, it is hoped that advances in the New Horizon reform agenda thus far will give greater opportunity to broaden the contributing base for UN peacekeeping. The evolving environment also gives impetus for progress in the areas of transition planning, national capacity-building, *oversight and benchmarking to help increase synergies among peacekeepers and other peacebuilding actors* and to better prepare peacekeeping missions from the outset to build the foundation for transition to longer-term peace consolidation and development. *While taking into account the risks that increased pressure for cost-savings may bring to the reform efforts and the realities of the global financial situation, the Secretariat will continue to propose effective and efficient means of matching resources to mandated tasks to ensure that the investment in peacekeeping is financially sound and contributes to the long-term sustainability of peace."* [Emphasis added], Department of Peacekeeping Operations and Department of Field Support, The New Horizon Initiative: Progress Report No. 1 (October 2010), 20-21.

[105] See e.g. Budget for the United Nations Multidimensional Integrated Stabilization Mission in Mali for the period from 1 July 2013 to 30 June 2014, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/68/653 (2013), 4, para.17; 5, para.19 and especially 6, para.22 – p. 8, para.29.

[106] The difficulty of a precise delimitation can also be due to a certain ambiguity of the mandate of the operation, Villani, *supra* note 8, 225, 398. Security Council Resolution 501, for instance, defined self-defense for the purpose of the operation as follows "self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council", Security Council Resolution 501 (1982), para. 3 (d). A deterioration of the security situation might equally call for an adjustment of the mandate, including enforcement measures (*ibid.*, 398). The Brahimi Report elaborates upon this matter in the following way: "The Panel concurs that consent of the local parties, impartiality and use of force only in self-defence should remain the bedrock principles of peacekeeping. Experience shows, however, that in the context of modern peace operations dealing with intra- State/transnational conflicts, consent may be manipulated in many ways by the local parties. A party may give its consent to United Nations presence merely to gain time to retool its fighting forces and withdraw consent when the peacekeeping operation no longer serves its interests. A party may seek to limit an operation's freedom of movement, adopt a policy of persistent non-compliance with the provisions of an agreement or withdraw its consent altogether. Moreover, regardless of faction leaders' commitment to the peace, fighting forces may simply be under much looser control than the conventional armies with which traditional peacekeepers work, and such forces may split into factions whose existence and implications were not contemplated in the peace agreement under the colour of which the United Nations mission operates.", Panel on United Nations Peace Operations, *supra* note 50, para.48. See also Evaluation of the implementation and results of protection of civilians mandates in United Nations

of an operation has to be changed depending on the situation on the ground.[107] The UN operation in Sierra Leone started as a 70 strong observer mission (UNOMSIL). After the failure of the peace agreement, the Council authorised the deployment of more than 17,000 troops with a robust mandate adopted under Chapter VII of the Charter, deploying a completely different operation on the ground (UNAMSIL).[108] The debate in the Security Council in June 2014 on new trends in UN peacekeeping illustrates, however, that the issue of peacekeeping operations with more of a peace enforcement mandate is not yet settled.[109]

peacekeeping operations, Report of the Office of Internal Oversight Services, UN Doc. A/68/787 (2014), 11-12, para. 28.

[107] Verdirame states that the change of mandate is problematic if it is combined with an ambiguous mandate that produces confusion, uncertainty of interpretation and also leads to a tension between the operation and the political command of the operation Verdirame, *supra* note 86, 198; R. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2004), 233-38.

[108] For UNOMSIL, Security Council Resolution 1181, UN Doc. S/RES/1181 (1998), for UNAMSIL, Security Council Resolution 1270, UN Doc. S/RES/1270 (1999) and Security Council Resolution 1289, UN Doc. S/RES/1289 (2000).

[109] The concept note prepared for the Council under the Russian presidency points out – while referring to Mali and the DRC – that these "new circumstances of United Nations Peacekeeping" may not be in full conformity with, and even contrary to the fundamental principles of peacekeeping; so far the UN was only able to adopt a "fragmented approach" towards "trends that are gaining momentum", United Nations peacekeeping operations: new trends, Concept note, Annex to the letter dated 1 June 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. A/68/899–S/2014/384 (2014), 3, para. 1. In the ensuing discussion in the Council, it became obvious that the opinion of members is split. The Secretary-General himself called Resolution 2098 for MONUSCO "a milestone" as an expression of the resolve of the Council to address the changing nature of conflicts and peacekeeping operations, Security Council 7196th meeting, UN Doc. S/PV.7196 (2014), 3. Rwanda (*ibid.*, 3), France (*ibid.*, 9), the UK (*ibid.*, 12), the USA (*ibid.*, 19), Jordan (*ibid.*, 16-18) and the EU (*ibid.*, 30) are not opposed to similar future mandates for other operations on the basis of a variety of arguments. France and the USA consider the mandates to be effective and they emphasise the need to protect civilians which for the latter is also a "moral imperative". In similar fashion, the EU sees MONUSCO as an example that "peace enforcement where necessary and under defined conditions can support the success and legitimacy of a United Nations operation." The UK and Jordan do not consider the mandate of MONUSCO to be a radical departure from previous practice, pointing to recent examples of the AU (the UK) or regarding the current UN practice as "a repetition of previous cycles in peacekeeping." Jordan goes even so far to call for the establishment of UN standing forces. Several states are opposed to any future similar mandates and they also provide various reasons. Some countries are afraid that this practice might either turn the UN into a party to the conflict (China, *ibid.*, 20), expose peacekeepers to unnecessary risks (India, *ibid.,* 27) or compromise the impartiality of UN peacekeepers (Turkey, *ibid.*, 58), a view which is not shared by Ireland (*ibid.*, 59). Pakistan and Bangladesh believe that peacekeeping and peace enforcement should not be conflated (*ibid.*, 33, 60). The Latin-American countries (Guatemala, Peru and Uruguay, *ibid.*, 35, 42, 43) remain apprehensive and emphasise that MONUSCO's mandate should not be a precedent for future operations. Ethiopia shares this view (*ibid.*, 45), but is convinced – as is Chile (*ibid.*, 6-7) that "some serious thinking" is necessary. Reacting to the developments unfolding in Mali in May 2014, the government also asked for a "much more robust mandate under Chapter VII" for MINUSCA, Security Council 7179th meeting, UN Doc. S/PV.7179 (2014), 4. To a certain extent that wish was fulfilled by the Council with the adoption of Security Council Resolution 2164, UN Doc. S/RES/2164 (2014), 6, para. 13 a) (i), (iv). With regard to this issue, cf., ICRC, 'Interview with Lieutenant General Babacar Gaye', (2014), *FirstView* Article, *International Review of the Red Cross*, 1, 4, 9-10.

4. An emerging division of labour between international organisations in peacekeeping operations

The multiplication of tasks in peacekeeping operations has been part of the increased inter-institutional cooperation between different international organisations during peacekeeping operations. In 2007, 54 peace operations were deployed around the world, of which not less than 40 involved an element of cooperation with another international organisation.[110] The practice suggests that there is a general tendency towards the UN focusing on traditional peacekeeping operations regarding the level of the use of force authorised, with an emphasis also on the multi-dimensional and non-military level and that UN-mandated operations will be provided with more robust mandates.[111] The massive presence in the field has also contributed to the overstretching in the capacities of the United Nations which in 2008 alone deployed 120,000 peacekeepers on the ground.[112]

The organisations use different terminology. Whereas the UN uses the classic terminology of "peacekeeping operations", the European Union refers normally to "crisis management operations" and the African Union speaks of "peace support operations". In the present study the terminology of the United Nations will be used.[113]

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[110] A. S. Bah, B. D. Jones, 'Peace Operations Partnerships: Lessons and Issues from Coordination to Hybrid Arrangements', Center on International Cooperation, New York University (2008), 1.

[111] Besides political and practical reasons, e.g. the military capacity of each organisation is one of the relevant aspects. Secretary-General Annan was very direct in this matter, while addressing NATO Parliamentarians, saying that "[i]t is also likely that the year ahead will see other new peace operations in Africa, as well as in Haiti and possibly elsewhere. Should such a surge take place, stronger support from NATO would be tremendously helpful. Specifically, NATO might be employed in a "peace enforcement" role, much as the European Union deployed "Operation Artemis" in the Democratic Republic of the Congo as a bridging force before the deployment of a UN operation. NATO could also provide an "over-the-horizon" capacity, should the need arise for localized enforcement tasks.", Secretary-General's opening remarks at meeting with Nato Parliamentarians, New York, 8 March 2004, available at: http://www.un.org/sg/statements/?nid=808.

[112] M. Derblom, E. Hagström Frisell, J. Schmidt, 'UN-EU-AU Cooperation in Peace Operations in Africa', FOI, Swedish Defence Research Agency (2008), 30. The significant engagement of resources also put conflict prevention and early warning systems under the spotlight. The Security Council adopted, for example, Resolution 1625 aimed at strengthening the effectiveness of the Security Council's role in conflict prevention, particularly in Africa, Security Council Resolution 1625, UN Doc. S/RES/1625 (2005). That resolution includes the objective to strengthen likewise regional and subregional capacities for early warning (para. 2 (d)) and it stresses the importance of a regional approach to conflict prevention (para. 5). See also, Department of Peacekeeping Operations and Department of Field Support, A New Partnership Agenda. Charting a New Horizon for UN Peacekeeping (2009), Section 1:4. See also, A regional-global security partnership, *supra* note 40, 18, para. 88.

[113] The importance of a common terminology was stressed by the Study of the Lessons Learned Unit which state clearly that "[i]t is important that the UN and regional organizations use the same terminology of peace-keeping and have the same understanding of the terminology, that they understand each other and avoid misunderstandings that could undermine the other's efforts", Lesson Learned Unit, Department of

In the past years, at least three different kinds of cooperation between international organisations in the area of peacekeeping have emerged. They are sequential, parallel and integrated deployment of troops by international organisations.[114] Besides, the strains of international and regional politics are "pushing global peacekeeping towards a different future, one in which several different organizations –principally the UN, NATO, the EU and the AU – each develop a fuller range of multi-faceted capacities, ranging from rapid, robust response to longer-term, civilian peacebuilding functions."[115]

(i) Sequential Operations include, *inter alia*, the 2003 operation of ECOWAS in Liberia which gave way to the long-term presence of the United Nations Operation in Liberia (UNMIL). Normally peacekeeping operations transit from being an authorised regional or multilateral operation or an *ad hoc* authorised operation to a United Nations operation. This is explained by the more effective and faster decision-making process of small actors, and certain other advantages such as geographic proximity, which allow a faster deployment on the ground. However, some recent operations mirror a contrary development, the handover of the NATO operation in Bosnia to the European Union, the similar transfer of operational power from the UN to the EU in Kosovo and also the transition from a UN operation into a Special Task Force of the African Union.[116] This development underlines the growth of multi-faceted capacities by regional organisations, although one has to keep in mind that many of the Member States of these organisations which take part in the new incoming peacekeeping operation have already deployed troops as part of the old, outgoing operation. The transfer from one operation to the other is then limited to a "re-hatting" and the transfer of operational command and control.

(ii) In contrast, parallel operations have taken various forms. They include temporary, military, support operations by one organisation for another, for example, operations of the EU in the

Peacekeeping Operations, Cooperation between the United Nations and Regional Organizations/Arrangements in a Peacekeeping Environment, Suggested Principles and Mechanisms (1999), Part II A., para. XII.

[114] Bah, Jones, *supra* note 110, 2-3; cf. Thematic evaluation of cooperation, *supra* note 36, 5, para. 5; see also A regional-global security partnership, *supra* note 40, 8, para. 36; Challenges Project, Meeting the Challenges of Peace Operations: Coopration and Coordination (2005), 12, para. 5; Department of Peacekeeping Operations and Department of Field Support, *supra* note 112, 9; Statement by the President of the Security Council, UN Doc. S/PRST/2010/2 (2010), at 3 which calls for coordination of peacebuilding plans and programmes of regional and subregional organisations with United Nations peacekeeping operations and the wider United Nations presence on the ground. Other classifications mention, e.g., "subcontracting; bridging operations; joint operations; integrated operations; and evolving operations", W. Pal Singh Sidu, 'Regional Groups and Alliances', in T. Weiss, S. Daws (eds.), *The Oxford Handbook on the United Nations* (2007), 217, 218; Balas speaks of sequential, parallel and hybrid peace operations, A. Ballas, 'It Takes Two (or More) to Keep the Peace: Multiple Simultaneous Peace Operations', in (2011) 15 *Journal of International Peacekeeping*, 384, 393-396.

[115] Bah, Jones, *supra* note 110, 1.

[116] *Ibid.*, 2. Other recent examples follow the traditional pattern; AFISMA in Mali was transformed in MINUSMA, pending the improvement of security conditions on the ground, AMISOM will most likely be transformed into a UN operation and the operation of ECCAS in the Central African Republic was now transformed in an African-led peacekeeping operation.

Democratic Republic of the Congo – Operation Artemis and EUFOR RD Congo. More common is a separation of tasks, from military operations existing alongside observer operations to separated civilian and military operations such as KFOR by NATO and UNMIK in Kosovo.[117]

UNMIK is also one example of an integrated operation, as UNMIK consisted of four different organisations working together: the UN Secretariat, UNHCR, the EU and the OSCE. The general structure is that either the organisations share the command between themselves or that one organisation subordinates itself to the other.[118] The first example was the International Civilian Mission in Haiti (MICIVIH) which joined the UN operation alongside the operation of the Organisation of American States (henceforth: OAS). The most integrated operation so far is nonetheless the hybrid United Nations/African Union operation in Darfur whose structure is completely under unified command.

The Elements of Implementation of the European Security Strategy distinguish first of all between national contributions to a UN operation and a "stand alone operation".[119] The "stand alone operation" comprises two different models, the "bridging model" and the "stand by model". As the name suggests, the bridging model refers to an organisation "which aims at providing the UN with time to mount a new operation or to reorganize an existing one."[120] The challenge is to provide a rapid deployment of troops on the ground, but the advantage is that if troops of a previous EU operation are "re-hatted" and continue to be deployed on the ground as part of the follow-up UN operation, a smoother transfer of power can take place.[121]

Whereas the "bridging model" is a temporary arrangement to enable the UN to mandate and initiate a peacekeeping operation or to reorganise and restructure such an operation, the "stand by model" consists "of an 'over the horizon reserve' or an 'extraction force' provided by the EU in support of an UN operation [which] would be of particular relevance in an African context."[122] Thus, the "stand by model" is used in cases in which immediate, short-term support of a peacekeeping operation is necessary, calling for the rapid deployment of contingents and this is why there are substantive issues of coordination between the UN and the EU.[123]

[117] Bah, Jones, *supra* note 110, 3.
[118] *Ibid.,* 3.
[119] EU-UN co-operation in Military Crisis Management Operations, Elements of Implementation of the EU-UN Joint Declaration (2004), para. 7.
[120] *Ibid*., paras. 8 – 9.
[121] *Ibid*., paras. 9, 12.
[122] *Ibid*., para. 13.
[123] *Ibid.*, para. 13.

The different forms of cooperation between international organisations in the area of peace and security emphasise anew the complexity of the topic and why an analysis, such as that carried out in the present study, is important. It also highlights some of the underlying advantages and disadvantages. While cooperation allows organisations to build upon the competence of one another,[124] there are also shortcomings such as handover challenges and questions of legitimacy and ownership in inter-institutional arrangements.[125]

The increased activism of regional organisations since the end of the Cold War has also led to a reactivation of another chapter of the Charter, namely Chapter VIII, which had also been impaired during the Cold War.[126]

1.3. The new "old" Chapter VIII of the UN Charter – or the merger of Chapters VII and VIII?

> "The ability of the Security Council to become more proactive in preventing and responding to threats will be strengthened by making fuller and more productive use of the Chapter VIII provisions of the Charter of the United Nations than has hitherto been the case."
>
> - Report of the High-Level Panel on Threats, Challenges and Change (2004) [127]

> "The principle of establishing stronger partnerships with regional organizations is embedded in the very DNA of the United Nations. With great vision and foresight, Chapter VIII of the Charter of the United Nations lays out the critical role of regional Organizations in maintaining international peace and Security."
>
> - Secretary-General Ban Ki-moon (2014)[128]

[124] M. Brosig, 'The Multi-Actor Game of Peacekeeping in Africa', (2010) 17 *International Peacekeeping*, 327, 329.

[125] Bah, Jones, *supra* note 110, 4-5. One also has to keep in mind that "[r]egional organizations have their own objectives and interests, which do not always coincide with those of the United Nations, and it may be difficult for the United Nations to predict which organizations can and will cooperate and the resources that they will bring to the relationship", Thematic evaluation of cooperation, *supra* note 36, 5, para. 7.

[126] Secretary-General, An Agenda for Peace, *supra* note 36, 17, para. 60; Rensmann, 'Reform', *supra* note 31, 25, 52, mn. 93.

[127] Report of the High-Level Panel, *supra* note 22, 70, para. 270. Another argument made in favour is that "There are multiple pressures for a wide range of problems to be tackled on a regional rather than global basis – an approach that accords with the provisions on regional arrangements in Chapter VIII of the Charter. A UN rapid-reaction capability might tilt the balance too far away from regional responsibility, thereby overloading the UN and undermining efforts to build up standing force capabilities on a regional basis", Roberts, 'Proposals for UN Standing Forces', *supra* note 38, 99, 128.

The previous two sections have traced the development of peacekeeping within the wider framework of the United Nations Charter as well as under Chapter VII. They confirmed that the maintenance of international peace and security by the Security Council cannot be seen in isolation from the larger framework of cooperation with regional organisations. This part therefore analyses Chapter VIII of the United Nations Charter, which applies to relations with regional organisations in the field of the maintenance of international peace and security. Whereas it is generally accepted that peacekeeping is in conformity with the United Nations Charter, the interpretation of Chapter VIII is rather disputed. This is firstly due to the very vague language used in Chapter VIII. Secondly, it is a result of the interests of various actors in interpreting Chapter VIII in their favour, which is once again an expression of the duality between universality and regionalisation: "total formal control by the UN Security Council to *de facto* discretion and arbitrariness of (…) regional organizations; subsidiarity in UN-regional relations to complementarity of intergovernmental tasks."[129]

1. The relevance of practice for the interpretation of the Charter and the dispute over a definion of "regional arrangements and agencies"

The practice of the United Nations and the involved regional organisations is particularly relevant for the interpretation of Chapter VIII. This approach has the additional advantage of guaranteeing the flexible interpretation necessary to ensure that the Security Council can exercise its mandate effectively and efficiently. Being a political body, this method might also be better at accommodating the political implications in the activity of the Security Council. Furthermore, it must be underlined that the drafters of the United Nations Charter decided that each organ of the organisation has primary responsibility for interpreting the parts of the Charter which regulate its competences and functions. The debate on this issue at the San Francisco Conference began with a proposal by the Kingdom of Belgium that "[t]he General Assembly has sovereign competence to interpret the provisions of the Charter."[130] The "sovereign" notion in this context was intended "to mean that the original part lies with the Assembly, but the Assembly may of course consult the International Court."[131] Following another proposition by the UK representative, it was decided to refer the whole

[128] Statement by the Secretary-General during the 7112th meeting of the Security Council on Cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security, European Union, Security Council 7112th meeting, UN Doc. S/PV.7112 (2014), 2.
[129] Douhan, *supra* note 96, 22.
[130] United Nations, Documents of the United Nations Conference on International Organization, San Francisco, 1945, Volume III Dumbarton Oaks Proposals Comments and Proposed Amendments (1945), 339.
[131] *Ibid.*

matter to the Fourth Committee.[132] Following a lengthy debate in the subcommittee, the Fourth Committee approved the report in which it was stated that

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. (…) Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.[133]

To safeguard the necessary flexibility for the Security Council, the drafters of the UN Charter also decided to refrain from defining "regional arrangements and agencies" for the purposes of Chapter VIII. As stated in the *Agenda for Peace*,

> [t]he Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.[134]

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[132] Documents de la Conférence des Nations Unies sur l'organisation internationale, San Francisco, 1945, Tome IX, Commission II Assemblée Générale (1945), 74, 347. The issue was debated extensively in Commission IV and then referred to a subcommittee for further study by an affirmative vote of 16-13, Documents de la Conférence des Nations Unies sur l'Organisation Internationale, San Francisco, 1945, Tome XIII, Commission IV, Organe Judiciare (1945), 633-34, 653-54.

[133] *Ibid.,* Tome XIII, 709-710, 831-32. See generally also, L. B. Sohn, 'Interpreting the Law', in O. Schachter, C. C. Joyner, *United Nations Legal Order. Volume I* (1995), 169 – 230. This competence of interpretation was also explicitly recognised by the ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3rd, 1950*, 9, 2nd para. from the top of the page; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion* (20 July 1962), 10 (of the advisory opinion), 2nd last paragraph. Also, the Security Council alone and any organ authorised by it – arguably – may give an authoritative interpretation of its resolutions, E. Papastavridis, 'Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis', in (2007) 56 *International & Comparative Law Quarterly*, 83, 91. As the PCIJ held "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it", Publications of the Permanent Court of International Justice, Series B, No. 8, December 6th, 1923, Collection of Advisory Opinions, Question of Jaworzina (Polish-Czechoslovakian Frontier), p. 37. It also should be recalled that, although Security Council resolutions are documents of a primarily political body, they can contain legal rules binding upon states as well as trigger the application of legal rules. Cf. also *Certain Expenses*, *ibid.,* 168.

[134] Secretary-General, An Agenda for Peace, *supra* note 36, 17, para. 61; also M.N. Shaw, *International Law* (2008), 1274 ; Villani, *supra* note 8, 225, 271. This lack of definition is also once again a result of the compromise between the regionalists and universalists when the Charter was adopted, E. P. J. Myjer, N. D. White, 'Peace Operations Conducted by Regional Organizations and Arrangements', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 163, 164-5.

This particular point was debated during the San Francisco Conference, and Egypt proposed the following definition

> There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical, or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise (…) as well as for the safeguarding of their interests and the development of their economic and cultural relations.[135]

The proposition was however rejected on the arguments that

> on oppose qu'il n'est pas souhaitable d'inscrire une définition dans une Charte générale comme celle qui est en cours de préparation ; qu'une telle définition provoquera de longs débats, et qu'on a des raisons de douter que cette définition se révèle suffisamment large. On estime qu'il est bien évident que le paragraphe additionnel, concernant le droit de légitime défense, individuelle ou collective, contre une attaque armée, recommandé par le Conseil (…) est suffisamment compréhensif et que son application n'est nullement limitées aux accords régionaux. [136]

The only sustainable, judicial argument made is the solicitude that the proposed definition would not be comprehensive enough;[137] the latter part of the argument acknowledges the compromise solution between the proponents of the universalist approach and those of a regionalist vision (*infra,* 1.1). No further attempts at clarification have been made during the history of the United Nations. In 1994, the General Assembly adopted a Declaration concerning the enhancement of cooperation with regional entities in the area of international peace and security, but that declaration merely acknowledged the "variety of mandates, scope and composition of regional arrangements or agencies."[138]

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[135] United Nations, Documents of the Conference on International Organisation, San Francisco, 1945, Vol. XII, Security Council (1945), 857.

[136] United Nations, Documents de la Conférence des Nations Unies sur l'Organisation Internationale, San Francisco, 1945, Tome XII, Commission III, Conseil de Sécurité (1945), 860 ; Cf also A regional-global security partnership, *supra* note 40, 16, para. 77.

[137] M. Akehurst, 'Enforcement Actions by Regional Agencies with special References to the Organization of American States', in (1967) 42 *British Yearbook of International Law*, 175, 177-78; Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1439 mn. 16.

[138] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 2-3, Preamble. In his report of 1995, the Secretary-General interestingly, however, preferred to explain the lack of definition by making the following remark: "Cooperation between the United Nations and regional organizations must constantly adapt to an ever-changing world situation. The Charter itself anticipated this need for flexibility by not giving a precise definition of regional arrangements and organizations, thus enabling diverse organizations and structures to contribute, together with the United Nations, to the maintenance of peace and security.", Report of the Secretary-General on the work of the Organization, August 1995, UN Doc. A/50/1 (1995), 122, para. 930.

It is consequently hard to define the idea and the character of regional arrangements and entities as expressed in Chapter VIII of the Charter. The political arguments which were raised during the preparatory conference of the United Nations and the fact that the League of Nations explicitly mentioned political constructs such as the Monroe Doctrine in the Covenant suggest that the concept of "regional" or "regional organisation" is a political, and adjustable one, rather than being legal in origin, safeguarding the necessary flexibility to include potentially new regional entities as well. Unfortunately, these political concerns can hardly be reconciled with legal principles such as the principle of legal certainty; however, one can argue that legal principles are intrinsic to Chapter VIII. Chapter VIII can be interpreted as a mechanism to distribute competences, rights and obligations; in other words, it determines whether the United Nations or a regional organisation is *responsible* for action. Therefore, this Chapter has a direct bearing on the law of international responsibility which determines responsibility on the basis of the attribution of conduct.

All in all, it appears that Chapter VIII has to be seen as incorporating the conflict between supporters of a universalist and a regionalist view of the system of collective security, as well as an interplay between arguments of law and politics. As a result, any attempt of interpretation of Chapter VIII is highly delicate.

2. The unrelenting influence of Chapter VII on Chapter VIII

The influence of universalism versus regionalism as enshrined in the United Nations Charter is reinforced by the virtue of Chapter VII. Whilst Chapter VII establishes the universalist perception as regards the maintenance of international peace and security – with the Security Council as the guardian – Chapter VIII establishes the tradition of the regionalistic perspective:

> There was a reason Chapter VIII was drafted by the Charter's framers and that reason is as valid today as it was 61 years ago. It is to ensure that global and regional collective security is mutually complementary and that the total effort of the international community for securing the peace is optimized through the collaboration of our various international organizations.[139]

A joint consideration of Chapter VIII and Chapter VII is required for several reasons. First of all, Chapter VIII does not provide the Security Council with any substantive powers of peace enforcement in addition to the powers the Security Council holds under Chapter VII of the Charter. Article 53 (1) of the Charter only gives the Security Council the right to delegate Chapter VII powers to regional arrangements; thus "[t]he delegation of Chapter VII powers to a regional arrangement (…)

[139] A regional-global security partnership, *supra* note 40, 16, para. 80.

takes place by the Council using its specific competences so to delegate under Chapter VIII."[140] Consequently, there is no legal difference if the Security Council were to authorise states to use force under Article 53 of the Charter or simply under Chapter VII as its powers under Chapter VIII derive from Chapter VII. Nevertheless, there might be a symbolic importance, given that the use of Chapter VIII amounts to recognising the specific role of regional organisations.[141]

An analysis of Chapter VIII in the context of peacekeeping is also pertinent as "[a]ny endeavour to enhance [and understand] the relationship between the United Nations and regional organizations under Chapter VIII will need to be based on a clearer definition of the basis and processes of such cooperation."[142] The Secretary-General proposed that the Security Council "[d]iscuss[es] the desirability and practicability of partner organizations identifying themselves either as regional organizations acting under Chapter VIII or as other intergovernmental organizations acting under other provisions of the Charter."[143] But, "[t]he question could be asked, however, whether the partnership would be operationally more effective if each partner knows under which Charter provisions it is functioning."[144] However, from a legal point of view, it does not matter whether a regional organisation can be subsumed under Chapter VIII or whether there is acquiescence by the regional organisation to be bound by Chapter VIII and a corresponding agreement by the Security Council. To offer an example to the contrary, NATO could arguably be considered as a regional organisation under Chapter VIII, but it refuses to be considered as such (*infra* 1.8).

[140] D. Sarooshi, 'The Security Council's Authorization of Regional Arrangements to Use Force: The Case of NATO', in V. Lowe, A. Roberts, J. Welsh (eds.), *The United Nations Security Council and War* (2008), 226, 288; This implies also that the Security Council can only rely on Chapter VIII if the conditions of Article 39 are fulfilled and if the envisaged action has as its aim to restore international peace and security, Villani, *supra* note 8, 225, 325.

[141] Gray, *supra* note 54, 426; C. Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 271. One difference might be that Article 54 foresees that the Security Council shall at all times be kept fully informed of activities undertaken or contemplated by a regional organisation. However, it is the established practice of the Security Council that operations conducted on the basis of an authorisation under Chapter VII will report regularly to the Security Council. Following the decision in *Behrami/Saramati* and the subsequent decisions, it is rather likely that the Security Council will have underlined its request for reports on operations under UN authorisation. J.-P. Schütze, *Die Zurechenbarkeit von Völkerrechtsverstößen im Rahmen mandatierter Friedensmissionen der Vereinten Nationen* (2010), 55. An extensive analysis of the Security Council's practice of authorisation came, indeed, to the conclusion that most of the resolutions adopted in the period of 2000-2012 contain more specific mandates, almost all of them have specific time limits and reporting requirements, cf. N. Blokker, 'Outsourcing the use of force. Towards more Security Council control of authorised operations?', to be published in M. Weller, (ed.), *The Oxford Handbook on the Use of Force in International Law* (2014).

[142] Report of the Secretary-General on the relationship, *supra* note 5, 6, para.8.

[143] A regional-global security partnership, *supra* note 40, 16-17, para. 82; 21, para. 99.

[144] *Ibid*. The fulfilment of formal criteria is, in practice, "not a major issue" for the UN as long as there is a permanent secretariat or a secretary-general as first point of contact, regional organisations are seen as partners in cooperation, Griep, *supra* note 10, 37.

For the purposes of analysing the applicability and the procedural framework of Chapter VIII of the UN Charter to regional organisations, it is firstly necessary to define certain criteria as contained in Articles 52 – 54 of the Charter.

3. Defining the elements in Article 52 of the UN Charter

Article 52 enshrines the priority of regional organisations as regards matters relating to the maintenance of international peace and security, and underlines that they are appropriate for regional action. Regional organisations enjoy particular priority for the pacific settlement of "local disputes" under Article 52 (2) and (3).[145] It suggests that the "regional" criterion is of a geographical nature, meaning that in order to qualify as a regional arrangement or agency under Chapter VIII, the member states of this agency or arrangement need to be in geographical proximity to each other.[146] Such an interpretation is supported by two other aspects; the feeling of solidarity, and the intimate knowledge of the geopolitical conditions in a given situation, which argue both in favour of a geographical interpretation of the "local disputes" wording in Article 52 as it concerns the meaning of "regional".[147]

The drafting history however shows that a large majority of states were against any specification as to the regional criterion.[148] Equally, the existing advantages of geographical proximity for dispute resolution can be offset by the existence of arbitral or judicial proceedings within a regional

[145] Cf. Griep, *supra* note 10, 62, 65-66.

[146] Boisson de Chazournes argues– while citing Kelsen – that the "regional" notion refers to the nature of the conflict and not to the organisation, Boisson de Chazournes, *supra* note 11, 79, 245-6 ; according to Kelsen, "it is not required that the parties to the regional arrangement are geographically neighbors. It is essential only that the actions of the organization established by the regional arrangement be restricted to a certain area (…) The action taken under the arrangement must have the character of 'regional action'", H. Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?', (1951) 45 *The American Journal of International Law*, 162, 163.

[147] Cf. Villani, *supra* note 8, 225, 273. Villani also argues that a group of states which are not geographically conjoined could be perceived as being only united for the purpose of exercising their influence or predominance in a specific region (*ibid.*), an argument which is often also raised against NATO in the Arab world. A "local" dispute per se implies "that the dispute is not of a nature as to affect international peace and escurity in a global dimension", Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1469 mn. 78. Taking into account of the overall development of the practice regarding the interpretation of threats to international peace and security under Article 39, "local dispute" covers both interstate as well as internal armed conflics (*ibid.*, 1469 mn. 79); See also B. Boutros-Ghali, *Contribution à l'étude des ententes régionales* (1949), 169-173.

[148] Villani, *supra* note 8, 225, 274 ; The same view is expressed by Myjer and White who emphasise that Chapter VIII was included on the insistence of the then already existing "regional" organisations, Myjer, White, 'Peace Operations Conducted by Regional Organizations and Arrangements', *supra* note 134, 163, 167; The regional concept is thus interpreted as "non-universal" and the rejection of the draft proposal of Egypt as a rejection of any requirement of geographical proximity. But in the end it is not equivalent to saying that the delegates in San Francisco were opposed to every single criterion; Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1447 mn. 3; 1448 mn. 10; also R. Pernice, *Die Sicherung des Weltfriedens durch regionale Organisationen und die Vereinten Nationen. Eine Untersuchung zur Kompetenzverteilung nach Kapitel VIII der UN Charta* (1972), 26-29.

organisation, and nor is it indispensable that the states intervening in a dispute are located in the same geographic region.[149] The General Assembly has also repeatedly granted the status of observers to organisations based on political, religious or even linguistic ties rather than on geographical ties, such as OSCE, the Commonwealth, the OIC and the Organisation international de la francophonie.[150] Nevertheless, the fact that Chapter VIII speaks of "regional" agencies and supports an interpretation of the regional specification as meaning that the organisation or its constituent instrument shall concern one specific geographic region; that its rules and competences shall have as their object this zone in order to abet the maintenance of peace and security. Otherwise, one could consider the organisation to be acting outside of Chapter VIII of the Charter.[151] A teleological approach underlines the need of "some geographical link" as "activity on the local level, (…) pre-existing greater familiarity with the subject-matter of a disputed, enhanced legitimacy, and solidarity are factors favouring a peaceful settlement."[152]

Other factors including a shared language or cultural aspects may contribute to the coherence and common identity of a given organisation strengthening the "close and reliable ties" between the

[149] Villani, *supra* note 8, 225, 274. Other arguments can be found in Article 53 of the Charter; regional organisations can be used by the discretion of the Security Council "where appropriate" and without any other qualification and the connector between states against an ex-enemy state is that the latter is outside of the (regional) organisation or arrangement. *Ibid.*, 275. Indeed, whereas in the earlier literature geographic vicinity is determinative, recent academia seems to consider organisations as regional even if their area of action is regionally limited, one example being the Antarctica Treaty, Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1447 mn. 6-7, 1449 mn. 14-15 ; J. I. Charney, 'The Antarctic System and Customary International Law', in F. Francioni, T. Scovazzi (eds.), *International* Law *for Antarctica* (1996), 51, 64-65.

[150] The GA does, however, not distinguish between universal and regional organisations. Villani, *supra* note 8, 225, 275. See also, Secretary-General, An Agenda for Peace, *supra* note 36, 17,para. 62; 23, para. 83. In the doctrine, it is also the signification of an observer status of a given (regional) organisation at the General Assembly regarding its status as a regional organisation or arrangement under Chapter VIII of the UN Charter. One can distinguish three different approaches within the sphere of the United Nations; first of all, the granting of observer status as a recognition of the fact that Chapter VIII is applicable for the given situation (pure recognition of a fact), secondly – similar to the two theories concerning statehood – a constitutive approach which regards the bestowal of the observer status as constitutive of its recognition as a regional arrangement or agency under Chapter VIII of the Charter, thirdly, an approach which considers the conferral of an observer status as entailing no consequences regarding the question if the given situation falls under Chapter VIII of the Charter, cf. Boisson de Chazournes, *supra* note 11, 79, 180-2.

[151] Villani, *supra* note 8, 225, 276. In the case between Cameroon and Nigeria, the ICJ recognised the "regional" character of the Lake Chad Basin Commission on the basis that "it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter", *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11 June 1998, para. 67.

[152] Walter, 'Chapter VIII Regional Arrangements' *supra* note 8, 1445, 1448 mn. 11 ; Boisson de Chazournes, *supra* note 11, 79, 246 ; For a general overview of advantages and disadvantages of conflict management on a regional level, see P.F. Diehl, 'New Roles for Regional Organisations', in C.A. Crocker, F.O. Hampson, P. Aall (eds.), *Leashing the Dogs of War : Conflict Management in a Divided World* (2007), 537, 540-47.

members of the organisation which generate the expectation that the organisation in question can contribute to the maintenance of peace and security.[153]

One can however infer, from the "regional criterion" – *argumentum e contrario* – that the membership has to be limited in order to distinguish them from universal organisations falling outside the scope of Chapter VIII.

In academic writing, controversy has also arisen over the question of whether a given regional organisation can be qualified as falling under Chapter VIII if under its constitutive instrument the organisation can take action – whether under Article 52 or Article 53 – against a non-state member (external threat), as these actions are also covered by the right of self-defense as enshrined in Article 51.[154] But there are no indications that such a limitation is imposed by Chapter VIII. Article 53 refers to enforcement action against enemy states "whether these states are or are not members of the regional organization."[155] That self-defense, as an exception to the prohibition on the use of force, also applies to Chapter VIII is evident from the introductory words of Articles 51 and 52: "nothing in this Charter precludes".[156] Moreover, this approach is not convincing from a functional perspective, since the very same organisation may fulfill quite different tasks according to specific strategic requirements given in precise circumstances. The OAS provided for collective security and collective self-defence,[157] while the re-orientation and expansion of NATO activities following the end of the Cold War is another example of an organisation fulfilling different tasks in a simultaneous manner.[158]

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[153] Walter, *supra* note 141, 39-47. For a summary of a functional analysis, see Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1450 mn. 16 and especially 1459 mn. 48 ; a liberal interpretation also takes into account that regional organisations are "self-defining in terms of membership and objects and purposes", N. D. White, 'The EU as a Regional Security Actor within the International Legal Order', in M. Trybus, N. D. White (eds.) , European Security Law (2007), 329, 332-33.

[154] Boisson de Chazournes, *supra* note 11, 79, 246. In contrast, the wording of a joint communiqué by the Security Council and the AU PSC suggests that the dispute settlement role of regional organisations is limited to "the settlement of disputes among and within their Member States", Annex to the letter dated 14 October 2013 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, Joint communiqué of the seventh annual consultative meeting between members of the Security Council of the United Nations and the Peace and Security Council of the African Union, UN Doc. S/2013/611 (2013), 2, para.2.

[155] H. Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement ?', (1951) 45 *The American Journal of International Law*, 162, 165.

[156] As Kelsen argues, although the "framers of the Charter did not anticipate that the system of collective security laid down in the Charter will not work at all (…) [and although] it may not be in conformity with the intention of the framers of the Charter to organise self-defense by a treaty (…) the rule of Article 53, that no enforcement action shall be taken without the authorization of the Security Council (…) is restricted by Article 51", *ibid.,* 162, 54.

[157] Articles 28 and 29 of the Charter of the Organisation of American States.

[158] See below, Chapter II, 2.2., and Walter, *supra* note 141, 1452-53 mn. 24; R. Wolfrum, 'Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeiten und Grenzen', in (1993) 53 *Heidelberg Journal of International Law*, 576, 579.

The distinction in Chapter VIII between "arrangements" (in French: accords) and agencies (organismes) contains, once again, a broad margin for interpretation and the inclusion of regional entities under Chapter VIII. It is probably for this purpose that the distinction was made, which is irrelevant in practice as the application of the dispositions of Chapter VIII is identical for both of them.[159] The term "agency", as a synonym for "organisation" presupposes a permanent, institutionalised structure, although it does not necessarily amount to the definition of "international organisation" (*infra* 2.1.1.).[160] The word "arrangements" refers to the less-developed form of acting together through an "alliance" or based on a treaty. The intersection with agencies constitutes the treaty as organisations, at least those with an international legal personality, are based on such an international agreement. Thus, any-less developed forms of cooperation do not enter the remit of Chapter VIII. Therefore, the extensive practice of 'ad hoc' authorisations to use all necessary means or measures given to a group of states falls outside the scope of Chapter VIII.

Articles 52 and 53 also imply that organisations subject to Chapter VIII have internal mechanisms to resolve disputes (Article 52 (2)) and that they are able to conduct coercive measures (Article 53 (1)). In order to enable the United Nations to "maintain international peace and security" and "to take *effective collective measures*" [Emphasis added] and to "bring about by peaceful means (…) adjustment or settlement of international disputes or situations"[161], any interpretation of Chapter VIII has to be done in conjunction with the general rules of the organisation. To guarantee the effective maintenance of international peace and security, it has to be sufficient that a regional organisation disposes of either internal dispute resolution mechanisms or that it is able to carry out coercive measures.[162] As the general requirements for regional organisations are laid down in Article

[159] Douhan, *supra* note 96, 46; Villani, *supra* note 8, 225, 297 ; Boisson de Chazournes, *supra* note 11, 79, 248 ; Myjer, White, 'Peace Operations Conducted by Regional Organizations and Arrangements', *supra* note 134, 163, 165 ; Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1451 mn. 21.

[160] Villani, *supra* note 8, 225, 295. Security Council Resolution 816, i.e., also speaks of "regional organizations or arrangements", Security Council Resolution 816, UN Doc. S/RES/816 (1993), 2, para. 4. See also G. Lind, 'Chapter VIII of the UN Charter. Its revival and significance today', in P. Wallensteen, A. Bjurner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 28, 29.

[161] Article 1 (1) of the United Nations Charter. "Situation" as a term has a broader meaning than "disputes" and it is normally accompanied by additional explanation. A dispute refers to a specific claim raised by a party which is denied by the other party, Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1469 mn. 76-77.

[162] Cf. Villani, *supra* note 8, 225, 282-3. The necessary flexible interpretation is confirmed by the practice of the United Nations. In the Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security of the General Assembly, UN Doc. A/RES/49/57 (1994) Annex, it is expressed that "Regional arrangements or agencies can, in *their fields of competence* and in accordance with the Charter, make important contributions to the maintenance of international peace and security, *including*, *where appropriate*, through the peaceful settlement of disputes, preventive diplomacy, peacemaking, peace-keeping and post-conflict peace-building" (para.2) [Emphasis added]. The emphasised points show that the contribution and integration of regional

52 (1) it also remains unclear why paragraph 2 should add new requirements; the latter delineates competences between the United Nations and a regional organisation.[163]

4. The relationship between the UN and regional organisations under Articles 52 and 53

The effectiveness of the cooperation with regional organisations can, however, be impaired if several organisations deem themselves to be competent in a given situation which is "appropriate for regional action". All actions falling short of "enforcement action" under Article 53, are not subject to the authorisation of the Security Council, and thus there can be situations in which a regional organisation is engaged in activities maintaining international peace and security, and the Security Council simultaneously decides to act or to authorise enforcement action. Generally speaking, Article 52 seems to be inspired by the idea of an alternative rapport between the universal level of the Security Council and the regional level.[164] The practice shows a preference for an increased cooperation between the United Nations and regional organisations as can be inferred, *inter alia*, from the 1994 Declaration in which states and regional arrangements and agencies are encouraged to cooperate further with the United Nations in the whole area of the maintenance of international peace and security.[165] An example of joint action by the Security Council and regional organisations was the crisis within the Democratic Republic of the Congo. In its Resolution 1234, the Security Council not only expressed its support for the mediation process of the OAU and the Southern African Development Community, but simultaneously, the Security Council requested all parties to

organisations in the maintenance of international peace and security is not limited to these activities, but can take various forms.

[163] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1455 mn. 30-31.

[164] Villani, *supra* note 8, 225, 318 ; The practice is unclear as to whether there is a priority for regional action. In several cases the United Nations and regional organisations have been active, it "seems to reject clear alternatives between universal or regional jurisdiction" Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1470 – 77, 1476 mn. 106 ; See equally Wolfrum, *supra* note 158, 576, 579-80.

[165] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 4-5, especially paras. 8 – 10. Nevertheless, increased cooperation in practice means that the Security Council might decide whether to act itself or whether to delegate and support the actions of a regional organisation. In the case of the dispute between Ethiopia and Eritrea, the Security Council expressed its support for the actions of the OAU and called upon the parties to fully cooperate with the latter, Villani, *supra* note 8, 225, 319; Security Council Resolution 1177, UN Doc. S/RES/1177 (1998), 2, paras. 4-5. This organ of the UN strengthened its supports for the mediation efforts of the OAU in the two follow up resolutions, Security Council Resolution 1226, UN Doc. S/RES/1226 (1999), 1, paras. 1, 3; 2, para. 4, and Security Council Resolution 1227, UN Doc. S/RES/1227 (1999), 1, paras. 4-5. After fights restarted, the Security Council issued a resolution under Chapter VII demanding the states to resume peace-talks under AU auspices, Security Council Resolution 1298, UN Doc. S/RES/1298 (2000), 2, paras. 4-5. Furthermore, it imposed an embargo on weapons (see, in particular paras. 6-8), thus putting pressure on the two states so that they would accept the proposed settlement by the OAU.

cooperate fully with its special envoy by also reaffirming the readiness of the UN to help with the application of a ceasefire agreement.[166]

In comparison to Article 52, the relationship between the United Nations and regional organisations is reversed in Article 53. The priority of regional organisations under Article 52 is replaced by the priority of the Security Council.[167]

The Security Council keeps its broad margin of discretion, which it disposes in maintaining international peace and security under Chapter VII also within Chapter VIII, as it shall utilise "where appropriate" regional arrangements or agencies. Any other interpretation would only add more than was intended by the drafters of the Charter.[168] In practice, the Security Council normally refers to all "relevant international organisations" in its resolutions rather than to pick up a specific one.[169]

5. The interpretation of "enforcement action" in Article 53

Another problem of interpretation is the question as to which circumstances the Security Council can rely upon regional organisations. Article 53 (1) speaks of enforcement action, which seems to exclude other coercive measures which can be found in the United Nations Charter such as "preventive action" (Article 5) or "preventive measures" (Article 50).[170] The logical consequence is to presume that the application of Article 53 is limited to cases in which the coercive measures are a *re*action rather than an action, similar in nature to self-defense which is applicable only in cases of an actual armed attack to repel invaders.

Another argument of systematic interpretation, while referring to Article 1 of the Charter which mentions "effective collective measures for the *prevention and removal of threats to the peace"*

[166] Security Council Resolution 1234, UN Doc. S/RES/1234 (1999), paras. 11-15.
[167] Villani, *supra* note 8, 225, 325. Kelsen said therefore, that "Article 52 and 53 of the Charter refer to regional agencies which may be considered to be – at least indirectly – organs of the United Nations in so far as Members of the United Nations are authorised by the Charter to constitute such agencies for purposes of the United Nations (…) Regional agencies are neither principal nor subsidiary organs within the meaning of Article 7" and "[r]egional organisations may act as organs of the United Nations not only in settling local disputes, but also in taking enforcement action under the authority of the Security Council", H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (1950), 145-6, 326.
[168] Cf. Villani, *supra* note 8, 225, 327.
[169] *Ibid.,* 328. However, as always in the context of peace-keeping and peace-keeping operations which are all unique in their individual make-up, it depends on all the relevant circumstances, Resolution 2085 refers expressly to some specific organisations, Security Council Resolution 2085, UN Doc. S/RES/2085 (2012).
[170] Villani, *supra* note 8, 225, 329. But in the Spanish version of the Charter, Article 42 speaks of "medidas" and not of "acción" and action is equally used in non-military contexts in other articles, e.g. Article 2 (5) and Article 11. Taking into account of other differences in the English, French and Spanish versions, no positive conclusion can be drawn from the terminology, C. Walter, 'Article 53', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1478, 1482 mn. 2-3.

supports the view of a broader interpretation of "enforcement action". The powers of the Security Council under Chapter VIII are derived from Chapter VII and its actions under Chapter VIII are based on the existence of a situation under Article 39, so that a broad interpretation of enforcement action is justified.[171] In practice, the Security Council has in most cases in its resolutions either referred to a "threat to international peace and security" or even abstained from giving any determination, but decided "to act under Chapter VII of the United Nations Charter". This practice allows the Council to keep a greater margin of discretion and appreciation and this non-distinction between the three different scenarios in Article 39 should accordingly be applied to Article 53 as well.[172]

Furthermore, what kinds of measures are comprised by "enforcement action" under Article 53 should be determined. Article 39 does not distinguish between measures taken under Article 41 and 42 but qualifies both as measures to restore international peace and security. Articles 50 and 5 also show that enforcement measures can be of a non-military nature.[173] Thus, enforcement action under Article 53 comprises all measures which can be coercive upon a state. That interpretation is supported by the principle of effectiveness; in order that the enforcement action is effective, the international organisations have to be able to use all means necessary. Moreover, as established, the power of the Security Council under Chapter VIII derives from Chapter VII so that they comprise *per se* all possible forms of enforcement measures under Chapter VII should the Security Council decide to authorise a regional organisation to act. [174]

This interpretation also finds support in the practice of the Security Council. In its resolution 757, the Security Council imposed a ban on the import and export of all goods from Yugoslavia, which was binding for international organisations.[175] Limitations of enforcement action arise in the form of the respective constitutional framework of each regional arrangement or agency which either permits them to carry out a certain action (the action would be *intra vires)* or prohibits them from doing so as

[171] Another supportive argument is the effectiveness and proper functioning of the organisation. Against this view, for instance, Wolfrum, *supra* note 158, 576, 581-82; Argument *a maiore ad minus*, if the Security Council can use regional organisations for military purposes, it can most certainly do so in cases involving non-military measures, Walter, 'Article 53', *ibid.*, 1478, 1497 mn. 53.

[172] Security Council Resolution 883 which imposed an embargo against Libya was based on a qualification of the situation as a "threat to international peace and security" and called upon all states and international organisations to act accordingly with the resolution, Security Council Resolution 883, UN Doc. S/RES/883 (1993), 1, Preamble; 4, para. 12.

[173] Including economic measures (under Article 50) or the suspension of rights and privileges of membership (under Article 5).

[174] Cf. also Villani, *supra* note 8, 225, 331-32 ; Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/54/87 (1999), 14, para. 116, 118.

[175] Security Council Resolution 757, UN Doc. S/RES/757 (1992), para. 11. The resolution contains many other measures which international organisations are asked to apply.

this would be tantamount to acts *ultra vires*.[176] This inherent limitation is recognised in the 1994 Declaration according to which "Cooperation between regional arrangements or agencies and the United Nations should be in accordance with their respective mandates, scope and composition."[177]

On the basis of the principle of *pacta tertiis nec nocent nec prosunt* which is enshrined in Article 34 of the Vienna Convention on the Law of Treaties, the Security Council likewise cooperates with regional organisations, for example in the form of recommendations and consultations, as the Security Council cannot create obligations for non-members of the United Nations.[178] D'Aspremont makes a very similar argument with regard to regional organisations which have not submitted themselves at least formally under Chapter VIII of the UN Charter, e.g. NATO.[179]

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[176] Similarly, Villani, *supra* note 8, 332. As Villani correctly says "toute la matière de la compétence de l'organisation régionale se situe en dehors de la portée et des pouvoirs du Coseil de sécurité et doit être appréciée uniquement par rapport au statut de l'organisation", *ibid.*, 335-6. Article 48 (2) of the Charter likewise stipulates that "decisions [of the Security Council] shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." In practice, the question as to whether a regional organisation has the constitutive rights to engage in peacekeeping has been discarded, but the question of the legality of action has been examined on the basis of the UN Charter and general international law. The argument made, especially during peacekeeping action in the Cold War, is that what states can do separately, they can also do together, notwithstanding the question as to whether the formal procedures of the respective internal law of the organisations were respected, Gray, *supra* note 54, 391-2. In practice, some organisations have later adopted instruments allowing them to conduct such operations, see C. Gray, 'The Use of Force and the International Legal Order', in M. D. Evans, *International Law* (2010), 642; Cf. also Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/53/127 (1998), 15-16, paras. 107, 110; Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/54/839 (2000), 18-19, paras. 156, 160

[177] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 4, para. 4.

[178] Articles 24 and 25 of the UN Charter stipulate that the members of the organisation confer primary responsibility for the maintenance of international peace and security on the Security Council, that the Council acts on their behalf and that they agree to accept and carry out its decisions. One cannot forget however that the organisations are bound indirectly by their respective members which are also free to choose in which form they execute the decisions of the Council on the basis of Article 48 (2) of the Charter and bearing in mind that the Security Council often leaves the decision to the states in which form they act. In its Resolution 794, it held "[a]cting under Chapter VII and VIII of the Charter, calls upon States, nationally or through regional agencies and arrangements, to use such measures as may be necessary to ensure strict implementation of paragraph 5", Security Council Resolution 794, UN Doc. S/RES/794 (1992), 4, para. 16. In Resolution 770, the Security Council equally called upon "States to take nationally or through regional agencies or arrangements all measures to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo.", Security Council Resolution 770, UN Doc. S/RES/770 (1992), 2, para. 2. Further examples can be found, *inter alia*, in Security Council Resolutions 787, UN Doc. S/RES/787 (1992), 4, para. 12 and Security Council Resolution 820, UN Doc. S/RES/820 (1993), 4, para. 17; 6, para.29. In some limits, one could imagine an obligation for regional organisations to carry out decisions of the Security Council in the form that the Security Council could impose on its members the need to act through the regional organisations of which they are members, cf. Villani, *supra* note 8, 225, 345 – 9.

[179] J. d'Aspremont, 'The Law of International Responsibility and Multilayered Institutional Veils: The Case of Authorized Regional Peace-Enforcement Operations', in SHARES Research Paper 24 (2013), ACIL, 2013-10, available at www.sharesproject.nl and SSRN, 6-7. In his view, such a scenario has also an impact on the law of international responsibility. By the lack of submission to Chapter VIII of the UN Charter by a given regional organisation, the application of Article 17 ARIO to a peace enforcement operation conducted by this

Another requirement of Article 53 is that the enforcement action is taken under the authority of the Security Council which corresponds to an adoption of coercive measures by the Security Council in the form of a resolution.[180] Should the Security Council authorise enforcement action, it nevertheless keeps control of the activities as it is specified under Article 54 of the Charter.[181] In this way, the Security Council acts upon its primary responsibility for the maintenance of international peace and security, that is conferred on it by virtue of Article 24 of the Charter.[182]

Various forms of control exist and are used by the Security Council. The committees created by the Security Council in order to supervise sanctions are one form of supervision at its disposal, but the Secretary-General can also be included in the control mechanism as e.g. in Resolution 787 in which the "[s]tates concerned [are requested], nationally or through regional agencies or arrangements, to coordinate with the Secretary-General inter alia on the submission of reports to the Security Council regarding actions taken."[183] With regard to the operational level, the authority of the Security Council is normally limited to the examination of reports presented to it by states or directly by the regional organisations, as the latter regional organisations conduct the enforcement action.[184]

6. A different interpretation of "enforcement action" for Article 53 (1) second sentence: the practice of sanctions by the UN and regional organisations

In the case of regional organisations taking enforcement action under their own initiative, according to Article 53 (1), second sentence, "enforcement action" has to be interpreted more restrictively than in the alternative scenario of the Security Council utilising regional organisations for enforcement actions under its authority. Otherwise, regional entities would have to ask for the authorisation of the Security Council for all kinds of acts that were potentially coercive in nature possibly coercive nature, such as diplomatic, economic, political, financial and military measures.

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organisation authorised by the Security Council would be precluded if the effect of the authorisation on the law of international responsibility extends only to the fulfilment of the obligations under the UN Charter., *ibid.*, 17-18.

[180] Villani, *supra* note 8, 225, 349.

[181] Article 54 stipulates that the Security Council shall be kept fully informed of all activities undertaken or in contemplation by regional organisation for the maintenance of international peace and security.

[182] Villani, *supra* note 8, 225, 349 – 50.

[183] Security Council Resolution 787, UN Doc. S/RES/787 (1992), 4, para. 14. Villani, *supra* note 8, 225, 350-1. In the case of Sierra Leone, the Security Council attributed the power to the sanction committee to coordinate with its counterpart at ECOWAS, Security Council Resolution 1132, UN Doc. S/RES/1132 (1997), 4, para. 10 (h).Even more comprehensive, in Resolution 1196, the Security Council encouraged the chairmen of the established sanction committees imposing arms embargos on Africa to "seek to establish channels of communication with regional and subregional organizations and bodies.", Security Council Resolution 1196, UN Doc. S/RES/1196 (1998), 2, paras. 3-4.

[184] Cf. Villani, *supra* note 8, 225, 352-3. So, KFOR, e.g. submitted regular reports directly to the Security Council.

On the basis of Article 31 of the VCLT, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Taking into account that the terminology is identical to the first sentence of Article 53, not to mention that the first sentence is contextualised by the second sentence, any other interpretation does not seem to be reasonable.

Yet, the object and purpose are different. As explained, in the first sentence, the purpose is to allow the Security Council to utilise – in an effective way – regional organisations for the maintenance of international peace and security which permits and justifies a broad interpretation, whereas in the second alternative, the authorisation renders an otherwise illegal action legal.[185] Moreover, by applying once more the principle of effectiveness, a stricter interpretation of enforcement action is preferable for the second alternative; otherwise the Security Council would have to authorise all manners of measures and the resulting work-load and delay would not be insignificant. A stricter interpretation further allows the regional entities to keep a certain autonomy, rendering their performance more effective.[186]

This later interpretation is confirmed by the practice of the Security Council and the relevant organisations. [187] The European Union imposed an embargo on weapons and military equipment

[185] F. L. Morrison, 'The Role of Regional Organizations in the Enforcement of International Law', in J. Delbrück (ed.), U. E. Heinz (ass. ed.), *Allocation of Law Enforcement Authority in the International System. Proceedings of an International Symposium of the Kiel Institute of International Law, March 23 to 25, 1994*, 39, 43.

[186] Cf. also for similar arguments, Villani, *supra* note 8, 225, 356-7. ; Also in favour of a restricted interpretation, J. Frowein, 'Zwangsmaßnahmen von Regionalorganisationen' in U. Beyerlin, M. Bothe, R. Hofmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (1995), 57, 66-7; A. Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) 43, 45-46, 49, 53-54; Article 2(4) also only prohibits states and consequently, group of states to use military force against each other, but permits other forms of coercion. This is supported by Schreuer, *supra* note 27, 477, 491, who says "[t]here is nothing to stop a group of States from joining efforts in the framework of a regional organization and to do what they are permitted to do under general international law, such as taking reprisals not involving the use of force." This presupposes however a permissive ground in international law to apply other coercive measures such as a violation of an obligation *erga omnes*, Frowein, *ibid.*, 67. The very same argument was already made by the Columbia Chairman of Committee III/4 in San Francisco: "Enforcement action, with the use of physical force, is obviously the prerogative of the Security Council (…) [b]ut the other measures, those of Article 41, are not; (…) it is with any State – withouth necessarily violating the principles of the Charter – to break diplomatic, consular and economic relations or to interrupt its communications with another State", as cited in F. V. Garcia-Amador, *The Inter-American System, ,Its Development and Strengthening* (1966), 190; N. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 102, 127; Orakhelashvili, *supra* note 58, 310; Also supporting an authorisation for the use of force, M. Roscini, 'L'articolo 17 del Trattato sull'Unione europea e i compiti delle Forze di pace', in N. Ronzitti (ed.), *Le Forze di Pace dell'Unione Europea* (2005), 49, 58.

[187] Boisson de Chazournes, *supra* note 11, 79, 265. Another argument in favour of this interpretation is, that when states can use such measures individually without an autorisation of the Security Council, the very same has to apply, *mutatis mutandis*, when they act collectively through an international organisations, *ibid.*, 266; Gray, *supra* note 54, 403-4. In the Cuba Crisis, sanctions by the OAS were considered not to be "enforcement action" under alternative 2, necessitating an authorisation of the Security Council, M. G. Goldman, 'Action by

against Yugoslavia without asking for the permission of the Security Council which persisted even after the adoption of Security Council Resolution 713. The European measures were actually more restrictive and went beyond what was required by the resolution of the Council.[188] In 1999, by its own initiative, the European Union adopted common position 1999/624/CFSP which imposed a ban on arms, munitions and military equipment against Indonesia. The permissive foundation in international law for the introduction of such measures was the massive violations of human rights (*erga omnes* obligations) and international humanitarian law by Indonesia in East Timor.[189] Seven years earlier, ECOWAS had imposed an embargo on weapons on that part of the territory of Liberia which was controlled by the National Patriotic Front of Liberia (NPFL). ECOWAS then proceeded to ask the United Nations for assistance in the application of the sanctions which was granted by Security Council Resolution 788.[190] Another important resolution is Security Council Resolution 841, in which the Council decided to implement the trade embargo recommended by the Organisation of American States against Haiti and to make it consequently universally compulsory unless

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the Organization of American States: When is Security Council Authorization Required under Article 53 of the United Nations Charter?', in (1962-1963) 10 *UCLA Law Review*, 837, 849-51. Measures taken regionally would be subject to the Security Council's ratification only if they called for the use of armed force", Security Council Official Records, Fifteenth, 893rd meeting: 8 September 1960, 6 para. 32. Similarly Venezuela stated "It is the Venezuelan Government's view that the authorization of the Security Council would be required only in the case of decisions of regional agencies the implementation of which would involve the use of force, which is not the case with this resolution of the American states", *ibid.,* 13 para. 77. See also, Akehurst, *supra* note 137, 175, 195; White, 'The EU as a Regional Security Actor', *supra* note 153, 329, 340-41.

[188] Villani, *supra* note 8, 225, 361-2.

[189] Council Common Position of 16 September 1999 concerning restrictive measures against the Republic of Indonesia (1999/624/CFSP), Preamble, Article 1.

[190] M. Weller (ed.), *Regional Peace-keeping and International Enforcement: The Liberian Crisis* (1994), 226-233. In the letter, ECOWAS requested "United Nations assistance in connection with the application by the international community, in accordance with the relevant provisions of Chapter VIII of the United Nations Charter, of sanctions against those parties to the conflict that do not respect the provisions of the Yamoussoukro IV Accords.", Letter dated 28 October 1992 from the Permanent Representative of Benin to the United Nations addressed to the President of the Security Council, UN Doc. S/24735 (1992), para. 4. In its resolution, the Security Council decided "under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Liberia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Liberia", Security Council Resolution 788, UN Doc. S/RES/788 (1992), 3, para. 8 ; See also Walter, 'Article 53', *supra* note 169, 1478, 1485 mn. 19-20. Although in another example, regarding sanctions against Sierra Leone by ECOWAS, this organisation was authorised to use sanctions by virtue of Security Council Resolution 1132 (1997), an analysis of the debate in the Council as well as of the text of the resolution show that the decisive factor for the mandate was the fact that the implementation of the non-military sanctions might lead to situations involving the use of military force, *ibid.*, 1486 mn. 21-22. France referred to the "authorisation as being exceptional in nature, but legitimized by the past experience of cooperation between the United Nations and ECOWAS." Poland considered the situation to be threatening international peace and security", moreover "[t]he relevant paragraph of the draft resolution related to the enforcement of measures stipulated therein authorizes the regional organization —ECOWAS —to *ensure strict implementation* of Security Council decisions. It is our sincere hope that by creating such an *enforcement mechanism* this draft resolution will contribute to resolving the crisis in Sierra Leone and immediately terminating the plight of its people, thus preventing possible adverse implications for peace and stability in the whole region." [Emphasis added], Security Council, Fifty-second Year, 3822nd meeting, Wednesday, UN Doc. S/PV.3822, 6, 8.

> the Secretary-General, having regard to the views of the Secretary-General of the Organization of the American States, has reported to the Council that, in light of the results of negotiations conducted by the Special Envoy for Haiti of the United Nations and the Organization of American States Secretaries-General, the imposition of such measures is not warranted at that time.[191]

Thus, the Security Council can, by its discretionary power, reverse the relationship of Article 53 and act as an executor of decisions taken by a regional organisation of measures not involving the use of force.[192] Whereas this practice underlines the pragmatic approach taken by the Security Council, it has to be added, however, that the non-application of Article 53 paragraph 1 to non-military sanctions by regional entities does not mean that these sanctions or actions are automatically legal. These actions are justified if they have a valid basis under (general) international law. The one exception is if the regional organisation receives an authorisation of the Security Council which would render actions which were otherwise not justified under international law, legal, on the premise that the Security Council has assessed that the respective situation fulfills the criteria under Article 39 of the Charter.[193]

Recent examples of non-military sanctions by regional organisations not having an authorisation by the Security Council include those adopted by the Arab League and the EU against Syria in 2011 with "no indication that (…) any member of the UN maintained that these measures were illegal."[194] The Security Council likewise only took note of the decisions of ECOWAS and the AU to adopt targeted sanctions in Mali.[195]

Should the Security Council decide to act itself, the legality of actions by regional organisations is more difficult to assess. Measures taken by regional organisations going beyond the measures imposed by the Security Council could affect the efficiency of the latter and the reestablishment of international peace and security.[196] Additionally, in the event that the Council decides to stop or to lift the imposed sanctions and the regional entities continue to maintain or establish enforcement action under their authority, this would contravene first of all the assessment of the Security Council

[191] Security Council Resolution 841, UN Doc. S/RES/841 (1993), paras. 1, 3.
[192] Depending on the specific operation, the Security Council might decide to let a regional organisation intervene and then take over the operation or vice versa. It cannot be strengthened enough that the practice of the Security Council shows a high degree of flexibility. cf. Griep, *supra* note 10; Villani, *supra* note 8, 225, 364.
[193] Villani, *ibid.*, 225, 364-7.
[194] Walter, 'Article 53', *supra* note 169, 1478, 1487 mn. 24-25; EU Council Decision, 'concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP' (1 December 2011), 2011/782 CFSP (2011).
[195] Security Council Resolution 2056, UN Doc. S/RES/2056 (2012), 3, para. 6.
[196] It is also in that regard that one can separate "authorisation" from "delegation of powers". Whereas in the case of an authorisation of the use of force, the Security Council effectively delegates some of its own powers to the regional organisation, in other cases, the Security Council may authorise or impose measures which if executed by the Security Council itself would be *ultra vires*, such as the creation of the ICTY, see Boisson de Chazournes, *supra* note 11, 79, 271-4.

of the existence of a situation under Article 39 as well as contravening its primary responsibility for the maintenance of international peace and security on the basis of Article 24 of the Charter.[197]

Concerning Yugoslavia, the EU adopted severe sanctions which went far beyond all measures imposed by the Security Council. Villani views these sanctions as not legitimate; he considers them to be incompatible with the primary responsibility conferred on the Security Council by the members of the organisation.[198] It seems nevertheless to be correct to consider them as legitimate under certain circumstances[199] and it is preferable to rely upon the self-regulation mechanisms of the Security Council. As the primary guardian of international peace and security, there would be a reaction in the form of a resolution, or informal or formal consultations in the case of enforcement measures, contravening the efforts of sanctions by the Security Council.[200] In practice, there would normally be informal or formal consultations between the UN and regional organisations before the adoption of sanctions by the latter, and even more so in these cases where members of the Security Council are also engaged in enforcement actions by regional entities given that their dual membership allows them to assess the enforcement actions and to oversee their compatibility. [201]

There may be situations in which a regional organisation recommends the use of force against another state, and in such a case, the authorisation of the Security Council is also necessary as it would be illogical to require an authorisation by the Council for a binding decision of the regional organisation, but not for recommendations issued by the regional organisation.[202]

The general practice of the United Nations and the Security Council regarding the authorisation of the use of force by regional organisations also confirms that the Council continues to exercise its own

[197] Villani, *supra* note 8, 225, 367-9 ;

[198] *Ibid.* This legal argument is not convincing, as regional organisations have to be distinguished from member states of the UN, the latter ones are bound by the UN Charter. His other arguments are more plausible, and it may, indeed, happen, that certain supplementary or excessive measures adopted by regional organisations could not only affect the effectiveness of the measures by the Security Council, but that they lead to a resurgence of fighting among parties to a conflict, *ibid.*

[199] See *infra* 1.3.5., as well as the beginning of this part, 1.3.6.

[200] Villani, *supra* note 8, 225, 368-9.

[201] But one cannot deduce an authorisation from the silence or inactivity of the Council as silence does not signify consent (*qui tacet neque negat, neque utique fatetur)*, cf. Villani, *supra* note 8, 225, 377-9.

[202] Villani, *supra* note 8, 225, 369-70. The recommendation to use armed force against a state also constitutes a violation of Article 2(4) of the Charter as a threat of the use of force. In the Cuba Missile Crisis, the United States relied upon this distinction in the crisis when they imposed a naval embargo against Cuba on a basis of a recommendation by the Organisation of American States. In the Resolution, the Organisation of American States recommended "that the member-states (…) take all measures, individually and collectively, including the use of armed force, which they may deem necessary", the text of the Resolution can be found in Security Council, Official Records, Seventeenth Year, 1022nd meeting, UN Doc. S/PV.1022 (1962), 16, para. 81; Boisson de Chazournes, *supra* note 11, 79, 267.

responsibility to maintain international peace and security by supervising enforcement operations.[203] Resolution 816, for example, authorises Member States, "acting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary means in the airspace of the Republic of Bosnia and Herzegovina (…) to ensure compliance with the ban on flights."[204] Although this resolution refers to Chapter VIII in the preamble, it was adopted under Chapter VII and it therefore connects both Chapters of the Charter.[205] Moreover, it effectively blurs the difference between Article 53 (1) first sentence and Article 53 (1) second sentence as any authorisation under Chapter VII can be equated rather to an authorised enforcement action taken by a regional organisation under Article 53 (1) second sentence. The repetition of "under the authority" in the resolution however points towards Article 53 (1) first sentence and thereby to an enforcement action by a regional organisation taken under the authority of the Security Council. Nevertheless, it proves that in practice, the distinction between the two options for enforcement action in Article 53 is less relevant.[206]

7. Peacekeeping operations of regional organisations and the application of Article 53 of the UN Charter

Peacekeeping operations conducted under the auspices of a regional organisation based on the consent of the host-state are exempt from the requirement of an authorisation by the Security Council.[207] The consent given renders their deployment on the ground legal under international law.[208] Another requirement is that their use of military force is limited to cases of self-defence. The

[203] Villani, *supra* note 8, 225, 381-9 ; Sicilianos also held that, regional organisations do not possess "un pouvoir illimité d'auto-interprétation du mandat", L.-A. Sicilianos, 'L'autorisation par le Conseil de sécurité de récourir à la force : une tentative d'évaluation', (2002) 106 *Revue générale de droit international public*, 5, 17.

[204] Security Council Resolution 816, *supra* note 160, 2, para. 4. The resolutions stressing that regional organisations act under the authority of the Security Council were implemented in practice by establishing an agreement between the military command of FORPRONU and NATO. After the conclusion of the agreement, NATO conducted bombardments to defend the security zones in Bosnia-Herzegovina, Villani, *supra* note 8, 225, 383.

[205] Other examples, include, e.g. Security Council Resolution 1744, UN Doc. S/RES/1744 (2007), 2-3, paras. 4 b) and d); See equally, Walter, 'Chapter VIII Regional Arrangements, *supra* note 8, 1429, 1444 mn. 32.

[206] Villani, *supra* note 8, 225, 355-6 ; similar, Boisson de Chazournes, *supra* note 11, 79, 272.

[207] Myjer, White, 'Peace Operations Conducted by Regional Organizations and Arrangements', *supra* note 134, 163, 169; E. Jimenez de Arachaga, 'International Law in the Past Third of a Century', Recueil des cours de l'Académie de La Haye, Volume 159 (1978), 138; Lind, 'Chapter VIII of the UN Charter', *supra* note 160, 28, 32.

[208] *Certain Expenses*, *supra* note 133, 170.

ICJ held in the *Certain Expenses* case that "the operations known as UNEF and ONUC were not *enforcement* actions within the compass of Chapter VII of the Charter."[209]

However, the possible coercive nature of recent third-generation peacekeeping operations challenges that premise and an examination of whether Article 53 of the UN Charter is applicable for these operations is thus necessary.[210] Article 53 does not *per se* apply to peacekeeping operations by regional organisations which were not foreseen during the preparation of the United Nations Charter; as Boutros-Ghali expressed "Peace-keeping can rightly be called the invention of the United Nations. It has brought a degree of stability to numerous areas of tension around the world."[211] Thus, the precise question is whether regional operations conducting peacekeeping operations, which can include the potential use of military force, need an authorisation to conduct these operations or if they can operate independently and autonomously from the Security Council.[212]

Peacekeeping operations, as classically conceived, which are based on the consent and cooperation of all parties and with a conservative mandate such as the supervision of a ceasefire, only allow for the use of force in cases of self-defense. As such, these kinds of operations do not fall under the requirement of authorisation of the Security Council as the use of force is not intended to be employed against a particular party and as self-defense is one of the exceptions to the prohibition of the use of force under the regime of the Charter.[213] Consequently, should an operation include or assume a coercive character, it enters into the field of application of Article 53 and can consequently only be implemented with the authorisation of the Security Council.[214]

Now, it has to be defined under which conditions a peacekeeping operation can be considered coercive under Article 53 of the Charter. Obviously, this includes military operations conducted without the consent of the concerned parties, but more often, the operations are established on the

[209] *Certain Expenses*, *supra* note 133, 165. However, in this context, it is worthwhile to mentioning the statement of the Secretary-General who said that "While the General Assembly is enabled to establish the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be stationed or operate on the territory of a given country without the consent of the Govern[ment] of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter", Secretary-General, Second and final report of the Secretary-General on the plan for an emergency international United Nations force requested in the resolution adopted by the General Assembly on 4 November 1956 (A/3276), UN Doc. A/3302 (1956), para. 9.
[210] Cf. Bothe, 'Peacekeeping', *supra* note 55, 1171, 1192 mn. 31.
[211] Secretary-General, An Agenda for Peace, 14, para. 46. Cf. also Virally, *supra* note 28, 483-86.
[212] Villani, *supra* note 8, 225, 392.
[213] Cf. Villani, *supra* note 8, 225, 393-5. But an authorisation by the Security Council always enhances the legitimation of a regional peacekeeping operation. As stated in the study of the Lessons Learned Unit of the United Nations: "peacekeeping operations by regional organizations and/or arrangements command greater consensus if authorized by the Security Council before they are established", Lesson Learned Unit, Department of Peacekeeping Operations, *supra* note 113, Part II A. para II.
[214] Cf. Villani, *supra* note 8, 225, 407.

basis of consent of the parties and implying a mandate to use force. Notwithstanding the consent of all parties, do these operations nevertheless enter into the field of application of Article 53 or, in other words, does the consent render enforcement action legitimate?[215]

In situations of internal crisis or civil war, it can be difficult, first and foremost, to identify the respective parties and the *de facto* government. Nevertheless, as it has been highlighted in the Brahimi report, there are no guarantees that the consent will not be revoked or given for insidious reasons.[216] The 1994 Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies emphasises in this regard that "peace-keeping activities undertaken by regional arrangements or agencies should be conducted with the consent of the State in the territory of which such activities are carried out" and that regional organisations are encouraged to build up and assemble troops "for use as appropriate, in coordination with the United Nations and, when necessary, under the authority or with the authorization of the Security Council, in accordance with the Charter."[217] The reference to "when necessary" can only be interpreted so that as long as the regional organisation conducts a classic peacekeeping operation which does not involve any form of (military) enforcement action, an authorisation by the Security Council is not *necessary*; should the regional agency or arrangement however implement an operation with coercive elements, an authorisation under Article 53 is required.[218] The practice of the Security Council regarding states or groups of states confirms and validates that interpretation, *inter alia*, in Security Council Resolutions 940 and 1080.[219] In practice, it can be problematic if there are different interpretations of a mandate provided by the Security Council for a military operation of a regional organisation. The very recent practice (*infra* 1.3.8. and Chapter II) suggests that regional organisations increasingly tend to ask for an authorisation by the Security Council notwithstanding the qualification of the planned operation as a peacekeeping or peace enforcement operation. Should the Security Council hand out a rather imprecise mandate which may be interpreted differently by the Security Council and the regional organisation, the question would arise what consequences this different interpretation could entail in terms of the law of international responsibility if there is a violation of international law occurring during the deployment of the operation. It could be necessary to inquire if the different interpretation of the mandate by the

[215] *Ibid.,* 225, 407.
[216] Panel on United Nations Peace Operations, *supra* note 50, 9, para.48.
[217] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 2-3, Preamble; 4, paras 9-10.
[218] Shaw, *supra* note 134, 1275; Villani, *supra* note 8, 225, 408-9 ; C. Walter, 'Security Council Control over Regional Action', (1997) 1 *Max Planck Yearbook of United Nations Law*, 129, 174-5. Another argument one can made is that the consent of the host state corresponds to the common law doctrine of *volenti fit iniuria*.
[219] Security Council Resolution 940, UN Doc. S/RES/940 (1994), 2, paras. 1, 4; Security Council Resolution 1080, UN Doc. S/RES/1080 (1996), 2, paras. 1-7.

regional organisation would correspond to a failure of supervision by the Security Council. If that were to be answered in the affirmative, one could at least theoretically also engage the responsibility of the United Nations and not only the responsibility of the regional organisation conducting the operation.

8. Towards a merger of Chapter VII and Chapter VIII in the practice of the Security Council

There have been cases when regional peacekeeping operations were conducted without the authorisation of the Security Council, but the very recent practice shows that these operations have been carried out either with a prior authorisation or approbation by the Security Council in the early stages of the peacekeeping operation.[220] The IFOR operation in Yugoslavia was based on the Annex to the Agreement of Paris and was authorised by a Security Council Resolution with a mandate to use all means necessary to guarantee the implementation of the Peace Agreements.[221] These examples are very important as the Security Council considered it to be necessary to give its authorisation, though all the parties had already agreed to the establishment of the peacekeeping operation.[222] Overall, the conclusion is that any assessment will depend on the specific circumstances and the specific mandate given by the Security Council. Confronted with the situation in Mali, the Security Council passed Resolutions 2056 (2012), 2071 (2012) and 2086 (2012) of which not one refers to Chapter VIII of the Charter, including Resolution 2086 which established AFISMA, an African-led[223] operation with a clear enforcement mandate.[224] In this regard, Walter argues that

[220] See, for more details, Villani, *supra* note 8, 225, 411-6.

[221] The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Annex 1A Agreement on the Military Aspects of the Peace Settlement; Security Council Resolution 1031, UN Doc. S/RES/1031 (1995), 3, paras. 14-15. Similarly, the follow-up operation SFOR was authorised by Resolution 1088 to take all necessary measures for the implementation of the Peace Agreement, Security Council Resolution 1088, UN Doc. S/RES/1088 (1996), 3, para. 8; 5, paras. 18-21. The same applies for the KFOR operation in Kosovo, cf. Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), 2, para.7.

[222] Villani, *supra* note 8, 225, 416.

[223] The operation is implementation on the basis of the African Peace and Security Architecture (APSA) in coordination between the AU and ECOWAS.

[224] Security Council Resolution 2056, *supra* note 195; Security Council Resolution 2071, UN Doc. S/RES/2071 (2012), Security Council Resolution 2086, UN Doc. S/RES/2086 (2012). That the practice of the Security Council is accommodating can be seen in other cases. In Resolutions 770 (1992) and 1484 (2003), the Council referred exclusively to Chapter VII, In resolutions 875 (1993) and 1464 (2003), the Council gave references to both chapters, while in Resolution 816 (1993) the Council acted under chapter VII while equally reaffirming Chapter VIII. Another variation is contained in Resolution 1497 (2003), while acting under Chapter VII, the Resolution contains a reference to Chapter VIII in its preamble. Yet another variation is that the Security Council will not refer to Chapter VIII but will authorise or encourage states "acting nationally or through regional agencies or arrangements", Security Council Resolution 770, *supra* note 178; Security Council Resolution 816, *supra* note160; Security Council Resolution 875, UN Doc. S/RES/875 (1993), Security Council Resolution 1464, *supra* note 85; Security Council Resolution 1484, UN Doc. S/RES/1484 (2003); Security Council Resolution 1497, UN

> [w]ith the original concept of using troops under Art. 43 for military enforcement measures having generally been replaced by a concept of authorization, the distinction between Chapter VII and Art. 53 (1) as the legal basis for authorizations relating to the use of force by regional organizations has lost its practical relevance.[225]

Other authors offer similar arguments, for example, Boisson de Chazournes sees Article 53 as a precursor of the trend towards the decentralised use of force on the international level.[226] One explanation for the use of Chapter VII rather than Chapter VIII is the fact that many regional organisations are reluctant to be subjected to Chapter VIII and the obligations it entails.[227] From a legal perspective, the shift to Chapter VII does not involve fundamental changes as the practice continues to be based on an authorisation by the Security Council and as the Security Council continues to keep global and ultimate control.[228]

Doc. S/RES/1497 (2003); For the last scenario see e.g. Security Council Resolution 942, UN Doc. S/RES/942 (1994), para.5; Cf. Boisson de Chazournes, *supra* note 11, 79, 297 ; see also S. Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping: The African Example', (2010) 51 *Virginia Journal of International Law*, 185, 195.

[225] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1444 mn. 33; also Gray, *supra* note 54, 426; N.D. White, Ö. Ülgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function', in (1997) *44 Netherlands International Law Review*, 378, 389.

[226] Boisson de Chazournes, *supra* note 11, 79, 275. As she observes, the impossibility to implement the system of Chapter VII based on a channeling of the authority to use force through the Security Council, led to two different reactions. Firstly, the concept of peacekeeping operations under the direct command and control of the United Nations was created. Secondly, there emerged an tendency towards a decentralised approach within Chapter VII according to which the Security Council authorises and delegates the use of force to the member states. As contrary to the framework of the United Nations Charter it may appear, it is an expression of the logic of Article 53, *ibid.*, 275-76.

[227] Boisson de Chazournes, *supra* note 11, 79, 304. One has to note that in practice the Security Council has also adopted a very flexible approach regarding the qualification of organisations as regional arrangements or agencies, irrespective as to whether the organisation in question falls under Chapter VIII or considers itself to be bound by it, Gill, 'Characterization and Legal Basis for Peace Operations', *supra* note 77, 135, 139. Christine Gray also argues that generally it is of limited importance of an organisation was expressly established on the basis of Chapter VIII or was considered to be such an organisation by its founders; the crucial fact is "not the nature of the organisation but the type of action that is undertaken and the attitude of the Security Council", Gray, *supra* note 54, 386.

[228] D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of Its Chapter VII Powers* (2000), 248-49 ; Boisson de Chazournes, *supra* note 11, 79, 304-5. As explained above, there is no legal difference regarding the autorisation under Chapter VII and Chapter VIII as the powers of the Security Council under the latter stem from Chapter VII. Chapter VIII adds however, qualifications such as the question which organisations qualify as regional arrangements or agencies and as already mentioned the specific reporting requirements may be different under Chapter VII depending on what the Security Council decides; cf. Walter, 'Article 53', *supra* note 169, 1478, 1499 mn. 58-59; E. de Wet, 'The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VIII of the United Nations Charter', in (2002) 71 *Nordic Journal of International Law*, 1, 19-20; Paliwal, *supra* note 224, 185, 195-96. Naert, *supra* note 91, 239-40; Sarooshi*, ibid.,* 248-49; As Naert says "Chapter VIII status seems merely to formalize a willingness to integrate in the UN system without any significant rights or obligations under than a reporting duty.", Naert, *supra* note 91, 239-40.

As beneficial as this pragmatic approach by the Security Council may be to prevent tensions arising in its relations with the regional organisations, the potential disadvantages may not be ignored. It may be asked whether this development does not illustrate the gradual impairment of the authority of the Security Council; the stronger and more resourceful – particularly in a political and economic sense – the regional organisations in question are, the more they can dictate the conditions for the deployment of their troops under the authority of the Security Council.[229] Furthermore, as pragmatic as the approach of the Security Council is, these acts of improvisation contribute to the conceptual misunderstandings whose repercussions may influence the legal analysis of the relationship existing between the United Nations and regional organisations.[230]

Another reason offered for this practice of the Security Council is to return to the *raison d'être* of Chapter VIII, which is "to make available the specific contributions of regional organizations to the maintenance of international peace and security which result from the specific ties which bind their members." So, if a regional organisation decides to act outside its region as defined in broad terms, "there are no reasons to assume that such action occurs within the framework of Chapter VIII."[231] Such an interpretation opens up the possibility of reliance on Article 48 (2) of the Charter.[232] The distinction between Chapter VIII and Chapter VII is even less relevant for Article 53 (1), second sentence, which can be equated more closely with authorisations by the Security Council under Chapter VII. [233]

[229] Cf. Boisson de Chazournes, *supra* note 11, 79, 305 ; but compare with the Report of the Secretary-General on United Nations-African Union cooperation in peace and security, UN Doc. S/2011/805 (2011), 2, para. 4.
[230] Boisson de Chazournes, *supra* note 11, 305-6.
[231] It is suggested also suggested that similar considerations apply for measures taken against non-member States of the respective organisation. Walter, 'Article 53', *supra* note 169, 1478 1498-99 mn. 57; Pernice, *supra* note 148, 149.
[232] Security Council Resolutions 770 (1992), 781 (1992) 787 (1992) 1031 (1995) all refer to "actions be taken nationally or through regional agencies or arrangements" which is very similar to the wording of Article 48 (2), Security Council Resolution 770, *supra* note 178; Security Council Resolution 781, UN Doc. S/RES/781 (1992), Security Council Resolution 787, *supra* note 183; Security Council Resolution 1031, *supra* note 221. In this context, Frowein asserts that there was even confusion among member states of NATO and the WEU as to whether Article 48 or Article 53 would be applicable and thus whether the organisations shall be considered as falling under Chapter VIII, J.A. Frowein, 'Das Verhältnis zwischen den Vereinten Nationen und Regionalorganisationen bei der Friedenssicherung und Friedenserhaltung', Vortrag gehalten am 10. Juli 1996, 11-12.
[233] Walter, 'Article 53', *supra* note 169, 1478, 1505 mn. 77. Franck argues, however that there is one difference between Chapters VII and VIII which is that the former presupposes the determination of situation constituting a threat to the peace or one of the two other options under Article 39. This argument seems to be rather formalistic and is not convincing if one takes into account that the powers of the Council to act under Chapter VIII are derived from its powers under Chapter VII. Thus, one might reply that they consequently include an implicit assessment under Article 39, T. M. Franck, 'The Emerging Right to Democratic Governance', in (1992) 86 *American Journal of International Law*, 46, 84 including fn. 209.

This evolution has been characterised as a migration of regionalism from Chapter VIII to Chapter VII,[234] but Chapter VIII has, notwithstanding, real relevance in the practice of the Security Council. As the Secretary-General pointed out: "The complex challenges in the world today require a revitalized and evolving interpretation of Chapter VIII of the Charter of the United Nations."[235] Even more striking is the argument made by the President of the Security Council in the debate on cooperation with regional and subregional organisations:

> More than six decades ago, when the Charter was drafted, there was no practical example of how this cooperation would be structured and executed. However, Chapter VIII of the Charter was groundbreaking in that, in spite of the fact that there were no regional organizations at the time, it provided for flexibility in cases where such regional organizations would be established.[236]

The reactivation of Chapter VIII following the end of the Cold War has led to flows of activity within the UN but also on an inter-organisational level with the aim to further institutionalise relations via established, permanent organs such as the United Nations-European Steering Committee on Crisis Management.[237] Various studies and reports on the reform of peacekeeping and the relationship of the United Nations with regional organisations have been carried out. In 1993, the Security Council invited, within the framework of Chapter VIII, regional arrangements and organizations to study "ways and means to strengthen their functions to maintain international peace and security within their areas of competence, paying due regard to the characteristics of their respective regions." Furthermore, it asked them to analyse ways and means to improve the coordination of their efforts with those of the United Nations.[238] Therefore,

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[234] Boisson de Chazournes, *supra* note 11, 296-304.

[235] Support to African Union peacekeeping operations authorized by the United Nations, Report of the Secretary-General, UN Doc. A/65/510–S/2010/514 (2010), 14, para. 54. This view is shared by the African Union which even calls for a creative reading of Chapter VIII "to allow the African Union and its regional mechanisms for conflict prevention, management and resolution to fully play their role as integral components of collective security" and an "innovative strategic and forward-looking reading of Chapter VIII" Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 6-7, 9, 10; Peace and Security Council, 307th Meeting, PSC/PR/COMM.(CCCVII) (2012), 3. A similar view was expressed by Ethiopia, Security Council, 6702nd meeting, UN Doc. S/PV.6702 (Resumption 1) (2012), 7. See also the Statement of Togo, Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 11.

[236] Mr. Zuma (South Africa), Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 2; See in contrast, G. Ress, 'Article 53' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995), 687.

[237] For each chosen regional organisation and their relations to the UN and among each other, see, *infra* Chapter II.

[238] Note of the President of the Security Council, UN Doc. S/25184 (1993), 1-2. A similar appeal came from the General Assembly, Resolution adopted by the General Assembly, Comprehensive review of the whole question of peace-keeping operations in all their aspects, UN Doc. A/RES/48/42 (1994), 9, paras. 62-65; see also Report of the High-Level Panel, *supra* note 22, 71, paras. 271-272; General Assembly Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security, UN Doc. A/RES/49/57 (1995), 2-5.

> In all areas not involving the use of force, notably as far as cooperation on matters of peacekeeping in the African context is concerned, Chapter VIII has witnessed an enormous boost, which is largely due to limited resources, both at the regional and the universal levels. It is certainly also favoured by the fact that the antagonism between universalism and regionalism which was formative for the understanding of Chapter VIII during the Cold War period, has today lost much of its significance.[239]

The aim of all these efforts is to institutionalise relationships, away from relations on an *ad hoc*, case-by-case basis (*infra* 2.1.-2.6.).

9. Conclusions

This Chapter began by analysing the thesis that the general framework of the UN Charter for maintaining international peace and security had been shaped by supporters of both a universalist and a regionalist view of the system of collective security.

Indeed, by examining the documents of the Dumbarton Oaks conference, it became clear that Chapters VII and VIII of the UN Charter were codified by the founders as a compromise between universalism – Chapter VII – and regionalism – Chapter VIII; maintaining the primary responsibility of the Security Council for the maintenance of international peace and security under Chapter VII while allowing for regional action under Chapter VIII. This dichotomy between universalism and regionalism is mirrored within the specific dispositions of Chapter VIII. Article 52 of the Charter grants, on paper, a high degree of autonomy to regional organisations for the pacific settlement of disputes. In contrast, Article 53 of the Charter retains the primary responsibility of the Security Council for the maintenance of international peace and security. The Council may look to regional organisations for enforcement actions under its authority, and enforcement actions under the authority of the latter have to be authorised by the Security Council.[240]

In practice, however, a much more complex picture has emerged of the system for maintaining international peace and security under the UN Charter which, *prima facie*, is very much removed from the tension characterized by Chapters VII and Chapters III. The analysis revealed that the practice of the UN and regional organisations for maintaining international peace and security is very flexible and pragmatic and that, overall, the practice of the United Nations and regional organisations

[239] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1444 mn. 34.
[240] This very same dichotomy can be also found within Chapter VI, which grants both rights and obligations to parties in a conflict, and which may, arguably, amount to a group of states all being members of a regional organisation, and to the Security Council, for the pacific settlement of disputes.

gravitates around the epicentre of universalism and regionalism – cooperation between the UN and regional organisations.[241]

Regarding the specific context of peacekeeping operations, a division of labour is emerging between the UN and regional organisations which, once again, constitutes a compromise between universalism and regionalism. The UN focuses on traditional peacekeeping operations based on the consent of all parties and allowing only a very limited amount of military force whereas peacekeeping operations with a more robust mandate, as well as peace enforcement operations are delegated to and conducted by regional organisations.[242] This practice was possibly also catalysed in response to criticism that the UN would be incapable of mounting "militarised" peacekeeping operations.[243]As part of the cooperation of the UN with regional organisations in peacekeeping operations, the former would also focus on the broader spectrum of activities surrounding the concept of peacekeeping, e.g., peacebuilding, state-building and the reconstruction of the political system within the state.

[241] The very same view is contained in the statement by the Representative of Chile during the Security Council's debate on cooperation of the UN with the EU in maintaining international peace and security on 14 February 2014. The Representative said: "Chile believes that collective action is crucial for addressing the threats to international peace and security, and that such action is enhanced by the involvement of regional and subregional organizations. That is the way in which my country interprets Chapter VIII of the Charter of the United Nations. That leads us to promote efficient multilateralism that is endowed with the ability to effectively include contributions by regional and subregional organizations in order to face crises and conflicts that may affect international peace and security", Security Council 7112th meeting, *supra* note 128, 15-16. Cf. Lind, 'Chapter VIII of the UN Charter', *supra* note 160, 28, 30

[242] Regarding specifically the African continent, the Security Council has now twice authorised France to act in such a role, in Mali and in the Central African Republic (CAR) which does not constitute a change in practice, but rather a pragmatic solution by the Security Council when a swift intervention was necessary and bearing in mind France's special interests as a former Colonial Power. Nevertheless, also MINUSMA, interestingly, acts under robust rules of engagement. As an analysis of the case-studies will illustrate, Mali is however, an exceptional case. On 20 January 2014, the European Council decided to deploy an EU peacekeeping operation in the CAR for a period of up to six months, "with a view of handing over to the AU" and "in particular of the possibility of MISCA being transformed into a UN peacekeeping operation.", Council conclusions on the Central African Republic, Foreign Affairs Council meeting, Brussels, 20 January 2014, 1, para.2. The Council emphasised that this operation "must be based on a United Nations Security Council resolution", *ibid.*, 2, para.2

[243] Sloan, *supra* note 76, 7-8; "The UN can no more conduct military operations on a large-scale on its own than a trade association of hospitals can conduct heart surgery", M. Mandelbaum, 'The Reluctance to Intervene', (1994) 95 *Foreign Policy*, 3, 10-11. It is alleged that past practice of the SC was also to provide understaffed operations with enforcement mandates they were unable to implement as it was perceived to be "better" than the alternative in which the SC did not act at all, Kofi Annan is quoted saying that "[t]he time has passed when 15 council members can provide themselves with "an alibi" by passing peacekeeping resolutions that cannot be implemented.", J. Hoagland, 'Who wants Peacekeeping? Put Up or Shut Up', *Washington Post/International Herald Tribune*, 3 August 2000, available at: http://www.globalpolicy.org/component/content/article/199/40895.html ; Chesterman, *supra* note 65, 2, 5.

Legally speaking, this emerging practice between the organisations led to a shift in the mandating practice of the Security Council from authorising regional peacekeeping operations solely under Chapter VIII for which there are several reasons. First of all, traditional peacekeeping operations of regional organisations do not require the authorisation of the Security Council in contrast to robust peacekeeping operations which do require a mandate from the Security Council. Furthermore, the nature of peacekeeping operations and the nature of "situations" in which peacekeeping operations are deployed have evolved. In the majority of cases, peacekeeping operations are now deployed in situations of volatile, armed conflicts in which the enduring consent of all parties to the conflict concerning the deployment of a peacekeeping operation is not deployed. An authorisation under Chapter VII is therefore preferable as it would enable the peacekeeping operation to respond with military force if unforeseen circumstances make it necessary. The emerging practice of the UN to mandate regional peacekeeping operations under Chapter VII corresponds with the UN's practice as regards its own peacekeeping operations which are now routinely mandated under Chapter VII as well.

Nevertheless, this shift in the mandating practice of the Security Council does not equate to a convergence of power in the Security Council at the expense of regional organisations. It has to be emphasised strongly that, in practice, the gap between universalism and regionalism is bridged by cooperation between the UN and regional organisations. It has to be further underlined that there is no blueprint to define – including from a legal point of view – the relations between the UN and regional organisations in the exercise of their functions under Chapter VII and VIII of the UN Charter. Indeed, the cooperation arrangements of the involved organisations are solely dependant on the specific circumstances of the situation.

One can draw three conclusions from the analysis carried out in this Chapter on the law of the responsibility of international organisations.

Firstly, the emerging practice of the Security Council and regional organisations which is based on cooperation and the division of labour or an "institutional balance" is an impetus for a scenario in which the United Nations and regional organisations might be jointly responsible.

Secondly, any criterion of attributing conduct to international organisations for acts or omissions arising in the context of peacekeeping operations needs to be constructed in such a way so as to take into account the varied nature of cooperation arrangements between the United Nations and

regional organisations in peacekeeping operations. In other words, it must be able to capture the *casuistic approach* used by the United Nations and regional organisations.

Thirdly, and perhaps most importantly, while examining the attribution of conduct, it is necessary to embark upon an analysis of the legal foundation of the relationship and cooperation between the UN and regional organisations. As was mentioned rather briefly in this Chapter, regional organisations are *per se* not bound by the United Nations Charter and thereby also not by Chapter VIII which serves as the framework for the relations between the UN and regional organisations for maintaining international peace and security. Therefore, it needs to be analysed if that fact influences the interaction between the regional organisations and the United Nations, as well as the potential distribution of international responsibility. It is also important, as despite the shift in the mandating practice of peacekeeping operations by the Security Council to Chapter VII, Chapter VIII is repeatedly invoked in order to legitimate the relations between the UN and regional organisations.

Chapter II: The (emerging) system of collective security consisting of the United Nations and regional organisations

> Now the evolution of United Natons peacekeeping missions is such that the organization, planning and execution of related operations are transcending the primary normative framework mentioned in Chapters VI, VII and VIII of the Charter of the United Nations. Peacekeeping missions, in their multidimensional design, now rely on a normative framework that brings together the relevant provisions of the Charter and the international legal instruments for human rights and international humanitarian law, as well as of regional and subregional organizations.
>
> - Statement by Togo in the Security Council.[1]

2.1. Relations between the United Nations and regional organisations and among different regional organisations

The previous chapter traced the evolution of peacekeeping within the framework of the UN Charter and the general practice of the UN with respect to Chapter VII and VIII of the Charter. It showed that the framework for maintaining international peace and security under the Charter is based on a compromise between universalist, unipolar and regionalist, multipolar views, thereby increasing the potential for joint and common action by several entities. This Chapter will first of all analyse whether the findings of Chapter I can be further corroborated by examining the relations between the UN and regional organisations. Furthermore, such an exercise on the basis of the various cooperation agreements, partnerships and declarations among international organisations can shed light on the potential distribution of responsibility among them or even allow the formulation of a presumption of joint responsibility between two specific organisations. If these documents are conceived solely as part of the internal law of the respective organisation(s), they nevertheless "[provide] guidance in determining issues of attribution of conduct and responsibility" as they define the relational context on whose basis international organisations interact with each other in

[1] Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 11.

maintaining international peace and security,[2] as well as in peacekeeping operations. Moreover, their inter-institutional cooperation may also shape financing procedures, command and control arrangements, operational practices, as well as accountability or reporting mechanisms.[3]

Various factors influence the relations between universal and regional organisations. Virally suggests that these relations pivot on three main ideas: collaboration or cooperation, competition, and "chasse gardée."[4] Cooperation can be based on formal arrangements and agreements or also simply on practice.[5] Formalised cooperation often implies an orientation of the regional organisations towards the activities of the universal organisation, which may also include the execution of decisions by the latter.[6] Cooperation allows organisations to define their roles from each other, thereby preventing redundancies and duplications of conduct, according to each organisation's means. However, should the interests of international organisations diverge, the potential for competition may lead to the creation of organisations with opposite mandates on a regional level, e.g. the NATO and the Warsaw Treaty Organisation. These opposed organisations might even bypass regulation on a global level or sideline an existing universal organisation.[7]

Although competition may have beneficial effects such as pushing the agenda on certain issues, negative effects can equally arise; especially if a regional organisation chooses to ignore the involvement of a universal organisation in a particular domain. Finally, a regional organisation may even go so far as to claim the exclusive responsibility for a specific issue within its own ranks to the detriment of the universal organisation.[8]

In practice, relations between regional organisations and universal organisations rarely subscribe to one idea alone, but they stretch across various, complex areas, while taking into account the specific circumstances in each situation. The network of relations among organisations is normally relatively flexible, practice-driven and external factors such as the lack of resources and means often prompt organisations to seek cooperation rather than confrontation. In addition to burden sharing, cooperation between international organisations can be used as a strategy to allow a holistic or

[2] L. Boisson de Chazournes, 'United in Joy and Sorrow : Some Considerations on Responsibility Issues under Partnership among International Financial Institutions', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 213, 218.
[3] Cf. T. Tardy, 'Hybrid Peace Operations: Rationale and Challenges', in (2014) 20 *Global Governance*, 95, 97.
[4] M. Virally, *L'Organisation Mondiale* (1972), 295.
[5] *Ibid*.
[6] *Ibid.,* 295-96.
[7] Cf., *ibid.*, 296. NATO and the Warsaw Treaty Organisation did not sideline the UN, but the blockade within the Security Council effectively contributed to their creation by the two opposing blocks during the Cold War.
[8] *Ibid.,* 297.

comprehensive approach towards peacekeeping or to allow flexibility and selectivity in engaging in peacekeeping operations.[9]

Moreover, the complexity of the current issues the international community faces has also changed, not only in terms of the way in which they are perceived but also how these crises are understood. Today, it is generally accepted, that one organisation, be it regional or universal, may not be able to tackle a given issue on its own, but rather cooperation between international organisations and a multilayered response is necessary.[10]

Chapter II introduces the various organisations, their peacekeeping activities, and their normative and political framework. It also analyses the internal and external challenges facing each organisation which affect their ability to carry out peacekeeping activities. It further explores the relations among these organisations. Throughout the past two decades, the United Nations has continuously strengthened its relations with regional organisations; and in all events many questions remain open. A report of the Secretary-General from 2008 highlights some of the open questions with respect to the relationship between the United Nations and regional organisations, of which those relevant for the purposes of this thesis shall be addressed in the following analysis:

> With a view to clarifying the critical role of regional organizations in maintaining international peace and security, (…) the Security Council could consider:
>
> > (a) Defining the role regional organizations play in the maintenance of peace and security, in particular the prevention, management and resolution of conflicts;
> >
> > (…)
> >
> > (c) Discussing common approaches and frameworks that can be designed to ensure that the nature of the collaboration and cooperation between the United Nations and regional organizations is clarified, (…)
> >
> > (d) Discussing how to make a distinction between regional organizations for Chapter VIII activities and all other regional organizations' activities (…)

[9] Tardy, *supra* note 3, 95, 99-104.
[10] Ibid., 95, 100.

> (e) Engaging in consultations on options for a structured cooperation between the United Nations and regional organizations involved in regional peace operations, including a possible mechanism aimed at enhancing interactions with the Security Council.[11]

This passage from the report underlines that the cooperation arrangements and methods between the UN and regional organisations are still *in statu nascendi*. The following analysis traces the development of the relations among the UN and the regional organisations, but focuses on the current situation and the current status of relations among these organisations. Past developments might help to give indications for the future and similarly references to specific operations may equally contribute to the assessment; but any such practice merely serves for the purpose of defining the inter-institutional relationship between the two (or more) organisations in question.

As cooperation among international organisations in peacekeeping operations becomes more frequent, the deployment of military troops by one organisation does not "tak[e] place in a vacuum", but ideally – presupposes coordination and cooperation with other organisations – in a setting of "reciprocal interaction"[12] – an emerging system of regional security with "explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in [this] given area of international relations."[13]

It cannot be underlined strongly enough that each peacekeeping operation is unique in its mandate, composition and implementation. Many factors, including political factors, combine to determine the way in which an operation is conducted. As the examples mentioned in the previous chapters show, the Security Council uses its mandate in a very flexible manner so that the relationship between the United Nations and regional organisations is never static. Whereas the cooperation between the United Nations and a given regional organisation X might take a relationship in the form of a partnership based on coordination, in another operation Y, coordination might be replaced by the subordination of one organisation to the other.[14] Thus, the relationships are not static in respect of the *mission level*; nor are they static on an inter-organisational or *institutional level* as they continuously develop and evolve. All these factors contribute to raise the level of difficulty in legally

[11] Report of the Secretary-General on the relationship between the United Nations and regional organizations, in particular the African Union, in the maintenance of international peace and security, UN Doc. S/2008/186 (2008), 20, para. 71.
[12] M. Brosig, 'The Emerging Peace and Security Regime in Africa: The Role of the EU', in (2011) 16 *European Foreign Affairs Review*, 107, 109-110.
[13] S.D. Krasner, 'Structural causes and regime consequences: regimes as intervening variables', in S.D. Krasner (ed.), *International Regimes* (1982), 1, 2.
[14] It goes without saying that the cooperation of the United Nations with one of these organisations or in between the latter might be different in other areas than in the field of international peace and security.

assessing the attribution of conduct for violations of international law occurring in peacekeeping operations.

As pointed out, the degree of diversity in terms of institutional structures and capabilities means "that no simple or singular global pattern for future development can reasonably be proposed."[15] Nevertheless, it is helpful to distinguish between institutional partnership and operational collaboration, as the former constitutes a long-term effort, whereas the latter is essentially *ad hoc*.[16]

The present analysis will therefore combine both elements in order to facilitate a thorough examination of the relations existing among the organisations. The focus will nevertheless remain on inter-institutional relations, as operational cooperation will be examined in the case studies in Chapter V of this study. It is advantageous to analyse the relationship of the United Nations with each individual organisation. Following this approach, this study explores two regional organisations from both Europe and Africa[17], which is beneficial as the links are traditionally particularly strong among regional organisations from the same continent. They often share the very same cultural heritage and as they exercise their activities within the same geographic region, their respective roles are often more defined than towards other international organisations.[18]

[15] J. Morris, H. McCoubrey, 'Regional peacekeeping in the post-cold war era', in (1999) 6 *International Peacekeeping*, 129, 147.

[16] H. Yamashita, 'Peacekeeping cooperation between the United Nations and regional organisations', in (2012) 38 *Review of International Studies*, 165, 167.

[17] The vast majority of NATO's members are European and the cultural ties are strong with their transatlantic fellow NATO members.

[18] As such it is said, that "we must establish the necessary link between NATO reform and the process of deepening and at the same time broadening European integration. NATO and the European security and defence identity are not at odds with one another; rather, they are complementary", V. Rühe, 'Adapting the Alliance in the Face of Great Challenges', (1993) 41 (6) *Nato Review*, 3-5. NATO-EU cooperation is based on the Berlin-Plus Agreements whereas ECOWAS and the AU are connected through the African Peace and Security Architecture.

2.2. NATO: a Euro-Atlantic pillar for peacekeeping or a security actor with a broader agenda?

"NATO possesses unique capabilities to contribute to peacekeeping operations."

- NATO Defence Planning Committee[19]

1. The Foundation of NATO

NATO was effectively born out of the power-play between the USSR and the United States and its allies in the times of the Cold War. The blockade in the Security Council led to a strange form of regionalism as the two sides attempted to safeguard and expand their spheres of interest and influence by creating regional organisations. The North Atlantic Treaty Organisation was founded in 1949, in the same year as the Council for Mutual Economic Assistance (Comecon). [20] It was clear that international peace and security could not be guaranteed within the Security Council, and NATO was seen as a way out of the stalemate.[21] The founding of NATO was preceded by the Brussels Treaty which led to the creation of the Western European Union.[22] However, what was lacking, in order to counter the military strength of the USSR, was US participation.

After consultations and negotiations to establish a new military alliance, the North-Atlantic Treaty was signed in Washington, D.C. on April 4, 1949.[23] NATO was created with the understanding that it would operate within the framework of the United Nations and accepts the latter's role in maintaining international peace and security. This role clearly derives from the preamble to the North-Atlantic Treaty which says: "The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments."[24] This subordination to the primacy of the UN Charter is mirrored throughout the whole North Atlantic Treaty.

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[19] Final communiqué of the Meeting of the Defence Planning Committee, 11 December 1992, para. 4.
[20] Comecon was the economic counter-part to the Warsaw Treaty Organization of Friendship, Cooperation and Mutual Assistance, "Warsaw Pact" which was established in 1955.
[21] P. Sands, P. Klein, *Bowett's Law of International Institutions* (2009), 195; also with further references, S. R. Lüder, *Völkerrechtliche Verantwortlichkeit bei Teilnahme an „Peace-keeping"-Missionen der Vereinten Nationen* (2004), 141.
[22] 'The Brussels Treaty', Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, 17 May 1948. The Western European Union was abolished in 2010 by a common decision of its member states after the competences were completely transferred to the European Union, taking effect by 30 June 2011.
[23] The North-Atlantic Treaty, Washington D.C. – 4 April 1949.
[24] See also articles 1, 7. The latter states that "This Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace

Article 1 reiterates the prohibition of the use of force as enshrined in Article 2 (4) of the UN Charter, stating that the parties undertake "to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."

This reference to Article 2 (4) of the UN Charter which prohibits the use of force against the territorial integrity or political independence of any state, does nevertheless not allow NATO to take a more flexible approach in the area of maintenance of international peace and security. Article 7 of the North-Atlantic Treaty equally refers to the UN Charter and to the primary responsibility of the Security Council for maintaining international peace and security.[25] Despite these close links to the United Nations system, the question whether NATO qualifies as a regional arrangement or agency under Chapter VIII of the Charter has been the subject of great controversy.

2. NATO and its formal submission under Chapter VIII of the UN Charter

NATO is generally considered as an international organisation with separate legal personality under international law[26] and it arguably fulfils the criteria to qualify as a regional organisation under Chapter VIII of the UN Charter.[27] Nevertheless, NATO itself has always rejected any qualifications as a regional arrangement under Chapter VIII.[28] Until the end of the Cold War this opposition was

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and security." For an overview of NATO's relations with the United Nations, see http://www.nato.int/cps/en/natolive/topics_50321.htm.

[25] The notions of territorial integrity and political independence are also commonly interpreted as covering any possible kind of trans-frontier use of armed force, see with further references, A. Randelzhofer, O. Dörr, 'Article 2 (4)', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), The Charter of the United Nations. A Commentary. Volume I (2012), 200, 215-16, mn. 37.

[26] See, for instance, Plea by France in *Bankovic and others v. Belgium and others*, Admissibility, Decision of 12 December 2001, para. 32, German Constitutional Court, Urteil des Zweiten Senats vom 22. November 2001, 2 BvE 6/99, Fraktion der PDS im Deutschen Bundestag und Bundesregierung, BVerfGE 104, 151, 155.

[27] See, *infra* Chapter I.

[28] Appearing before the Security Council, the Deputy Assistant Secretary-General of NATO, Mr. Robert F. Simmons, stated that "[a]lthough the alliance does not consider itself *formally* a regional organization under Chapter VIII of the United Nations Charter, NATO's transition from a purely collective-defence organization into a security manager in a broad sense has enabled it to act in the same spirit, first in Europe and now beyond" [Emphasis added], Security Council, 5007th meeting, UN Doc. S/PV.5007 (2004), 24-25. One can only note however the qualification of "formally" which seems to suggest a general agreement to the spirit of Chapter VIII, but an equal will to remain autonomous. Equally, Zwanenburg says that "even if NATO is a regional agency, it does not necessarily feel constrained by Article 53 of the Charter in certain circumstances", M. Zwanenburg, 'NATO, Its Members and the Security Council', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality. A Need for Change?* (2005), *189, 195.* The aim of NATO to keep a certain autonomy regarding a qualification as a regional organisation has also found an expression in NATO's Strategic Concept of 1999 in which it is stated "NATO will seek, *in cooperation with other organisations*, to prevent conflict, or, should a crisis arise, to contribute to its effective management, consistent with international law, (…) NATO recalls its offer, made in Brussels in 1994, *to support on a case-by-case basis in accordance with its own procedures, peacekeeping and other operations under the authority of the UN Security Council* (…) Taking into account the necessity for Alliance solidarity and cohesion, participation in any such operation or mission will remain subject to decisions of member states in accordance with national constitutions.", The Alliance's

primarily motivated by NATO's intention not to submit to a Security Council whose members included the USSR, as well as to the reporting requirements under Article 54 of the UN Charter, than by a position of opposition against cooperation with the United Nations.[29] Generally, NATO's relations with the UN were limited during the Cold War. This changed in 1992 when "their respective roles in crisis management led to an intensification of practical cooperation between the two organizations in the field."[30] In the 1991 Strategic Concept, it was already expressed that "Allies could, further, be called upon to contribute to global stability and peace by providing forces for United Nations missions."[31]

Another reason for NATO's opposition to a qualification under Chapter VIII was, of course, to safeguard NATO's autonomy of action. However, it had been argued in 1949 that there are "no reasons of logic or precedent stand[ing] in the way of attributing to the North Atlantic Treaty the character of regional arrangement."[32] As the statement by NATO shows[33], the position has changed since the end of the Cold War and this seems to be equally recognised by the United Nations. Security Council Resolutions 781 (1992) and 787 (1992) upon which NATO acted in Yugoslavia refer explicitly to states acting through regional arrangements or agencies.[34] Arguments brought forward against a qualification of NATO as a regional organisation rely, for example, on Article 12 of the North Atlantic Treaty, which suggests that NATO was not considered to be a regional arrangement under

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Strategic Concept, Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., 24 April 1999, para. 31; concerns about such a possible qualification were previously raised during the negotiations for the North Atlantic Treaty. Any such suggestion was seen as justifying "the argument that all action taken (…) should be subject to the veto of the Security Council", N. Henderson, *The Birth of NATO* (1983), 102. In fact, the delegates all agreed upon omitting any specific reference in any part of the Treaty to Chapter VIII of the Charter, *ibid.*, 103.

[29] D. S. Yost, 'NATO and International Organizations', Forum Paper 3, NATO Defense College, September 2007, 34.

[30] NATO's relations with the United Nations, http://www.nato.int/cps/en/natolive/topics_50321.htm

[31] The Alliance's New Strategic Concept, agreed by the Heads of State and Government participating in the Meeting of the North Atlantic Council, 07 November 1991 – 08 November 1991, para. 41.

[32] E. N. van Kleffens, 'Regionalism and Political Pacts', (1949) 43 The *American Journal of International Law*, 666, 679.

[33] NATO's relations with the United Nations, *supra* note 30. The Alliance's New Strategic Concept, *supra* note 31, para. 41.

[34] Security Council Resolution 781, UN Doc. S/RES/781 (1992), 2, para. 5; Security Council Resolution 787, UN Doc. S/RES/787 (1992), 4, para. 14. Boutros-Ghali referred also explicitly to NATO as a regional arrangement and so did the Security Council, Letter Dated 9 April 1993 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/25567 (1993), 1 first paragraph; Security Council, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, UN Doc. S/25996 (1993), 3 para. 3 (d). The response of NATO to the Agenda for Peace leaves the question once again unanswered, *ibid.*, 18-19. Some authors interpret these resolutions as "it is clear from the context that NATO was regarded as such an regional arrangement.", G. Ress, J. Bröhmer, 'Article 53', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2002), 854, 862, see also Security Council Resolutions 1031, UN Doc. S/RES/1031 (1995), point II.4 which refers indirectly to NATO and also Security Council Resolution 1022, UN Doc. S/RES/1022 (1995), in which the Security Council pays tribute to, *inter alia*, NATO and also the WEU.

Chapter VIII of the UN Charter at the time of the conclusion of the North-Atlantic Treaty. This article states:

> After the Treaty has been in force for ten years, or at any time thereafter, the Parties shall, if any of them so requests, consult together for the purpose of reviewing the Treaty, having regard for the factors then affecting peace and security in the North Atlantic area, *including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security*. [Emphasis added]

Others who are skeptical of qualifying NATO as falling under Chapter VIII remark that the structures, as well as the objectives of an organisation of collective defence such as NATO, are different from those of a regional organisation under Chapter VIII. They submit that collective defence mechanisms act against external aggressors whereas regional organisations act internally in relation to their own members. The latter also need an authorisation of the Security Council to carry out coercive measures, whereas organisations established for the collective defence of its members only have to report to the Security Council the measures taken under Article 51 of the Charter.[35] These objections are not convincing as nothing in the drafting history or in the Charter suggests any such limitation (*infra 1.3.*).

The interplay between Article 51 and Article 54 signifies that only coercive measures not taken as a response to an aggression, which would be based on Article 51, necessitate a prior authorisation of the Security Council. Apart from this, there is no point of contact between Article 51 and Chapter VIII in their substance.[36] In practice, this tension has lost all relevance due to the flexibility, if not unpredictability, of the Security Council's action and its utilization of both Chapter VIII, as well as Chapter VII.

3. NATO: Rising like a phoenix post the Cold War? A new strategic alignment

NATO underwent a massive transformation after the end of the Cold War. Article 5 sets out the heart of the system of collective security and self-defense according to which an armed attack against one or more members shall be considered an armed attack against the whole alliance, triggering the right of individual or collective self-defence. The end of the Cold War saw NATO lose its principal purpose

[35] U. Villani, *Les Rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix*, Recueil des cours de l'Académie de La Haye, Volume 290 (2001), 225, 287.

[36] Article 52 may be considered closer Article 49 than to any other disposition in the Charter. As explained, article 51 was included in the Charter to satisfy supporters of a regionalist approach. The United Nations Security Council has therefore a unique role in providing the framework of legitimacy for NATO, Yost, *supra* note 29, 28.

of existence as a Western military alliance against the Soviet bloc.[37] The organisation was forced to transform and to take on new tasks and responsibilities as well as to defend its continuing existence.[38]

NATO declared that for the attainment of its objectives it would no longer act solely through the military dimension, but also through the political dimension under Article 2 of the North Atlantic Treaty.[39] These political tools and the new agenda of "comprehensive political guidance" opened up new political courses of action for NATO. They enabled the organisation to expand military crisis management from reaction to action and to include wider elements in its agenda such as conflict prevention.[40] Part of this new comprehensive security notion within NATO was the establishment of regular dialogues with states who were part of the former Soviet Union as well as cooperation with

[37] See also The Alliance's New Strategic Concept, *supra* note 31, para. 1.

[38] As recalled by the Assistant Secretary-General of the Political Affairs and Security Policy Division of NATO in 2005 "During the first 40 years of its existence, NATO had a very specific role in the historic context of what we call the period of the cold war. Those times are long gone, and the once static and passive alliance of European and North American democracies has changed profoundly.
Today, NATO is no longer focused on deterrence. Instead, we have embarked on a journey to turn the alliance into a provider of stability in Europe and even beyond. This journey began in response to a brutal act of violence in the Balkans. Ten years ago, in 1995, the Srebrenica massacre in Bosnia and Herzegovina became the symbol of a tragedy that could have been avoided if the international community had acted more resolutely.
Srebrenica was a wake-up call. It was a turning point for Europe, and it was a defining point for NATO. Srebrenica has taught us that we have to face challenges earlier. It spurred NATO allies to engage themselves more resolutely in the search for a solution to the Bosnian conflict. The result was a major peacekeeping operation — first the Implementation Force (IFOR), later the Stabilization Force (SFOR) — the first even in NATO history (…).
That is, so to speak, the past. NATO has become an organization that defends the security of its members and provides stability far beyond its own borders. Although not a regional organization per se, but an international intergovernmental organization, the alliance has evolved over the years into a security manager in a broad sense, first in Europe and now beyond.", Statement by Mr. Martin Erdmann, Assistant Secretary General of the Political Affairs and Security Policy Division of NATO, Security Council, 5282nd meeting, UN Doc. S/PV.5282 (2005), 25; Cf. A. Hyde-Price, 'NATO's Political Transformation and International Order', in J. Ringsmose, S. Rynning (eds.), NATO's New Strategic Concept: A Comprehensive Assessment, DIIS Report (2011), 45, 45-46.

[39] Declaration on a Transformed North Atlantic Alliance, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council "The London Declaration", 05 July 1990 – 06 July 1990, especially paras. 1-7; J. Woodliffe, 'The Evolution of a New NATO for a New Europe', (1998) 47 *The International and Comparative Law Quarterly*, 174, 174.

[40] Other items to be considered as potential threats are for example terrorism, cyber-attacks, and competition over natural resources. Cyber warfare has been especially a very prominent topic on the international agenda, several states have adopted Cyber Security Strategies, i.e. Canada, the United Kingdom, and Russia, and in March 2013, an international group of experts adopted the Tallinn Manual on the International Law Applicable to Cyber Warfare (2013), prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence. It is rather likely that as cyber warfare becomes increasingly common in future armed conflicts that states and international organisations will be forced to increase their cooperation in this new area and one can presume that it will be used as a tool to facilitate, as well as hinder peacekeeping operations. Indeed, in 2008, during the war between Russia and Georgia, Russia attacked the websites of Georgian institutions as well as of the local bases of international organisations and news organisations, R. D. Admus, *A Little War that Shook the World – Georgia, Russia, and the Future of the West* (2010), 166-68.

all states in Europe[41] based on the principles contained in the Charter of Paris for a new Europe.[42] On the basis of the partnership for peace and other programmes[43] NATO consequently transformed into an organisation with a broader mandate, "including fostering peace and stability in the Euro-Atlantic region through crisis management and involvement in peace-keeping operations."[44] The organisation consequently gained renewed credibility and legitimation as an exporter of stability even outside the North-Atlantic area. In a speech in November 2012 by NATO's Deputy Secretary General, the core roles of NATO were stated as "collective defence, crisis management and cooperative security." [45]

In its Strategic Concept set out in 1999, NATO, while referring to the United Nations, declared that "[m]utually reinforcing organisations have become a central feature of the security environment."[46] Moreover, the evolving activity outside of the Euro-Atlantic area and beyond the more traditional area in which armed attacks feature, is equally mirrored in the 1991 and the 1999 Strategic Concepts. In respect of Article 5 of the North Atlantic Treaty, "Alliance Security must also take account of the global context (…) [it] can be affected by other risks of a wider nature, including acts of terrorism (…) organised crime."[47] The interpretation of Article 5 was further expanded in the new Strategic

[41] Declaration on Peace and Cooperation, Issued by the Heads of States and Government participating in the Meeting of the North Atlantic Council ("The Rome Declaration"), 08 November 1991, para. 4.

[42] Woodliffe, *supra* note 39, 174, 175. See also Charter of Paris for a New Europe, Meeting of the Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe (CSCE), Paris 19 – 21 November 1990; Declaration on Peace and Cooperation, *supra* note 41, paras. 13-14. Further Programmes and Partnerships are e.g. the Partnership for Peace, the NATO-Ukraine Commission as well as the Istanbul Cooperation Initiative (ICI). The Bucharest summit expanded NATO's reach through "partnerships across the globe.", Bucharest Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008, para. 30.

[43] The Foreign Ministers of NATO members approved A More Efficient and Flexible Partnership Policy in April 2011 which has the aim to "sustain and broaden NATO's partnerships and as well as increase their effectiveness and flexibility, in order to enhance their contribution to Euro-Atlantic and international security in the 21st century", Active Engagement in Cooperative Security: A More Efficient and Flexibilie Partnership Policy (2011), para.2.

[44] A main reason is the extended membership of NATO which increased from 16 to 28 after the Cold War, transforming the Alliance from an eurocentric Alliance to an "Alliance treating security questions transcending the borders of Europe", Speech by NATO Secretary-General Jaap de Hoop Scheffer at the NATO Defense College, Rome, 28 May 2009., see also Sands, Klein, *supra* note 21, 195; The Alliance's Strategic Concept, *supra* note 28, para. 31.

[45] NATO in 2020: Strong capabilities, strong partnerships. Keynote speech by NATO Deputy Secretary General Ambassador Alexander Vershbow at the international conference "NATO and the global structure of security: the future of partnerships", Bucharest, Romania, 10 November 2012.

[46] The Alliance's Strategic Concept, *supra* note 28, para. 12.

[47] The Alliance's Strategic Concept, *supra* note 28, para. 24; The Alliance's New Strategic Concept, *supra* note 31, para. 12. The 1991 concept does not speak of organised crime, but instead of the risk of proliferation of weapons of mass-destruction. An example of an Article 5 operation against terrorism is Operation Active Endeavour (OAE), cf. Lisbon Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Lisbon on 20 November 2010, para. 6. The representative of the USA at NATO argued that any focus on a specific region against threats is not feasible anymore but that "The North Atlantic (…) is submerged in a globally integrated world (…) the right lens for transatlantic relations is not so much American or European – it is global" and threats can also come from anywhere, Ambassador I. H.

Concept, which was issued in November 2010. This document asserts that "NATO will *deter* and defend against any threat of aggression, and against *emerging security challenges* where they threaten the *fundamental security* of individual Allies or the Alliance as a whole"[48][Emphasis added].

4. Assuming new tasks of security proliferation and projection – in accordance with the NAT?

The new Strategic Concept also abdicates the territory requirement in case of an armed attack.[49] The Lisbon Strategic concept thus conveys the collective will of NATO member states to transform NATO into a more globally acting organisation, alone or in combination with the increasing network of partnerships and cooperation arrangements.[50] This transformation is based on three identified core tasks of NATO, "defence and deterrence", "security and crisis management" as well as "promoting international security through cooperation."[51] This is somewhat astonishing as NATO has not considered it to be necessary to amend the North Atlantic Treaty accordingly.[52] Consequently, this

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Daalder, permanent representative of the United States to NATO, Transatlantic Forum, Berlin, 1 July 2009; J. M. Goldgeier, 'The Future of NATO', Council on Foreign Relations, Council Special Report No. 51, February 2010, 8; Speech by NATO Secretary-General Jaap de Hoop Scheffer at the NATO Defense College, Rome, 28 May 2009.

[48] Strategic Concept For the Defence and Security of The Members of the North Atlantic Treaty Organisation", Active Engagement, Modern Defence, 2010, para. 4. a.

[49] *Ibid*. This contrasts with the Alliance Strategy of 1991 which was described as follows: "The Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defence, and it does not consider itself to be anyone's adversary. The Allies will maintain military strength adequate to convince any potential aggressor that the use of force *against the territory* of one of the Allies would meet collective and effective action by all of them and that the risks involved in initiating conflict would outweigh any foreseeable gains. The forces of the Allies must therefore be able to *defend Alliance frontiers*, to stop an aggressor's advance as far forward as possible, to maintain or restore *the territorial integrity of Allied nations* and to terminate war rapidly by making an aggressor reconsider his decision, cease his attack and withdraw. The role of the Alliance's military forces is to *assure the territorial integrity and political independence* of its member states, and thus contribute *to peace and stability in Europe*" [emphasis added], The Alliance's New Strategic Concept, *supra* note 31, para. 35. The Bucharest Summit Declaration of 2008 lists as one of the aims that "[t]hese forces must be able to conduct, upon decision by the Council, collective defence and crisis response operations *on and beyond Alliance territory*, *on its periphery, and at a strategic distance, with little or no host nation support*", Bucharest Summit Declaration, *supra* note 42, para. 44. [Emphasis added]

[50] J. Ringsmose, S. Rynning, 'Introduction. Taking Stock of NATO's New Strategic Concept', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 7, 7-8, 14. Nonetheless, the main priority is given to the defence of NATO territory. In contrast to the will to act more globally, NATO has limited its consideration of international security crises to those in which NATO is actively involved, thereby narrowing "NATO's political horizons (…) and consultations", J. Shea, 'What does a New Strategic Concept Do for NATO?', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 25, 26.

[51] Cf. K. Wittmann, 'An Alliance for the 21st Century? Reviewing NATO's New Strategic Concept', in J. Ringsmose, S. Rynning (eds.), NATO's *New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 31, 33. The Concept does not prioritise between these three main tasks, but adopts a holistic approach. Prevention and crisis management also contribute to defence and deterrence. Seee also Wales Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales from 4 to 5 September 2014, para. 3.

[52] Although it is generally accepted that norms and treaties are subject to an evolutionary interpretation, one may question whether an amendment to the North Atlantic Charter might not have been preferable. Two

new Strategy gives NATO a great degree of leeway, if not close to carte blanche to act in matters of international peace and security. Article 5 of the North Atlantic Treaty also provides the legal basis for the peacekeeping operations if NATO is engaged in "crisis management operations", falling within the scope of the broad interpretation which was given to that article through the practice of the organisation and the recent Strategic Concepts.[53]

Although evolutionary interpretation through practice has been recognised in international law,[54] the broadening interpretation raises questions regarding its compliance with other dispositions in the North Atlantic Treaty. Article 7 supports the new interpretation of Article 5 as the establishment of NATO-run operations, such as IFOR and SFOR, is based on resolutions of the Security Council.[55] Another pertinent aspect of the North Atlantic Treaty is Article 4. This article prescribes that NATO members will consult each other in cases of threats to territorial integrity, political independence, or security of any members. In the post-Cold War period, a broader interpretation has been given to that article based on the recognition that threats to members of NATO can arise from other sources than armed attacks by a third state.[56] Consequently, that disposition cannot be interpreted as a limitation of NATO's competences to mere consultations, but it includes other reactions, including the participation of NATO in peacekeeping operations, as well.[57]

authors suggests that member states have amended the NATO constitution through practice, see E. de Wet, 'The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VIII of the United Nations Charter', in (2002) 71 *Nordic Journal of International Law*, 1, 9. Blokker and Muller add as a qualification that it would still be necessary to change the constitution, N. Blokker, S. Muller, 'NATO as the UN Security Council's Instrument: Question Marks From the Perspective of International Law?', in (1996) 9 Leiden Journal of International Law, 417, 420-421.

[53] These operations clearly do not fall under the rubrique of self-defence, F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 26.

[54] The International Court of Justice declared in its Namibia advisory opinion that "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971)*, para. 53. In an academic context, a similar assessment had been provided in 1946 by Pollux who stated: "The Charter, like every written constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an Article, implies interpretation, on each occasion a decision is involved which may change the existing law and start a new constitutional development", Pollux, 'The Interpretation of the Charter', 23 (1946) *British Yearbook of International Law*, 54, 54. Pollux was a pseudonym used by Edvard Hambro, a participant of the Norwegian delegation.

[55] B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen* (2006), 36.

[56] S. Trifunovska, *North Atlantic Treaty Organization (NATO) (2010)*, 29-30, para. 26

[57] Dold, *supra* note 55, 36.

A potential weak point in the legal framework is NATO's tendency to adopt all decisions by consensus which in an organisation with 28 member-states can be problematic.[58] As consensus amounts to decisions being taken without a vote, technically speaking each member state has a veto right, as a threat not to agree to a consensus amounts to a veto.

5. NATO, peacekeeping and its relations with other organisations

1. Beginnings/History – NATO and the UN

The new strategic orientation of NATO as established in the 1991 Strategic Concept was fully implemented in the Yugoslavia crisis. NATO's involvement in the Balkan crisis also triggered the "Alliance's increasingly extensive cooperation with other international organisations."[59]

NATO ships were engaged in monitoring operations in the Adriatic in support of the arms embargo which was imposed by the Security Council against all republics of the former Yugoslavia.[60] Whereas these operations fall under UN sanctions or peace enforcement operations, NATO declared in December 1992

> the preparedness of our Alliance to support, on a case-by-case basis and in accordance with our own procedures, peacekeeping operations under the authority of the UN Security Council, which has the primary responsibility for international peace and security. We are *ready to respond* positively to initiatives that the UN Secretary-General might take to seek Alliance assistance in the implementation of UN Security Council Resolutions[61] [Emphasis added]

and

[58] The danger of paralysis of NATO has actually increased with NATO's enlargement from 16 to 28 members which include – despite claims to the contrary – countries as diverse as Albania, Norway, Turkey and Spain, Hyde-Price, 'NATO's Political Transformation and International Order', *supra* note 38, 45, 52.

[59] Yost, *supra* note 29, 20; D. Leurdijk, 'NATO and the UN the dynamics of an evolving relationship', in (2004) 149 (3) *The RUSI Journal*, 24, 24; De Hoop Scheffer calls it "the birth of United Nations-NATO cooperation", Security Council, 5075th meeting, UN Doc. S/PV.5075 (Resumption 1) (2004), 2.

[60] See, e.g., although not explicitly mentioned Security Council Resolution 781, *supra* note 34, 2, para. 5; Security Council Resolution 776, UN Doc. S/RES/776 (1992), 2, para. 3. Security Council Resolution 787, gave the mandate to use "such measures commensurate with the specific circumstances as may be necessary (…) to halt all inward and outward maritime shipping", Security Council Resolution 787, *supra* note 34, 4, para, 10, see also para. 12. See also NATO, Statement on former Yugoslavia, 17 December 1992, specifically paras. 6 – 8 and Security Council Resolution 713, UN Doc. S/RES/713 (1991); Security Council Resolution 757, UN Doc. S/RES/757 (1992) and the Statement on NATO Maritime Operations (1), 10 July 1992.

[61] Final communiqué of the Ministerial meeting of the North Atlantic Council (including decisions on NATO support for peacekeeping operations under the responsibility of the UN Security Council), 17 December 1992, para. 4.

> In this spirit, we are contributing individually and as an Alliance to the implementation of the UN Security Council resolutions relating to the conflict in the former Yugoslavia. *For the first time in its history, the Alliance is taking part in UN peacekeeping and sanctions enforcement operations*. The Alliance, together with the WEU, is supporting with its ships in the Adriatic the enforcement of the UN economic sanctions against Serbia and Montenegro and of the arms embargo against all republics of former Yugoslavia. UNPROFOR is using elements from the Alliance's NORTHAG command for its operational headquarters. NATO airborne early-warning aircraft - AWACS - are monitoring daily the UN-mandated no-fly zone over Bosnia-Hercegovina. [Emphasis added][62]

Following the conclusion of the Dayton Peace Agreements, NATO deployed its first peacekeeping forces, the Implementation Force (IFOR) in Bosnia and Herzegovina on the basis of a mandate of the Security Council under Security Council Resolution 1031.[63] IFOR was replaced a year later by SFOR on the basis of another resolution by the Security Council.[64]

NATO is a military organisation so that the range of its activities is clear and defined and cannot be compared with the range of activities of organisations with general competence such as the European Union and the African Union. It would however be shortsighted to consider NATO's potential limited to the military area. It combines the military capabilities and the economic power of the United States with the collective European political influence and weight, making it a significant global actor.[65]

The ties between NATO and the UN concerning crisis management and maintenance of international peace and security were increased in the following years. NATO cooperated with the UN throughout the Kosovo crisis and on the basis of Security Council Resolution 1244 it established KFOR. According to the resolution, KFOR was designated as the military component of the broader multidimensional

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[62] *Ibid*., para. 5; See also Final communiqué of the Meeting of the Defence Planning Committee, *supra* note 19, paras 3 – 4.

[63] Security Council Resolution 1031, UN Doc. S/RES/1031 (1995), 3, paras. 12, 14-16; The General Framework Agreement, Annex 1A, Agreement on the Military Aspects of the Peace Settlement, 14 December 1995, Article I 1. A., Article VI 1.

[64] Security Council Resolution 1088, UN Doc. S/RES/1088 (1996).

[65] Z. Brzezinski, 'An Agenda for NATO. Towards a Global Security Web', (2009) 88 (2) *Foreign Affairs*, 2, 10. NATO lacks generally a strong civilian side to peacekeeping. An internal UN report noted that "NATO sought to cooperate with the United Nations partly to enlarge its available tools for peacekeeping. While NATO has substantial military assets under its command, interviewees at NATO noted that it lacked other civilian capacities. As peacekeeping missions become increasingly more multidimensional, with broadened mandates that include, for example, protection of civilians and reform of the justice sector, it is imperative that NATO engage in cooperation with other bodies in order to enhance its response to the complex security challenges. Cooperation with organizations such as the United Nations could provide NATO and its partners with a broader set of tools in responding to complex conflicts", Thematic evaluation of cooperation between the Department of Peacekeeping Operations/Department of Field Support and regional organizations, Report of the Office of Internal Oversight Services, UN Doc. A/65/762 (2011), 10, para. 28.

operation, under the authority of the United Nations Special Representative and working closely with the civilian component which was set up by the United Nations (UNMIK).[66]

2. *Between autonomy and approximation, NATO and its relations with the UN*

In 2008, the UN and NATO issued a joint declaration concerning UN/NATO Secretariat Cooperation, "reaffirming [their] commitment to the maintenance of international peace and security" and providing for further, increased, but flexible consultation and cooperation between the two Secretariats.[67] Nevertheless, NATO retains its autonomy as regards the United Nations, and there is no institutionalised representation of NATO at the UN through a mission, nor does NATO possess observer status in the General Assembly. The 2008 joint declaration is also a step backwards from the envisaged UN-NATO framework agreement including a joint declaration and a memorandum of understanding, which was drafted in September 2005 by the Alliance. These did not gain approval within the UN before Kofi Annan left his office and no further action has been taken since then in this matter.[68] The 2008 declaration was also only possible after a lengthy struggle between NATO's main-contributors in favour of signing the declaration and important states voicing their concern about such a declaration; in the end the UN Secretariat urged NATO not to publish the accord.[69] Nevertheless NATO remains committed to expanding its institutional ties with the UN and its practical support to UN peacekeeping operations as confirmed by the organision during the Wales Summit 2014.[70]

The relationship between the two organisations has developed along two main lines of cooperation in peacekeeping operations.[71] Under the first option, NATO is subcontracted by the United Nations and subscribing to its primary responsibility for the maintenance of international peace and security, relying on an authorisation of the Security Council "for collective security purposes." Alternatively, NATO acts on its own without a formal authorisation of the Security Council, for example through NATO airstrikes in Kosovo in 1999, and in accordance with its primary purpose for which it was

[66] Security Council Resolution 1244, UN Doc. S/RES/1244 (1999). As confirmed at the Chicago Summit, NATO remains committed to KFOR, Chicago Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Chicago on 20 May 2012, para. 12.
[67] Annex to DSG (2008)0714 (INV), Joint Declaration on UN/NATO Secretariat Cooperation, para. 1. At the Chicago Summit, NATO affirmed its will to enhance both the political dialogue as well as the practical cooperation with the UN in conformity with the Declaration of 2008, Chicago Summit Declaration, *ibid*., para. 19.
[68] Yost, *supra* note 29, 10; K. M. Haugevik, New partners, new possibilities. The evolution of inter-organizational security cooperation in international peace operations, NUPI Report, Security in Practice no. 6 (2007), 6.
[69] M.F. Harsch, J. Varwick, 'NATO and the UN', in (2009) 51 *Survival: Global Politics and Strategy*, 5, 8-9.
[70] Wales Summit Declaration, *supra* note 51, 101.
[71] Leurdijk, *supra* note 59, 24, 26-27.

established, collective defence against external threats.[72] This did not cause a rift in their relations, largely as a result of their mutual pragmatic approach, and there was no "political punishment". NATO was even included in the plans for the reconstruction of Kosovo in Resolution 1244.[73] Griep submits that NATO and the United Nations complement each other well: NATO with its unique robust military potential and the United Nations with their mandates providing globally unique legitimation.[74] In addition, NATO has more than 60 years of experience in how to prepare and lead countries in complex multinational and inter-service operations.[75] In 2011, NATO contributed through the UN mandated operation "Unified Protector" and with the support of the Arab League to the protection of the civilian population in Libya, an example once again that NATO "can quickly and effectively conduct complex operations in support of the broader international community."[76] The NATO Operation in Libya, as well as in Afghanistan, further suggest also that NATO will in the future rely on an authorisation of the Security Council instead of acting on its own. This is, in particular, because NATO's increasing circle of partners will insist on such an authorisation.[77] An essential part of NATO's strategy to rely on a continuously growing network of partners was the realisation that military operations must not only combine various tools and initiatives covering all elements of a conflict, but also that they need a civilian and a military response. The organisation learnt – the hard way – in Bosnia as well as in Kosovo "that it could not win peace on its own, and that success in

[72] D. A. Leurdijk, 'The UN and NATO: The Logic of Primacy', in M. Pugh, W. P. Singh Sidhu, *The United Nations and Regional Security. Europe and Beyond* (2003), 57, 58. NATO's comments to the ILC on the articles on responsibility clearly expressed this line of policy: "With regard to NATO missions, each NATO or NATO-led operation requires a mandate from the North Atlantic Council. *It is in the power of the nations represented in the Council to decide on NATO-led operations on their own authority* but, in practice, *its decisions are normally made on the basis either of relevant resolutions of the United Nations Security Council* ***or*** *in response to the request of a specific State or group of States seeking NATO participation or support*.", International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 12-13, para.5.

[73] E. Griep, *Regionale Organisationen und die Weiterentwicklung der VN-Friedenssicherung seit dem Ende des Kalten Krieges* (2012), 310.

[74] *Ibid.,* 311; J. de Hoop Scheffer, 'New missions, new means', in (2004) 149 (4), *The RUSI Journal*, 42, 42; See also the Remarks of NATO Secretary-General before the Security Council, Security Council, 5075th meething, UN Doc. S/PV.5075 (Resumption 1) (2004), 2.

[75] Yost, *supra* note 29, 43. After the negative experiences in NATO-UN operational cooperation in Bosnia and Herzegovina, i.e. under the dual-key arrangement, NATO will not commit to any international mission upon which it is decided by the Security Council in the absence of prior consultations, D. Lightburn, 'Should NATO support UN peacekeeping operations?', (2005) (June) NATO Review.

[76] Chicago Summit Declaration, *supra* note 66, paras.13-14. But it was a shift within NATO as the U.S. refused to take a leading role in the airstrikes, and rather was limiting its role to leading from behind, while considering Libya as a primarily European (NATO members) problem, J. H. Michaels, 'NATO After Libya', in (2011) 156 (6) *The RUSI Journal*, 56, 57.

[77] Yost, *supra* note 29, 44. NATO is – as most of the other organisations – also reacting to each given crisis/situation specifically and may serve "as the principal organiser of a collaborative effort, or as a source of specialized assistance, or in some other complementary role", NATO 2020: Assured Security; Dynamic Engagement. Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO, 17 May 2010, 10.

peace and stabilisation operations ultimately depends on civilian instruments that the Alliance does not possess."[78] Instead of developing a comprehensive approach of its own, NATO conceptualised its role as that of a catalyst between the various organisations engaged, fostering "cooperation and coordination between all the relevant actors involved in such operations."[79] Moreover, it precisely allows NATO to leave the "driver's seat" as regards overall coordination for the needed comprehensive approach to the United Nations while focusing on its own area of expertise.[80] Nevertheless, NATO continued its "two-pronged approach" regarding cooperation in peacekeeping operations by enhancing its own capacity to conduct military operations from a comparatively holistic point of view.[81]

3. NATO and the AU

NATO's relations with the African Union are fairly limited, which could be perceived as surprising given that NATO's military capacities could well contribute to the peacekeeping operations undertaken by the African Union. One principal reason is that NATO, despite its various partnership programmes with countries outside of the Euro-Atlantic zone, remains primarily committed to this area, as well as the immediate neighbourhood.[82] Therefore, NATO intervened in Libya on the request of the Security Council but it is currently not participating in the crisis management in Mali.

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[78] P. V. Jakobsen, 'NATO's Comprehensive Approach after Lisbon: Principal Problem Acknowledged, Solution Elusive', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 83, 83-84.

[79] Jakobsen, *ibid.*, 83, 84; Cf. "Strategic Concept For the Defence and Security, *supra* note 48, paras. 4 c), 28-33; H.B. Lindbo Larsen, 'Cooperative Security: Warning Influence in the Eastern Neighbourhood', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 91, 92.

[80] This strategic direction explains why NATO decided to establish only a very modest civilian component for the management of its military operations on the basis of the 2010 Strategic Concept, "Strategic Concept For the Defence and Security, *supra* note 48, para. 25 bullet point 3; cf. S. Biscop, 'From Lisbon to Lisbon: Squaring the Circle of EU and NATO Future Roles', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 106, 107-108. Another reason for NATO to be rather the passenger than the driver is the primacy of foreign policy in crisis management, *ibid.* 110-111. NATO might be chosen to coordinate the framework for military operations, involving other actors such as the EU and the UN from the very beginning in the planning of the other non-military tasks which would be implemented by these organisations under their own authority, *ibid.*, 111.

[81] This includes the adoption of the Effects Based Approach to Operations (EBAO), the Comprehensive Operational Planning Directive (2010), NATO's Counterinsurgency (COIN) Doctrine (2011) as well as the Civilian Advisor (CIVAD) Concept (2010). These measures do not only enhance NATO's own capacities but they equally strengthen and facilitate NATO's cooperation with other international actors, Jakobsen, *supra* note 78, 83, 84. The implementation of this comprehensive approach in the practice was – at the best – only partial successful in Afghanistan, *ibid.*, 84-85.

[82] Cf. i.e. Active Engagement in Cooperative Security: A More Efficient and Flexible Partnership Policy (2011), para.4. This does not mean that NATO is excluding the possibility of extending its relation to other areas and countries, but there is at least a certain restraint in doing so, *ibid.*, para. 10. One part of the restraint is that NATO's resources are not limited so priority is given to new partners which can contribute militarily, politically, financially or otherwise to NATO's operations and efforts, and likewise to a partner which is of a special strategic importance for NATO, Active Engagement, *ibid.*, para.16; cf. Michaels, *supra* note 76, 56, 56.

Furthermore, as the case of Mali has demonstrated again, the former colonial powers have maintained a certain solidarity and responsibility for their former realms and leave open the possibility to intervene on their own – at the request of the respective government.[83] Finally, NATO attempts to avoid duplication with the European Union which has institutionalised relationships with the African Union. Consequently, NATO is not proactive, but is rather responsive in its relations with the AU, providing the latter "with operational support, at its request."[84] This cautious position of NATO is fueled by internal pressure to justify its operations. Governments of NATO members need to be able to tell their parliaments that they have been asked to assist. In this scenario, a request from the United Nations is taken very seriously due to its legitimising function. The consequence is "widespread ignorance in the United Nations, the African Union, and other organizations about NATO's capacities."[85] Even notwithstanding these explanations of NATO's defensive stand, one may still ask whether such a NATO policy of more or less completely excluding any element of conflict prevention on the African continent is beneficial for the long-term strategy of the organisation.[86] Regarding inter-organisational and intra-operational cooperation, NATO is providing support to the African Union Mission in Somalia in providing strategic airlift and sealift support, as well as through the secondment of some experts to the AU's Peace Support Operations Division's desk on AMISOM.[87] Furthermore NATO has been assisting the African Union Mission in Sudan (AMIS).[88] During a visit of the AU High Commissioner for Peace and Security to NATO in 2007, he stated that the AU is looking

[83] All of the countries which possessed colonies on the African continent are members of NATO. Indeed, some nations such as France "hold as a matter of principle that NATO should stay out of Africa and that the EU should be responsible for security assistance to this continent, in view of the magnitude of EU development aid to Africa." Furthermore, the Colonial Powers of which several are also members of the EU, wish to make the EU an instrument of enduring influence on the African continent, Yost, *supra* note 29, 82.

[84] Chicago Summit Declaration, *supra* note 66, para. 15 (3); J. Miranda-Calha (Portugal), General Rapporteur, NATO Parliamentary Assembly, 167 DSC 06 E – Lessons Learned From NATO's Current Operations, para.76, available at: http://www.nato-pa.int/Default.asp?SHORTCUT=997 . NATO also established a Africa Support and Monitoring Team at its headquarters in support of the EU's Amani Africa 2010 project, E. A. Akuffo, 'Human security and interregional cooperation between NATO and the African Union', in (2011) 23 *Global Change, Peace & Security*, 223, 232.

[85] Yost, *supra* note 29, 44-45. The Secretary General of NATO said before the Council: "NATO nations are always prepared to consider further requests for support, and I fully expect and trust that this cooperation will continue.", Security Council, 5075th meeting, *supra* note 59, 4. It is not only ignorance but often also the persistent perception in certain parts of the world that NATO is a "US-led Cold War military organization", e.g., in the Darfur crisis, "the UN has often taken an 'arm's length' attitude toward NATO.", Yost, *supra* note 29, 46, 58-59.

[86] Cf. Wittmann, 'An Alliance for the 21st Century? Reviewing NATO's New Strategic Concept', *supra* note 51, 31, 36, 40.

[87] P.D. Williams, 'Somalia', in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 257, 275.

[88] NATO assistance to the African Union, http://www.nato.int/cps/en/natolive/topics_8191.htm

for long-term cooperation with NATO,[89] but it appears that no further efforts have been undertaken by both organisations regarding such a plan.

6. Conclusions

One can conclude that NATO has evolved from a collective defence organisation to a global security actor, which is independent in its actions, despite maintaining strong connections with the United Nations and the European Union.[90] The analysis of NATO's cooperation with the UN showed that NATO is interested in safeguarding its autonomous role while respecting the primary responsibility of the Security Council for maintaining international peace and security. The institutionalised arrangements for cooperation between NATO and the UN have not developed further since the joint declaration of 2008.

First, this stagnation might be explained by NATO's impulse for autonomy. Furthermore, NATO-UN relations might not be developing further because NATO appears to prefer fostering relations with a plurality of other partners through its various partnership programmes. NATO's More Efficient and Flexible Partnership Policy foresees the streamlining of its partnership tools, opening all cooperative activities and exercises to all partners as well as harmonising partnership programmes.[91] The consequences are significant also from the perspective of international responsibility as it means that the operational partners will "be consulted and offered the opportunity to put forward views on all relevant issues and be fully involved in the discussion of documents in particular Concepts of Operations, Operations plans, Rules of Engagements and their revisions."[92] Thus, the input of these partners in the operational activity of NATO will be tremendous. Nevertheless, in its Chicago Summit Declaration, NATO emphasised that it would develop stronger institutionalised relationships with the UN, the EU and the AU and other global and regional actors in the near future.[93]

As regards the general strategic direction of NATO, the organisation appears to oscillate between a broad global outlook on strategic security issues and a narrower Euro-Atlantic-centered one, which

[89] African Union looks to long-term cooperation with NATO, 2 March 2007, http://www.nato.int/docu/update/2007/03-march/e0302a.html .
[90] See, *infra*, 2.3.
[91] Active Engagement, *supra* note 82, paras. 12-13.
[92] Political-Military Framework for Partner Involvement in NATO-LED Operations (2011), para.9. Further aspects of the framework include meetings to discuss ongoing operations involving operational partners (para. 10). The NAC retains, however, "the ultimate responsibility for decision-making.", *ibid.*, para.12.
[93] Keynote address by NATO Secretary General Jaap de Hoop Scheffer at the Youth Forum, 02 April 2009; Chicago Summit Declaration, *supra* note 66, para. 24.

attempts to consolidate the status quo of "an Atlantic alliance focused on the globe."[94] Other authors submit that the rift within NATO regarding the strategic orientation runs deeper in reality; that it resurfaced and was intensified by NATO's post-Cold War expansion of tasks and missions.[95] This question is even more relevant in the context of the ISAF operation ending in 2014, when the troops will return to their barracks: one must ask not only what the principal purpose of the existence of NATO will be but also what its main purpose of activity will entail.[96] One author suggests that due to the geopolitical shift of US interests in the Pacific region, the global economic crisis and NATO's operational experiences, the organisation would be inclined in the near future to limit its military operations to smaller scale and short-term missions, in contrast to the scale and length of the operations of ISAF and KFOR for example.[97] Indeed, these operations have drawn strongly on the financial and military reserves of the Alliance and they have only been met with limited success or possibly even failure, thereby "dampen[ing the] enthusiasm [of NATO members] for undertaking comparatively ambitious and exhausting tasks in the future."[98]

The problem with the latest Strategic Concept of NATO is its preoccupation with multiple or abstract threats, and that it lacks the political vision necessary to design the future of NATO.[99] It was suggested by Jaap de Hoop Scheffer, upon his leaving of office that NATO should focus on "the new

[94] Ringsmose, Rynning, 'Introduction. Taking Stock of NATO's New Strategic Concept', *supra* note 50, 7, 8-9; NATO 2020, *supra* note 77, 20.

[95] Hyde-Price, 'NATO's Political Transformation and International Order', *supra* note 38, 45-46. Wittmann is also critical and argues that there is no consensus whether NATO is a regional or global organisation. Besides, as to "NATO's reach and character, *one would like to be able* to read from the Strategic Concept that NATO continues to regard itself as a regional organisation, but one with a global perspective." [Emphasis added], Wittmann, 'An Alliance for the 21st Century? Reviewing NATO's New Strategic Concept', *supra* note 51, 31, 37. The US has been pushing a more global agenda for NATO since the mid 90's. Then Secretary of State Albright called upon NATO to confront "challenges beyond Europe's shores" in 1997, but European NATO states were opposed to that proposition of a global NATO, M. Webber, 'Three Questions for the Strategic Concept', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 99, 101. Further disagreement arose over the issues of capabilities (including the lack of burden sharing), specific operations such as Iraq or the broader international security architecture, T. Legendre, 'Military Change – Discord or Harmony', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 137, 137.

[96] Interview with Jaap de Hoop Scheffer in The Hague, 18 April 2013.

[97] M. Madej, 'After the Chicago Summit – the Condition and Prospects for Development', in R. Czulda, R. Loś (eds.), *NATO Towards the Challenges of Contemporary World* (2013), 39-45. Simultaneously, NATO will be more disposed to reach out to other international organisations if it decides to deploy military forces, *ibid.*, 51.

[98] *Ibid.*, 44.

[99] Webber, 'Three Questions for the Strategic Concept', *supra* note 95, 99, 103. Other authors credit the Concept with being concise and deem it successful, without breaking "a daring new path for NATO, nor (…) bridg[ing] an age-old divide." But, it is acknowledged that NATO is in a transition and opposed to other challenges such as personnel cuts from about 13000 to circa 8000 staff, Biscop, 'From Lisbon to Lisbon: Squaring the Circle of EU and NATO Future Roles', *supra* note 80, 106, 106. It is also conceded that the current "threats" NATO is facing are rather challenges than threats amounting to "an immediate risk of violence", Biscop, *ibid.*, 107; K.-H. Kamp, 'The Alliance after Lisbon: Towards NATO 3.0?', in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment,* DIIS Report (2011), 167, 167.

agenda of human security"[100], the 2010 Strategic Concept is also considered as a tool to re-engage NATO member states with the core principles of the organisation.[101]

Consequently, NATO appears to be currently at a crossroads and it is hard to predict its further development on the international and global security agenda. So, what are the legal implications of NATO's activities in the specific context of cooperation with other international organisations in peacekeeping operations?

In the peacekeeping context and in its relations with the AU and the UN, NATO generally keeps an autonomous role, acting on its own, although now normally with a Security Council authorisation, or by responding solely to specific requests for support, e.g. by the AU. Even within a framework of cooperation such as the KFOR operation, NATO tends to focus on its own operative role and is not seeking a leadership position. It is therefore not very likely that the activities of NATO in cooperation with the AU and the UN will amount to cases of joint responsibility under international law – at least not beyond a scenario of aid and assistance in terms of international responsibility. It appears more likely that cases of joint responsibility could arise for NATO on the basis of its partnership arrangements.

[100] Speech by NATO Secretary General Jaap de Hoop Scheffer in Bratislava, Slovakia, 17 July 2009. There are several good arguments for NATO to be refocusing on the broader area of peacekeeping and human security, Webber, *ibid.*, 99, 103-104.
[101] Kamp, 'The Alliance after Lisbon: Towards NATO 3.0?', *supra* note 99, 167, 167.

2.3. The EU: an emerging strong actor within the system of collective security?

> "The enlarged European Union has the power and the capability to shape global order. During the last fifty years, we built a peaceful Europe based on freedom and solidarity. In the future, to guarantee and to reinforce such achievements, we need to influence and to shape the world around us….We will not live in peace if we do not face the external threats to our security and the instability in the regions close to Europe."

- European Commission President José Manuel Barroso[102]

> "With the creation of a European military capacity, the question of the EU's possible contribution to UN-mandated peacekeeping and peace-making operations becomes more urgent than ever."

- Communication from the Commission to the Council and the European Parliament (2003)[103]

"The European Union (EU) and the United Nations (UN) are natural partners. They are united by the core values laid out in the 1945 Charter of the United Nations."

- The partnership between the UN and the EU[104]

1. The Foundation of the EU and its normative and political framework

The origins of the European Union can be traced back to the European Coal and Steel Community as well as the European Economic Community which were both established in the 1950s. The 1992 Maastricht Treaty created the European Union under its current name. A common and foreign defence policy started to develop in the 1970s.[105] Member states of the European Communities started intergovernmental consultations and cooperation mechanisms on foreign policy and law and order.[106] The Reactivation of the WEU in the 1980s carved the way for the European Security and

[102] Cited in European Union, Delegation of the European Commission to the USA, 'The EU and Peacekeeping: Promoting Security, Stability and Democratic Values' in (2008) eufocus, available at: http://www.eurunion.org/News/eunewsletters/EUFocus/2008/EUFocus-Peacekeeping-Nov08.pdf

[103] Communication from the Commission to the Council and the European Parliament, The European Union and the United Nations: The choice of multilateralism, COM(2003) 526 final, 2003, para. 1.1 c)

[104] United Nations, The partnership between the UN and the EU, The United Nations and the European Commission working together in Development and Humanitarian Cooperation (2006), 6.

[105] The end of the Cold War was not the sole factor which allowed the creation of a common foreign and security policy within the EU, but it accelerated such a development, L. Boisson de Chazournes, 'L'Union européenne en quête d'une politique étrangère et de sécurité commune', in, La documentation française, *L'intégration européenne au XXIe siècle, en hommage à jacques Bourrinet* (2004), 237, 243.

[106] Naert, *supra* note 53, 21.

Defence Policy (ESDP) through the adoption of the Platform on European Security Interests, containing the commitment "to build a European Union in accordance with a Single European Act" on the basis of the conviction that "the construction of an integrated Europe will remain incomplete as long as it does not include security and defence."[107]

The Maastricht Treaty, which established the European Union, replaced the European Political cooperation with the Common Foreign and Security Policy (CFSP) which was pinned in the 2nd pillar of the Union. Simultaneously, the treaty paved the way for the development of a European defence policy within the EU.[108] The failure of the member states to agree upon a common stance and to prevent the massacres in the wars in Yugoslavia prompted a change in policy; they increased their activity through the EU in the area of the CFSP.[109] The elaboration and implementation of decisions and actions of the European Union in this area was allocated to the Western European Union (WEU). The Council of the European Union was only empowered to adopt the necessary practical arrangements in this regard, jointly with the WEU[110], leaving untouched the obligations of member states under the North Atlantic Treaty.[111] It was a political compromise between a majority of member states in favour of an independent European defence identity and a minority supporting the continuation of the "old" system under which NATO should be responsible for all defence questions.[112] The Maastricht Treaty underlines that priority was given to national policies in the area of defence, considering the framing of a common defence policy only as an "eventual aim" and the establishment of "common defence" as a mere potential idea for the future.[113] Nevertheless, it signified "both the growing confidence of the Union as an international player and the incremental widening of the scope of its activities."[114]

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[107] *Ibid.,* 22. The WEU was mostly dormant in the 1960s and 1970s, but it played a more active role in the 1980s, including as regards mine-clearing naval operations in the Persian gulf in 1987-1988 and support to enforce the UN embargo against Iraq in 1990, *ibid.*

[108] The Treaty of Maastricht stipulated in Article B the aim of "the implementation of a common foreign and security policy including *the eventual framing of a common defence policy, which might in time lead to a common defence*.", Treaty on European Union (Maastricht, 7 February 1992). A very similar wording can be found equally in Article J.1 (1). On the origins and very early evolution of the CSDP, cf. P. Koutrakos, *The EU Common Security and Defence Policy* (2013), 5-21.

[109] Koutrakos, *ibid.,* 15-16. The wars in the Balkans in the late 1980s and 1990s "had shocked the system of European integration so profoundly as to create considerable momentum for a more active EU in the area of foreign and security policy", *ibid.*, 84; See also, J.-P. Schütze, *Die Zurechenbarkeit von Völkerrechtsverstößen im Rahmen mandatierter Friedensmissionen der Vereinten Nationen* (2010), 62.

[110] Treaty on European Union (Maastricht, 7 February 1992), Article J.4 (2).

[111] *Ibid.*, Article J.4 (4)

[112] M. Kuhn, *Die Europäische Sicherheits- und Verteidigungspolitik im Mehrebenensystem. Eine rechtswissenschaftliche Untersuchung am Beispiel der Militäroption der Europäischen Union in der Demokratischen Republik Kongo 2003* (2012), 18.

[113] Cf. Naert, *supra* note 53, 29.

[114] Koutrakos, *supra* note 108, 16.

The objectives of the CFSP therefore contained, *inter alia*, "the safeguard[ing of] the common values, fundamental interests and independence of the Union" as well as the "strengthen[ing of] the security of the Union and its Member States in all ways."[115] The annexed "Declaration on Western European Union" set out in detail the plan to develop the WEU as "the defence component of the European Union and as a means to strengthen the European Pillar of the Atlantic Alliance."[116] Interestingly, an awareness was already evident within the WEU of the need to decentralise the maintenance of international peace and security and of the emergence of peacekeeping undertaken by regional organisations.[117]

The Treaty of Amsterdam (1997) introduced further changes to the European security architecture. The framing of a European defence policy became a reality[118] and the European Council was empowered to "set up a common defence that might result from the progressive – thus no longer eventual – framing of a common defence policy."[119] In this treaty, the scope of common defence activities at the disposition of the EU is set out explicitly for the first time under Article 17 of the revised treaty in the form of the so-called Petersberg tasks: "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking." [120]

The intergovernmental conference that prepared the Treaty of Amsterdam also debated the future of the relations between the EU and the WEU[121], which led to the integration of several functions of

[115] Article J.1(2) TEU (Maastricht).
[116] Paragraph 2 of the annexed Declaration on Western European Union. Cf. also the dispositions of the Petersberg Declaration on the Implementation of the Maastricht Declaration, I.9. – 16. See also Petersberg Declaration of the WEU, Western European Union Council of Ministers, Bonn, 19 June 1992.
[117] In Article 2 of the Petersberg Declaration, it is stated that the WEU is "prepared to support (…) the effective implementation of conflict-prevention and crisis-management measures, including peacekeeping activities of (…) the United Nations Security Council", Western European Union Council of Ministers, Bonn, 19 June 1992, Petersberg Declaration, I.2. Later on, in the Petersberg Declaration, it is set out in detail that "[a]part from contributing to the common defence in accordance with Article 5 of the Washington Treaty and Article V of the modified Brussels Treaty respectively, military units of WEU member States, acting under the authority of WEU, could be employed for:
- humanitarian and rescue tasks;
- peacekeeping tasks;
- tasks of combat forces in crisis management, including peacemaking", II.4.
[118] Cf. Article 17 (1) (on the basis of the new numbering, previous article J.7) of the Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997.
[119] Naert, *supra* note 53, 36.
[120] Article 17 (2) of the Treaty of Amsterdam
[121] The two opposing opinions were: (I) to keep the relations as they are, separation between EU and WEU, or (II) to gradually merge the two organisations, a proposal, which was supported by many states, e.g., Germany, France, Italy and Spain. The agreed compromise was to integrate part of the functions of the WEU in the treaty, F. Pagani, 'A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union', (1998) 9 *European Journal of International Law*, 737, 740.

the WEU in the Treaty on European Union.[122] The Crisis management functions of the WEU were fully absorbed in the European Union in 1999.[123] Consequently the EU "decided to develop a (C)ESDP that should enable it to carry out the Petersberg tasks, either with or without recourse to NATO assets."[124] In a similar way to the intended arrangements under Article 43 of the UN Charter, the ESDP provides for availability of national military and police forces to the European Union so that the latter may carry out "crisis management" and military actions.

The next reform steps were taken on the basis of the Helsinki European Council Presidency Conclusions, transforming the legal framework and establishing different bodies of a civilian and of a military nature, firstly on an interim, then on a permanent basis; these include for example the Political and Security Committee (PSC), the EU Military Committee (EUMC) and the EU Military Staff (EUMS).[125] The Treaty of Nice consolidated and affirmed the reform steps.[126] The annexed Declaration on the European Security and Defence Policy established a time-frame for the full implementation of the ESDP.[127] It was declared fully operational by the Council during its meeting in 2003.[128]

A year later, in 2004, the EU founded the European Defense Agency which has the mandate to "support the Member States in their effort to improve European defence capabilities in the field of

[122] Cf. also Article 17 (1) 2nd paragraph which also safeguards the possibility of an integration of the WEU in the EU. The increased integration of WEU's function was also possible due to a change in the British position in respect of this topic, see e.g. S. Biscop, 'The UK's Change of Course: a new Chance for the ESDI', (1999) 4 *European Foreign Affairs Review*, 253 – 68.

[123] 1999/404/CFSP: Council Decision of 10 May 1999 concerning the arrangements for enhanced cooperation between the European Union and the Western European Union.

[124] The Petersberg Tasks were later complemented in the Treaty of Lisbon (Article 42 TEU) with joint disarmament operations, military advice and assistance tasks as well as post-conflict stabilisation tasks. Peace-keeping operations now include conflict prevention, Naert, *supra* note 53, 47.

[125] Helsinki European Council 10 and 11 December 1999, Presidency Conclusions, paras. 25-29 and Annex IV; Council Decision of 22 January 2001 setting up the Political and Security Committee (PSC), (2001/78/CFSP); Council Decision of 22 January 2001 setting up the Military Committee of the European Union (2001/79/CFSP).

[126] S. Duke, 'CESDP: Nice's Overtrumped Success?', in (2001) 6 *European Foreign Affairs Review*, 155, 159ff. The Laeken Declaration adopted 10 months after the treaty of Nice then launched the process leading to the project of the European Constitution. It amplified the call for the EU to act on issues of a wider international agenda and to shoulder responsibility, Laeken Declaration on the future of the European Union, Annex 1 to the Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, Doc. SN 300/1/01 REV 1, 19-20, 23.

[127] Declaration on the European security and defence policy as annexed to the Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001 (2001/C 80/01)

[128] External Relations Council, Declaration on EU Military Capabilities, May 2003, 19-20.V.2003, para.2. Generally the European Security and Defence Policy allows and envisions the usage of NATO's operational capacities, however the European Council has equally the power to conduct crisis management operations without relying on NATO capacities and facilities, Helsinki European Council, *supra* note 125, Annex I, para.7; D. Thym, 'Die gemeinsame Sicherheitspolitik vor und nach Nizza', WHI – Paper 3/01, April 2001, 3.

crisis management and to both sustain the ESDP as it stands now and to develop it in the future."[129] The 2003 Communication from the Commission to the Council and the European Parliament held that "[g]iven that EU actions in this area will invariably be consistent with, and in many cases complementary to, decisions and frameworks developed by the UN, the need for effective complementarity with the UN is also crucial."[130] Article 21 (2) (c) of the Treaty on European Union stipulates that

> [t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
>
> (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders.

2. Interpreting the legal framework of the EU in the area of the CFSP/CSDP

The legal framework, as it was amended by the Treaty of Lisbon, regarding the Common Foreign and Security Policy is very short and vague in parts, and, as a result, intrinsically prone to problems of interpretation, which is only heightened by the absence of authoritative interpretation through case-law.[131] Article 24 (1) provides that

> [t]he Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

Whereas, the "area of foreign policy" is not defined further in the treaty, matters relating to the Union's security are covered in the "Provisions on the Common Security and Defence Policy" (CSDP).[132] Article 42 of this section is also the base for EU peacekeeping operations and states that

[129] Joint Action of the Council of Ministers of July 12, 2004 (2004), O.J. L 245.
[130] Communication from the Commission to the Council and the European Parliament, The European Union and the United Nations: The choice of multilateralism, COM (2003) 526 final, 2003, para. 2.2. According to Article 30 of the Treaty on European Union as modified by the Treaty of Lisbon, the "Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations, Article 30 1. (2).
[131] The CFSP is expressly excluded from the jurisdiction of the Court of Justice pursuant to Article 24(1) subparagraph 2 TEU and Article 275 TFEU; See also P. Eeckhout, 'The EU Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism', in A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon* (2012), 265, 266-68; Koutrakos, *supra* note 108, 27.
[132] CSDP replaced ESDP as a term.

> [t]he common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use *them on missions outside the Union for peace-keeping*, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States[133] [Emphasis added].

Article 43.1. specifies that

> The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.

As such, it appears that, whereas the CSDP objectives are rather precise, the specific CFSP objectives as they existed in the EU treaties *ante*-Lisbon have been replaced by a set of overall objectives for the wide area of EU external action.[134] Moreover, the distribution of competences in the area of CFSP is not clear.[135] Article 2 (4) TFEU stipulates simply that the "Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy." In contrast, the preceding paragraphs of the very same article provide for either shared or exclusive competences. Prior to the Lisbon Treaty it was also never disputed that the CFSP does not fall under the exclusive competence of the EU, but that it is rather in the domain of shared/concurrent competences and these latter concepts were invoked while referring to it.[136] Therefore the silence of the treaties on this particular issue attracts attention. It is suggested that any such characterisation might have had a "pre-emptive effect"; being seen as falling under the area of "shared/concurrent competences and thereby trigger action (by member states) accordingly."[137] A better explanation

[133] Article 42 1. Treaty on European Union.

[134] Article 21 (2) TFEU; Eeckhout, 'The EU Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism', *supra* note 131, 265, 266-67. Furthermore the wording of Article 43(1) "shall include" underlines that it is a non-exhaustive list, Koutrakos, *supra* note 108, 59.

[135] As Craig asserts, the CFSP does not fit really in any of the categories of competences existing under EU law, P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (2010), 182.

[136] Eeckhout, 'The EU Common Foreign and Security Policy after Lisbon : From Pillar Talk to Constitutionalism', *supra* note 131, 265, 268; R. G. Bono, 'Some Reflections on the CFSP Legal Order', in (2006) 43 *Common Market Law Review*, 337, especially 357-62. On the different categories of competences within the European legal order, cf. R. Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis', in (2008) 33 *European Law Review*, 709-722; D. Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', in (2011) 7 *European Constitutional Law Review*, 453, 473. Cf also Boisson de Chazournes, 'L'Union européenne en quête d'une politique étrangère et de sécurité commune', *supra* note 105, 237, 245.

[137] Eeckhout, 'The EU Common Foreign and Security Policy after Lisbon : From Pillar Talk to Constitutionalism', *supra* note 131, 265, 268. Koutrakos suggests that the silence of the treaty on this issue "must be taken as a

might be the attempt to safeguard a margin of appreciation not only for member states but also for the European Union *per se*, which has now emerged as even more of an independent legal actor.[138]

According to a similar argument the broad wording of these dispositions reflects the "more ambitious" CSDP of the EU, but it also acknowledges the central role of member states which "may draw [on] the policy they want the Union to carry out."[139] However, there are indeed indications that the CFSP includes elements which suggest an exclusive competence of the EU, for example in the exclusion of the possibility to adopt legislative acts within the scope of the CFSP on the basis of Article 24 (1) TEU[140] as well as its "autonomous administrative structure and the development of its working methods."[141]

Overall, it seems that the regulation of the CFSP and the CSDP within the Treaty of Lisbon was a "face-saving" compromise to guarantee the autonomy and influence in this area of member states and the EU alike. From a legal point of view, however, it leaves unanswered the question of who is responsible in cases of violations of international law by activities undertaken in this particular field – at least from the internal EU point of view.

3. The relevant organs and the implementation of the CFSP

This part introduces the relevant organs and the procedures to implement the CFSP of the EU. Concerning the activation and execution of the CFSP under the treaties, the Council shall adopt decisions relating to the task referred to in Article 42 (1), defining their objectives and scope and the general conditions for their implementation (Article 43.2.). The decision-making process is based on unanimity, which increases the challenge to agree upon the deployment of an operation as the 28

corroboration of the distinct nature of the Union's competence in the area." Distinct legal mechanisms for the exercise, management and enforcement of the CFSP further support this view, Koutrakos, *supra* note 108, 27.

[138] Also because of the clarification about its legal status under international law as an international organisation.

[139] Koutrakos, *supra* note 108, 60-61.

[140] The 41st Declaration attached to the Lisbon Treaty prohibits the adoption of legislative acts in the area of CFSP, Declaration on Article 352 of the Treaty on the Functioning of the European Union. The Treaty of Lisbon does not contain the distinction between legislative and non-legislative acts as it was foreseen in the Constitution for Europe, but it retains the distinction between ordinary and special legislative procedures for the adoption of legal acts by the EU all of which involve the participation of the Parliament and the Council, cf. Eeckhout, 'The EU Common Foreign and Security Policy after Lisbon : From Pillar Talk to Constitutionalism', *supra* note 131, 265, 279-80. The duty of member states to "unreservedly support" CFSP and to "refrain from any action which is contrary" may also be considered to some extent as another indication of supranationalism and thereby an exclusive competence of the EU, but it seems more accurate to consider it as an expression of the loyal duty of cooperation existing in all international organisations, *ibid.* The German Constitutional Court similarly confirmed that the CFSP will not fall under supranational law, "Lissabon-Urteil", BVerfG, 2 BvE 2/08 vom 30.6.2009, paras. 342, 390.

[141] Koutrakos, *supra* note 108, 64-67. See also especially Thym, *supra* note 136, 453, 460-67.

Ministers of Foreign Affairs all have to agree.[142] The High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of such tasks. The decision to initiate a crisis management mission is adopted by the Council either on proposition of the High Representative or a member state according to Article 42.

The Political and Security Committee, which consists of representatives from the 28 member states in Ambassadorial rank, exercises the political and strategic direction of the crisis management operations under the responsibility of the Council and of the High Representative (Article 38 Treaty on the European Union).[143] The Council can authorize the Committee for the purpose and for the duration of a crisis management operation, to take the relevant decisions concerning the political and strategic direction of an operation (Article 38.3).[144] But it is also the "eye and ear" of the EU's foreign policy institutions, acting as an early warning system with the right to deliver opinions to the Council, as well as monitoring the implementation of policies.[145]

The established chain of command is similar to the one used in United Nations operations. An appointed EU special representative carries out his mandate under the authority of the High Representative whereas the actual military control of the operation rests with the EU Operation and the EU Force Commanders.[146] In that regard, the decision of the military headquarters is *taken ad hoc*, made amongst the choice of five locations in five different Member States,[147] whereby the state whose headquarters are chosen will act as the framework state for the implementation of the mission.[148] In March 2012, the EU decided to activate for the first time the EU Operations Centre in Brussels which can – by its mandate – act as the headquarter in the case of joint military and civil operations.[149]

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[142] This can be problematic as the European Union's inherent weakness is the "difficulty of member states to agree and talk with one voice when it comes to foreign and security policy.", M. Derblom, E. Hagström Frisell, J. Schmidt, 'UN-EU-AU Cooperation in Peace Operations in Africa', FOI, Swedish Defence Research Agency (2008), 18. One only has to think of the contrary positions of the United Kingdom and Germany and Italy regarding the invasion in Iraq in 2003.

[143] N. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 102, 114.

[144] For a list of respective competences of the Council and the PSC for EU-led military operations, cf. also Council of the European Union, EU Concept for Military Command and Control, Brussels, 24 September 2012, 15-16, para.16.

[145] Koutrakos, *supra* note 108, 64; Thym, *supra* note 136, 453, 465.

[146] Council of the European Union, EU Concept, *supra* note 144, 9, para. 9 b.; Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', *supra* note 143, 102, 114.

[147] The UK, Italy, France, Germany and Greece.

[148] Koutrakos, *supra* note 108, 101-102.

[149] Council Decision 2012/173/CFSP of 23 March 3012 on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa; Council Decision

As the CFSP and especially the CSDP continue to evolve in practice, it is possible that a greater number of EU operations in the future will be directed from the EU operation centre as it allows to professionalise, as well as to streamline proceedings, guidelines and mechanisms. In addition, its geographical proximity to all the other EU bodies is advantageous to guarantee the necessary military command and control arrangements. Once again, however, there are political implications as some member states prefer to be in control and "to be seen to be in control."[150] Following the proposition in 2011 by Ashton, the High Representative of the EU for Foreign Affairs, to establish a permanent headquarters in Brussels, the UK threatened to veto any such proposal, declaring that "the UK will block any such move now and in the future" and that the proposal amounts to a "red line."[151] The UK which has always been a strong proponent of the transatlantic alliance feared that the establishment of a permanent headquarter would be to the detriment of NATO and would duplicate the latter's structures and capabilities[152] and therefore preferred a plan to locate the EU Operational Headquarters at NATO SHAPE.[153] Nevertheless, the "Big Five"[154] urged Ashton to bypass the British veto by using the permanent structured cooperation under the Lisbon Treaty and to proceed urgently with the planning for a permanent EU military headquarter as "'it remains the most comprehensive basis for further work on all the issues: capabilities, including civil-military planning and conduct capability, battle groups and EU/Nato [sic] relations.'"[155] France was, however, not willing to jeopardise the Lancaster bilateral defence accord with the UK government, and backed down. The French government is now pursuing a policy of accomplishing a *fait accompli* by establishing a permanent Operational Headquarters through the deployment of the EUTM in Mali and the extension of Operation Atalanta.[156]

The provision of troops to EU military operations resumes the flexible framework for the implementation of the CFSP under the TEU. Generally speaking, member states are obliged under

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2008/298/CFSP of 7 April 2008 amending Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union, 4.

[150] Factsheet, the Activation of the EU Operations Centre, 2; Koutrakos, *supra* note 108, 102; M. Norheim-Martinsen, 'Our work here is done: European Union peacekeeping in Africa', in (2011) 20 *African Security Review*, 17, 20.

[151] J. Hale, 'U.K. Rejects Idea of EU Operations HQ', *Defence News*, 18 July 2011, available at: http://www.defensenews.com/article/20110718/DEFSECT04/107180306/U-K-Rejects-Idea-EU-Operations-HQ .

[152] *Ibid.* Also against: L. Coffey, 'EU Defense Integration: Undermining NATO, Transatlantic Relations, and Europe's Security', *The Heritage Foundation*, Backgrounder No. 2806, June 6, 2013, 10.

[153] R.H. Ginsberg, S. Penska, *The European Union in Global Security* (2012), 191-192.

[154] France, Germany, Italy, Spain and Poland.

[155] B. Waterfield, '"Big five" tell Baroness Ashton to bypass Britain over EU military HQ', *The Telegraph*, 08 September 2011, available at: http://www.telegraph.co.uk/news/worldnews/europe/eu/8747399/Big-five-tell-Baroness-Ashton-to-bypass-Britain-over-EU-military-HQ.html .

[156] H. Samuel, B. Waterfield, 'EU military headquarters plans 'backed by Baroness Ashton'', *The Telegraph*, 11 November 2012, available at: http://www.telegraph.co.uk/news/worldnews/europe/eu/9670265/EU-military-headquarters-plans-backed-by-Baroness-Ashton.html .

Article 42(1) and (3) to provide military and civilian capabilities for the performance of these tasks.[157] But the European Union and the Member States have discretion regarding the provision of troops to these operations as the Council under Article 44.1 "may entrust the implementation of the task to a group of Member States who are willing and the have the necessary capability for such a task."[158]

4. The EU's Security Policy – A global actor or rather a great dream?

In 2003, the European Union adopted a European Security Strategy. The document clarified that the European Union perceives itself as a global actor and even obligated it to act in such a role; thus, "Europe should be ready to share in the responsibility for global security and in building a better world."[159] This pledge was implemented in practice in the very same year by the deployment of the first peacekeeping operation of the EU in Macedonia. Since then the capabilities of the EU to launch military and civilian crisis management operations have been strengthened extensively. The Brussels European Council 2008 Presidency Conclusions contain the pledge of the EU to augment its capabilities to a level where the EU can deploy 60,000 troops in 60 days for a major operation, as well as to enable the organisation to conduct several operations simultaneously.[160] These pledges

[157] The scope of this disposition also remains vague, Koutrakos, *supra* note 108, 63.

[158] Article 44.1. Treaty on European Union. That article therefore corresponds to Article 48 (1) of the UN Charter, which authorises the Security Council to determine a group of states to carry out its decisions for the maintenance of international peace and security. As observed by Catherine Ashton in her final report for the December 2013 Defence Council, this article "could be used in the context of rapid reaction, when consensus exists, and a group of Member States is willing to provide capabilities and take action on behalf of the Union", thereby offering "flexibility and speed of action." In her view, the case of Mali prefigured an application of that disposition as France was deploying quickly while other member states provided niche support. Nevertheless, she declared that its "potential scope of application should be further explored with the Member States", Preparing the December 2013 European Council on Security and Defence, Final Report by the High Representative/Head of the EDA on the Common Security and Defence Policy, Brussels, 15 October 2013, 12.

[159] In the Introduction, it is said: "As a union of 25 states with over 450 million people producing a quarter of the world's Gross National Product (GNP), and with a wide range of instruments at its disposal, the European Union is inevitably a global player", A Secure Europe in a Better World, European Security Strategy (2003).

[160] "Europe should be capable, in the years ahead, in the framework of the level of ambition established, inter alia of deploying 60 000 men in 60 days for a major operation, within the range of operations envisaged within the headline goal for 2010 and within the civilian headline goal for 2010, of planning and conducting simultaneously:
– two major stabilisation and reconstruction operations, with a suitable civilian component, supported by a maximum of 10 000 men for at least two years;
– two rapid response operations of limited duration using inter alia the EU's battle groups;
– an emergency operation for the evacuation of European nationals (in less than ten days), bearing in mind the primary role of each Member State as regards its nationals and making use of the consular lead State concept;
– a maritime or air surveillance/interdiction mission;
– a civilian-military humanitarian assistance operation lasting up to 90 days;
– around a dozen ESDP civilian missions (inter alia police, rule of law, civil administration, civil protection, security sector reform and observation missions) of varying formats, inter alia in a rapid reaction situation, including a major mission (possibly up to 3 000 experts), which could last several years.
For its operations and missions, the European Union uses, in an appropriate manner and in accordance with its procedures, the resources and capabilities of Member States, of the European Union and, if appropriate for its

sound impressive, but they are, in reality, a reiteration of the policy formulated 9 years beforehand. In 1999, the Helsinki Headline Goal envisaged that these troops be operational by the end of 2003.[161] In 2004, however, the deadline was extended to 2010, but was once again not met.[162] In fact, as recently as 2012, the EU was unable to deploy two battlegroups simultaneously and, as a result, not a single battlegroup was deployed.[163] The future of EU battlegroups is generally unclear, as is the political will to deploy them. Whereas Germany proposed to allow the deployment of at least one of the two standing EU battlegroups for other purposes, such as training foreign militaries, other countries prefer the expansion of EU battlegroups and the EEAS proposed even an additional navy and airforce component.[164] A month before the European Defence Council of December 2013, the Council of the EU underlined that the "need for concrete improvements in EU military rapid response capabilities, including the EU Battlegroups" which includes the enhancement of their operational deployability and usability.[165]

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military operations, of NATO", Declaration by the European Council on the Enhancement of The European Security and Defence Policy (ESDP), Annex 2 to Brussels European Council 11 and 12 December 2008 Presidency Conclusions, Doc. 17271/1/08 REV 1, 16, para. 3 and fn.1.

[161] European Council Meeting, Helsinki Headline Goal, Helsinki, Finland, December 1999; A. Roberts, 'Proposals for UN Standing Forces: A Critical History', in V. Lowe, A. Roberts, J. Welsh et al (eds.), The United Nations Security Council and War (2008), 99, 123. According to Article 42 3. of the Treaty on European Union, "Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those Member States which together establish multinational forces may also make them available to the common security and defence policy." The failure to generate the necessary capacities by the end of 2003 led the EU to lower its ambitions and to adopt the EU Battlegroup Concept whereby a Battlegroup will consist of approximately 1500 personnel, Coffey, *supra* note 152, 6. Another interpretation given is that the size of EU Operation *Artemis* in 2003 was used as a reference model "for the development of a BG sized rapid response capability.", R. Hamelink, 'The Battlegroups Concept: Giving the EU a concrete "military face"', *Defence and Security*, Winter 2005, 8; M. Hatzigeorgopoulos, 'The Role of EU Battlegroups in European Defence', in (2012) 56 *European Security Review*, 1, 2; Directorate-General for External Policies of the Union, Directorate B – Policy Department - , Note, The EU Battlegroups, 12 September 2006, 4-5; EU Council Secretariat ~Factsheet~, EU Battlegroups, February 2007, 1-2.

[162] Headline Goal 2010 approved by General Affairs and External Relations Council on 17 May 2004, endorsed by the European Council of 17 and 18 June 2004, 1, para.2

[163] M. Hatzigeorgopoulos, 'EU Battlegroups – battling irrelevance?', *isis Europa blog*, available at: http://isiseurope.wordpress.com/2012/07/04/eu-battlegroups-battling-irrelevance/ ; Koutrakos, *supra* note 108, 104; Norheim-Martinsen, *supra* note 150, 17, 20; G. Faleg, A. Giovannini, 'The EU between Pooling & Sharing and Smart Defence. Making a virtue of necessity?', CEPS Special Report (2012), 3; Ginsberg, Penska, *supra* note 153, 27-28.

[164] Spiegel Online, 'EU-Kampftruppen: Beraten statt schießen', 21 July 2013, available at: http://www.spiegel.de/politik/ausland/bundesregierung-will-eu-kampftruppen-zu-beratern-machen-a-912267.html, C. Hasselbach, 'Military. Debate surrounds future of EU battle groups', DW, 01 June 2013, available at: http://www.dw.de/debate-surrounds-future-of-eu-battle-groups/a-16852649. See also A. Novosseloff, 'Options for improving UN-EU cooperation in the field of peacekeeping', in J. Krause, N. Ronzitti (eds.), *The EU, the UN and Collective Security. Making multilateralism effective* (2012), 150, 154.

[165] Council conclusions on Common Security and Defence Policy, EDUCATION, YOUTH, CULTURE and SPORT Council meeting, Brussels 25-26 November 2013, 5, para.12. b.

In a similar way to NATO, the EU entertains various partnership programmes with other states and regions, e.g. the European Neighbourhood Policy or the Black Sea Synergy within the Union's neighbourhood framework. [166] In 2008, the European Council also issued the Report on the Implementation of the European Security Strategy which – going beyond its title – updated and adapted the main strands of the European Security Strategy.[167] It is suggested that it was foreseen to adopt a new Security Strategy but political pressure by the governments of Germany and the United Kingdom prevented such an achievement.[168]

The advantages of the European Union are that its broad structure and competences allow it to respond to a multitude of threats and challenges, which require political, economic, judicial, military, etc, responses.[169] Given this flexibility, the European Union has been able to carry out 20 civilian and military operations since 2003, which nearly amounts to one third of all UN peacekeeping operations since 1945.[170] It proves *de novo* that the European Union will increasingly play a more important role in the field of the maintenance of international peace and security.

[166] Brussels European Council 11 and 12 December 2008 Presidency Conclusions, Doc. 17271/1/08 REV 1, 11, para.29.
[167] Report on the Implementation of the European Security Strategy – Providing Security in a Changing World – (2008), S407/08, 9-12. For the external dimension of security, cf. Communication from the Commission to the European Parliament and the Council, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe (2010).
[168] A. Toje, *The European Union as a Small Power. After the Post-Cold War* (2010), 79-80.
[169] A Secure Europe, *supra* note 159, 7. Cf. also Preparing the December 2013 European Council, *supra* note 158, 4, para.II Cluster 1. 1.
[170] Including missions, the number stands at nearly 30, Preparing the December 2013 European Council, *ibid.*, 3.

5. The EU and the United Nations – between submission and self-reliance

"The UN stands at the apex of the international system. The long standing and unique co-operation between the EU and the **United Nations** spans many areas, and is particularly vital when it comes to crisis management. At the **operational level**, cooperation with the UN is dense and fruitful."

-High Representative of the Union for Foreign Affairs and Security Policy, October 2013[171]

"The United Nations and the European Union increasingly work side-by-side on the ground in peacekeeping and civilian crisis-management operations, and through preventive diplomacy."

- Secretary-General Ban Ki-moon, February 2014[172]

The foundations for the institutionalised relations between the EU and UN were first laid down at the European Council of Nice in 2000 and the 2001 Gothenburg Summit.[173] In 2003, the EU and the UN issued the Joint Declaration on EU-UN Cooperation in Crisis Management. Part of this declaration was the establishment of the UN-EU Steering Committee[174] with the mandate to "examine ways and means to enhance mutual co-ordination and compatibility" in the areas of planning, training, communication and best practices framework for cooperation.[175] The European Union, thereby,

[171] *Ibid.*, 5.
[172] Security Council 7112th meeting, UN Doc. S/PV.7112 (2014), 2.
[173] A. Novosseloff, United Nations – European Union Cooperation in the Field of Peacekeeping: Challenges and Projects, GGI Analysis Paper No.4/2012, 8; 2356th Council Meeting – General Affairs – Luxembourg, 11-12 June 2001; Presidency Report to the Götebourg European Council on European Security and Defence Policy, Annex (2001), para.4. The EU was the first organisastion to develop institutionalised relations with the UN in the area of peace and security, Thematic evaluation of cooperation, *supra* note 65, 18-19, paras. 55-58; cf. also Security Council, 6306th meeting, UN Doc. S/PV.6306 (2010), Security Council, 6477th meeting, UN Doc. S/PV.6477 (2011).
[174] The members of the steering committee include people of the Secretariat of both the UN and the Council as well as of the Commission. "Building on the 2003 EU-UN declaration, civilian and military relations between the two organisations are stronger than ever, with links and support in DRC and Darfur (AMIS II) being key catalysts. (…) Regular meetings between representatives of both organisations continued to take place, inter alia through the consultative mechanism known as the EU-UN Steering Committee.", EU Presidency Report on ESDP, approved by the European Council, Brussels, 16 December 2005, para. 60. The Steering Committee did not meet in 2010 and 2011 mainly because of the reorganisation of European institutions following the adoption of the Treaty of Lisbon and it has been considered by many of only limited use unless a joint operation is deployed on the ground and when only a general exchange of views takes place, Novosseloff, *ibid.*, 15-16. According to Ginsberg and Penska, the steering committee has lost its pivotal role and the European External Action Service is now assuming the coordination with the UN DPKO, Ginsberg, Penska, *supra* note 153, 167.
[175] Joint Declaration on UN-EU Co-operation in Crisis Management (2003), para. 3; EU-UN co-operation in Military Crisis Management Operations, Elements of Implementation of the EU-UN Joint Declaration (2004), 2, para.2; United Nations, Department of Peacekeeping Operations, Department of Field Support, United Nations Peacekeeping Operations, Principles and Guidelines (2008), 86 A Secure Europe, *supra* note 159, 11. A similar statement can be found in the Presidency Conclusions of the Brussels European Council (2005), 10255/1/05 REV 1, para. 25. The Steering Committee conducts biannual meetings, Implementation of the

clearly recognises, that "the United Nations has the primary responsibility for the maintenance of international peace and security"[176] but it also asserts its willingness to bear its burden, acknowledging that "Europe should be ready to share in the responsibility for global security."[177] The EU, as a result, sees its role not only as a partner, but also as an auxiliary organisation for the UN to carry out its mandate effectively.[178] The Security Strategy thus introduced the notion of "effective multilateralism" which was featured equally in the 2008 Report on the Implementation of the Security Strategy.[179]

The Lisbon Treaty followed in the footsteps of this careful balancing act of the EU.[180] On the one hand, the EU is committed to the concept of responsibility within the international security system established under the United Nations Charter; on the other hand, the EU is committed to effective multilateralism which is perceived as one of the pillars of the EU's international perception and of the understanding of its role in the world.[181] References to the United Nations and its Charter feature

recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, Addendum, UN Doc. A/60/640/Add.1 (2005), 6, para. 9. Several working-groups within the EU are charged with UN relations, e.g. the Working Group of the Council on the UN (CONUN), responsible for both "UN institutional and horizontal issues" or the Council Working Group on Human Rights Policy (COHOM) which coordinates the official position of the EU within the Third Committee of the UN, G. De Baere, E. Passivirta, 'Identity and Difference: The EU and the UN as Part of Each Other', in H. de Waele, J.-J. Kuipers (eds.), *The European Union's Emerging International Identity. Views from the Global Arena* (2013), 21, 28.

[176] A Secure Europe, *supra* note 159, 9; Joint Declaration on UN-EU Co-operation, *ibid.*, para.1. The Joint Statement on UN-EU cooperation in Crisis Management restates the pledge, and adds: "In this context, the United Nations recognizes the considerable contribution of human and material resources on the part of the European Union in crisis management, Joint Statement on UN-EU cooperation in Crisis Management (2007), para. 1; In the Report on the Implementation of the European Security-Strategy it is reiterated, but there is also an emphasis placed on the aspiration for the European Union to play a leading role: "At a global level, Europe must lead a renewal of the multilateral order. The UN stands at the apex of the international system", Report on the Implementation, *supra* note 167, 2.

[177] A Secure Europe, *supra* note 159, 1.

[178] "Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority", A Secure Europe, *ibid.*, 9.

[179] P. Koutrakos, 'The European Union in the Global Security Architecture', in B. Van Vooren, S. Blockmans, J. Wouters (eds.), *The EU's Role in Global Governance: The Legal Dimension* (2013), 81, 82; Report on the Implementation, *supra* note 167, 2. The emphasis on "multilaterialism" was also an EU response to US "unilateralism" under the first Bush administration, C. Mace, 'Making Multilateralism matter: The EU Security Strategy', in (2003) 18 *European Security Review*, 1, 2.

[180] According to the TEU, the EU is resolved to implement a CFSP, thereby "reinforcing the European Identity and its independence in order to promote peace, security and progress in Europe and in the world", TEU, Preamble, 11th Recital. However, by promoting its value, the EU "shall contribute to peace [and] security in the world (…) as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter", Article 3(5) TEU. But according to Article 21(1) TEU, the EU "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations" and it shall "promote an international system based on stronger multilateral cooperation", pursuant to Article 21 (2) (h).

[181] Effective multilateralism does not mean that the United Nations is just another international organisation, but, it is a policy of effective multilateralism with the "United Nations at its core", Remarks by High Representative Catherine Ashton at United Nations Security Council: Cooperation between the UN and regional and sub-regional organizations, New York, 13 February 2013, 1.

prominently throughout the Treaty of Lisbon[182] prompting some authors to speak of a "constitutional attitude [of the EU] towards the UN system, rather than an instrumental attitude grounded in traditional foreign policy objectives."[183] However, the simultaneously existing "autonomy streak" diversifies the picture.

It is argued by Griep that the quest for autonomy is due to the institutional history of the EU. As an organisation *sui generis*, the European Union is a mosaic of competences on the international level.[184] More and more competences of the member states on the internal and external sphere have been transferred to the organisation as otherwise the Member States could have damaged the internal process of integration by contracting individually with third states or international organisations.[185] Whereas the European Community and the European Union used to act independently, within their respective competences, as entities of distinct legal personality, the Treaty of Lisbon created an entity which has – in comparison to an individual Member State – competences in a variety of areas, but on a larger scale.[186]

Likewise, the European Union has refused to submit itself – at least formally – to Chapter VIII of the UN Charter.[187] At the start of the cooperation between the European Union and the United Nations, a number of resolutions referred to Chapter VIII,[188] but now authorisations given to the EU are usually rooted on Chapter VII.[189] One has, however, to interpret this fact with caution as the general practice of the Security Council in its relations with regional organisations has moved towards Chapter VII. The EU could, arguably be considered as falling under Chapter VIII of the Charter as a successor to the WEU which was considered to be a regional organisation within the meaning of

[182] In addition to Article 21, references to the UN (Charter) are also contained in Article 42 (1) and (7) TEU, in the Seventh Recital of the Preamble of the TFEU, Article 208 (2) TFEU, Article 214 (7) TFEU and Article 220 (1) TFEU.

[183] De Baere, Passivirta, 'Identity and Difference: The EU and the UN as Part of Each Other', *supra* note 175, 21, 23.

[184] Due to its vast competences in many diverse areas and its highly developed infrastructure, the EU is a very attractive partner for the UN, Griep, *supra* note 73, 382.

[185] L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 184.

[186] *Ibid*., 79, 185.

[187] Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 83.

[188] Security Council Resolution 713, UN Doc. S/RES/713 (1991), Preamble and para.1; Security Council Resolution 727, UN Doc. S/RES/727 (1992), Preamble and para.5.

[189] Security Council Resolution 1671, UN Doc. S/RES/1671 (2006), 1-2, Preamble; 2, paras. 2-3; 3-4, paras. 6-11; 3, para.15; Security Council Resolution 1778, UN Doc. S/RES/1778 (2007), 4-5, paras. 6-12. In an external study for the DPKO, Tardy explained the reluctance of the European Union as based on the reliance of the EU on NATO military assets, stating that "EU members are somewhat reluctant to condition their operations to a Security Council vote, especially in cases when a) the operation is to be conducted with resort to NATO assets and b) they consider that such a vote is not legally required", T. Tardy, Limits and Opportunities of UN-EU Relations in Peace Operations: Implications for DPKO (2003), 10.

Chapter VIII.[190] Under Declaration 13 annexed to the Treaty of Lisbon the EU *per se*, and its Member States remain bound by the provisions of the Charter of the United Nations, including the primary responsibility of the Security Council for the maintenance of International Peace and Security. [191] The entry into force of the Treaty of Lisbon converted the representation of the EU at an institutional level in New York from the European Commission Delegation and the EU Council Liaison Office to a merged European Union Delegation under the authority of the High Representative for Foreign Affairs and Security Policy.[192]

The balanced position of the EU in the perception of its role to maintain international peace and security and in its relations with the UN can be also found in its practice – specifically, in its crisis management operations. In 2004, the EU adopted the Elements of Implementation of the EU-UN Joint declaration which provides two options for EU-UN cooperation in peacekeeping operations.[193]

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[190] The last of the powers of the WEU were absorbed by the European Union under the Treaty of Lisbon. It was decided to terminate the treaty of the WEU and the organisation was officially declared defunct on 30 June 2011; W. Hummer, M. Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2002), 807, 836. The European Community was also considered to be a regional agency within the meaning of Article 52 of the Charter, as can be deduced, for example, from the statement of the President of the Security Council on 28 January 1993, page 3, UN Doc. S/25184. In Resolution 727 (1992), the Security Council also referred to the European Community "Recalling also the provisions of Chapter VIII of the Charter, and noting the continuing role that the European Community will play in achieving a peaceful solution in Yugoslavia", Security Council Resolution 727, *supra* note 188, Preamble, cf. also Security Council Resolution 743, UN Doc. S/RES/743 (1992).

[191] 13. Declaration concerning the common foreign and security policy, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, 30.3.2010, Official Journal of the European Union, C 83/343, 9.

[192] About the EU at the UN, available at: http://www.eu-un.europa.eu/articles/en/article_9389_en.htm. The EU Delegation at the UN is in charge of EU coordination in New York with about 1300 meetings per year, the same task is now administered by the European External Action Service (EEAS) in Brussels, De Baere, Passivirta, 'Identity and Difference: The EU and the UN as Part of Each Other', *supra* note 175, 21, 29. The advanced observer status of the EU at the UN on the basis of GA Resolution 65/276 allows, for example, the EU to participate in the general debate of the GA, General Assembly Resolution 65/276, UN Doc. A/RES/65/276 (2011), Annex, 2-3, paras. 1-4; see also generally on this issue, E. Brewer, 'The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organizations', in (2012) 9 *International Organizations Law Review*, 181-225. The Security Council's provisional rules of procedure do not allow for observer status of any entity, but it has regularly invited representatives of international organisations to present their views on a given issue.

[193] EU support to UN peacekeeping is guided by the following principles:

a) **Added value and mutual advantage** - EU CSDP engagement in support of UN peacekeeping should add value and produce real operational benefits on the ground. It should be based on the principle of comparative advantage, leading to a complementarity of efforts and elimination of duplication and competition. It should bring advantages to both organizations.

b) **Political control and strategic direction** - For a given UN or EU operation, from a political to tactical level, there should be only one body providing political control and exercising strategic direction.

c) **Unity of the chain of command** - For a given UN or EU operation, there should be only one operational commander in charge of the operation.

d) **National ownership of decision to allocate resources** - EU CSDP support to UN peacekeeping does not hamper the UN's ability to reach out to its Member States directly, nor to receive assistance from EU Member States on a bilateral basis.

As the decision to provide military contingents rests with the national states, these could assign forces to United Nations operations whereby the EU might act as a "clearing house" mechanism.[194] The other option is the launching and conducting of an EU operation in support of the United Nations, under the political control and strategic direction of the EU, and authorised by a Security Council Resolution.[195] In this context, it is argued that "there is no legal or political undertaking that the EU will defer to the UN organs. On the contrary, one may trace an independent and assertive streak in EU relations with the UN."[196] There are

> more cogent and political reasons (…) subordination to the UN will weaken such control [over EU operations] but also undermine the Union's aim of visibility in security and defence. Secondly, when NATO resources are used, the EU will be even more cautious in submitting to UN control, considering the fact that NATO has resisted such control. Thus, the subcontracting model appears to be the only viable option because it offers flexibility and independence.[197]

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e) **Lessons Learned** - Further work on enhancing EU CSDP support to UN peacekeeping operations should be based on relevant lessons learned from previous experiences.
f) **Consistency with UN reform** - Cooperation should be in line with existing peacekeeping reform efforts endorsed by the Member States. This includes the various elements of the New Horizons initiative, including the capability-driven approach and the Global Field Support Strategy.
g) **Increasing EU Member States Direct Contributions** – An important purpose of our cooperation should be to increase direct contributions by EU Member States to peacekeeping operations, in particular as Police Contributing Countries (PCC) or Troop Contributing Countries (TCC).
h) **Coordinated support to regional and sub-regional organisations and southern partners** Collaboration between the UN and EU should go beyond EU support to the UN. It should focus equally on collaboration in the provision of support and capacity building to regional (e.g. AU) and sub-regional organisations and southern partners, Actions to enhance EU CSDP support to UN peacekeeping, Brussels, 24 November 2011, 3-4.

[194] EU-UN co-operation in Military Crisis Management Operations, *supra* note 175, 2-3 paras. 3-6; Actions to enhance EU CSDP support, *ibid.*, 4-6.

[195] EU-UN co-operation in Military Crisis Management Operations, *ibid.;* H. Krieger, 'Common European Defence: Competence or Compatibility with NATO', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 174, 186; C. Major, 'EU-UN cooperation in military crisis management: the experience of EUFOR RD Congo in 2006', Occasional Paper, n°72, September 2008, EUISS, 11. Four different scenarios are envisaged for operations under EU command and control: a stand alone mission, specialised support in a confined area (modular approach), a bridging operation or a over the horizon reserve, M. Brosig, D. Motsama, 'Modeling Cooperative Peacekeeping. Exchange Theory and the African Peace and Security Regime', in (2014) 18 *Journal of International Peacekeeping*, 45, 59-60. With regard to EU civilian operations, the EU and its members envisage an option 3: a coordinated EU contribution to a UN operation, J. Wouters, 'The United Nations, the EU and Conflict Prevention: Interconnecting the Global and Regional Levels', in V. Kronenberger, J. Wouters (eds.), *The European Union and Conflict Prevention. Policy and Legal Issues* (2004), 369, 388.

[196] Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', *supra* note 143, 102, 129.

[197] Tsagourias, *ibid.*, 102, 129. One also has to take into account the financial weight of the EU in the UN, providing the largest share of the UN peacekeeping budget (~39 percent in 2003) and more than half of the world's development assistance (56.9 % in 2002), European Union, The enlarging European Union at the United Nations: Making multilateralism matter (2004), 5,7, 28; The UN Under-Secretary-General for Peacekeeping Operations, Ladous perceives an emerging trend towards "an increasing deployment of UN and EU operations alongside each other, within the same political contexts, but with separate mandates.", UN peacekeeping chief welcomes growing links with European Union in crisis management, 30 November 2012, http://www.un.org/apps/news/story.asp?NewsID=43649#.UWBSy1fGHYE ; M. Mubiala, 'Cooperation between

The UN, in need of external partners, does not hesitate from satisfying the EU in order to ensure their support. In 2008, following the failure of a political settlement on the Kosovo question, doubts arose regarding the legitimacy of the European Union's Rule of Law mission. It was suggested that it lacked an express authorisation from the Security Council.[198] The reaction of the UN was to welcome the mission in two reports.[199]

An EU operation in support of the UN includes two further scenarios calling for special attention: rapid response operations in the form of either a "bridging model" or a "stand by model".[200] The bridging model aims at buying time for the UN to mount a new operation or to reorganise an existing one, e.g. Operation Artemis.[201]

6. The EU and peacekeeping

When the United Nations approached the EU to support MONUC during the election process in 2006, the EU did not only insist on political control and strategic direction by the EU, but also requested autonomy to decide upon the use of force.[202] This shift towards more autonomy by the EU is partly based on the expanding autonomous military capabilities of the EU as well as the wish – being the biggest financial contributor for peacekeeping operations – to effectively be involved in shaping the peacekeeping agenda on a global level.[203] The model of sub-contracting was first used outside of Europe in Operation Artemis in the Democratic Republic of Congo (henceforth: DRC). The departure of Ugandan troops in the Northeastern Province Ituri and the capital led to a void in political power with subsequent violent clashes between Hema and Lendu ethnic groups. Deteriorating human security, a flow of refugees and the inability of UN peacekeepers to stop the violence led to the Security Council endorsing an additional EU-led intervention. 1800 troops were deployed in the DRC.

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the United Nations, The European Union and the African Union for Peace and Security in Africa', in (2007) LX *Studia Diplomatica. The Brussels Journal of International Relations*, 111, 116.

[198] Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 84.

[199] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/211 (2008), 2, para.5; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354 (2008), particular 2, para.8; 3-4, para. 13.

[200] EU-UN co-operation in Military Crisis Management Operations, *supra* note 194, 3-5, paras. 8-14. Statement on behalf of the EU, Security Council, 7015th meeting, UN Doc. S/PV.7015 (Resumption 1) (2013), 17-18.

[201] *Ibid.*, 4, para.9.

[202] Letter dated 28 March 2006 from the Minister for Foreign Affairs of Austria addressed to the Secretary-General, Annex II to Letter dated 12 April 2006 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2006/219 (2006), 4, paras. 1-2; Actions to enhance EU CSDP support, *supra* note 193, 7. Cf. also for a more comprehensive overview of the relations between the EU and the United Nations, Security Council, 6306th meeting, *supra* note 173, 3; Security Council, 6477th meeting, *supra* note 173; B. Charbonneau, 'What is So Special about the European Union? EU-UN Cooperation in Crisis Management in Africa', in (2009) 16 *International Peacekeeping*, 546, 549-550;

[203] Major, *supra* note 195, 13.

Based on Security Council Resolution 1484, Operation Artemis was deployed in close coordination with MONUC in anticipation of a strengthened United Nations military deployment which arrived on 1 September 2003. Several European leaders stressed that the operation constituted the litmus test for the European Security and Defense Policy. It not only proved the military capacities and strength of the European Union, but also constituted evidence of emancipation from NATO: "The EU has a genuine military operational capacity at its disposal."[204]

However, this appraisal has to be qualified. Indeed, the operation achieved its objectives with only minor casualties, but practical problems persisted throughout the implementation of the operation; the troops had to deal with obsolete equipment, a lack of common communication channels as well as the lack of strategic transport.[205] These problems were not inimitable for Operation Artemis, but also appeared in Operation EUFOR Tchad/RCA, when the EU had to rely on external contributions for strategic airlift by Russia.[206]

In the context of Operation *Artemis*, the EU member states adopted the European Union action plan to enhance the Common Security and Defence Policy support for United Nations peacekeeping activities.[207] The United Nations, in return, emphasised in the *New Horizon* Agenda, that for any new mission to be deployed in complex situations, it will take into account the capacities of regional actors for supporting action to "expedite mission deployment, including political measures as well as

[204] Statement by the French defence minister Michèle Alliot-Marie as quoted in R. C. Hendrickson, J. R. Strand, K. L. Raney, 'Operation Artemis and Javier Solana: EU Prospects for a Stronger Common Foreign and Security Policy', (2007) 8 *Canadian Military Review/Revue militaire canadienne*, 35, 40. France has generally been most critical of NATO throughout the history of the existence of the organisation, withdrawing from NATO command at one point which led to the relocation of NATO headquarters from Paris to Brussels. A similar statement was e.g. also made by the Greek Minister of Defence Papantoniou who described the operation as "'very important for the Union' as because it was the first autonomous operation and promoted efforts for cooperation between the EU and the UN.", available at: http://www.greekembassy.org/Embassy/content/en/Article.aspx?office=4&folder=351&article=11721, Similar "Artemis became an EU operation because of the political weight it could provide in proving the value of an EU military capability for peacekeeping", K. Homan, 'Operation Artemis in the Democratic Republic of Congo', in A. Ricci, E. Kytoèmaa, European Commission (eds.), *Faster and more united?: the debate about Europe's crisis response capacity* (2007), 151, 153. Generally on the political implications of Operation Artemis, cf. S. Duke, 'Consensus building in ESDP: The lessons of Operation *Artemis*', (2009) 46 *International Politics*, 395, 397-402.

[205] Koutrakos, *supra* note 108, 110; A. Menon, 'Empowering paradise? The ESDP at ten', in (2009) 85 *International Affairs*, 227, 234.

[206] D. Helly, 'The EU military operation in the Republic of Chad and the Central African Republic (Operation EUFOR Tchad/RCA)', in G. Grevi, D. Helly, D. Keohane (eds.), *European Security and Defence Policy. The First 10 Years (1999-2009)*, 339, 349. The number of troops deployed in EUFOR Tchad/RCA also never reached the number originally envisaged, prompting the Operations Commander to comment that "for a while we were a mission without means", M. Merlingen, *EU Security Policy. What It Is, How it Works, Why it Matters* (2012), 165; See also, Koutrakos, *supra* note 108, 120. CSDP civilian missions were also hit by these familiar problems, Koutrakos, *ibid.*, 161.

[207] This document is not available to the public. However, in 2011, the document entitled Actions to enhance EU CSDP support to UN peacekeeping, Brussels, 24 November 2011 was adopted and in 2012 the Plan of Action to Enhance EU CSDP Support to UN Peacekeeping, EEAS 01024/12, Brussels 13 June 2012.

strategic lift and other operational support."[208] The United Nations welcomed the development of EU's peace facility for Africa and encouraged the development of further mechanisms to support the AU.[209] Therefore, it appears that there is a mutual interest for both organisations to cooperate, as well as to increase their cooperation. It is a "mutually reinforcing link", in that the EU can offer both the financial and military support not provided by the UN and thereby "achieve its ambition to become a central security player."[210] In exchange, the UN can provide political and legal legitimacy and endorsement of EU operations.[211] In summary, an alternative view to EU-UN relations, is one of "an affair of transatlantic cooperation" with both the UK and France as the driving forces within the EU and the UN.[212]

7. A limited military engagement on the African continent – or an emerging division of labour?

Following the adoption of the Lisbon Treaty, however, speculations arose whether the aims of the EU might have been too ambitious and if a certain re-evaluation of its active role was necessary. The EU has only launched two training missions since 2007, namely EUTM Somalia, training 2000 Somali soldiers[213] and EUTM Mali.[214] In January 2014, the EU decided to deploy a small-scale peacekeeping operation in the Central African Republic for a period of up to six months.[215] Plans were established for an EU military operation in support of humanitarian assistance operations in Libya, but the plan

[208] Department of Peacekeeping Operations and Department of Field Support, A New Partnership Agenda. Charting a New Horizon for UN Peacekeeping (2009), 9. The same applies even more so in cases when United Nations operations are deploying alongside or in parallel with regional organisations, *ibid.*, 34.
[209] Report of the Special Committee on Peacekeeping Operations and its Working Group, 2004 substantive session (New York, 29 March-16 April 2004), UN Doc. A/58/19 (2004), 13, para. 75; Enhancement of African peacekeeping capacity, Report of the Secretary-General, UN Doc. A/59/591 (2004), 4 paras. 14-15.
[210] Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 85. See also Statement by the President of the Security Council, UN Doc. S/PRST/2014/4 (2014),
[211] Major, *supra* note 195, 9.
[212] Charbonneau, *supra* note 202, 546, 551-552.
[213] Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces.
[214] Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Council Decision 2013/87/CFSP of 18 February 2013 on the launch of a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali).
[215] Council conclusions on the Central African Republic, Foreign Affairs Council meeting, Brussels, 20 January 2014. The Central African Republic granted its consent to the deployment of the EU operation in a letter to the Security Council of the UN, Letter dated 27 January 2014 from the Secretary-General addressed to the President of the Security Council, Annex, UN Doc. S/2014/34 (2014). In Resolution 2134, the Security Council authorised the deployment of the EU operation for the CAR, Security Council Resolution 2134, UN Doc. S/RES/2134 (2014), 11, paras. 43-50. On 10 February 2014, the EU military operation in the CAR was established, Council of the European Union, Brussels, 10 February 2014, 6249/14, EU military operation in the Central African Republic established.

was ultimately not implemented.[216] Disagreement within the EU, including the abstention of Germany in the Security Council might explain why several EU states participated in the airstrikes against Libya outside of the EU framework.[217] Criticism also arose over the EU's passive role in the Arab Spring and its long tolerance of autocratic regimes. Several reasons have been given to explain the passivity of the EU. First of all, it is argued that there is certain lack of leadership at the top of the CFSP,[218]and second is the focus of member states on the financial crisis, which has affected their willingness and capacity to contribute to the implementation of the CFSP.[219]

However, like the United Nations, and other international organisations, the EU depends on its members for the fulfillment of its mandate, and disagreement amongst the latter hampers the effective implementation of the EU's mandate.[220] There might also be a preference in some countries to pay for the maintenance of global peace and security rather than to deploy their own troops because of various domestic issues, including pressure by the electorate or the opposition.[221] Syria is another example of the failure of member states to agree upon a common position. Most certainly the principle of unanimity in the Council is not beneficial for the implementation of an effective CFSP

[216] Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya); Council Decision 2011/764/CFSP of 28 November 2011 repealing Decision 2011/210/CFSP on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya); Council conclusions on Common and Defence Policy, 3130th FOREIGN AFFAIRS Council meeting, Brussels, 1 December 2011, 2, para.12. It was foreseen that the planning and implementation of the operation was to be carried out "in close cooperation and complementarity" with OCHA, NATO, the UN coordinator and other actors, Council Decision 2011/2010/CFSP, *ibid.*, Article 8.

[217] Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 85.

[218] The first High Representative Catherine Aston has so far shown little interest in the CSDP. Speaking to the European Parliament in April 2011 on the principal choices for the CFSP and CSDP, she only referred to security and defence in the context of the (then) planned small military operation in Libya and as an indication of "how far we have come.", Speech of High Representative Catherine Aston on main aspects and basic choices of the Common Foreign and Security Policy and the Common Security and Defence Policy, Brussels 11 May 2011, A 179/11, p.3; See also Koutrakos, *supra* note 108, 47; N. Koenig, 'Between conflict management and role conflict: the EU in the Libyan crisis', (2014) *European Security*, DOI: http://www.tandfonline.com/action/showCitFormats?doi=10.1080/09662839.2013.875532, 11-12.

[219] Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 86. See also Council conclusions on Common and Defence Policy, 3130th FOREIGN AFFAIRS Council meeting, *supra* note 216, 1, para.2; 3, para.18; European Council 13/14 December 2012, Conclusions, 10, para.22.

[220] Cf. Koutrakos, *ibid.*, 81, 88. For a recount of the events and disputes arising over the Arab Spring within the EU, cf. Y. Devuyst, 'The European Council and the CFSP after the Lisbon Treaty', in (2012) 17 *European Foreign Affairs Review*, 327, 333-340.

[221] That also explains that states and international organisations prefer "the easy-to-sell provision of peacekeeping training" over the supply of military hardware, see B. Franke, R. Esmenjaud, 'Who owns African ownership? The Africanisation of security and its limits', in (2008) 15 *South African Journal of International Affairs*, 137, 150. As stated by Berman and Sams "Supplying the type and amount of military equipment as well as the level of logistical support that might enable African peacekeepers to respond effectively to crises on their continent is neither financially nor politically feasible at this time; providing low-level training and instruction is.", E.G. Berman, K.E. Sams, 'Keeping the Peace in Africa', (2000) Disarmament Forum, 21, 26. See also the remark of Nicholas Sarkozy acknowledging national electoral pressure as not conducive for obtaining consensus within the Council, Devuyst, *ibid.*, 327, 342 with reference.

and a CSDP. On the macro-level, however, one has also to notice the absence of any longer-term reflection on the grand strategy of the CFSP following the entry into force of the Treaty of Lisbon.[222] The 2013 December Defence Council, the first thematic debate on defence since the entry into force of the Lisbon Treaty, also left many of the difficult questions open. These questions include, for example, the funding of CSDP activities or the future of the EU Battlegroups.[223] The Defence Council followed an extensive report by High Representative Ashton which provided more substantial propositions, but nonetheless failed in defining a long-term strategy for the development of the CSDP.[224]

Notwithstanding the limited ambition of the EU, refusing to mount fully-fledged large-scale peacekeeping operations on the African continent is in fact part of the general strategy of the EU. In practice, EU peacekeeping strategies in Africa have been precisely "developed around these models of compensating UN shortcomings in the rapid deployment of troops on a short-term basis."[225] The EU therefore favours "short-term, geographically limited support operations under its direct political and military control in selected cases."[226] Also, the EU strategy has to be seen in the wider context of EU-UN, EU-AU and UN-AU relations (*infra*, 2.3.9., 2.5.4).[227] The absence of new EU peacekeeping operations on the African continent can consequently be explained by the broader framework of cooperation existing within the organisations. African ownership and the "primary responsibility of the AU" for the maintenance of international peace and security are key issues in distributing the roles of players on the field on the African continent. Hence, the 2012 Plan of Action to Enhance EU CSDP Support to UN Peacekeeping stipulates that a joint EU-UN coordination mechanism on

[222] Devuyst, *ibid.*, 327, 332.

[223] N. von Ondarza, M. Overhaus, 'The CSDP after the December Summit', in SWP Comments 7, January 2014, 2. The Council managed to agree upon the establishment of an EU Cyber Defence Policy Framework in 2014 and an EU Maritime Security Strategy by June 2014, European Council 19/20 December 2013, Conclusions, 4, para.9.

[224] Among the recommendations in her report are: Strengthening and ensuring inter-mission cooperation between the different CSDP missions and operations in a region, Preparing the December 2013 European Council, *supra* note 158, 5. She also recommended the further development of the partnerships with the UN and NATO "focusing on stronger complementarity, cooperation and coordination", *ibid., 7.* Regarding the AU particularly, it was proposed to "reinforce the peace and security partnership (…) and [to] continue strong support to the African Peace and Security Architecture, notably through the support provided to the AMANI cycle of military and civilian exercises", *ibid.*, 7.

[225] Brosig, *supra* note 12, 107, 115. The decision of the EU to deploy troops in the CAR fulfils exactly this role. The EU Representative confirmed during a meeting of the Security Council that the EU's strategy generally consists of deploying bridging operations on the African continent pending an eventual takeover by the UN Security Council, 7228th meeting, UN Doc. S/PV.7228 (2014), 6.

[226] *Ibid*. See also the statement on behalf of the EU, Security Council, 7015th meeting, *supra* note 200, 17.

[227] As well as the fact that over 50% of all international military interventions since 1990 were led by the UN, the EU and African organisations, M. Dembinski, B. Schott, 'Converging Around Global Norms? Protection of Civilians in African Union and European Union Peacekeeping in Africa', in (2013) 6 *African Security*, 276, 277.

assistance to the AU and other regional organisations shall be defined through various actions within a year following the adoption of the plan. These actions include:

> - Enhanced coordination and information-sharing at operational/ technical level in Addis Ababa between the EU Delegation to the AU and the UN Office to the African Union (UNOAU);
>
> - A yearly coordination meeting of EU and UN with the AU Peace and Security Department to discuss benchmarks, goals, needs and timelines for operationalization of the African Peace and Security Architecture and possible adjustment of strategies as necessary;
>
> - Possible synergies between the African Peace Facility capacity-building program and the technical assistance and training implemented by UNOAU for the African Standby Force (ASF) and within the larger African Peace Support Architecture (APSA); EU and UN support to the AU for ASF should take into account the results of the Amani Africa cycle;
>
> - Cooperation between EU, UN and AU, building on the EU-AU 2010 assessment of the APSA readiness, with an eye to identifying the support required to make the African Standby Force operational;
>
> - Continued EU assistance to AU in the preparation of African forces for deployment on UNPKO.[228]

This framework of cooperation between the EU and the UN therefore suggests that, indeed, a triangular relationship among these two organisations and the AU is emerging for maintaining international peace and security which will be further examined in the parts on EU-AU and on AU-UN relations.

8. The EU and NATO – NATO and the EU – Complementarity, competition and compromises

NATO maintains closer relations to the EU than to any other organisation.[229] The overlaps in membership of NATO and the EU have led to a condition of "cultural symbiosis" and general mutual trust between the two organisations. Shared interests and the identity of political and military agendas and objectives[230] have equally contributed to advancing this relationship.[231] The beginnings of NATO and EU cooperation can be traced back many decades. The envisaged European Defence Community Treaty of 1952 included general and specific rules on close cooperation by the inclusion

[228] Plan of Action to Enhance EU CSDP Support, *supra* note 207, 18, para.58 as well as Actions to enhance EU CSDP support, *supra* note 193, 11. The two Progress reports on the Implementation of the Plan of Action are not available to the public.

[229] The EU remains a prioritized partner for NATO, cf e.g., Chatham House, The Future of the Atlantic Alliance, Jaap de Hoop Scheffer, Secretary General of NATO, 20 July 2009, 6.

[230] It goes without saying that the EU is also engaged extensively in the collective defence of the EU-(Atlantic) area.

[231] NATO is committed to the European Union, Statement by Mr. Jaap de Hoop Scheffer, Secretary-General of NATO, Security Council, 5529th meeting, UN Doc. S/PV.5529 (2006), 32.

of a mutual defence clause with NATO, as well as an integrated European army.[232] The clauses on cooperation between the EU and NATO in the TEU derive from the treaty on the EDC and are nearly identical.[233] While the incorporation and absorption of the WEU by the EU was slow, this ultimately led to increased interaction between the two organisations. In fact, institutionalised links between NATO and the European Union have existed since 2001, but they are based on previous developments in the 1990s. NATO itself recognises the importance of developing the European Security and Defence architecture, the role of the WEU and the need for both organisations to develop complementary roles in the security architecture.[234] In subsequent years the cooperation between NATO and EU/WEU increased, further developed,[235] and was fully implemented in 1999[236]

[232] M. Trybus, 'The Vision of the European Defence Community and a Common Defence for the European Union', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 13, 37. Boisson de Chazournes, 'L'Union européenne en quête d'une politique étrangère et de sécurité commune', *supra* note 105, 237, 238.

[233] Article 5 of the Treaty of the EDC provided that "[t]he Community shall work in close cooperation with the North Atlantic Treaty Organization". A broader statement can be found in the preamble. Article 17 (1) Paragraph 2 of the TEU states that "[The Union] shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organization (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework." Reference to the defence obligation of certain EU Member States was also made in the Protocol on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union (2007), Preamble.

[234] See in this regard the final communiqué of the 1991 North Atlantic Council in which it was recognised: "that it is for the European Allies concerned to decide what arrangements are needed for the expression of a common European foreign and security policy and defence role, we further agree that, as the two processes advance, we will develop practical arrangements to ensure the necessary transparency and complementarity between the European security and defence identity as it emerges in the Twelve and the WEU, and the Alliance", Final Communiqué, North Atlantic Council, Copenhagen, Denmark 6-7 June 1991, para. 3. The aim was to strengthen European defence capabilities within and outside of NATO.

[235] "We therefore stand ready to make collective assets of the Alliance available, on the basis of consultations in the North Atlantic Council, for WEU operations undertaken by the European Allies in pursuit of their Common Foreign and Security Policy. We support the development of separable but not separate capabilities which could respond to European requirements and contribute to Alliance security. Better European coordination and planning will also strengthen the European pillar and the Alliance itself. Integrated and multinational European structures, as they are further developed in the context of an emerging European Security and Defence Identity, will also increasingly have a similarly important role to play in enhancing the Allies' ability to work together in the common defence and other tasks.", Ministerial Meeting of the North Atlantic Council/North Atlantic Cooperation Council, NATO Headquarters, Brussels, 10-11 January 1994, Declaration of the Heads of State and Government, para. 6. See also para. 8 "Against this background, NATO must continue the adaptation of its command and force structure in line with requirements for flexible and timely responses contained in the Alliance's Strategic Concept. We also will need to strengthen the European pillar of the Alliance by facilitating the use of our military capabilities for NATO and European/WEU operations, and assist participation of non-NATO partners in joint peacekeeping operations and other contingencies as envisaged under the Partnership for Peace." See, for instance, Final Communiqué Issued at the Ministerial Meeting of the North Atlantic Council, 10 December 1996, para.17.

[236] See also Naert, *supra* note 53, 34.

after the heads of state and government of NATO decided to develop the arrangements known the "Berlin-plus agreements."[237]

In December 2002, NATO and the EU signed the Declaration on ESDP[238] and in March 2003 the Agreement of the Framework on Cooperation.[239] These arrangements give the EU assured access to NATO's planning capabilities for EU-led Crisis Management Operations. This includes access to NATO's collective assets and capabilities, including command arrangements and assistance in operational planning; in "effect they allow the Alliance to support EU-led operations in which NATO as a whole is not engaged."[240] The "Berlin Plus" agreements include various components:

> Assured EU access to NATO planning capabilities able to contribute to military planning for EU-led operations;
>
> The presumption of availability to the EU of pre-identified NATO capabilities and common assets for use in EU-led operations;
>
> Identification of a range of European command options for EU-led operations, further developing the role of DSACEUR in order for him to assume fully and effectively his European responsibilities;
>
> The further adaptation of NATO's defence planning system to incorporate more comprehensively the availability of forces for EU-led operations.[241]

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[237] 'An Alliance for the 21st Century', Washington Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C. on 24th April 1999, paras. 8 – 10.

[238] According to the Declaration the main principles governing the EU-NATO relationship are partnership, effective mutual consultation, dialogue, cooperation and transparency, equality and due regard to the decision-making autonomy of both respective organisations.

[239] EU-NATO Declaration on ESDP, 16 December 2002; Framework Agreement, 17 March 2003. This framework was based on the "3D"s as defined by US Secretary of State Madeleine Albright in 1999: No duplication of NATO assets, no discrimination against non-EU NATO members and "not to decouple the EU from the transantlantic security architecture.", C. Buharalı, 'Better NATO-EU Relations Require More Sincerity', Discussion Paper Series 2010/1, Centre for Economics and Foreign Policy Studies, January 2010, 3; L. Michel, 'NATO and the United States: working with the EU to strengthen Euro-Atlantic security', in S. Biscop, R.G. Whitman (eds.), *The Routledge Handbook of European Security* (2013), 255, 256.

[240] NATO-EU: a strategic partnership, http://www.nato.int/cps/en/natolive/topics_49217.htm; Cooperation with Nato, http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/l33243_en.htm, EU-NATO: The Framework for Permanent Relations and Berlin Plus, http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf

[241] 'An Alliance for the 21st Century', *supra* note 237, para. 10. Berlin Plus agreement is a short title for a comprehensive package of agreements between NATO and EU, based on conclusions of the NATO Washington Summit. It is comprised of the following major parts:
a. NATO - EU Security Agreement
b. *Assured Access to NATO planning capabilities for EU-led Crisis Management Operations (CMO*)
c. *Availability of NATO assets and capabilities for EU-led CMO*

Regarding the early stages planning of EU operations, NATO may contribute to the work on the military strategic options via SHAPE in Mons, Belgium. If a decision is taken on the basis of 'Berlin Plus' agreements, operational planning by NATO will be furnished for the implementation of the mission. While NATO military assets are not guaranteed for an EU operation, it is presumed that they are available. Furthermore, NATO should make available a European command option for EU-led operations. The Operation Commander should be NATO's Deputy SACEUR, playing thereby a pivotal role between both organisations.[242] From a current perspective, however, the relevance of the agreement has to be relativised. The two organisations did not anticipate that the need may arise to deploy troops cooperatively or even jointly in the same conflict region.[243]

The European Security Strategy (2003) also recognises the important ties with NATO. It states that the transatlantic relationship strengthens the international community as a whole and that "NATO is an important expression of that relationship."[244] On a practical level, there are regular meetings of both the EU PSC and the NATO North Atlantic Council. The EU established a small cell at NATO's SHAPE and NATO formed a liaison team at the EU Military Staff.[245]

Nevertheless, the progressing relations between NATO and the EU were not free of competition.[246] Both organisations expanded their competences in various areas in the 1990s which were

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d. Procedures for Release, Monitoring, Return and Recall of NATO Assets and Capabilities
e. Terms Of Reference for DSACEUR and European Command Options for NATO
f. *EU - NATO consultation arrangements in the context of an EU-led CMO making use of NATO assets and capabilities*
g. Arrangements for coherent and mutually reinforcing Capability Requirements"[Emphasis added], Berlin Plus agreement, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/berlinplus_/berlinplus_en.pdf. The European Union said regarding permanent NATO-EU arrangements and especially Berlin Plus, that it will "enhance the capability of the EU and provide the framework for the strategic partnership between the two organisations in crisis management", A Secure Europe, *supra* note 159, 12.

[242] NATO's Deputy Supreme Allied Commander (DSACEUR) would remain at SHAPE where the EU Operational Headquarter would be established. Further command elements such as the EU Force Commander, the EU Force Headquarters deployed in theatre or the EU Component Commands would either be provided by NATO or by EU member states, EU-NATO: The Framework for Permanent Relations and Berlin Plus. See also, F. Terpan, 'EU-NATO Relations: Consistency as a Strategic Consideration and a Legal Requirement', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 270, 284.

[243] Cf. Ginsberg, Penska, *supra* note 153, 188-189. In Kosovo, the EU and NATO have conducted joint operations for the first time, despite the lack of any formal accord; Turkey is actually reported as having blocked a Memorandum of Understanding for interinstitutional cooperation in Kosovo, *ibid.*, 199.

[244] A Secure Europe, *supra* note 159, 9. That was reaffirmed in the Report on the Implementation, *supra* note 167, 2 which called for a deepening of the strategic relationship between the two organisations, Report on the Implementation, *supra* note 167, 2.

[245] Koutrakos, *supra* note 108, 106; cf. Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia, Article 10.

[246] See generally Regarding the EU and NATO rivalry, R. E. Hunter, *The European Security and Defense Policy. NATO's Companion – or Competitor?* (2002).

traditionally within the competences and mandate of the other organisation. The European Union was pursuing the development of the CDSP, including the absorption of the WEU, while NATO was transforming in and expanding as a more political organisation.[247] Moreover, the construction of the CSDP was an expression of the political will of the EU to act outside of NATO. [248] This reposition was triggered by the shift of position of the UK government; the "sea-change" towards EU defence at the Franco-British summit in Saint-Malo in 1998.[249] The United States was in favour of a European pillar within NATO, although the position of its government was ambiguous as it was simultaneously a way "to hinder the creation of a European defence policy outside NATO."[250] A compromise was found a year later at the Helsinki European Council where it was decided that the EU could launch and conduct EU-led military operations in response to an international crisis and "where NATO as a whole is not engaged."[251] The official positions of NATO and the EU are that the EU is not taking the lead if the US intends to participate; if the US does not want to be involved, the EU may start an operation with recourse to NATO assets if the NATO Council agrees.[252] This safeguarding compromise was also facilitated by increased cooperation between the two organisations following the US government's

[247] Cf. Trybus, 'The Vision of the European Defence Community and a Common Defence for the European Union', *supra* note 232, 13, 38-39. Overall the cooperation arrangements were more comprehensive and integrative under the EDC Treaty. Before the development of the EDSCP, the term "European Security and Defence Identity" was used within NATO and the EU.

[248] Declaration on a Transformed North Atlantic Alliance, *supra* note 39, para. 3; The Alliance's New Strategic Concept, *supra* note 31, para. 2; Cologne European Council 3-4 June 1999, Conclusions of the Presidency, Annex III – European Council Declaration on Strengthening the Common European Policy on Security and Defence, para. 1. The EU declared that it "must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises without prejudice to actions by NATO" (*ibid.*); See also Terpan, 'EU-NATO Relations: Consistency as a Strategic Consideration and a Legal Requirement', *supra* note 242, 270, 272.

[249] Joint Declaration of the British-French summit, Saint-Malo, 3-4 December 1998, in M. Rutten (ed.), *From St Malo to Nice, European Defence: Core Documents*, Chaillot Paper 47 (2001), 9 para. 2. As the two governments stressed "the Union must have the capacity for autonomous action backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises (…) In strengthening the solidarity between the member states of the European Union, in order that Europe can make its voice heard in world affairs, while acting in conformity with our respective obligations in NATO, we are contributing to the vitality of a modernised Atlantic Alliance which is the foundation of the collective defence of its members." The Declaration also stressed the need for appropriate structures and capabilities for the EU and can be seen as a compromise struck between Atlanticism and Europeanism, Terpan, *ibid*., 270, 274-75; See also R. Matarazzo, 'Le strutture istituzionali della Pesd', in N. Ronzitti (ed.), *Le Forze di Pace dell'Unione Europea* (2005) , 21, 27; Koutrakos, *supra* note 108, 18-19 ; Nice, European Defence: Core Documents, Chaillot Paper 47, May 2001.

[250] Terpan, 'EU-NATO Relations: Consistency as a Strategic Consideration and a Legal Requirement', *supra* note 242, 270, 277.

[251] Helsinki European Council, *supra* note 125, para. 27. The same formula was reiterated in Annex 1 to the Presidency Conclusions: "The European Union should have the autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and then to conduct EU-led military operations in response to international crises in support of the Common Foreign and Security Policy (CFSP).", Annex 1, 2; 3 years later this formula was confirmed in the EU-NATO Declaration on ESDP, *supra* note 239.

[252] Terpan, 'EU-NATO Relations: Consistency as a Strategic Consideration and a Legal Requirement', *supra* note 242, 270, 286.

war against terrorism post 11 September 2001.[253] However, the clause aims primarily at safeguarding the compatibility of the CSDP with NATO: "The alliance shall not be endangered by some of its Member States which prefer to conduct crisis management operations by excluding other NATO members. This is emphasized by the formula 'NATO as a whole'."[254] It is important to underline that

> the EU stresses, in principle, its equality as a security actor in ESDP documents. Consequently, in line with the primary obligations of the TEU, the clause stresses the primacy of NATO missions and contains a prohibition against circumventing NATO. EU Member States shall only use the ESDP as a framework for military operations when NATO agrees or is not willing to act in a manner which is, in principle, consistent with European policy goals or is simply not interested in a mission. Thus ESDP documents show that the ESDP is complementary to NATO and not conceived as a forum for competition.[255]

In practice, controversies have arisen out of these envisaged mechanisms to prevent competition. The EU launched Operation Artemis in the DRC fully independent of NATO, acting with its own facilities and assets, but even further, the EU adopted the decision to deploy troops without previously consulting NATO.[256] One author argues that the following two independent NATO and EU operations in Sudan where a consequence of and a reaction to the lack of NATO consultation for Operation Artemis. [257] In contrast, other examples underline a good degree of cooperation between

[253] M. Szapiro, 'International Organisations' Cooperation in the Field of Conflict Prevention', in V. Kronenberger, J. Wouters (eds.), *The European Union and Conflict Prevention. Policy and Legal Issues* (2004), 347, 365.
[254] Krieger, 'Common European Defence: Competence or Compatibility with NATO', *supra* note 195, 174, 194.
[255] Krieger, *ibid.*
[256] The Secretary-General of NATO considered it a circumvention of previous arrangements, in the end, however, NATO did not protest but "acknowledged support for the EU by wishing its operation success.", A. Orakhelashvili, *Collective Security (*2011), 310; See also M. Reichard, *The EU-NATO Relationship: A Legal and Political Perspective* (2006), 267. However, the proof that the EU functions independently of NATO did not go "down too well among certain NATO States, particularly the USA; which insisted that the EU should desist from taking such autonomous actions as Operation ARTEMIS.", A. Abass, 'Extraterritorial Collective Security: The European Union and Operation ARTEMIS', in M. Trybus, N. D. White, *European Security Law* (2007), 134, 153. In contrasts to Abass' view, Biscop asserts that the USA was not interested in contributing to the operation and even voted in favour of the Security Council Resolution authorising Operation Artemis, S. Biscop, 'NATO and the EU: A Bipolar Alliance for a Multipolar World', in E. Hallams, L. Ratti, B. Zyla (eds.), *NATO Beyond 9/11. The Transformation of the Atlantic Alliance* (2013), 239, 243. See also, F. Faria, 'Crisis Management in Sub-Saharan Africa. The role of the European Union', Occasional Paper n° 51, European Union Institute for Security Studies, 47; A. Bjurner, 'On EU Peacemaking. Challenging or complementing the UN?', in P. Wallensteen, A. Bjurner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 89, 93-94. The European Council, however, reaffirmed in 2008 "the goal of strengthening the strategic partnership between the EU and NATO in order to address current needs, in a spirit of mutual enhancement and *respect for their decision-making autonomy*, [backing] the setting up of an informal EU-NATO high-level group to improve cooperation between the two organisations on the ground in a pragmatic manner, Declaration by the European Council on the Enhancement of The European Security and Defence Policy, *supra* note 160, 17, para. 7.
[257] Buharalı, *supra* note 239, 4. Two other authors suggest the separate provision of the airlift to move AU peacekeeping troops into Darfur was due to the simple fact that neither organisation was willing to defer to the other for leadership, Ginsberg, Penska, *supra* note 153, 202-203. A certain rift in NATO-EU relations consisted because of Turkey, NATO member, and, Greece, Cyprus, EU member and the "Northern Cyprus issue". It took,

the two organisations, also based on the Berlin Plus agreements. EUFOR Althea in Bosnia-Herzegovina took over from NATO's IFOR operation on the basis of Security Council Resolution 1575. This operation has profited from NATO planning expertise and also drew on other Alliance assets and capabilities and is under the command of the NATO Supreme Allied Commander Europe.[258] In practice, the "Berlin-Plus"-Arrangements were likewise applied when the EU-led "Operation Concordia" took over the responsibilities of the NATO-led mission "Allied Harmony" on the territory of the Former Yugoslav Republic of Macedonia. Regarding future operations, a further use of the Berlin Plus Agreements is nevertheless rather implausible as NATO-EU relations continue to be impaired by Turkey and Cyprus over the whole Cyprus issue;[259] NATO has not concluded a security arrangement with Cyprus thereby barring it from meetings and from access to NATO documents, whereas the EU has excluded Turkey from participating in the European Defence Agency on the basis of the lack of a similar security agreement.[260]

As the US is refocusing its geopolitical interests on Asia and on other challenges predominantly outside of Europe, the US will also play a less dominant role within NATO, prompting an increase in the financial but also logistical burden for the European States within NATO[261] after the percentage of the US contribution to NATO has increased from 63% to 77% in the decade since 2001.[262] However, the EU remains the closest partner for NATO. The financial crisis of the past years,

for instance, 3 years for NATO and the EU to finalise the "Berlin Plus" Agreement because the difficulties between Turkey and Greece had to be resolved, Yost, *supra* note 29, 75.

[258] NATO-EU: a strategic partnership, *supra* note 240. The command arrangement under the Berlin Plus Agreements was equally used in Operation Concordia as well as in Operation Althea, Yost, *supra* note 29, 79.

[259] Interview with Jaap de Hoop Scheffer in The Hague, 18 April 2003.

[260] N. H. Hedegaard, 'NATO's Institutional Envrionment: the New Strategic Concept Endorses the Comprehensive Approach' in J. Ringsmose, S. Rynning (eds.), *NATO's New Strategic Concept: A Comprehensive Assessment*, DIIS Report (2011), 75, 81; Koutrakos, *supra* note 108, 106-107; Kuhn, supra *note 112,* 10, 153-154 ; Cf. also NATO 2020, *supra* note 77, 24.

[261] The US will focus its commitment on future conflicts and military contributions in the form of high intensity highly technical military components: "Most European countries are *now producers of security rather than consumers of it*. Combined with the drawdown in Iraq and Afghanistan, this has created a strategic opportunity to rebalance the U.S. military investment in Europe, moving from a focus on current conflicts toward a focus on future capabilities. In keeping with this evolving strategic landscape, our posture in Europe must also evolve. As this occurs, the United States will maintain our Article 5 commitments to allied security and promote enhanced capacity and interoperability for coalition operations. In this *resource-constrained era*, we will also work with NATO allies to develop a "Smart Defense"" approach to pool, share, and specialize capabilities as needed to meet 21st century challenges", Department of Defense, Sustaining U.S. Global Leadership: Priorities for 21st Century Defense, January 2012, 3 and letter from President Obama, 1 in the same document; . See also Krieger, 'Common European Defence: Competence or Compatibility with NATO', *supra* note 195, 174, 176. Secretary of Defence Hagel said that the US has to see the EU as a "a geopolitical force in its own right, distinct from, although connected to, the NATO security alliance. Washington's relationship with NATO will in fact be strengthened through recognition of the diplomatic and economic significance of the U.S.-EU relationship", C. Hagel, 'A Republican Foreign Policy', in (2004) 83 *Foreign Affairs*, 64, 73.

[262] Opening Address by High Representative Catherine Aston at the symposion on the Common Security and Defence Policy, Washington DC, 8 May 2013, 1.

ironically, was beneficial for NATO-EU relations. The decreased military spending by member states fueled the willingness of NATO members to increase their cooperation in military matters within NATO under the concept of "Smart Defence"[263] as well as with the EU under its "Pooling and Sharing initiatives."[264] The motivation to cooperate is further reinforced by defence cuts in many (European) countries; Germany alone will reduce its defence budgets by 25% until 2016 while the UK's budget will be reduced by 8% until 2015.[265] Many of the initiatives of "Smart Defence" are carried out, however, on a smaller multinational and not on an Alliance level.[266] An additional incentive is obviously the shift of policy of the United States towards a stronger focus on the Pacific area and their decision to decrease their support for Europe within the NATO.[267]

The conflict in Libya created anew resentments between the two institutions. In need of swift action, EU member states, i.e. France and the UK chose to rely upon NATO and not upon the EU, prompting some commentators to declare that the EU's security and defence policy is dead or that is has "failed miserably."[268] Despite these apparent failures, other authors paint a more optimistic portrait for the

[263] Smart Defence is one of two new NATO Initiatives. Smart Defence focuses on making NATO more efficient through improving the way NATO's defence capabilities are developed and acquired. In contrast, the Connected Forces Initiative focuses on better training and on increasing the interoperability of NATO forces and technology, NATO in 2020: Strong capabilities, strong partnerships. Keynote speech by NATO Deputy Secretary General Ambassador Alexander Vershbow, *supra* note 45. Since the NATO Summit in May 2012, NATO is already moving ahead with over twenty multination Smart Defence projects, e.g., sharing of smart munition, a longer-term program for Joint Intelligence, Surveillance and Reconnaissance, *ibid.*

[264] Chicago Summit Declaration, *supra* note 66, para.20; Wales Summit Declaration, *supra* note 51, para. 70. S. Mölling, 'Pooling und Sharing in EU und Nato', in (2012) 25 SWP Aktuell, 1, 1; Council of the European Union, Council conclusions on Common Security and Defence Policy, , 3130th FOREIGN AFFAIRS Council meeting, *supra* note 216, 6, paras. 34-35; Council of the European Union, Council Conclusions on Pooling and Sharing of Military Capabilities – Foreign Affairs Council (Brussels, 22 March 2012), 2, para.1; 3, para.4; Council of the European Union, Council Conclusions on Military Capacity Development, Brussels, 19 November 2012, 3, paras. 5-6; 4, para. 9.

[265] J. Gordon, S. Johnson, F.S. Larrabee et al., 'NATO and the Challenge of Austerity', in (2012) 54 *Survival*, 121, 121.

[266] B. Giegerich, 'NATO's Smart Defence: Who's Buying?', in (2012) 54 *Survival: Global Politic and Strategy*, 69, 71.

[267] Cf. also Mölling, *supra* note 264, 1, 1. Madej, 'After the Chicago Summit – the Condition and Prospects for Development', *supra* note 97, 39, 41-43. NATO's forces are also generally overstretched due to all the out-of-area operations and a multitude of new threats, including piracy, climate change, political upheaval in the Middle East, the fragility of Pakistan, Michaels, *supra* note 76, 56, 59. A thorny issue has always been also the financial burden-sharing with NATO and the critique of Non-European members of the insufficient defence spending of their European allies.

[268] A. Menon, 'European Defence Policy from Lisbon to Libya', in (2011) 53 *Survival: Global Politics and Strategy*, 75, 76; J. Larik, '*Arma fero, ergo sum?* The European Union, NATO and the Quest for European Identity', in H. de Waele, J.-J. Kuipers (eds.), *The European Union's Emerging International Identity. Views from the Global Arena* (2013), 43, 57. Koenig argues that Catherine Ashton was also very opposed to any military engagement, warning that a no-fly zone would be very risky and that it would possibly entail a large number of civilians being killed, Koenig, *supra* note 218, 12. The EU was, however, the biggest humanitarian aid donour in the Libyan crisis and strongly engaged in the domain of sanctions, *ibid.*, 15.

European Union's future.[269] Indeed, whereas NATO is mostly focused on securing the common defence and security of its own members and becomes involved occasionally in "international crisis management", the EU's objectives are "to promote an international system based on strong multilateral cooperation and good global governance."[270]

The recent conclusions of the Council of the EU just before and during the European Defence Council 2013 confirm that the EU adheres to its ties and its cooperation with NATO and even intends to strengthen the institutional links. The Council envisaged the development of a proposal for synergies between both organisations for the rapid deployment of troops while safeguarding the institutional decision-making autonomy of both the EU and NATO.[271] It also encouraged "further implementation of practical steps for effective EU cooperation with NATO while keeping the overall objective of building a true organization-to-organization relationship."[272] NATO, in its turn reconfirmed its intention at the September 2014 Wales Summit to "continue to work side-by-side in crisis management operations" with the EU and to expand political consultations and cooperations.[273]

9. The EU and the African Union – an effective partnership

Since the launch of the CSDP in 1999, the EU's strategy towards Africa has been based on the idea of "African ownership" and the premise that the "primary responsibility for prevention, management and resolution of conflicts on the African continent lies with Africans themselves", while the Security Council has the primary responsibility for the maintenance of international peace and security.[274] The EU expressed its intention to work towards more formalised relations with the AU in 2005.[275] Two

[269] Biscop, 'From Lisbon to Lisbon: Squaring the Circle of EU and NATO Future Roles', *supra* note 80, 106, 107; S. Duke, 'The EU, NATO and the Treaty of Lisbon: Still Divided Within a Common City', in P.J. Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Area* (2012), 335, 354.

[270] Art. 21(2)(h) TEU; Larik, '*Arma fero, ergo sum?* The European Union, NATO and the Quest for European Identity', *supra* note 268, 43, 58.

[271] Council conclusions on Common Security and Defence Policy, *supra* note 165, 6, para.12.b.; European Council 19/20 December 2013, Conclusions, 2, para.2.; See also Preparing the December 2013 European Council, *supra* note 158, 6. The Defence Council was preceded by a meeting with NATO's Secretary-General who presented his views on current and future security challenges, European Council 19/20 December 2013, *ibid.,* 1, Preamble. This decision-making autonomy is generally important for the EU in its relations with other international organisations in the area of peace and security, Council of the European Union, Council conclusions on the EU's comprehensive approach, Foreign Affairs Council meeting, Brussels, 12 May 2014, 4, para. 14. See also Collective Defence and Common Security, Twin Pillars of the Atlantic Alliance, Group of Policy Experts report to the NATO Secretary-General, June 2014, 5, para. 2.3.

[272] Council conclusions on Common Security and Defence Policy, *ibid.*, 7, para.15. b.

[273] Wales Summit Declaration, *supra* note 51, para. 102.

[274] Council Common Position of 26 January 2004 concerning conflict prevention, management and resolution in Africa and repealing Common Position 2001/374/CFSP, Doc. 2004/85/CFSP, Preamble (1), (2); Brosig, *supra* note 12, 107, 111.

[275] Council of the European Union, The EU and Africa: Towards a Strategic Partnership, Brussels 19 December 2005, 2, paras. 2-4.

years later, in 2007, the European Union supported its pledge and adopted – with the AU – the Joint Africa-EU-Strategy in Lisbon.[276]

The Joint Africa-EU strategy consists of eight pillars of which one is devoted to Peace and Security. It provides, *inter alia*, for financial support in fully implementing and operationalising the African Peace and Security Architecture.[277] The Action Plan for ESDP support to Peace and Security in Africa of 2004 mentions further that the EU stands ready to consider other forms of support that may include, "training, the provision of equipment, operational support and possibly even ESDP advisory or executive missions in the framework of African-led operations or United Nations (UN) peacekeeping operations."[278] The specific goals of the Joint Strategy were laid down in two Actions Plans, covering the years 2008-2010 and 2011-2013. Both recognise and emphasise three items as priority actions: "Enhanc[ing] dialogue on challenges to peace and security", "Full operationalization of the African Peace and Security Architecture" and "Predictable Funding for African-led Peace Support Operations".[279]

To implement the first priority the two organisations sought to develop common positions and implement common approaches on the basis of inter-institutional meetings, regular triennial AU-EU summits, joint annual meetings of the PSC and the EU Political and Security Committee[280] as well as meetings at the ministerial and ambassadorial level.[281] The second action plan noted positively the

[276] Report on the Implementation, *supra* note 167, 11.
[277] Council of the European Union, The Africa-EU Strategic Partnership. A Joint Africa-EU Strategy, 16344/07 (Presse 291) (2007), para. 17, also at 26. During the Fourth EU-Africa Summit it was decided to strengthen the operationalisation of the APSA, as well as general coordination between the AU PSC and the EU Political and Security Committee and between the EU and RECs, Fourth EU-Africa Summit, 2-3 April 2014, Brussels, Roadmap 2014-2017, 3, paras. 9, 11-12; Fourth EU-Africa Summit 2-3 April 2014, Brussels, Declaration, 3, paras. 11-12.
[278] Council of the European Union, Action Plan for ESDP support to Peace and Security in Africa, 10538/4/04 REV 4 (2004), 2. The First Action Plan also lists as activities for the 2nd priority action:
"Work towards the operationalization of the African Standby Force and its civilian dimension, including through EU support for regional brigades training, exercises, validation and logistics (such as Euro-RECAMP);
Facilitate training courses, exchanges of experts and of information, joint seminars and initiatives at continental, sub-regional and national levels", First Action Plan (2008-2010) for the Implementation of the Africa-EU Strategic Partnership, 8.
[279] First Action Plan (2008-2010), *ibid.*, 2, 5-9; Joint Africa EU Strategy Action Plan 2011-2013, 15. Also, Preparing the December 2013 European Council, *supra* note 158, 6.
[280] Council of the European Union, The Africa-EU Strategic Partnership. A Joint Africa-EU Strategy, 16344/07 (Presse 291) (2007); 7th Meeting of the Joint Coordination Committee of the African Peace Facility, Addis Ababa, 18 October 2011.
[281] First Action Plan (2008-2010), *supra* note 278, 6. Other meetings include meetings of the established Joint Africa-EU Expert Groups (JEG), meeting biannually, meetings of the Joint Africa-EU Task Force (JTC) as well as meetings of the AU Military Staff Committee (MSC) and the EU Military Committee (EUMC), M. Brosig, 'The African Union a Partner for Peace', in S. Biscop, R.G. Whitman (eds.), *The Routledge Handbook of European Security* (2013), 292, 297.

progress made on this particular issue. [282] Thus a network of cooperation on a political level through meetings has been established, including the appointment of an EU Special Representative to the AU and the establishment of the EU Delegation to the AU in 2008.[283]

Regarding the African Peace and Security Architecture (APSA), the EU has undertaken specific steps after the originally envisaged time frame for the operationalisation of the APSA could not be kept; expected to be fully operational in 2010, it will not be fully functional before 2015. The EU appointed a Special Advisor for African Peacekeeping Capabilities in 2008 acting as a focal point in liaison with the EU Delegation and the Special Representative for capacity building programmes.[284] The Joint Africa EU Strategy Action Plan (2011-2013) emphasised the need for further efforts for the operationalisation of the APSA,[285] following the critique contained in the 2010 Assessment Study, in particular of the "mandate-resource gap" of the AU.[286] Capacity-building through training of groups is also part of the Joint Africa-European Union Strategy to operationalise the APSA and to ensure "its effective functioning to address peace and security challenges in Africa."[287]

The effective functioning of the APSA includes a further involvement of the regional economic communities, such as ECOWAS, in the process of making the APSA operational whereby the AU will provide the overall leadership.[288] One of the measures which were launched is the Euro Recamp – Amani Africa initiative in 2008 with a three years timeframe. The programme delivered – through civil-military activities – provides seminars and workshops on strategic planning, particularly on how to establish a decision-making plan for crisis management, and it supports the AU Peace Support Operations Divisions accordingly in the exercise of their activities. Furthermore, it also supported the AU Peace Support Operations Division in order to enable it to function and to work effectively from

[282] "[T]he structural and systematic linkages between decision making organs, such as the EU PSC and the AU PSC, the EUMC and the AU MSC, Crisis management teams on both sides, have been strengthened. African and EU heads of delegations in Addis Ababa, Brussels and New York are in regular consultation." Joint Africa EU Strategy, *supra* note 279, 15. See also pp. 16-20 of the Action Plan.

[283] Delegation of the European Union to the African Union, http://eeas.europa.eu/delegations/african_union/about_us/welcome/index_en.htm .

[284] Council of the European Union, Javier SOLANA, EU High Representative for the CFSP, appoints General Pierre-Michel JOANA as Special Advisor for African peacekeeping capabilities, S091/08 (2008); Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 297.

[285] Joint Africa EU Strategy, *supra* note 279, 15. "Progress has been made in the operationalization of the APSA. However much remains to be done in order to sustain and consolidate this progress and to achieve a functional Architecture including smooth and effective interaction between all components of the APSA. EU funding for the next three years Action Plan will be jointly articulated on the basis of an AU-RECs-EU operational Roadmap."

[286] African Peace and Security Architecture (APSA), 2010 Assessment Study, 26, para.68.

[287] Information Brief on Amani Africa.

[288] Consultative meeting between the African Union (AU) - Regional Economic Communities (RECs)/ Regional Mechanisms for Conflict Prevention, Management and Resolution (RMs) and the European Union (EU) on the EU support to the Operationalization of the African Peace and Security Architecture (APSA) Akosombo, Ghana, 10 – 11 December 2009, 1, para. a).

the political decision up to the commitment of forces.[289] The Amani Africa initiative culminated in a 10 day command post exercise (CPX) in October 2010 involving more than 120 African military components and police forces along with various EU partners, which "aimed at determining and furthering the force's operational capacity."[290]

The second three-year cycle covering the period 2011-2014 named "Amani Africa II has the overall objective of validating the capacity of the AU to mandate and deploy Rapid Deployment Capability of the ASF and to run multidimensional peace support operations. An EU permanent Planning Team (EUPT) was formed on 23 April 2012 and mandated by the Political and Security Committee to continue this second cycle of training together with a team from the AU Commission.[291]

The African Peace Facility (APF), established by the EU to confront the third priority action, has provided more than 600 million Euros to date, which have been on peacekeeping operations under AU auspices.[292] A further 750 million Euros have been committed for the APF under the new Three Year Action Programme covering the period from 2014 – 2016.[293] The AU is consequently not only dependent on financial support of the EU, but it also must submit to the conditions dictated by the EU - under the EU's internal law. Therefore, every AU intervention financed by the African Peace Facility shall be "subject to prior approval by the Political and Security Committee."[294] Furthermore,

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[289] European Union, EURO RECAMP – AMANI AFRICA (2008 – 2010); AMANI Africa, Implementation Plan, Draft, African Union Peace Support Operations Division, 6-8, paras. 3.1. – 3.8.

[290] http://www.africom.mil/Newsroom/Article/7817/in-final-stage-amani-africa-exercise-gauges-africa "Amani Africa's CPX simulates a peace support operation in the Republic of Carana, located on the fictitious island sub region of Africa called Kisiwa. Participants at all levels are given scenarios. The exercise scenarios are then coordinated between the AU, mission headquarters, and strategic headquarters in order to respond holistically. Scenarios involve issues related to refugee protection, human rights, gender, rule of law, general security, political engagement and troop and police contributing country management", *ibid.*

[291] Amani Africa II, http://www.consilium.europa.eu/eeas/security-defence/capabilities/eu-support-to-african-capabilities/amani-africa-ii?lang=en; African Union, African Standby Force (ASF), AMANI AFRICA II Initial Planning Conference (PSC), Addis Ababa, Ethiopia 07 – 09 March 2012, Final Report. In 2014, it will be conducted, *inter alia*, an Operational Level Training Session as well as Strategic Level Training Session, Amani Africa II Cycle, Main Events Timeframe (TBC) as at 10/04/2013.

[292] Support to African Union peacekeeping operations authorized by the United Nations, Report of the Secretary-General, UN Doc. A/64/359–S/2009/470 (2009), 8, para.29. With other measures such as capacity-building and early response mechanism, the African Peace Facility has already channeled € 740 million to the AU, http://ec.europa.eu/europeaid/where/acp/regional-cooperation/peace/index_en.htm. Olsen considers the APF to be an "double-edged sword, as it was – on the one hand – established "to avoid deploying European troops on the continent by offering financial contributions to African peace and conflict management operations", on the other hand, it contributes to the capacity building of the AU, G.R. Olsen, 'The EU and Military Conflict Management in Africa: For the Good of Africa or Europe?', in (2009) 16 International Peacekeeping, 245, 252.

[293] Joint Press Release, The African Union Commission and the European Union Hold the 9th Meeting of the Africa Peace Facility (APF) Joint Coordination Committee, 3 June 2014, 1.

[294] Council Regulation (EC) No 617/2007 of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-ECP Partnership Agreement, Article 12. The EU Commission seeks effectively the approval of the EU PSC "on the political appropriateness of the intervention requested" by the AU, Annual

the Action Programme contains a reporting requirement for the AU.[295] The EU also expects that the AU acts under a UN mandate and as the APF is financed through the European Development Fund (EDF), any financial contribution to the AU cannot be used for military or arms expenditure.[296] Therefore, the EU could effectively block any AU operation if it so wished, but the African Peace Facility also raises issues under the law of responsibility. First of all, the EU exercises a high degree of control not only over the financing but also over the envisaged AU operation *per se*.[297] The EU PSC determines the "political appropriateness" of the AU operation and the EU could therefore easily demand that various specific, political parameters are fulfilled during the deployment of the operation in order that it grants the AU the necessary funding for the operation.[298] Thus, the question is whether the EU could control the AU to such a degree that its contributions to the AU under the APF regime would fall under the ambit of the Articles on the Responsibility of International Organisations.[299] The fact that the EU contributes not only financially to AU operations could, however, also open up the application of other areas of the Articles – aid and assistance as well as the wider issue of joint responsibility. Nevertheless, the controversial issue of financing of

report, The African Peace Facility 2010, 5, para.2.5.; Poulton, Trillo, Kukkuk, *supra* note 471, 29. The EU, as an independent actor, will decide upon its own preferences whether to accord further money to the AU or not, thus, e.g., it recommended to the AU to make efforts to mobilise alternative sources of funding following the decision of the Security Council to increase the number of troops of AMISOM to 12000, 7th Meeting of the Joint Coordination Committee of the African Peace Facility, Addis Ababa, 18 October 2011, 2. Other authors emphasise that the APF is also inspired by "sentiments of common humanity" as well as economic and strategic incentives, K. Aning, K. F. Danso, 'EU and AU Operations in Africa: Lessons Learned and Future Scenarios. An African Perspective', in N. Pirozzi (ed.), Ensuring Peace and Security in Africa: Implementing the New Africa-EU Partnership (2010), 47, 48.

[295] Council Regulation (EC) No 617/2007, *ibid.*, Article 12. However, the general strategic focus and orientation of the APF is coordinated in the Joint Coordination Committee (JCC) co-chaired by both organisations and as established in 2005, Joint Press Release, *supra* note 293, 2.

[296] E.Y. Omorogbe, 'Can the African Union Deliver Peace and Security?', in (2011) 16 *Journal of Conflict & Security Law*, 35, 43. Non-eligible APF expenditure includes ammunition, arms and specific military equipment, spare parts for arms and military equipment, salaries for soldiers and military training for soldiers. Eligible expenditures include per diems, rations, medical consumables and facilities, transport, fuel, troop allowances, and communication equipment, Annual report, The African Peace Facility 2010, 5, para.2.4.

[297] The AU has expressed concern about the influence of its partners, including the EU on the planning of, in particular, AU peacekeeping operations. The support provided by the EU "often reflects the priorities of its MSs and institutions rather than the needs of the APSA or indeed the situation on the ground. Consequently, the preparation, implementation, and impact of African PSOs are often either inadequate or do not sufficiently address the long-term root causes of the crisis", A.P. Rodt, J.M. Okeke, 'AU-EU Partnership: Strengthening Policy Convergence and Regime Efficacy in the African Peace and Security Complex?', in (2013) 6 *African Security*, 211, 226. In another article it is even argued that as the AU is increasingly depending on external funds and expertise its security architecture is also increasingly determined by actors such as the EU or the United States, B. Franke, S. Gänzle, 'How "African" is the African Peace and Security Architecture? Conceptual and Practical Constraints of Regional Security Cooperation Africa', in (2012) 5 *African Security*, 88, 101.

[298] 90% of the staff within the Peace and Security Department of the AU are actually paid for by the EU which means that „[a]n end to or decrease in EU financial support could thus lead to deep institutional crisi [sic] within the AU", Rodt, Okeke, *ibid.*, 211, 224; See also A. Mattelaer, E. Marijnen, 'EU Peacekeeping in Africa. Towards an indirect approach', in M. Wyss, T. Tardy (eds.), *Peacekeeping in Africa: The evolving security architecture* (2014), 54, 62, 69.

[299] Article 15 ARIO without prejudice to the question of individual responsibility of the AU.

peacekeeping operations is not limited to the EU-AU context. Both organisations cooperate on the issue of establishing a UN mechanism, under Chapter VIII to provide funding for peacekeeping operations undertaken by the African Union or under its authority and with the consent of the Security Council.[300]

The Action Plan (2011-2013) likewise underlined that the AU and regional mechanisms are not sufficiently financially independent yet to conduct peacekeeping operations of their own, necessitating further exchanges and efforts.[301] In this context, the EU emphasises the need for "more concerted action between the AU, the EU and the UN" on the basis of the recommendations formulated in the Prodi Report.[302]

10. A slow shift towards an equal standing in EU-AU relations

The policy of the EU seeks to move away from a donor-receiver relationship towards a relationship of equal standing in which the African Union can also fully accept the responsibility for the maintenance of international peace and security on the African continent without being dependent upon financial contributions by the industrialised countries. Although the EU gives priority to "African ownership", it is nevertheless prepared to become involved, when necessary, with its own troops in crisis management on the African continent.[303] However, the EU's involvement in peacekeeping operations of its own has very defined limits; the EU prefers limited engagements with their own troops in the form of bridging operations which has prevented joint EU-AU peacekeeping operations or the take-over of one operation by the other organisation.[304] It is, indeed, as it was just argued, more likely that responsibility of the EU in the context of AU peacekeeping operations will arise due its manifold contributions, including on the political level to the AU, rather than on the basis of a joint peacekeeping operation.

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[300] Council of the European Union, The Africa-EU Strategic Partnership, *supra* note 277, para. 21. Moreover, the UN itself could be responsibility on the basis of its own AU operations finance mechanism based on assessed contributions, *infra, 2.5.4.4.*

[301] Council of the European Union, The Africa-EU Strategic Partnership, *supra* note 277, para. 21.

[302] *Ibid.* See, *infra* 2.5.4.4.

[303] Council Common Position of 26 January 2004, *supra* note 274, Article 1, para. 2; Article 6, para. 1; Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, Article 1. In contrast, there are also critical voices who perceive the EU's policy towards Africa in the area of peace and security as "first and foremost been motivated by European concerns, which consist of both common interests and French national interests in particular", Olsen, *supra* note 292, 245, 257; Norheim-Martinsen, *supra* note 150, 17, 26. See also K. Engberg, 'Trends in Conflict Management. Multilateral intervention and the role of regional organizations', in P. Wallensteen, A. Bjurner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 72, 82.

[304] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 294. The planned EU operation in the CAR will also serve as a bridging operation until the AU or the UN can step in.

As the AU also tends to deploy bridging operations, recent examples include Mali and Somalia,[305] the AU and the EU cooperate more closely with the UN during the deployment of operations than with each other.[306] The lack of resources of the AU means that "African ownership" can often not be generated,[307] but the EU is forced to step in and engage in capacity-building or may be forced to wait for the AU to develop its capacities in this area.[308] The EU's response to the Darfur crisis and the deployment of the EU's Support Operation AMIS II[309] was, in essence, a response to the shortcomings of the AU operation[310] and it sidelined the general capacity-building work of the EU, forcing the organisation to do on-the-job capacity building for AMIS.[311] The Support Operation provided planning and technical assistance to AMIS II command, military observers as well as training of African troops and observers and strategic and tactical transportation.[312] Altogether, the EU and its member states spent more than one billion Euros for humanitarian aid and capacity-building for AMIS.[313] EU support ended with the transition to the hybrid UNAMID operation, proof once again that the EU's preference is to act on short-term engagements alone with clear exit options.[314] EUFOR Chad/CAR is another example of the EU's political parameters of its peacekeeping strategy on the African continent. The operation was set up for a period of one year, it was based on the consent of the host countries, it included only a limited military contingent,[315]and it was executed in multilateral cooperation with the UN and with a clear exit option.[316]

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[305] For Somalia see also, *Infra*, 2.5.4.5.

[306] Cf. Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 294-295. The AU's PSC is obliged to cooperate and work closely with the United Nations pursuant to Article 17 of the PSC Protocol.

[307] See for example AMANI Africa, Implementation Plan, Draft, African Union Peace Support Operations Divison, 8, para. 4.1.1. ii. In addition to "ownership", the Joint Strategy is based on "partnership and solidarity", Annual report, The African Peace Facility 2010, 4, para. 2.1.

[308] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 300; Franke, Esmenjaud, *supra 221*, 137, 149.

[309] Council Joint Action 2005/557/CFSP, *supra* note 303.

[310] Brosig, *supra* note 12, 107, 117.

[311] International Crisis Group, The EU/AU Partnership in Darfur: Not Yet A Winning Combination, Africa Report N°99 – 25 October 2005, 9.

[312] B. Franke, 'The European Union's supporting actions to the African Union mission in Sudan (AMIS) and Somalia (AMISOM)', in G. Grevi, D. Helly, D. Keohane (eds.), *European Security and Defence Policy. The First 10 Years (1999-2009)*, 255, 260-61; International Crisis Group, *ibid.*, 9-10.

[313] European Union Factsheet, European Union response to the Darfur Crisis, July 2006, 1.

[314] Brosig, *supra* note 12, 107, 118.

[315] Security Council Resolution 1778, *supra* note 189, 4-5, paras. 6-9; Security Council Resolution 1834, UN Doc. S/RES/1834 (2008), 2, para. 4. The adopted Council already explicitly refers to the operation as "a military briding operation", Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad in the Central African Republic, Article 1. For links to all other legal documents, see http://www.consilium.europa.eu/eeas/security-defence/eu-operations/completed-eu-operations/eufor-tchadrca/legal-basis?lang=en .

[316] Brosig, *supra* note 12, 107, 120. But EUFOR Chad was also affected by problems of force generation and equipment. It was in the Fifth Force Generation conference when France finally agreed to volunteer the essential assets for the deployment of the operation, Norheim-Martinsen, *supra* note 150, 17, 24.The EU

The cooperation between the EU and the AU in the area of maintaining international peace and security illustrates very well how the CFSP has been stimulated by other areas of the EU's external actions and particularly the broader development agenda.[317]

The institutionalised cooperation agreements between the European Union, the United Nations and the African Union were also welcomed by the Security Council in its Resolution 1809.[318] The engagement of the EU was comparatively more limited regarding AMISOM; it persisted beyond cooperation on a political level and financial support as the EU is also engaged in the training of African troops of the ASF in an operational context, for example in Mali as part of the ESDP support policy.[319] This policy also comprises, the provision of equipment, operational support and "possibly even ESDP advisory or executive missions in the framework of African-led operations or United Nations peacekeeping operations."[320]

As the African Union is at the head of the African Peace and Security Structure, it is also the point of entry for cooperation between the European Union and other organisations with the sub-regional organisations in Africa; the CSDP Policy is therefore to consult with the African Union in response to requests from sub-regional organisations on the African continent.[321] Thus, there is no systematic EU strategy to support capacity-building for RECs, but the EU has led individual support for specific RECs.[322]

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deployment to Chad had to be postponed for 6 months due to a lack of access to 16 helicopters and 10 transport aircrafts, leaving several member states having resort to hire transport aircrafts, Menon, *supra* note 268, 75, 80. But lack of capacities and not matching equipment is a problem also for NATO operations, as a senior NATO commander complained "I had to have nine different systems sitting on my desk just to communicate with all my units [in Afghanistan]", Menon, *ibid.*

[317] Cf. Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 89-90; Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus' (2006/C 46/01), especially para. 37. This is not a phenomenon that exists solely at an EU level, but an expression of a general acceptance on the international level that peace and security is also connected to other areas in the interconnected world we live in. One can mention, for example the shift from "protection of civilians" in peace operations to the wider notion of "human security".

[318] Security Council Resolution 1809, UN Doc. S/RES/1809 (2008), 3, para. 5. See also Paragraph 6 of the resolution.

[319] Council of the European Union, Action Plan for ESDP support to peace and security in Africa, Doc. 10538/04 (2004), 1; Other measures include, for example, capacity building for political and economic analyses, early warning system, negotiation/mediation skills, Council Common Position of 26 January 2004, *supra* note 274, Article 4 para. 1.

[320] *Ibid.* Similar to NATO's policy, ESDP action "should be in response to specific and well documented requests from the UN, the AU, African sub-regional organisations or African States. While fully respecting *African ownership*, proposals can be initiated by EU Member States." [Emphasis added], *ibid. 3*.

[321] *Ibid.*3, 4. B. Provision of a list of relevant EU documents,

[322] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 299.

11. Conclusions

From the early small steps of developing a common foreign security and defence policy, the EU has evolved to become a global actor within the system of collective security with vast military and non-military tools at its disposal. An analysis of the EU's relations with other organisations facilitates a corroboration of some of the findings which were made regarding NATO, as well as the ascertainment of certain general developments.

Firstly, a division of labour or a complementarity of roles has emerged between the EU and NATO regarding their relations with the UN and the AU. It was argued previously (see, *infra* 2.5.3.) that NATO's engagement on the African continent is very limited due to the preference of, in particular, European, NATO members to engage in activities for maintaining international peace and security in Africa through the EU. Furthermore, the analysis of NATO's relations with the AU illustrated that NATO provides principally in-mission support to the AU upon the specific request of the latter. In contrast, the EU has developed an impressive framework of institutional relations with the AU covering an array of areas, including the training of troops and the financing of peace operations. Cooperation between the EU and the AU during the peace operations is a consequence of the institutional cooperation arrangements between the two organisations and has to be assessed accordingly. Generally speaking, "operational cooperation in peacekeeping missions [between the EU and the AU] is hardly existing."[323]

Although NATO and the EU therefore seem to have reached a division of labour and an understanding regarding their role on the African continent, it is not clear what the future of their relationship will be, despite their long institutional history and the existing ties and channels. The December 2013 Defence Council emphasised the need to develop a true organisation-to-organisation relationship, but it failed to indicate the necessary steps for such an evolution. It is noteworthy that the conclusions of the Defence Council emphasise the decision-making authority of both organisations. This fact could imply a renunciation of the previous policy between the two organisations that the EU would act if NATO as a whole is not engaged or it is recognition of the emerging division of labour between the two organisations. Another interpretation of the decisions making authority of both organisations points towards the termination of the Berlin plus agreements which were not even mentioned in the documents of the Defence Council. Reichard, however, argues that there has been no reliance on NATO assets by the EU for many years because the recent engagement of the EU with military operations is low-key and the EU distinguishes between two

[323] Brosig, *ibid.*, 292, 299.

types of military operations, those requiring NATO assets as larger scale operations and those of a lower scale and intensity.[324]

EU-UN relations for maintaining international peace and security have developed along the same institutionalised path as EU-AU relations and they cannot be seen in isolation from the relations of the EU and the UN with the AU. The relations between the EU and the UN comprise an institutional framework on various political levels between the two organisations. Both organisations now interact as partners of equal standing with each other and they have fostered a partnership for maintaining international peace and security on the African continent and for their respective engagement with the AU. A division of roles between the AU, the EU and the UN seems to have emerged, an aspect which will be examined further in the part of this Chapter dealing with AU-UN relations.

In another aspect, the EU has followed in the footsteps of NATO. The EU has abandoned the practice of acting as a "clearing-house mechanism" for a UN peacekeeping operation in favour of launching its own short-term and small-scale operations under a Security Council mandate in support of UN operations or in the form of a bridging operation until a UN operation can be deployed.

All these specific developments are of course also fuelled by internal constraints such as resource problems. These problems, of which the EU is not spared, are not, once again, the only driving factor in increasing the networks of cooperation between the EU and the other international organisations, but also drive the EU to act in a comprehensive and thorough manner by using other means and tools to remedy for any lack of resources in other areas.[325] According to an estimation in 2008 by the first Chief Executive of the EDA, "the total number of troops deployed today (…) constitutes less than one third of one percent of European military manpower."[326] Nevertheless, the main limiting factors

[324] M. Reichard, 'Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement', in (2004) 73 *Nordic Journal of International Law*, 37, 42.

[325] So, for instance, "[t]he Council emphasizes that the focus and impact of such operational engagement is enhanced when it is embedded in an overarching strategy, such as the strategic frameworks for the Horn of Africa and the Sahel region. This allows for a comprehensive approach that makes full use of the role of the High Representative who is also one of the Vice Presidents of the European Commission, and that mobilises the different tools at the EU's disposal in close interaction with the Member States to achieve the EU's objectives, in close cooperation with other international actors and making optimal use of scarce resources.", Council of the European Union, Brussels, 23 July 2012, Council Conclusions, Doc. 12817/12, 2, para.3; A Secure Europe, *supra* note 159, 13.

[326] N. Witney, *Re-energising Europe's Security and Defence Policy (*2008), European Council on Foreign Relations, 7. One author spoke in the context of the EU's engagement on the African continent of "lack of ambition (…) [despite] the main strategy documents of the Union in the area", Koutrakos, *supra* note 108, 129.

for the engagement of the EU remain an unwillingness to engage[327] and political inactivity among the EU member states to further develop the CSDP.[328]

An analysis of the relations of the EU with other international organisations allows the drawing of two conclusions regarding the assessment of their activities in the peacekeeping context under the law of international responsibility.

Firstly, the criterion for the attribution of conduct has to be constructed in such a way as to take due account of institutionalised cooperation between international organisations; the criterion has to reflect the influence, power and control or the "normative power" that international organisations execute over other international organisations based on their institutionalised cooperation arrangements and even independent of any specific in-mission elements of cooperations. It has already been highlighted that the EU's African Peace Facility, in particular, raises various points under the law of responsibility.

Secondly, the analysis of the EU's relations showed that a certain triangular framework of relations between the AU, the EU and the UN appears to be emerging. It is therefore important that the criterion of attribution allows the attribution of conduct not only to two but also to more international organisations simultaneously.

2.4. ECOWAS and peacekeeping: The role-model for other subregional organisations on the continent

1. Introduction

The Economic Community of West African States (henceforth: ECOWAS) was set up in 1975 on the basis of the Treaty of Lagos and it is thus the oldest, continuously existing regional organisation on the African continent. Its mission was to promote economic integration and collective economic self-

[327] Apparently there were even instances in which Javier Solana had to "[phone] Defence Ministers in person to secure a single transport plane or field surgeon" as member states were unwilling to provide the necessary troops, Witney, *ibid*., 7; Koutrakos, *ibid.*, 154. This trend has also been fueled by the financial crisis which led to a decrease of solidarity between EU members, Bjurner, 'On EU Peacemaking', *supra* note 256, 89, 97.

[328] To a certain extent, one might therefore subscribe to the opinion of Brosig that the EU does not aim to be a provider of comprehensive peace-building solutions in Africa, but rather that it delegates the main burden of peacekeeping to both the AU and the UN, Brosig, *supra* note 12, 107, 121. Specific circumstances are also very relevant in the assessment of any given situation. At the European Council meeting in December 2012 it was also emphasised "that CSDP missions and operations should be carried out in close cooperation with other relevant international actors, such as the UN, NATO, the OSCE and the African Union (…) *as called for in each specific situation*" [Emphasis added], European Council 13/14 December 2012, Conclusions, 9, para.21; Cf. also Council of the European Union, Generic Standards of Behaviour for ESDP Operations, Brussel, 18 May 2005, 5.

sufficiency in this part of Africa. Its aims were originally strictly economic; the treaty from 1975 does not contain any dispositions for collective security. In 1978 and 1981 ECOWAS adopted two protocols on non-aggression, prohibiting cross-border attacks, and on mutual assistance in defence, according to which "economic progress cannot be achieved unless the conditions for the necessary security are ensured in all Member States."[329] Economic growth can be hindered in conflict regions for a variety of reasons, such as problems with supply due to captured transports, a lack of qualified personnel whom have fled the conflict region, and a general lack of human security.

In 1990, ECOWAS appointed a Commission of Eminent Persons with the task to submit proposals for a review of the treaty which led to the signature of the revised ECOWAS treaty in Cotonou in 1993, adding security policy elements to the mandate of ECOWAS.[330]

2. The Normative Framework

The new revised ECOWAS Treaty of 1993 was also created with the aim

> to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.[331]

Thus, *prima facie* it is rather surprising that ECOWAS became involved in peacekeeping activities. However, the revised Treaty follows the road ECOWAS had begun to move along on with the adoption of the two Protocols. Article 58 of the Treaty of ECOWAS entitled Regional Security sets out general objectives concerning the maintenance of peace, stability and security within the region.[332] The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security of 1999 (henceforth: MCPMRPS) established an appropriate framework.

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[329] Protocol Relating to Mutual Assistance on Defence (1981), Preamble. See also A. T. Soma, 'Les relations entre l'Union Africaine et la Communauté Economique des Etats de l'Afrique de l'Ouest en matière den maintien de la paix', in (2012) 18 *African Yearbook of International Law*, 345, 352-353.

[330] Griep, *supra* note 73, 332-33; International Peace Academy in partnership with Economic Community of West African States, Operationalizing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security (2002), 4.

[331] Article 3 of the Treaty of ECOWAS.

[332] Article 58 Regional Security

"1 . Member States undertake to work to safeguard and consolidate relations conducive to the maintenance of peace, stability and security within the region.

2. In pursuit of these objectives, Member States undertake to co-operate with the Community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-State and inter-State conflicts, paying particular regard to the need to (…)

f) establish a regional peace and security observation system and peace-keeping forces where appropriate."

The Protocol created the Mediation and Security Council and the Council of Elders. Whereas the functions of the Mediation and Security Council are similar to the responsibilities of the Security Council of the United Nations, the Council of Elders is a new mechanism unique to ECOWAS. It is a list of eminent personalities who may be asked by the Mediation and Security Council to deal with a given conflict situation.[333] The Authority (of Head of states) remains the highest decision-making body in the domain of peace-keeping and conflict-management,[334] but the Mediation and Security Council is mandated by the Authority to take appropriate decisions for the implementation of the Mechanism.[335] Under Article 10 of the Protocol, the Mediation and Security Council shall decide

(a) decide on all matters relating to peace and security;
(b) decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security;
(c) authorise all forms of intervention and decide particularly on the deployment of political and military missions;
(d) approve mandates and terms of reference for such missions;

The Protocol also prescribes the composition of the ECOWAS Cease-fire Monitoring Group (ECOMOG) which is "a structure composed of several Stand-by multi-purpose modules (civilian and military) in their countries of origin and ready for immediate deployment."[336] ECOMOG or the ECOWAS Standby Force (ESF) as it is also called[337] is charged, *inter alia*, with peacekeeping and the

[333] Article 20 of Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (1999).
[334] Article 6 of the Protocol.
[335] Article 7 of the Protocol. Article 10 states that the "[t]he Mediation and Security Council shall take decisions on issues of peace and security in the sub-region on behalf of the Authority. It shall also implement all the provisions of this Protocol. So, it shall
a) decide on all matters relating to peace and security;
b) decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security;
c) authorise all forms of intervention and decide particularly on the deployment of political and military missions;
d) approve mandates and terms of reference for such missions;
e) review the mandates and terms of reference periodically, on the basis of evolving situations;
f) on the recommendation of the Executive Secretary, appoint the Special Representative of the Executive Secretary and the Force Commander.
[336] Article 22 of the Protocol. Article 28, entitled Composite Stand-By Units, stipulates that "Member States hereby agree to make available to ECOMOG units adequate resources for the army, air force, navy, gendarmerie, police and all other military, paramilitary or civil formations necessary for the accomplishment of the mission.
Each Member State shall provide ECOMOG with a unit the size of which shall be determined after consultation with each Member State." Adebayo argues that the refined mechanisms of ECOWAS to manage their own conflicts are in large part due to neglect by the United Nations Security Council, A. Adebayo, 'The Security Council and Three Wars in Africa', in V. Lowe, A. Roberts, J. Welsh et al (eds.), The United Nations Security Council and War (2008), 466, 466.
[337] African Peace and Security Architecture (APSA), 2010 Assessment Study, 43, para.120.

restoration of peace, humanitarian intervention in support of humanitarian disaster and preventive deployment (Article 22). The ECOWAS Standby Force thereby implements the decisions of the Mediation and Security Council under Article 10 of the Protocol. As such, in a similar way to the African Union, ECOWAS possesses the mandate to intervene to "alleviate the suffering of the populations and restore life to normalcy in the event of crises, conflict and disaster."[338] In contrast to the United Nations which was unable to implement the agreements under Article 43 of the United Nations Charter, ECOWAS member states make available to ECOMOG composite stand-by units which are under the direct control of the Mediation and Security Council.[339]

Article 52 (3) of the Protocol regulates the relationship with the United Nations, and it stipulates that in accordance with Chapters VII and VIII of the UN Charter, ECOWAS shall inform the United Nations of any military intervention undertaken in pursuit of the objectives of the mechanism established under the Protocol, usually the information requirement is executed on the basis of submitted reports.[340] Although Chapter VIII of the United Nations only refers to of agencies and arrangements, the United Nations has accepted that this includes sub-regional organisations such as ECOWAS.[341] The organisation has been implicitly recognised by the Security Council in Resolution 788. [342] It is also argued that the Protocol Relating to Mutual Assistance on Defence made ECOWAS "both a defense alliance and a regional system of collective security under Chapter VIII of the UN Charter."[343]

Although the MCPMRPS does not stipulate explicitly that the Mediation and Security Council shall seek the authorisation of the Security Council before ordering military intervention, other parts of the Protocol state that ECOWAS accepts the primary responsibility of the Security Council for the maintenance of international peace and security.[344] Article 27 of the Protocol seems to suggest that

[338] Article 40 of the Protocol.
[339] Article 28 of the Protocol.
[340] This disposition, as well as Articles 26 and 27, nevertheless refers to the AU as the legal successor to the OAU. The Article also sets out that ECOWAS shall cooperate with the AU and that ECOWAS shall *fully* cooperate with the AU Mechanism for Conflict Prevention, Management and Resolution. Any military intervention presupposes, of course, an authorisation by the Security Council.
[341] "In addition to regional organizations, it will be of practical sense to identify also the subregional organizations within the partnership. Although the Charter is silent on this matter, it has always been clear to me and my colleagues that the provisions of Chapter VIII imply that subregional organizations are to be included", A regional-global security partnership: challenges and opportunities, Report of the Secretary General, UN Doc. A/61/204–S/2006/590 (2006), 16, para. 81.
[342] Security Council Resolution 788, UN Doc. S/RES/788 (1992), 1-2, Preamble; 2, paras. 1-2, 4, 6.
[343] Articles 2-4 of the Protocol Relating to Mutual Assistance on Defence, 29 May 1981; Hummer, Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', *supra* note 190, 807, 838; C. Walter, 'Chapter VIII Regional Arrangements. Article 52', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1445, 1468 mn. 73.
[344] Preamble and Article 2. The Revised ECOWAS Treaty also contains in Article 83 (2) a general obligation of ECOWAS to cooperate with the United Nations system "in pursuit of its objective." Under Article 58 of the Revised ECOWAS Treaty, Member States undertake to cooperate with the Community in establishing and

an authorisation of the Security Council is not required. Under that disposition, the submission of a report on a situation to the UN or the OAU (now: AU) is only one of six procedures by which the Mechanism may be applied.[345] In contrast to Article 27, Article 26 MCPMRPS submits ECOWAS completely to the authority of the Security Council as the latter may put into effect the mechanism upon its request.[346] That article therefore corresponds principally to Article 53(1) of the UN Charter according to which the Security Council may utilise regional organisations under its authority for peace enforcement authority.[347] In practice, and as it will be explained in length in the following part, ECOWAS has intervened twice in conflicts without an authorisation of the Security Council, but both interventions happened in the period before the Protocol existed. In summary, it is not clear under ECOWAS law, whether the organisation is required to seek the authorisation of the Security Council to intervene militarily in a conflict.[348]

3. ECOWAS, Peacekeeping and its relations with the United Nations

The relations between ECOWAS and the United Nations in the area of peacekeeping operations began with a bad start in 1990. Liberia was devastated by a civil war and ECOWAS had requested technical assistance by the United Nations to establish a peacekeeping force. Although the Liberian Ambassador had tried to bring the conflict to the attention of the Security Council in June 1990, the

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strengthening appropriate mechanisms for the timely prevention and resolution of intra-State and inter-State conflicts, paying particular regard to the need to: (f) establish a regional peace and security observation system and peace-keeping forces where appropriate.

[345] Article 27 (e). Under Article 27 (b), the Mediation and Security Council shall consider several options and decide on the most appropriate course of action to take in terms of intervention. Such options may include (…) intervention by ECOMOG. According to procedure (c) the Mediation and Security Council shall issue a mandate authorising the Executive Secretary to set up a mission and define its terms of reference.

[346] Article 25 of the Protocol defines the conditions for application which include the following circumstances:

(a) In cases of aggression or conflict in any Member State or threat thereof;
(b) In case of conflict between two or several Member States;
(c) In case of internal conflict:
    (i) that threatens to trigger a humanitarian disaster, or
    (ii) that poses a serious threat to peace and security in the sub-region
(d) In event of serious and massive violations of human rights and the rule of law
(e) In the event of an overthrow or attempted overthrow of a democratically elected government;

In the practice of the Security Council, options (a) –(d) have been and would be considered as fulfilling the criteria under Article 39 of the UN Charter so that any request by the Security Council under Article 26 of the Protocol would fulfil the conditions for application of the Protocol under Article 25.

[347] The implementation of such a request by the Security Council would, however, correspond rather to Article 53(2) of the UN Charter as the military intervention would be conducted under the authority of ECOWAS and not under the authority of the United Nations Security Council.

[348] For the question of the compatibility of the Protocol with the framework of the United Nations, it is referred to the analysis of the compatibility of the AU's Legal Framework for Military Intervention with the UN Charter which analyses this question extensively, *infra*, 2.5.3.

Security Council did not consider the issue until January 1991.[349] The Cold War was just over and the United Nations and the Security Council were trying to find and assert their new role in this post-bipolar world. Political implications, national interests as well as procedural traditions hampered any decisiveness, assertiveness and readiness by the Council to take action so that ECOWAS intervened on its own;[350] however the Security Council issued a statement commending the efforts of ECOMOG once unity had been reached.[351] Also, within ECOWAS there was opposition to the intervention. First of all, many ECOWAS members opposed a UN presence in Liberia in the early stages as they were afraid that the UN troops would take credit for ECOWAS's sacrifices.[352] Moreover, political splits within ECOWAS came to light as several francophone states had not been in favour of a Nigerian-led, intervention of Anglophone states in the civil war in Liberia.[353] The main reason of the opposition was however political as Nigeria dominates ECOWAS as the biggest economic player in the region which evoked resistance.[354]

In the absence of a Security Council mandate, the intervention by ECOWAS occurred in violation of the United Nations Charter,[355] but it was welcomed by the United Nations and the international

[349] J. Allain, 'The True Challenges to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', (2004) 8 *Max Planck Yearbook of United Nations Law*, 237, 260.

[350] The Security Council was blocked by three African States, Côte d'Ivoire, Zaire (now the DRC) and Ethiopia which refused any intervention into what they saw as the internal affairs of a member state of the OAU. In the Security Council existed also a tendency to defer to the African states when discussing an OAU member state, Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 471.

[351] Note on behalf of the President of the Security Council, UN Doc. S/22133 (1991); Adebayo, *ibid.*, 466, 471.

[352] J. O. C. Jonah, 'The United Nations', in A. Adebajo, I. O. D. Rashid, *West Africa's Security Challenges* (2004), 319, 323 – 26.

[353] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 470; D. Doktori, 'Minding the Gap: International Law and Regional Enforcement in Sierra Leone', (2008) 20 Florida Journal of International Law, 329, 334. Cf. A. van Nieuwkerk, 'The Peace and Security Architecture of African Subregional Organizations', in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 51, 62.

[354] Cf. C. Walter, 'Hybrid Peacekeeping: Is UNAMID a new Model for Cooperation between the United Nations and Regional Organizations?', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1327, 1329.

[355] Violation of Article 2 (4) of the Charter for each ECOWAS member state contributing to the operation and violation of Article 53 of the Charter for ECOWAS itself, see Allain, *supra* note 349, 237, 261. Similarly, see B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', (2003) 85 *International Review of the Red Cross*, 807, 821. It is suggested that it was based on a "[f]ear of West-African leaders that the Security Council could delay approval for necessary action in cases of sub-regional instability [which] led to an interpretation of Chapter VIII of the UN Charter to inform the Security Council after troops had been already deployed to deal either with a case of sub-regional instability or unconstitutional changes of government.", Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 467. The High-Level Panel also considered the possibility of an ex-post authorisation of enforcement action by the Security Council to regional organisations, cf. Report of the High-Level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565 (2004), 57, para. 207; 71, para. 272 a). The latter disposes that "**Authorization from the Security Council should in all cases be sought for regional peace operations**, recognizing that in some urgent situations *that authorization may be sought after such operations have commenced*" [Emphasis added].

community of states.[356] For the first time, the UN "sent military observers to support an already established sub-regional force"[357] and in a statement laid down in a Note by the President of the SC, the Security Council also commended the efforts of ECOMOG.[358] This note can be considered as a *post facto* authorisation to intervene. The relations between the United Nations and ECOWAS strengthened from 1992 onwards, coinciding with the publication of Boutros-Ghali's report, *An Agenda for Peace*, in which he called for increased cooperation with regional organisations (*infra*, 1.2).[359] After the Cotonou accord in 1993, a joint cease-fire monitoring committee was established which was chaired by the UN Observer Mission in Liberia (UNOMIL).[360] Nevertheless, the cooperation between ECOMOG and UNOMIL remained difficult. ECOMOG's ill-equipped peacekeepers complained about UNOMIL not giving them the right to use their helicopters and other vehicles and felt that the better paid UN troops left the difficult tasks to them. The problems were exacerbated with the publication of the seventh report by then Secretary-General Boutros-Ghali about Liberia in which, *inter* alia, he mentioned the rather likely involvement of ECOMOG personnel with rebels in one attack.[361]

As ECOMOG continued to struggle with financial difficulties and political divisions, the Secretary-General proposed the establishment of a large United Nations peacekeeping operation under which ECOMOG would be subsumed. Unfortunately, that proposal was met by "eloquent silence" as "the most powerful members of the Council (…) [were] increasingly wary of proliferating peacekeeping missions amidst the disasters of Somalia in 1993 and Rwanda in 1994".[362] The Security Council then issued Resolution 1001, after receiving the report by the Secretary-General, in which it was stated that the mandate of UNOMIL would not be extended if serious progress would not be made until September 1995. In response, ECOWAS members "warn[ed] that any UN withdrawal would

[356] The Security Council first commended the efforts of ECOWAS to restore peace and security in Liberia in the form of a resolution in November 1992, Security Council Resolution 788, *supra* note 342, 2, Preamble as well as para.1. Further efforts of ECOWAS in Liberia were, for example, recognised in Resolutions 813, 856 and 866, Security Council Resolution 813, UN Doc. S/RES/813 (1993), 1, Preamble; 2, para.2; Security Council Resolution 856, UN Doc. S/RES/856 (1993), 2, para.6; Security Council Resolution 866, UN Doc. S/RES/866 (1993), 1, Preamble. Cf. also Kioko, *ibid.*, 807, 821.

[357] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 466.

[358] Security Council, Note by the President of the Security Council, UN Doc. S/22133 (1991).

[359] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 472.

[360] Security Council Resolution 866, *supra* note 356.

[361] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 472 – 73; Seventh Report of the Secretary-General on the United Nations Observer Mission in Liberia, UN Doc. S/1994/1167 (1994), para. 13. In paragraph 4 d), it is, for example, stated that "[t]he limited financing available to ECOMOG has been a significant factor in hampering the group's ability to carry out its responsibilities in accordance with the Cotonou Agreement." For further reasons of disagreement, see Adebayo, *ibid*., 473.

[362] Adebayo, *ibid.*, 466, 473-74; Ninth Progress Report of the Secretary-General on the United Nations Observer Mission in Liberia, UN Doc. S/1995/158 (1995), 3, para. 12; 10-12, paras. 46-55, especially, p. 12, para. 52 (b).

compromise ECOMOG's efforts and could lead to the further destabilization of the West African sub-region."[363]

UNOMIL consisted of only 62 observers. The warning by the ECOWAS states was enunciated for reasons of international legitimacy and attention rather than for security concerns as the small UN observation mission was largely symbolic. But it also underlined the complex relationship existing between the United Nations and ECOWAS. Whereas the latter wanted the political legitimacy of the UN as well as their greater military and economic resources, they were once more concerned about the UN coming "late in the day to steal ECOMOG's thunder after several years of lonely peacekeeping."[364] However after the second civil war in Liberia started and ECOWAS intervened again, the United Nations ultimately established the United Nations Mission in Liberia (UNMIL) on the basis of Resolution 1509.[365]

A jointly chaired Implementation Monitoring Committee which included representatives from the EU and the AU[366] started meeting in November 2003 to oversee the disarmament of the factions.[367] In addition to Liberia, ECOWAS intervened, in Sierra Leone and Côte d'Ivoire, amongst others. In all three missions, the United Nations were forced to take over given that the ECOWAS peacekeepers were logistically ill-equipped and under-resourced, as the following analysis will show. In these scenarios, a partition of labour was finally agreed upon under which ECOWAS provided the core of the UN peacekeepers while the Security Council took charge of the political oversight and contributed additional troops and financial means.[368] The crisis in Sierra Leone was the second time that ECOWAS intervened without an authorisation of the Security Council, but as in the previous case

[363] ECOWAS Resolution A/RES.6/7/95 as annexed to Letter Dated 8 August from the Permanent Representative of Ghana to the United Nations Addressed to the Secretary-General, UN Doc. S/1995/701 (1995); Twelfth Report of the Secretary-General on the United Nations Observer Mission in Liberia, UN Doc. S/1995/781 (1995), 2-4; Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 474; Security Council Resolution 1001, UN Doc. S/RES/1001 (1995); Twelfth Progress Report of the Secretary-General on the United Nations Observer Mission in Liberia, UN Doc. S/1995/781 (1995), 2, para. 7.

[364] Adebayo, *ibid.*, 466, 474.

[365] This was preceded by U.S. support with 200 soldiers of the 3600 strong soldiers deployed in the ECOWAS mission in Liberia (ECOMIL), Security Council Resolution 1497, UN Doc. S/RES/1497 (2003), 2, para. 1.

[366] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 475.

[367] The Implementation Monitoring Committee (IMC) was set up on the basis of the Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Accra, 18 August 2003, article 29 (2). The Security Council had welcomed the conclusion of the Peace Agreement in the form of a Statement by the President of the Council and the Security Council urged all parties to implement fully their commitments under it, Statement by the President of the Security Council; UN Doc. S/PRST/2003/14 (2003), 1-2. In Resolution 1509 it authorised UNMIL in cooperation with the Joint Monitoring Committee (JMC) as established under the Peace Agreement to develop with relevant international financial institutions etc. an action plan for the overall implementation of disarmament, demobilization, reintegration and repatriation, Security Council Resolution 1509, UN Doc. S/RES/1509 (2003), 3, para.3 (e), (f).

[368] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 467-68.

in Liberia the non-authorised intervention was not met with any criticism, and rather ECOWAS was commended afterwards by the Security Council for its role and efforts.[369] The tasks were once again divided, the Security Council limited itself to travel restrictions and a petroleum and arms embargo on the basis of Security Council Resolution 1132.[370] This operation is once-again a striking example of the interlacement between Chapter VII action of the Security Council and cooperation under Chapter VIII and the evolutionary practice of the Security Council regarding this matter.[371] When the failure of the Conakry Peace Agreement became apparent, 13000 troops were deployed by ECOMOG. The United Nations itself played only a very limited role with the establishment of the United Nations Observer Mission in Sierra Leone (UNOMSIL). As in Liberia, the ECOMOG troops appeared to resent the better equipped and particularly better paid United Nations military observers.[372]

These two ECOWAS operations preceded the adoption of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security which in the view of some authors institutionalised the appropriation of powers from the United Nations by ECOWAS.[373]

In Liberia, ECOMOG was eventually replaced by a UN force (UNAMSIL) following Nigeria's intention to withdraw 2000 of its 12000 peacekeepers each month, though this was accompanied by a conditional offer to redeploy some troops under a new United Nations operation.[374] The United

[369] Security Council Resolution 1162, UN Doc. S/RES/1162 (1998). It is even argued that the non-complaint by the UN is due to the fact that "the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at that time", Kioko, *supra* note 355, 807, 821. Regarding Côte d'Ivoire, ECOWAS seemed to consider crisis management without the United Nations as not imaginable as it had urged the Security Council to act, Annex to the letter dated 19 December 2002 from the Permanent Representative of Senegal to the United Nations addressed to the President of the Security Council, Extraordinary summit of Heads of State and Government of ECOWAS, Dakar, 18 December 2002, Final Communiqué, UN Doc. S/2002/1386 (2002), 7-8, paras. 14, 18.

[370] Cf. Allain, *supra* note 349, 237, 261; Security Council Resolution 1132, UN Doc. S/RES/1132 (1997).

[371] Security Council Resolution 1132 was adopted under Chapter VII and VIII. The Security Council effectively combined both chapters to decide upon measures to be implemented by ECOWAS and other actors. See, *ibid*, particularly the last paragraph of the Preamble, paras.3, 4, 8, 9, 11, 14. Under the follow-up Security Council Resolution 1162, UN military liaison and security advisory personnel were effectively deployed to assist ECOMOG in the planning of future tasks, including the identification of the former combatant elements to be disarmed, Security Council Resolution 1162, *supra* note 369, 1-2, para. 5. In this context, regional organisations have regularly called for an innovative interpretation of Chapter VIII of the Charter based on the practice of the UN and regional and subregional organisations, cf. e.g. Statement of the League of Arab States, Security Council, 6257th meeting, UN Doc. S/PV.6257 (2010), 5.

[372] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 476-77; Security Council Resolution 1181, UN Doc. S/RES/1181 (1998).

[373] Allain, *supra* note 349, 237, 262.

[374] Eight Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, UN Doc. S/1999/1003 (1999), paras. 35-52; Security Council Resolution 1270, UN Doc. S/RES/1270 (1999). Nigeria also rejected a proposal by the Security Council to ECOMOG to continue the protection of Freetown and to undertake enforcement action against rogue rebel elements, realising that ECOMOG would be a useful scapegoat if something went wrong while being entrusted with these difficult and dangerous tasks. Consequently, Nigeria refused to remain in Sierra Leone as part of ECOMOG in a situation in which there would

Nations turned down ECOMOG's request to finance the entire force; however 4000 of its peacekeepers were subsumed under the new UN force. ECOWAS and some other sub-regional organisations continued to question why, on the one hand, they should be responsible to the United Nations, if, on the other hand, the UN does not finance their operations.[375] ECOWAS is nevertheless less dependent on external funding than the AU since about 80% of its budget for conflict prevention and management, which includes, for example, military exercises and election observer missions, is financed through a Community Levy of which a certain percentage is dedicated for the ECOWAS Peace Fund.[376] Problems continued to exist on the ground. A United Nations assessment mission sent to Sierra Leone in June 2000 gave a rather disastrous judgment, criticising the "serious lack of cohesion within the mission as well as some other shortcomings." These included, for instance, the lack of a "commonly shared understanding of the mandate and rules of engagement, as well as other problems in command and control."[377] After the monitored elections 2002, the primary responsibility for the maintenance of international peace and security was transferred to the government of Sierra Leone in 2004 and in the following year the United Nations operation was completed.[378]

One can say that ECOWAS was afflicted with political animosities between its members and that it lacked not only financial resources but also military and other equipment, amongst other things around the turn of the millennium. In addition, its soldiers were poorly trained and had an insufficient understanding of the applicable law, rules and standards. It is thus not surprising that ECOWAS has sought cooperation with the United Nations and other international organisations from an early stage. In fact, where one organisation lacks resources it is often the case that it seeks cooperation with other organisations. The DPKO reported in 2004 that cooperation with ECOWAS had intensified and that they had, at the request of ECOWAS,

> *provided logistical and financial advice* to the Community regarding the *development of support plans* and cost estimates for the establishment of the ECOWAS Mission in Côte d'Ivoire (ECOMICI). The United Nations Mission in Sierra Leone (UNAMSIL) also provided valuable *technical assistance to*

be two different operations deployed on the ground with different mandates, commands and conditions of deployment, Jonah, 'The United Nations', *supra* note 352, 319, 330.

[375] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 478. The claim that the United Nations should finance ECOWAS operations deployed was reaffirmed in 2003, International Peace Academy, *supra* note 330, 14.

[376] African Peace and Security Architecture (APSA), 2010 Assessment Study, 66, para.194.The AU Report calls it "an impressive instrument that undoubtedly enhances ECOWAS' ownership of its peace and security agenda, and should be replicated by other RECs/RM", *ibid.*

[377] Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/751 (2000), paras. 54 – 56.

[378] Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 479-80.

> *ECOWAS for the planning of the ECOWAS Mission in Liberia (ECOMIL)* and played a *critical role in the deployment and sustainment of the first ECOWAS troops in Liberia.*[379]

The African understanding was, however, that "the UN Security Council has primary responsibility for international peace and security and simply shifted its responsibilities to ECOWAS due to the reluctance of the Council, after debacles in Somalia and Rwanda, to sanction UN missions in Africa."[380] The United Nations reacted, *inter alia*, by creating the UN Office in West Africa (UNOWA) upon the recommendation of the UN Inter-Agency Task Force on West Africa whose mandate includes capacity building of regional and subregional mechanisms to address threats to international peace and security.[381]

4. A new era of relations between ECOWAS and the UN

The emergence of the African Union in 2002 led, however, to a profound shift in the relations between ECOWAS and other organisations in the area of international peace and security. The continuing operationalisation of the African Peace and Security Architecture (henceforth: APSA) under the AU focused cooperation arrangements as well as communication between the different organisations gradually on the AU as the primary responsible organisation on the African

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[379] Enhancement of African peacekeeping capacity, *supra* note 209, 2-3, para. 5. The United Nations has also conducted training and seminars for ECOWAS, Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/54/839 (2000), 19, 161-166.

[380] Adebayo concluded that the ECOWAS interventions underlined "the importance of an active Security Council role in sub-regional peacekeeping efforts", Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 487.

[381] "UNOWA is entrusted with the overall mandate of enhancing the contributions of the UN towards the achievement of peace and security in West Africa. This includes governance, mainstreaming security sector reform into development strategies, defining an integrated sub regional approach to humanitarian, human rights and gender issues, curbing corruption, poverty alleviation, addressing youth unemployment as well as cross-border illicit trafficking and organized crime. These emerging destabilizing issues can be considered as new threats to security.
UNOWA's core functions are to:

Monitor political developments in West Africa, carry out good offices roles and special assignment on behalf of the Secretary-General and enhance subregional capacities for conflict prevention and mediation in countries of the subregion.
Enhance subregional capacities to address cross-border and cross-cutting threats to peace and security, in particular, election-related instability and challenges related to security sector reform, transnational organized crime, illicit trafficking and terrorism.
Promote good governance and respect for the rule of law, human rights and the mainstreaming of gender in conflict prevention and conflict management initiatives in West Africa.
(…) available at: http://unowa.unmissions.org/Default.aspx?tabid=747
Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 488; Report of the Inter-Agency Mission to West Africa, Towards a comprehensive approach to durable and sustainable solutions to priority needs and challenges in West Africa, UN Doc. S/2001/434 (2001), paras. 6, 11,

Continent.[382] The same evolution could be seen in the context of peacekeeping operations in Africa in which the AU slowly gained influence.

In the Côte d'Ivoire crisis, the AU became increasingly involved as a Mediator in the conflict.[383] In Resolution 1633, the Security Council urged the AU as well as ECOWAS to consult with the Ivorian parties in order to ensure that a new Prime Minister acceptable to all the Ivorian parties shall be appointed, in accordance with the decision of the Peace and Security Council of the AU.[384] Following that resolution, there was gradually more cooperation between the AU, the United Nations and ECOWAS in the peace process in Côte d'Ivoire.[385]

Clearly, the AU strengthened its role in the peace process in Côte d'Ivoire, not only in relations with ECOWAS but also in its relations with the United Nations The following peace agreement of Ouagadougou was transmitted to the United Nations by the AU on the basis of ECOWAS recommendations.[386] The African Union commended the efforts of ECOWAS to promote reconciliation in Côte d'Ivoire and "[called] on all the parties (…) to extend full cooperation to *the ECOWAS, the AU and to the United Nations*"[387] [Emphasis added].

Moreover, the African Union urged the UN to act "to expedite the deployment of the UN operation in Côte d'Ivoire"[388] and it mandated ECOWAS "to take necessary action to ensure full restoration of operations of states in Côte d'Ivoire immediately."[389] The Security Council decided then to create an international consultative organ which included among its members, the EU, the AU and ECOWAS.[390]

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[382] See, *infra* 2.5.

[383] The AU's mediator managed to get the parties to to agree to the Pretoria Agreement on the Peace Process in Côte d'Ivoire, Annex I to the letter dated 25 April 2005 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc. S/2005/270 (2005), paras. 1-2, 10, 16. The Security Council commended the AU for their efforts, Security Council Resolution 1605, UN Doc. S/RES/1605 (2005), para.3.

[384] Security Council Resolution 1633, UN Doc. S/RES/1633 (2005), paras. 5-6; Griep, *supra* note 73, 141.

[385] Security Council Resolution 1739, UN Doc. S/RES/1739 (2007), para. 2 (i), (j), (m), 8 (f). ECOWAS is also pursuing a gradually expansionist agenda and gaining influence as a result, Y. Oke, 'Substitute for the United Nations? Extending the Frontiers of the North Atlantic Treaty Organisation and Implications for African Unity', in (2013) 21 *African Journal of International and Comparative Law*, 120, 136.

[386] Thirteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, UN Doc. S/2007/275 (2007), 2, para.5. The agreement was welcomed by the United Nations, Statement by the President of the Security Council, UN Doc. S/PRST/2007/8 (2007).

[387] Communiqué of the Third Session of the Peace and Security Council, PSC/PR/Comm. (2004) (III), paras. 2-3.

[388] *Ibid*., para. 5

[389] Communiqué of the Solemn Launching of the Tenth Meeting of the Peace and Security Council, PSG/AHG/Comm.(X) (2004), para. C. 7. The mandate given to ECOWAS is based on the cooperation with the regional mechanisms as part of the African Peace and Security Architecture which has its legal basis in Article 16 of the Protocol establishing the Peace and Security Council.

[390] Security Council Resolution 1765, UN Doc. S/RES/1765 (2007), paras. 8-9.

But this partial loss of direct cooperation between ECOWAS and the United Nations was remedied to a certain extent by the operationalisation of the African Peace and Security Architecture. The gradual operationalisation of all the 5 standing brigades of the African Standby Force contributed to an increased cooperation between ECOWAS and the United Nations and it transformed ECOWAS into a supporter of peace and security beyond their geographic region in Africa,[391] drawing on their strength as the African organisation with the most experience in peacekeeping operations.[392] However, efforts at capacity-building are still necessary to improve the functioning of the organisation and communication within its institutions.[393]

Regarding the crisis in Mali, The Support and Follow-up Group on the situation in Mali met under the joint chairmanship of the AU, the UN and ECOWAS and "ECOWAS, the AU, the UN and the EU [were encouraged] in cooperation with Mali and other stakeholders, to expedite the finalization of the joint planning to respond to the request (…) of Mali for an African-led International Force."[394]

5. ECOWAS and the European Union

The same observations regarding the relationship between ECOWAS and the United Nations are valid for the relations between ECOWAS and the EU. The latter cooperates predominantly with the "big brother" of ECOWAS, the African Union. One example of direct cooperation is the grant agreement of 76 Million Euros to support the African-led International Mission in Mali (AFISMA) signed between ECOWAS and the EU.[395]

6. Conclusions

ECOWAS has generally emerged as a serious actor for maintaining international peace and security. The analysis demonstrates an evolution of the relations ECOWAS entertains with other international organisations. In contrast to the relationship of NATO and the EU between each other and towards the UN, the relations ECOWAS has maintained with these three organisations have not been further

[391] See, *infra* 2.5. Griep, *supra* note 73, 342; Report of the Special Committee on Peacekeeping Operations and its Working Group, *supra* note 209, 12, para. 71; Enhancement of African peacekeeping capacity, *supra* note 209, 2, paras. 3, 5.
[392] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 292.
[393] A Proactive Mechanism for Change, Strategic Plan 2011-2015, 31; Regional Strategic Plan 2011-2015, 9-10; Regional Strategic Plan, A Proactive Mechanism for Change, 2-4 (of the document).
[394] Meeting of the Support and Follow-up Group on the situation in Mali, Bamako, Mali, 12 October 2012, Conclusions, 1, para. 1; 1-3, 4 a), d), d) (iii); 4, para. 4 e).
[395] 50 Million as pledged for at the donor's conference hosted by ECOWAS on the margins of the AU summit in Addis Ababa on 29th January 2013, another 20 million in fast-disbursing assistance from the EU's Instrument for stability, ECOWAS, EU Sign 76 Million-Euro Agreement to Support AFISMA, Free Movement, 9 April 2013, available at: http://news.ecowas.int/presseshow.php?nb=095&lang=en&annee=2013

institutionalised. This is primarily due to the continuing operationalisation of the APSA of the AU. Non-African international organisations focus their organisations on the AU which has the mandate to provide security on the whole African continent.

Nevertheless, an analysis of ECOWAS relations further illustrate that relationships between the UN and regional organisations for maintaining international peace and security, as well as for deploying peacekeeping operations, seem to have evolved from the early and also competitive stages if one is to adopt Virally's classification system as regards relations based on collaboration and cooperation.

From the legal analysis under the law of responsibility, ECOWAS and its relationships prompt the formulation of three further conclusions.

First of all, concerning the specific question of joint responsibility, ECOWAS might be acting in a subsidiary – rather than an equal – role in the context of peacekeeping operations, although the example of Mali suggests that ECOWAS is emerging as an independent actor alongside the AU. Moreover, the analysis of ECOWAS further emphasises the need to base the attribution of conduct on a criterion which incorporates the casuistic approach taken to peacekeeping operations as well as in relations among international organisations.

Finally, the lack of any substantive relations between ECOWAS and either NATO, or the UN or EU suggests that there is a security-facilitating triangle of actors evolving, consisting of the AU, the EU and the UN.

2.5. African Union peacekeeping activities

"[W]hat is happening in Darfur is extraordinary. We see there the African Union, the United Nations and Europe, working for peace. And who here can say that either of those organizations would have succeeded alone? We are able to make progress because we are all together, helping Africa, which will believe once again in its future."

- Statement of H.E. President Sarkozy, during the 5749th meeting, 25 September 2007, of the Security Council on the Head of State/Ministerial Level (France presiding)[396]

"Africa is no longer a private hunting ground; it is no longer anyone's backyard; it is no longer a part of the Great Game; and it is no longer anyone's sphere of influence: Those are the few simple rules that will allow the continent to shoulder its responsibility and to demonstrate inter-African solidarity."

- Statement of H.E. Mr. Alpha Oumar Konaré, Chairman of the African Union Commission, replying (partially) also to the Statement of President Sarkozy, in the very same meeting of the Security Council.[397]

1. Introduction

The African Union was established in 2000 succeeding to the OAU and "[c]onscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda."[398] The establishment of a new organisation was also motivated by the African trauma of the "1994 genocide in one small country [which] ultimately triggered a conflict in the heart of Africa that has directly or indirectly touched at least one-third of all the nations on the continent."[399] In its conclusions, the International Panel of

[396] Security Council 5749th meeting, UN Doc. S/PV.5749 (2007), 15.
[397] *Ibid.*, 17. The quotation should not be interpreted as excluding the willingness of the AU to cooperate with any other (international) actors, but simply of an assertion that African issues shall not be dominated by external actors. Indeed, as he says "Africa's responsibility (…) is essential", *ibid.* In his statement, Konaré likewise said that "the partnership between the African Union and the United Nations must be developed. The hybrid operation opens the way for that, and I believe that that indeed is the path to take in the future", *ibid.*
[398] Preamble of the Constitutive Act of the African Union (2000). Indeed, the United Nations system might not be able to prevent the outbreak of internal disturbances or of internal armed conflicts, W. Heintschel von Heinegg, 'The Impact of Law on Contemporary Military Operations – Sacrificing Security Interests on the Altar of Political Correctness?', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1177, 1178.
[399] Organization of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events* (2000), Introductory Chapter, para. 3.

Eminent Personalities, investigating the genoice in Rwanda, was convinced that the Organisation of African Unity needed "to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations."[400]

It required the financial backing and guidance of Libya to move to end the OAU and "to replace it with the African Union which incorporates powers which go beyond what had earlier been appropriated by ECOWAS."[401] The objectives of the African Union laid down in Article 3 include to "encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights" and to "promote peace, security, and stability on the continent."[402] In the 50th Anniversary Solemn Declaration, the Member States of the AU reconfirmed their determination to "end all wars in Africa by 2020."[403]

2. The AU's normative framework for the maintenance of international peace and security

The normative nramework and the political aims of the African Union are partly based on those of the OAU. The regime for maintaining peace and security in the African Union is decentralized, the power to act "is delegated to various actors, they act in conjunction with the Peace and Security Council which is the pivot of the system",[404] including the Assembly and the Executive Council.

The Assembly of Head of States and Government shall – under Article 9(1)(b) of the Constitutive Act "receive, consider and take decisions on reports and recommendations from the other organs of the Union". In the rules of procedure of the Assembly[405] it is specified in Article 4 that the Assembly shall

> d) give directives to the Executive Council, the PSC or the Commission on the management of conflicts, wars, acts of terrorism, emergency situations and the restoration of peace;
>
> e) decide on intervention in a Member State in respect of grave circumstances namely, war crimes, genocide and crimes against humanity;

Article 9(2) of the Constitutive Act says that the Assembly may delegate any of its powers and functions to any organ of the Union which contrasts with the Solemn Declaration on a Common

[400] *Ibid.*, Conclusions at Chapter 24.
[401] Allain, *supra* note 349, 237, 264.
[402] Article 1 (e), (f).
[403] 50th Anniversary Solemn Declaration by Heads of State and Government of the African Union assembled to celebrate the Golden Jubilee of the OAU/AU, 5, para. E.
[404] Allain, *supra* note 349, 237, 277.
[405] Rules of Procedure of the Assembly of the Union (2002).

African Defence and Security Policy which provides that the Peace and Security Council "is the appropriate organ to which the Assembly will delegate its powers relating to peace and security."[406]

The AU has established a whole framework for maintaining international peace and security on the African continent in the form of the African Peace and Security Architecture (APSA) going beyond the Mechanism for Conflict Prevention, Management and Resolution which already existed in the OAU and the competences of the organisation under its Constitutive Act. Indeed, the AU effectively amended the Constitutive Act in 2002, two years after its foundation with the adoption of the Protocol establishing the Peace and Security Council of the AU, conscious that the previous mechanism with its focus on preventive diplomacy was not sufficient to confront and deal efficiently with current security challenges on the African continent.[407] The OAU which strongly adhered to the principles of sovereignty and non-intervention was ill-equipped in facing new security challenges in the form of intra-state conflicts involving violent civil wars and mass atrocities.[408] The African Peace and Security Architecture (APSA) comprises the Peace and Security Council as the highest authority of the African Union.[409] Other components imply the Common African Security and Defence Policy, the Military Staff Committee, the African Standby Force and the Panel of the Wise.

The preamble of the Protocol establishing the Peace and Security Council[410] articulates a commitment to the principles of the United Nations, but also to the importance of developing international cooperation between the United Nations, other international organisations and the African Union:

> Mindful of the provisions of the Charter of the United Nations, (…) on the *role of regional arrangements or agencies in the maintenance of international peace and security*, and *the need to forge closer cooperation* and partnership between the United Nations, other international

[406] Solemn Declaration On a Common African Defence and Security Policy, para. 15.
[407] C.R. Majinge, 'Regional Arrangements and the Maintenance of International Peace and Security: The Role of the African Union Peace and Security Council', in (2010) 48 *Canadian Yearbook of International Law/Annuaire canadien de droit international*, 97, 114-115.
[408] S. Dersso, 'The African Peace and Security Architecture', in T. Murithi (ed.), *Handbook of Africa's International Relations* (2014), 51, 51.
[409] See generally K. Sturman, A. Hayatou, 'The Peace and Security Council of the African Union: From Design to Reality', in U. Engel, J. Gomes Porto (eds.), *Africa's New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (2010), 57-76.
[410] The Protocol establishes "the continent's first continent-wide, regional collective security system", J. I. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council : The Case of Darfur, Sudan', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality. A Need for Change?* (2005), 213, 213, 218.

> organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa; [Emphasis added][411]

The Peace and Security Council has a fairly broad mandate reaching from anticipation and prevention of conflicts to peace-building and post-conflict construction,[412] some of the functions of which are exercised by the Peacebuilding Commission of the United Nations. As stated in the Constitutive Act of the African Union, cooperation with the United Nations and other (regional) international organisations is a key issue in the agenda for maintaining international peace and security. Consequently, the Peace and Security Council has the mandate to "promote close harmonization, co-ordination and co-operation between Regional Mechanisms and the Union in the promotion and maintenance of peace, security and stability in Africa" and it shall also "promote and develop a strong partnership for peace and security between the Union and the United Nations and its agencies; as well as with other relevant organizations."[413] The predecessor of the African Union, the OAU, was explicitly recognised as a regional organisation under Chapter VIII of the United Nations Charter on the basis of Security Council Resolution 199[414] and there are no contrary arguments why the African Union does not fall under Chapter VIII.[415]

[411] Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).
[412] Article 3 of the Protocol.
[413] Article 7 j., k. of the Protocol. In detail it is set out in Article 17 which is as follows:
ARTICLE 17
RELATIONSHIP WITH THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
1. In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.
2. Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Unions' activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security.
3. The Peace and Security Council and the Chairperson of the Commission shall maintain close and continued interaction with the United Nations Security Council, its African members, as well as with the Secretary-General, including holding periodic meetings and regular consultations on questions of peace, security and stability in Africa.
4. The Peace and Security Council shall also cooperate and work closely with other relevant international organizations on issues of peace, security and stability in Africa. Such organizations may be invited to address the Peace and Security Council on issues of common interest, if the latter considers that the efficient discarge of its responsibilities does so require. Cf. also Article 13 (4).
[414] Security Council Resolution 199 (1964), Preamble and para.6.
[415] Hummer, Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', *supra* note 190, 807, 828-38.

3. Article 4 of the Constitutive Act of the UN and the United Nations Charter

The objectives of the African Union in the domain of peace and security include the defence of "the sovereignty, territorial integrity and independence of its Member States". In Article 4 of its Constitutive Act, these broad aims are qualified and specified. The principles of the African Union in Article 4 of the Constitutive Act comprise

> (d) establishment of a common defence policy for the African Continent;
>
> (e) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
>
> (f) prohibition of the use of force or threat to use force among Member States of the Union;
>
> (g) non-interference by any Member State in the internal affairs of another;
>
> (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;
>
> (i) peaceful co-existence of Member States and their right to live in peace and security;
>
> (j) the right of Member States to request intervention from the Union in order to restore peace and security.

The codification of these principles by the AU in its framework for maintaining international peace and security is once again explained by the shock about the 1994 genocide in Rwanda and by the passive attitude of the "international community" which prompted notably the elaboration and the wording of Article 4 (g):[416] It "provided clear evidence, in the view of African states, that [sic] they should seek to rely on their own forces in such circumstances."[417]

[416] A panel of eminent persons asked to investigate the Genocide in Rwanda by the Organisation of African Unity came to the conclusion that members of the Security Council, especially France and the United States "consciously chose to abdicate their responsibility for Rwanda", Organization of African Unity, *supra* note 399, para. 13.1. Similarly, Kioko, *supra* note 355, 807, 812. These dispositions are also considered to represent an inclusion of the concept of Responsibility to Protect in the Constitutive Act, Derblom, Hagström, Frisell, *supra* note 142, 29. The Mechanism for Conflict Prevention, Management and Resolution adopted by the OAU in 1993 at its Cairo Summit, "maintained some characteristics of the CSSDCA, including the clause on noninterference in the internal affairs of member states, which was one of the guiding principles of the OAU at its establishment in 1963. A key reason for the failure of the mechanism was the retention of this noninterference clause, which illustrated the continued unwillingness of African leaders to address internal conflicts. This in turn accounted for the lack of a strong OAU capacity to undertake sustained peacekeeping missions and its deferral of that crucial role to the UN and subregional organizations. The mechanism did, however, inspire the development of peacekeeping partnerships with the still evolving regional organizations, which had begun to broaden their focus beyond economic development as conflict increased—e.g., the Economic Community of West Africa States' (ECOWAS) peacekeeping role in Liberia.", International Peace

The Amendments to the Constitutive Act of the African Union led to the addition of a fourth alternative and a qualification to Article 4 (h) of the Constitutive Act, which is the "right of the Union to intervene in a Member state (…) in respect of grave circumstances, namely (…) a serious threat to legitimate order."[418] The first three options for intervention are based on crimes as defined under international law. Nevertheless the amendment with regard to the inclusion of a fourth option raises concern as both the AU's Constitutive Act and the PSC Protocol fail to indicate by whom, how and when the existence of these "grave circumstances" has to be determined.[419] As to the application of the first three options of Article 4 (h), any intervention by the AU prior to a legal determination of the commission of crimes would not be lawful under AU law.[420] However the fourth new cause for intervention raises even more questions as it is itself undefined. Two former legal counsels of the AU suggest that it covers, *inter alia*, severe violations of human rights amounting to crimes under international law, but that it would then be necessary to establish the threshold triggering its application,[421] a point which is taken up by the Solemn Declaration on a Common African Defence

Institute, Operationalizing the African Standby Force (2010), 4. Muhire argues that the provision of Article 4 (h) was also inspired by the legal framework and practice of ECOWAS, Y. G. Muhire, *The African Union's right of intervention and the UN system of collective security* (2013), PhD Thesis Utrecht University, 193.

[417] Sands, Klein, *supra* note 21, 250. Other authors see the transformation of the Organisation of African Unity (OAU) to the African Union as prompted by the Rwandan Genocide, A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', (2007) 54 *Netherlands International Law Review*, 415, 416. It is also argued that the success or failure of the OAS was also intertwined with the weaknesses or strengths of the African head of states as it is already stated in the preamble of its Charter that "We, the Heads of African States and Governments". This "underscores the predominant role that the African heads have played in the formation of the OAU". In contrast, the United Nations Charter starts with "We, the peoples of the United Nations…", P. M. Munya, 'The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation', (1999) 19 *Boston College Third World Law Journal*, 537, 543. It is nevertheless a startling and quick change of paradigm as due to the legacy of colonialism on the African continent, the African States and the OAS adhered strictly to the principle of non-intervention, Doktori, *supra* note 353, 329, 333. See also J.-M. Iyi, 'The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes and the UN Charter', in (2013) 21 *African Journal of International and Comparative Law*, 489, 491-492.

[418] Protocol on Amendments to the Constitutive Act of the African Union (2003), Article 4.

[419] Muhire, *supra* note 416, 194. In Muhire's view a determination by the not yet operating African Court of Justice and Human Rights with regard to the first three options for intervention under Article 4 (h) would not be functional. The "meteoric speed" with which these crimes are perpetrated would lead the Court to intervene after the crimes have been already committed, *ibid.* 194-195.

[420] Ibid., 195.

[421] The drafting history of the constitutive act also suggests that the members of the African Union wanted to limit the right of intervention to the grounds listed in Art. 4 (h) of the Constitutive Act. According to the Legal Counsel of the AU at that time "the Charter place[s] particular emphasis on the principles of sovereign equality and territorial integrity. (…) The limitation of the grounds for intervention to war crimes, genocide and crimes against humanity was predicated on the understanding that these acts are now generally recognized as violations of international law (…) As it presently stands, therefore Article 4(h) is in line with current international law", T. Maluwa, 'The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?', (2004) 99 *Proceedings of the Annual Meeting – American Society of International Law*, 232, 236. His successor in office takes a similar stand but adds that the competent organs of the Union will have either to establish threshold criteria, justifying an intervention along the guidelines as proposed by the ICISS Report on *The Responsibility to Protect* or on a case-by-case basis, Kioko, *supra* note 355, 807, 818.

and Security Policy.[422] The indeterminate nature may nevertheless prove to be beneficial for the work of the organisation. In a similar fashion, the Charter of the United Nations does not define "threat to the peace", "breach of the peace" and "act of aggression", which has enabled the General Assembly and the Security Council to interpret the Charter in ways that "facilitate fulfillment of the purposes for which the organisation was established."[423] A similar approach can be expected by the African Union, which is also subject to other constitutional limitations.[424] It is also argued by the legal adviser of the AU that the fourth alternative allows the Assembly to decide upon an intervention when the requirements of the other three provisions are not applicable, making it a mere emergency solution.[425] This does not cover cases such as "intervening to keep in power a regime that (…) commits gross and massive violations of human rights or refuses to hand over power after losing elections [which] is not in conformity with the values and standards that the Union has set for

[422] The Solemn Declaration on a Common African Defence and Security Policy (2004) hints at those circumstances under which the AU might intervene; it lists under common security threats in an intra-state conflict, *inter alia*, a lack of respect for the sanctity of human life, impunity, political assassination, acts of terrorism and subversive activities. Furthermore, it included coup d'états and unconstitutional changes of government. ibid., para. 8 (ii) (f), (g).

[423] Maluwa, *supra* note 421, 232, 237. It is suggested that the "lack" [of definition] was intentional. At San Francicso an area of discretion was left to the Council (…) In practice the problem may be one of acquiring accurate factual knowledge of events rather than one of legal definition", P. Sands, P. Klein, Bowett's Law of International Institutions (2001), 51 – 52.

[424] Similarly Baimu and Sturman say that "[i]n the absence of an African Court of Justice, the issue of interpretation of what would constitute a serious threat to legitimate order will fall upon the Assembly of the Union", E. Baimu, K. Sturman, 'Amendment to the African Union's Right to Intervene: A Shift from Human Security to Regime Security', (2003) 12 *African Security Review*, 37, 38. Speaking on a constitutional level, the amendment to Article 4 (h) of the Constitutive Acts bears certain challenges as well. Due to the amendments to Article 4 (h) of the Constitutive Act, the Peace and Security Council has to recommend an intervention before the Assembly can decide to do so. However, the Protocol establishing the Peace and Security Council predates the amendments to the Constitutive Act so that it only lists in Article 7 (1) (e) the previous three provisions under which the AU can intervene. Consequently, the Council possesses the power or rather the competence to recommend an intervention in the case of a serious threat to the legitimate order under its founding Protocol, but under the amended Constitutive Act. The same reasoning applies to Articles 4 (j) and 6 (d) of the Protocol establishing the Peace and Security Council. Formally speaking, it is thus doubtful if such a recommendation to intervene would be in accordance with AU law in a constitutional sense. However, as the founding document of the African Union, the Constitutive Act is thought to be at the top of the hierarchy of the internal law of the organisation and on the basis of a systematic interpretation, taking into account an argument for the effective functioning of the organisation, one can tentatively conclude, that the African Union can formally intervene in such a case.
As to the African Court of Human Rights it has been merged with the African Court of Justice which was supposed to be set up by a Protocol adopted in 2003, but until now it has not been functioning. According to Article 2 of the Statute of the African Court of Justice and Human Rights, it shall be the main judicial organ of the African Union. Article 28 of the Statute specifies that its jurisdiction covers the application and interpretation of the Constitutive Act and other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union.

[425] Kioko, *supra* note 355, 807, 815. He explains further that "[t]he addition to Article 4 (h) was adopted with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent, without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of member States. It should be borne in mind that the Peace and Security Council was intended, and should be able, to revolutionize the way conflicts are addressed on the continent", *ibid*. 817.

itself."[426] On the contrary – *argumentum a forteriori* – the African Union should intervene in such cases to guarantee the transfer of power to the newly elected governments.

A much more heated debate, particularly within the legal scholarship has however been caused by the question of whether the provisions of Article 4 (h) of the Constitutive Act are in conformity with the United Nations Charter and particularly Article 2 (4). It has to be accepted that the constitutional framework of the AU does not expressly refer to the use of force or armed military intervention,[427] but bearing in mind that any intervention under Article 4 (h) will respond to war crimes or to the existence of grave circumstances, which is considered to cover similar severe violations of human rights law, one may presume that any such intervention will involve the use of force.[428] The UN Charter prohibits the use of force except in self-defence under Article 51 and enforcement action under Chapter VII. Article 4 of the Constitutive Act does not stipulate that an authorisation of the Security Council is necessary in order for the AU to intervene in a Member State on the basis of Article 4 (h).[429]

One author refers implicitly to the debate on universalism and regionalism during the drafting of the Charter and states quite harshly that this empowerment of enforcement action by the African Union is "the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council."[430] According to this view, the right to intervene of the AU corresponds to the denial of the AU vis-à-vis the Security Council's primary responsibility for maintaining international peace and security as enshrined in Article 24 of the UN Charter.[431]

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[426] Kioko, *ibid.*, 807, 816.

[427] Muhire, *supra* note 416, 201.

[428] K. Kindiki, 'Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives', ISS Monograph Series, n° 131, 46.

[429] One has to emphasise that the procedure to intervene does not foresee an obligation for the African Union to seek an authorisation of the Security Council after the triggering of a military intervention, neither is Chapter VIII of the United Nations Charter mentioned, Boisson de Chazournes, *supra* note 185, 79, 289.

[430] Allain, *supra* note 349, 237, 238. More generally, it is important to note, that the predecessor of the AU, the OAU refused to carry out certain sanctions against Libya which were imposed by the United Nations Security Council, cf. Sands, Klein, *supra* note 21, 250, fn. 15. Sands and Klein conclude that "it cannot be excluded that such a course of conduct might influence the practice of other regional organizations which may be concerned about the legality of some of the decisions taken by the UN Security Council, particularly in the absence of any system of checks and balances or of judicial review of its acts", *ibid*. It should be emphasised that the procedure to intervene does not explicitly foresee an obligation for the African Union to seek an authorisation of the Security Council, whether prior or after the triggering of a military intervention, neither is Chapter VIII of the United Nations Charter mentioned, Boisson de Chazournes, *supra* note 185, 79, 289.

[431] Erika de Wet submits that "by making a determination in terms of Article 4 (h) of the Constitutive Act, the AU effectively replaces (or displaces) the role of the Security Council in relation to Article 39 of the Charter", E. de Wet, 'The United Nations Collective Security System in the 21st Century: Increased Decentralization through

Other authors have interpreted this disposition as an internal authorisation clause which establishes the constitutional competence of the AU to undertake such an operation in the case of the existence of an authorisation from the Security Council.[432]

In the specific context of this debate, it is also disputed whether the consent of the state in which intervention takes place, has a bearing upon the legal determination of the intervention as legal or illegal.

On the one hand, Article 3(a) of the African Union Non-Aggression and Common Defence Pact is more restrictive than Article 2 (4) of the Charter of the United Nations, as it covers the prohibition of the use of force "in matters *between [states]* and *within* them."[433] It so seems that this disposition prohibits the African Union from conducting an intervention that is as prohibited under Article 2 (7) of the United Nations Charter, but with the difference that the latter allows for intervention in cases of an authorisation granted by the Security Council under Chapter VII of the Charter.[434]

On the other hand, it is also argued in legal writings that the AU can intervene, in similar fashion as the United Nations under Article 2 (7) of the UN Charter, in cases of where no consent is given by the concerned state.[435] Upon closer inspection, this view cannot, however, withstand legal scrutiny.[436] First of all, a distinction of a peremptory and a non-peremptory part of the prohibition of the use of force in this specific case, with the latter being based on consent by being a member of the regional organisation whose charter authorises such an action would exempt all organisations from the requirement of seeking an authorisation by the Security Council and it would run "clearly against the

Regionalization and Reliance on Self-Defence', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1553, 1559.

[432] Boisson de Chazournes, *supra* note 185, 79, 290.

[433] Abass, *supra* note 417, 415, 425.

[434] *Ibid.*, 415, 425; A. Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004), 183-208. Muhire also argues that Article 4(h) of the AU Constitutive Act is not in violation of the content of Article 2(4) of the UN Charter as any intervention under the first three options would not aim at attacking the territorial integrity or political independence of states. The AU members would have otherwise not accepted the disposition. However, any such intervention would be incompatible with Article 2(7) of the UN Charter, Muhire, *supra* note 416, 229-230.

[435] S. A. Dersso, 'The Role and Place of Human Rights in the Mandate and Works of the Peace and Security Council of the AU: An Appraisal', in (2011) 58 *Netherlands International Law Review*, 77, 84. So, Yusuf argues that the distinction in Article 13 of the Protocol between peace and support operations and interventions "implies that the intervention is used (…) in the sense of coercive action involving armed force in a Member State without the consent of the government of that state.", A. A. Yusuf, 'The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?', in (2003) 11 *African Yearbook of International Law*, 3, 9.

[436] The vast majority of legal doctrine agrees that there is a conflict between the AU and the ECOWAS regime and the relevant dispositions of the UN Charter. See, with further references, Iyi, *supra* note 417, 489, 515-516.

purpose of Art. 53 (1)" of the UN Charter.[437] Moreover, the AU members *per se* would be violating Article 103 of the UN Charter while intervening in an AU member state on the basis of Article 4 (h), without Security Council authorisation.[438]

Nevertheless, one has to take into account that Article 4 and especially its paragraph (h) are at the core of the system of maintenance of peace and security as set up by the different instruments of the African Union. As it is argued by one author, the competences the African Union is endowed with under Article 4 (h) of the Constitutive Act are broader than the competences of the Security Council allocated under Chapter VII of the Charter, in the sense that even if the African Union were to comply with the UN Charter, it could nevertheless act in that area which is outside the jurisdiction of the Security Council. The Security Council can only authorise the use of force on the basis of a determination of the existence of one of the three possibilities under Article 39 of the Charter so that the question

> whether the AU subordinates itself or not (…) is immaterial to the possibility of the UN Security Council authorizing actions with respect to the provisions of Article 4 (h) as these four pretexts allowing for the use of force go beyond the Council's competence to act under Chapter VII.[439]

Indeed, further dispositions of the legal framework of the AU suggest that a right to intervene without a Security Council authorisation might have been envisaged by the drafters something that is

[437] C. Walter, 'Article 53', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1478, 1491 mn. 37. Cf. Abass, *supra* note 417, 415, 425. Muhire correctly points out that the unilateral use of force in the form of a humanitarian intervention by a state or a group of states acting collectively as a response to human rights violations is not accepted under current international law , Muhire, *supra* note 416, 229.

[438] Levitt argues that Article 103 of the Charter would not prevail over the obligations of the AU Charter as codified customary law, Levitt, 'The Peace and Security Council of the African Union', *supra* note 410, 213, 234. His argument is, however, not convincing. As the ICJ made clear in its Nicaragua ruling regarding the right to self-defence, a right under customary law can exist independently of the same right arising under an international instrument and thus, at least as the treaty rule is concerned, Article 103 would prevail. Due to the *jus cogens* and *erga omnes* character of the prohibition of the use of force, member states of the AU are prohibited from conferring powers to the AU whose exercise would correspond to a violation of their obligations under the UN Charter, T. Gazzini, *The changing rules on the use of force in international law* (2005), 114.

[439] Allain, *supra* note 349, 237, 282-283. Under ECOWAS law, new grounds as exceptions to the prohibition of the use of force under Article 2 (4) include internal conflicts threatening humanitarian disasters or sub-regional peace and security, massive violations of human rights and the overthrow or attempted overthrow of democratically elected governments, cf. also Iyi, *supra* note 417, 489, 497. To the extent that the AU and ECOWAS norms for military intervention deal with intra-state cases, they "are arguably outside the scope of article 2(4) of the Charter, which only regulates the use or threat of force in inter-state relations by UN Member States", *Iyi, ibid.*, 500. That point is also taken up by the Secretary-General in his report when he poses the question: "[H]ow far can the United Nations go to support decisions taken by regional organisations outside the remit of the Security Council? What types of authority does the Security Council delegate to regional organizations?", Report of the Secretary-General on the relationship, *supra* note 11, 7, para. 10.

not surprising if one bears in mind that the failure of the UN to act in Rwanda was one of the reasons which motivated the transformation of the OAU to the AU.[440]

This eagerness for independence of the African Union vis-à-vis the Security Council is clearly abdicated in the Protocol establishing the Peace and Security Council. The Preamble of the Protocol stipulates the determination to enhance the "capacity to address the scourges of conflicts on the Continent and *to ensure that Africa, through the African Union, plays a central role in bringing about peace, security and stability on the Continent*" [Emphasis added]. The intentions of the drafters are made even clearer in Article 16 of the Protocol according to which "[t]he Regional Mechanisms are part of the overall security architecture of the Union, *which has the primary responsibility for promoting peace, security and stability in Africa*" [Emphasis added]. This is a blunt and honest contradiction to Article 24 of the UN Charter but it can be questioned whether it truly "makes plain the dislodging of the United Nations Security Council from its primary responsibility for the maintenance of international peace and security" as it is suggested by Allain. [441]

First of all, the Article refers to the primary responsibility of the AU for the maintenance of international peace and security *only* in the context of its relations with the Regional Mechanisms; the (sub)-regional organisations on the African continent.[442]

This apparent contradiction of Article 4(h) of the AU Constitutive Act with the UN Charter is weakened or even remedied also by other clauses in the legal framework of the AU. According to Article 17 of the 2005 African Union Non-Aggression and Common Defence Pact, no position taken by the AU shall be considered as "derogating in any way from the obligations of Member States contained in the United Nations Charter (…) and from the primary responsibility of the United Nations Security Council for the maintenance of international peace and security."

[440] The right to intervention "occasioned some spirited debate in the ministerial deliberations" during the drafting of the Constitutive Act, but "[t]he implications of these provisions for the requirement of prior authorization by the UN Security Council of enforcement action by regional organizations (…) under Article 53 of the UN Charter were not addressed", T. Maluwa, 'Reimaging African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union', (2001) 9 *African Yearbook of International Law*, 3, 28. It appears more plausible that it was not simply forgotten, but that there was implicitly already consensus on its signification. Still in 2005 the AU stated in a document on the proposed UN Reform that "any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act, should be prohibited", Executive Council, 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ext/EX.CL/2 (VII), The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus", 6, para. B ii. Nevertheless, this document does not pronounce itself on the question whether an authorisation of the Security Council would be necessary. Furthermore, the UN Secretariat had provided political and legal expertise in the elaboration of the Protocol, L. Gelot, 'African Regional Organizations, Peace Operations and the UN', in P. Wallensteen, A. Bjurner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 137, 143.

[441] Allain, *supra* note 349, 237, 275.

[442] Omorogbe, *supra* note 296, 35, 41.

The Protocol relating to the Establishment of the Peace and Security Council also ascertains that "the Peace and Security Council shall also cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security."[443] Thus, it is argued – on the basis of a harmonious interpretation – that these references to the United Nations Charter qualify the right of intervention of Article 4 h).[444] While it is unclear whether under *AU law*, the AU has to seek an authorisation from the Security Council, "this does not necessarily suggest that the intention was for Article 4 (h) to operate ouside of the limits set under the UN Charter."[445]

On the contrary, distinguishing between the internal law of the AU of which the Protocol is part[446] and general international law, it is submitted that the authorisation of the AU to intervene under its internal law is necessary as the AU would be otherwise acting *ultra vires* under its own law should it be authorised by the Security Council to resort to enforcement action against one of its members.[447] An additional benefit of that harmonious interpretation is that an authorisation of the Security Council given to the AU to intervene will, arguably, help the latter to shed some light on the meaning of "a serious threat to legitimate order."[448] Other interpretations of the right to intervention argue for a necessity of an *ex post* authorisation only or an emerging customary norm which – given the lack of sufficient practice and its obscurity – is not convincing.[449] Without an authorisation of the

[443] Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002), Art. 17. One has to note that the Security Council has been meeting regularly with the Peace and Security Council since 2007, Thematic evaluation of cooperation, *supra* note 65, 14, para. 44.
[444] Boisson de Chazournes, *supra* note 185, 79, 290.
[445] Dersso, *supra* note 435, 77, 85.
[446] At the internal AU law level, the member states of the AU have given their prior consent to any intervention as they have freely signed the treaty. Therefore Naert suggests that there are more compatibilities than tensions with the United Nations Charter, Naert, *supra* note 53, 244.
[447] This equally takes into account the classic understanding of Article 103 of the Charter on the basis of which obligations under the United Nations Charter trump other obligations of member states under treaty law. This article is not applicable to international organisations (see also *infra* 1.3.). Against this interpretation, cf. Maluwa, *supra* note 421, 232, 238. Allain argues that the actions of the Peace and Security Council are not subordinated to those of the Security Council., Allain, *supra* note 349, 237, 265.
[448] The Problem with the interpretation of Article 4 (h) of the PSC Protocol became evident in the Darfur crisis when the AU, confronted with the allegations of the existence of grave circumstances including genocide, "took a position without any established mechanisms for ascertaining the existence of such circumstances." The PSC held, without any thorough analysis that "even though the crisis in Darfur is grave, with the attendant loss of lives, human suffering and destructions of homes and infrastructure, the situation cannot be defined as a genocide", Communiqué of the 12th Session of the PSC, AU Doc. PSC/MIN/Comm.(XII) (2004), para.2; Dersso, *supra* note 435, 77, 99. Darfur created another dilemma for the PSC as "in the force of a strong government, the PSC was forced to try to implement the promise of protection that Article 4(h) carries while trying to secure and maintain the support of the government for its intervention. This brings to light that, notwithstanding the law, in practical terms the AU PSC could not, or may not in the foreseeable future, implement the principle of intervention without the consent of the state, particularly where that state possesses some military might.", Dersso, *ibid.*, 100.
[449] Boisson de Chazournes, *supra* note 185, 79, 291-4. Cf. Muhire, *supra* note 416, 241.

Security Council, the AU's right to intervene under Article 4 (h) is "in breach of the collective security system as envisaged under Chapters VII and VIII of the UN Charter, in particular Article 53."[450]

The practice of both organisations also illustrates very clearly that an authorisation of the Security Council for intervention by the AU for measures going beyond traditional peacekeeping operations is considered to be necessary. In a statement by the President of the Security Council it was stressed that "in some cases, the African Union may be authorized by the Security Council to deal with collective security challenges on the African continent."[451] The Security Council and several of its members have repeatedly emphasised the role that the Council holds at the apex of the collective security system.[452]

Moreover, in practice, Article 4 (h) has never been invoked by the AU, not even in Darfur nor in respect of Libya in 2011, despite deliberate and systematic attacks on civilians in both countries.[453] Two authors argue that the inactivity of the AU was due to the fact that the organisation recognises the concept of the Responsibility to Protect, but simultaneously upholds state sovereignty, leaving the AU in a predicament.[454] It might be more plausible that the inactivity of the AU was due to pragmatic reasons such as political disagreement within the AU or simply the lack of financial and other resources to act independently. Indeed, the financial burden of the AU as well as the troop contributions to peacekeeping operations rest on the shoulders of a few African states, whereas most of the African states "have been reluctant to substantiate their political and financial

[450] Muhire, *ibid.*, 237.

[451] Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2007/7 (2007), 2. In its Resolution 1631, the Security Council, while also referring generally to African regional organisations, declared that "contribution [of regional organisations] must be made in accordance with Chapter VIII of the Charter", Security Council Resolution 1631, UN Doc. S/RES/1631 (2005), Preamble. In a Presidential Statement, the Security Council equally stressed that "in accordance with Article 54 of the Charter of the United Nations, the need for the African Union at all times to keep the Security Council fully informed of these efforts in a comprehensive and coordinated manner." The contributions of the African Union were also welcomed and acknowledged in the verbal records of the 5868th meeting, see, for example, the statement by the Representative of China who said "[w]hile maintaining its authority, the Security Council should give priority to supporting the key role of the African Union in resolving regional conflicts and should give full consideration to the views of the African Union." Equally, France said "the relations developing between the Security Council, on which the United Nations Charter confers the primary responsibility for the maintenance of international peace and security, and the African Union Peace and Security Council are a good illustration of cooperation between the two organizations" and "the United Nations Charter confers on the Security Council the primary responsibility for the maintenance of international peace and security. Chapter VIII of the Charter also provides for the role of regional organizations in that respect", Security Council, 5868th meeting, UN Doc. S/PV.5868 (2008), 11, 20.

[452] See for example Security Council Resolution 1631 (2005), UN Doc. S/RES/1631 (2005), Preamble; Statement by the President of the Security Council, UN Doc. S/PRST/2009/3 (2009), See also, *infra* Chapter I, 1.3.

[453] Rodt, Okeke, *supra* note 297, 211, 219.

[454] *Ibid.* See also, Franke, Gänzle, *supra* note 297, 88, 102.

commitment vis-à-vis the AU."[455] In any case, the practice shows that the African states themselves have defended the view that the Security Council has the primary responsibility for maintaining international peace and security which includes any possible consideration of a military intervention for humanitarian purposes. [456] In similar fashion, individual African states have expressed the necessity to remain within the ambit of Chapter VIII of the UN Charter with regard to any right of intervention; the extensive analysis by Corten in this context contains references to statements by not less than 20 African states.[457] Among these states are some which are also members of ECOWAS.[458] The AU itself states that it acts under Chapter VIII for the purpose of peacekeeping operations and therefore adheres to the system of the Charter. [459] Consequently, despite the apparent contradiction between Article 4(h) of the Constitutive Act of the AU and international law, this appears to have little impact in practice; the latter demonstrates an adherence to the system of collective security as was envisioned by the drafters of the UN Charter in 1945.

The most relevant feature is nevertheless that the AU PSC, in terms of the organisation's internal law and policy also, "*constitutes a legitimate mandating authority under Chapter VIII of the UN Charter. In this regard, the AU will seek UN Security Council authorisation of its enforcements actions. Similarly, the RECs/Regions will seek AU authorisation of their interventions.*"[460] [Emphasis added] In

[455] Franke, Gänzle, *ibid.*, 88, 102.

[456] O. Corten, 'L'Union africaine, une organisation régionale susceptible de s'émanciper de l'autorité du Conseil de sécurité? Opinio Juris et pratique récente des Etats', European Society of International Law Conference Paper Series, Conference Paper No. 11/2012, 5th Biennial Conference, Valencia (Spain), 13 – 15 September 2012 , 6. Among the States which have expressed them accordingly are the USA, the UK, France, China, Russia, for all references, *ibid.*, 7-8.

[457] *Ibid*., 8-9.

[458] The conclusions of the practice that there is general adherence to the system of collective security under the UN Charter are also valid for ECOWAS.

[459] Communiqué of the consultative meeting of members of the Security Council of the United Nations and the Peace and Security Council of the African Union (2008), Annex to UN Doc. S/2010/392/Add.1 (2010), 2, paras. 1, 3, 7 (b); Communiqué of the consultative meeting of members of the Security Council of the United Nations and the Peace and Security Council of the African Union, Annex to UN Doc. S/2010/392 (2010), 2, para. 2; Joint communiqué agreed by the Security Council and the African Union Peace and Security Council, Annex II to S/2007/421 (2007), 29, paras. 1-2. A very clear statement, in this matter came from President Kufuor when he was Chairperson of the AU who urged "the Security Council to view the African Union Peace and Security Council as an extension of the Security Council.", Report of the Security Council mission to Addis Ababa, Khartoum, Accra, Abidjan and Kinshasa, 14 to 21 June 2007, UN Doc. S/2007/421 (2007), 3, para. 12; Statement by Mr. Moses Wetangula, Minister for Foreign Affairs of Kenya and Chair of the Peace and Security Council of the African Union, Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 8.

[460] Experts' Meeting on the Relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, Addis Ababa 22 – 23 March 2005, Roadmap for the Operationalization of the African Standby Force (2005), 5, para. 10; Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee (Part I), Document adopted by the Third Meeting of African Chiefs of Defense Staff, 15-16 May 2003, Addis Ababa, 4, para. 2.2.; African Standby Force, Peace Support Operations Doctrine (2006), p. 2-7, para. 22; Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security. Towards Greater Strategic and Political Coherence, PSC/PR/2.(CCCVII) (2012), 23, para.87.

this sense, the AU therefore acts as the intermediary between the United Nations and ECOWAS for the purposes of maintaining international peace and security.[461]

4. The African Union and the United Nations

1. The early steps – defining their roles in the relationship

The analysis of the legal framework of the AU showed that the AU's mandate to maintain international peace and security is innovative as well as ambitious. However, whether the ambitions of the AU to be the leading figure in maintaining international peace and security on the African continent can be implemented in practice, and especially vis-à-vis the Security Council and on the basis of Chapter VIII of the UN Charter, deserves closer examination. The United Nations had already cooperated with the OAU from the mid 1990s onwards and helped it to develop its capacity for peacekeeping operations and the Mechanisms for Conflict Prevention, Management and Resolution through financial and technical assistance.[462] This tradition of reliance on the United Nations was brought within the AU when it was established in 2000. Indeed, the AU adopted a comparable if not parallel attitude to that of ECOWAS towards the United Nations. The perception was that in so far as the AU safeguards the maintenance of international peace and security on the African continent, the United Nations will provide financial, logistic and military support. The Declaration on a Common African Defence and Security Policy sees the UN in a supportive role towards the AU stating that "[w]here necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union's activities in the promotion of maintenance of peace and security."[463] This approach illustrates that African leaders were willing to "push the standards of collective stability and security to the limit without having any regard for legal niceties

[461] African Union, Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa (2008), Article XX, paras. 1-2. This is also in accordance with ECOWAS law, *infra 1.8.2.*

[462] See Comprehensive review of the whole question of peacekeeping operations, *supra* note 379, 19, 161-166; Cooperation between the United Nations and the Organization of African Unity, Report of the Secretary-General, Addendum, UN Doc. A/48/475/Add.1 (1993), 7-8, paras. 22-24; Report of the Secretary-General on the implementation of Security Council resolution 1625 (2005) on conflict prevention, particularly in Africa, UN Doc. S/2008/18 (2008), 2, para. 7; 3, para. 11; 10-11, paras. 45-46. The focus of the UN was very early concerned with developing the relations and capacity of the (O)AU, and later on also with subregional organisations such as ECOWAS, Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/59/608 (2004), 17, para. 76. See generally, Muhire, *supra* note 416.

[463] One also has to note that the first three paragraphs of Article 17 of the Protocol establishing the Peace and Security Council are copied word for word in the Solemn Declaration on a Common African Defence and Security Policy (2004), paras. 38-39. Cf. also T. Kwasi Tieku, 'The African Union', in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 33, 37.

such as the authorization of the Security Council"[464] and that they held a somewhat depreciatory view of the Council and its role within the system for maintaining international peace and security. In their opinion, the Security Council was "meant to assist the African Union's Peace and Security Council [and] not *vice versa*."[465]

In contrast to the early AU policy towards the UN, the latter's policy towards the African Union has been and remains to support the African Union in the maintenance of international peace and security in Africa and to further develop the "interorganisational" relationship, while nonetheless emphasising that the United Nations and in particular the Security Council have the primary responsibility for the maintenance of international peace and security.[466] One of the motives for the United Nations is to prevent the perception that the United Nations is subcontracting or "out-sourcing" peacekeeping to the African Union.[467] A clear expression of this policy is the recognition by the United Nations of the lack of resources at the disposal of the African Union: "While regional organizations have demonstrated commendable political will to deal with existing and emerging conflicts, timely responses have often been hampered by the lack of critical logistics and financial resources."[468] As four African Union or ECOWAS Peacekeeping Operations have been reassigned to United Nations Peacekeeping operations,[469] there is a conviction within the United Nations that "[t]he African Union's basic assumption is that the African Standby Force will undertake

[464] Kioko, *supra* note 355, 807, 821.
[465] Allain, *supra* note 349, 237, 287; Yamashita, *supra* note 16, 165, 177-178.
[466] "United Nations peacekeeping has undergone an exponential increase since the early 1990s. It has had its successes and its failures but few would argue that it has not made a positive difference. At the same time, the African Union has recognized the need to develop its own capacity to respond to crises on the continent. *There is a significant synergy to be achieved in drawing on the respective capacities of both organizations and exercising the comparative advantage that each can offer. However, this requires that the strategic relationship be clearly defined within the overall context of the Security Council's primary responsibility for the maintenance of international peace and security*" [Emphasis added], General Assembly/Security Council, Report of the African Union-United Nations panel on modalities for support to African Union peacekeeping operations, UN Doc. A/63/666-S/2008/813 (2008), 2, para. 6. The Report of the Secretary-General, while referring to cooperation with ECOMOG in Liberia, stated in a similar fashion "We should not, however, draw the conclusion that such responsibilities can henceforth be delegated solely to regional organizations, either in Africa or elsewhere. Delegation does not represent a panacea for the difficult problems facing peacekeeping", The causes of conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary-General, UN Doc. A/52/871-S/1998/318 (1998), 10, para. 44.
[467] Report of the African Union-United Nations panel, *ibid.*, 13, para. 39.
[468] Report of the Secretary-General on the relationship, *supra* note 11, 11, para. 31; A similar conclusion was reached in the Capacity Survey on Regional and Other Intergovernmental Organizations in the Maintenance of International Peace and Security (2008) produced by the United Nations University – Comparative Regional Integration Studies (UNU-CRIS). The report mentions an inadequate number of staff and level of qualification, payment arrears, 22-23; This major gap between the willingness of the PSC to authorise missions and its capacity to implement operations is also recognised by the AU, African Peace and Security Architecture (APSA), 2010 Assessment Study,26, para. 68. Cf. T. Murithi, 'The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur', in (2009) 14 *Journal of Peace, Conflict and Development*, 1, 15.
[469] Capacity Survey on Regional and Other Intergovernmental Organizations, *ibid.*, 26.

peacekeeping activities with a view, in due course, to handing them over to the United Nations."[470] Primarily due to the support of the EU through the African Peace Facility, the African Standby Force attained Initial Operational Capacity in 2010 and is expected to achieve Full Operational Capacity in 2015.[471]

2. *The World Summit as the catalyser for more institutionalised relations*

The 2005 World Summit Outcome document laid the basis for more institutionalised relations between the United Nations and the African Union using the cooperation between the UN and the EU as a blue-print for fostering a similar relationship.[472] The United Nations pledged to "support the development and implementation of a ten-year plan for capacity-building with the AU." [473] The start of this support came in the form of a Framework Declaration which was adopted a year later in 2006.[474] The main objective is "to enhance the capacity of the AU Commission and African subregional organizations to act as *effective UN partners* in addressing the challenges to human security in Africa."[475] [Emphasis added] This objective is significant for several reasons. First of all it stressed that the United Nations and the African Union are seen as partners rather than in a

[470] Report of the Secretary-General on the relationship, *supra* note 11, 11, para. 29.
[471] R. Poulton, E. Trillo, L. Kukkuk, *Part 1 of the African Peace Facility Evaluation: Reviewing the Procedures of the APF and Possibilities of Alternative Future Sources of Funding. Final Report* (2010), 12; Report of the Chairperson of the Commission, *supra* note 460, 8-9, para. 32.
[472] Report of the Special Committee on Peacekeeping Operations and its Working Group, 2006 second resumed session (18 December 2006), 2007 substantive session (28 February-16 March and 23 May 2007), 2007 resumed session (11 June 2007), UN Doc. A/61/19/Rev.1 (2008), 16, para. 92. The World Summit Outcome document included also pledges generally to the development of Africa and recognised the need of a strong African Union and the partnership between the UN and regional organisations, General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), 24, para. 93; Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/60/640 (2005) also called for a consolidation of cooperation with the African from an *ad hoc* to more institutionalised means that facilitated long-term cooperation, 9-10, paras. 29-31.
[473] General Assembly, 2005 World Summit Outcome, *supra* note 472, 23, para. 93 (b). On the basis of this plan, the United Nations and the African Union cooperate "in a wide range of areas including conflict prevention, early warning and electoral assistance, peacekeeping, peacebuilding, governance, human rights, and the rule of law; disarmament, humanitarian response, economic, social, trade and development, human settlements, recovery and food security, education, culture and health.", Capacity Survey on Regional and Other Intergovernmental Organizations, *supra* note 468, 26.
[474] Declaration, Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity Building Programme for the African Union, Annex to UN Doc. A/61/630 (2006).
[475] Declaration, Enhancing UN-AU Cooperation, *ibid.*, para. 2. The operational relationship between the UN Secretariat and the African Union Commission is twofold; implementation of the framework for the 10-year capacity-building programme of the AU as well as country-specific cooperation, Support to African Union peacekeeping operations authorized by the United Nations, Report of the Secretary-General, UN Doc. A/65/510–S/2010/514 (2010), 4, para. 13.

subordinate-superior relationship.[476] The Security Council, in contrast, again demonstrated its flexibility and pragmatic approach in its relations with regional organisations:

> In Africa, integrating the strengths of the United Nations and the African Union has become an indispensable part of the international community's response to crises on the continent. It has proven essential for the United Nations to work in tandem with regional or subregional actors, at times in a lead role, in a supporting role, in a burden-sharing role, in sequential deployments and in joint operations.[477]

In its report on United Nations-African Union cooperation in peace and security to the Security Council, the Secretary-General gave a more detailed description of the necessary pragmatic and flexible policy:

> [a]t the operational level, lessons and experience indicate that there is no generic model for cooperation between the two organizations that can be applied to any situation, and that each situation requires innovative solutions. It is therefore important to ensure that the conceptualization, mandates, rules of engagement and institutional arrangements for each peacekeeping operation are based on the strategic and operational requirements to support a peace process or the effective implementation of a peace agreement. Such arrangements should be predicated on a shared vision of the political process and preserve unity of command and strategic direction, while ensuring the provision of critical resource and capability requirements. To ensure a more coherent framework for global peacekeeping, the United Nations is committed to working with the African Union to harmonize peacekeeping standard operating procedures, including with respect to force generation, planning and mission start-up.[478]

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[476] The Secretary-General calls it a "strategic partnership", Support to African Union peacekeeping operations, *supra* note 292, 2-4, paras. 3-5; 7-10; Support to African Union peacekeeping operations (2010), *ibid.*, 2-3, paras. 3-6. That the United Nations also acts on a level playing field under Chapter VIII can be deduced from a report of the Special Committee: "The Special Committee underlines the need for a strategic and effective relationship between the United Nations and the African Union in the context of peacekeeping operations, in accordance with Chapter VIII of the Charter of the United Nations", Report of the Special Committee on Peacekeeping Operations, 2011 substantive session (New York, 22 February – 18 March and 9 May 2011), UN Doc. A/65/19 (2011), 40, para. 207; Report of the Secretary-General on the implementation of Security Council resolution 1625 (2005), *supra* note 462, 11-12, para. 49.

[477] Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/67/632 (2012), 12, para. 47.

[478] Report of the Secretary-General on United Nations-African Union cooperation in peace and security, UN Doc. S/2011/805 (2011), 17, para. 64. See also Statement by Sweden on behalf of the European Union, Turkey, Croatia, the former Yugoslav Republic of Macedonia, Albania, Montenegro, Ukraine, the Republic of Moldova and Armenia, Security Council, 6178th meeting, UN Doc. S/PV.6178 (2009), 30. Host country consent and security circumstances are important factors in determining which action will be taken: "In Darfur, the United Nations light and heavy support packages for AMIS and the hybrid operation (UNAMID) were the only options available for United Nations intervention with host country consent. With respect to Somalia, the United Nations technical and logistical support to AMISOM was authorized based on the Security Council's expressed intent to deploy a United Nations peacekeeping operation as a follow-on force to AMISOM at the right time

Moreover, this objective underlines the fact that the United Nations– just as the AU – has very high incentives for the AU to transform into an organisation which can effectively implement its mandate as the UN was itself overstretched and reaching the limits of its capacities given the volume of peacekeeping operations with which it had been involved.[479] The regional consultative mechanism established between the United Nations and the African Union provides for consultation and cooperation in different clusters of which one is dealing with peace and security.[480]

3. Aid for self-help by the UN

Two years later, in 2008, the United Nations established a Liaison office facilitating support to the African Union. [481] Particularly relevant for the present study is that specific priorities within the AU-UN cooperation were given to the development of logistical and financial reserves for the AU's rapid deployment capabilities as well as to help the AU in ensuring a common "doctrine and procedures for

under the right conditions", Report of the Secretary-General on United Nations-African Union cooperation, *ibid.*, 10, para. 31.

[479] Cf. e.g. Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/65/680 (2011), 13, para. 54. Furthermore, the "system of relations between the UN Security Council and regional organizations has moved from one of pure subsidiarity to one that involves a combination of subsidiarity (Security Council control over regional action) and complementarity (distribution of tasks in view of the UN system proving unable to handle alone all problems in the sphere of maintenance of international peace and security). The Security Council is viewed more and more often as a control body demonstrating political support, coordination and technical assistance. Even in UN documents, regional organizations are viewed as partners rather than supplements", A. F. Douhan, *Regional Mechanisms of Collective Security. The New Face of Chapter VIII of the UN Charter?* (2013), 138; see Statement by the President of the Security Council, UN Doc. S/PRST/2007/42 (2007); Another motive for striving for increased cooperation is to prevent duplication in the respective other organisation as the "demand for resources is likely to become increasingly competitive as mandates become more complex and expectations are raised. This underlines the need for those involved in the maintenance of international peace and security to work together in effective partnership if they are to achieve their objectives", Report of the African Union-United Nations panel, *supra* note 466, 8, para. 18.

[480] "4 consultative mechanisms at separate levels with the African Union on peacekeeping issues are implemented and supported between the Security Council and the African Union Peace and Security Council; the Secretary-General and the Chair of the African Union; the Joint Task Force on Peace and Security (relevant Under-Secretaries-General and African Union Commissioners); and peacekeeping desks of the United Nations and the African Union Commission", Budget for the support account for peacekeeping operations for the period from 1 July 2012 to 30 June 2013, Report of the Secretary-General, UN Doc. A/66/721 (2012), 21. In September 2006, the DPKO and the AU PSO Division agreed upon the establishment of the African Union (AU) Peace Support Team, within the DPKO to provide technical support to develop its peacekeeping capacity, Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, Addendum, UN Doc. 61/668/Add.1 (2006), 15, para.45; See also Yamashita, *supra* note 16, 165, 180.

[481] Report of the Secretary-General on the relationship, *supra* note 11, 9, paras. 19-20; Declaration, Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity Buildling Programme for the African Union, Annex to UN Doc. A/61/630 (2006).

joint planning and operational validation in its coordination with subregional economic communities."[482] The UN Secretariat continues

> to provide operational and planning support and long-term capacity-building support to the African Union Commission for its peace support operations (…) [which] includes support to the planning and management of ongoing operations such as AMISOM and potential future operations, as well as technical advice and support in the development of the policies, guidelines, doctrine and training for the African Standby Force.[483]

This fraction of the cooperation between the United Nations and the African Union raises questions from the point of view of responsibility for wrongful acts conducted in peacekeeping operations to be discussed in Part 3.[484]

The Policy Framework on the establishment of the African Standby Force and the Military Staff Committee as adopted in 2004 by decision of the Assembly of the AU foresaw the establishment of five standby brigades by 2010, forming the African Standby Force (ASF) for the five subregions on the African continent to be deployed rapidly under the auspices of the AU, ECOWAS or other subregional organisations[485] under one of the six conflict scenarios envisaged.[486] The interest of the United

[482] Report of the Special Committee on Peacekeeping Operations and its Working Group, *supra* note 472, 29 paras. 178-79; See also Enhancement of African peacekeeping capacity, *supra* note 209, 8, para. 35; Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/58/694 (2004), 16, para. 84.

[483] Furthermore, "UNOAU provides advice and mentoring to the African Union Commission on a daily basis in the areas of: mission planning, development of doctrines and policies, military, police, logistics, medical, human resources, procurement and other mission support.", Report of the Secretary-General on United Nations-African Union cooperation, *supra* note 478, 7, para. 22; See also generally on UN partnerships, Report of the Special Committee on Peacekeeping Operations and its Working Group, 2008 substantive session (10 March-4 April and 3 July 2008), UN Doc. A/62/19 (2008), 25-26, para. 156. According to the Budget Report, "[t]he priorities of the Office are to directly support the planning and strategic direction of African Union peacekeeping operations, to help build the capacity of the African Union Commission and the regional economic communities/regional mechanisms to plan, staff and deploy such operations, and to provide coordinated short-term operational support, in coordination with departments within the United Nations and with other partners. As part of this support, the delivery of technical expertise and the continued facilitation of donor coordination for the development of the African Standby Force, the provision of advice and assistance to the African Union in the overall planning and management of AMISOM with support from DPKO and DFS, and proposed operations (…) will remain priorities for the Office. In this respect, (…) the Office will continue to support the long-term development of the Union's African Peace and Security Architecture.", Budget for the support account for peacekeeping operations (2012), *supra* note 480, 20-21, para. 51.

[484] "With respect to AMISOM, as part of the overall United Nations strategy for Somalia and in accordance with various Security Council resolutions, in particular resolutions 1863 (2009), 1872 (2009) and 1910 (2010), the United Nations has worked with the African Union Commission in the planning, deployment and operations of AMISOM through the logistics support package provided by the United Nations Support Office to AMISOM (UNSOA) and through UNOAU (previously through the United Nations planning team", Support to African Union peacekeeping operations (2010), *supra* note 475, 8, para. 29.

[485] Policy Framework on the establishment of the African Standby Force and the Military Staff Committee, AU Doc. Assembly/AU/Dec.35 (III) (2004), Enhancement of African peacekeeping capacity, *supra* note 209, 3, paras. 8-9, Experts' Meeting on the Relationship, *supra* note 460, 1, para. 3.

Nations to establish this capacity is particularly profound because regional organisations are better equipped for the rapid deployment of troops.[487] The ASF comprises a maximum of 25000 troops and its operationalization will therefore only facilitate the burden of the UN in Africa which deployed 68027 peacekeepers in Africa alone in May 2013, excluding military observers, police, and other staff.[488] The United Nations as well as the European Union and NATO are engaged in training of the ASF:

> As part of the African Peace and Security Architecture, an AU continental-level peace support operation exercise code named AMANI AFRICA was conducted with UNOAU support, in close coordination with the European Union and NATO, to assess the operational readiness of the African Standby Force (ASF). This brought to a close the ASF Road Map II. UNOAU is currently assisting with the development of the African Standby Force Road Map III, which should culminate in the operationalization of the Force by 2015.[489]

As a result, the United Nations and other organisations are not only contributing to the mission and operational planning of the AU, but they equally contribute to the training of its troops. Consequently, it has to be examined whether this part of the cooperation between the organisations is relevant for an analysis of the responsibility of the organisations for conduct arising out of peacekeeping operations. It is even more so as the question of financing and financial support to AU

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[486] a. **Scenario 1**. AU/Regional Military advice to a Political mission.
b. **Scenario 2**. AU/Regional observer mission co-deployed with UN mission.
c. **Scenario 3**. Stand alone AU/Regional observer mission.
d. **Scenario 4**. AU/Regional peacekeeping force (PKF) for Chapter VI and preventive deployment missions.
e. **Scenario 5**. AU PKF for complex multidimensional PK mission-low level spoilers (a feature of many current conflicts).
f. **Scenario 6**. AU intervention – e.g. genocide situations where international community does not act promptly, Policy Framework for the Establishment of the African Standby Force, *supra* note 460, 3, para.1.6. In the case of scenarios 1-5, which altogether form the potential scenarios of a peacekeeping operation, the mandating authority of the AU derives from both UN law (Chapter VIII) as internal law of the organisation (Article 9(1)(g) of the Constitutive Act, Article 7(1) of the PSC Protocol, cf. also S.A. Dersso, 'The African Union's mandating authority and processes for deploying an ASF mission', in (2010) 19 *African Security Review*, 73, 80-81.

[487] Security Council, 4970th meeting, UN Doc. S/PV.4970 (Resumption 1) (2004), Ireland speaking on behalf of the European Union, 5-6; statement by the representative of Bangladesh, 7; statement by the representative of Ukraine, 12; Statement of South Africa, Security Council, 5776th meeting, UN Doc. S/PV.5776 (2007), 7. As expressed, e.g. by the African Ambassador Sam Ibok:"'The UN has global responsibility for the maintenance of international peace and security. In spite of this, genocide took place in Rwanda. It took place in Rwanda because Africans had to wait for more than six months for the deployment of UN peacekeeping forces. The same thing happened in Somalia, in the DRC, in Burundi, in Liberia and in Côte d'Ivoire'", as cited in Majinge, *supra* note 407, 97, 112.

[488] United Nations Peacekeeping Operations Factsheet 31 May 2013.

[489] Briefing by the United Nations Office to the African Union, Security Council, 6561st meeting, UN Doc. S/PV.6561 (2011), 3-4; Report of the Secretary-General on the implementation of Security Council resolution 1625 (2005), *supra* note 462, 11-12, para. 50; African Standby Force, Training Policy, Final Draft, November 2006, 2, para.14; 5, para.27.a.; 6, para.34.

peacekeeping operations could also entail the responsibility under international law of the supporting organisations. So far, AU peace-keeping operations authorised by the Security Council are funded primarily through voluntary contributions, especially the European Union's African Peace Facility (*infra*, 2.3.9.) as well as through United Nations assessed contributions.[490] Financial problems have so far seriously encroached upon nearly all if not all AU peace operations and e.g. hampered the rapid deployment of troops.[491]

4. *Support packages for AU peace operations and the possibility of control by the Security Council*

The UN-AU Panel was well aware of the fact that the various cooperation packages for the AU raise questions regarding the responsibility and oversight of these operations. Referring to the operations in Somalia and Darfur, the panel stated that "[w]hile the lack of resources put the operations at serious risk of failure, the dependency on external support for deployment and sustainment put the African Union in the position of having the potential responsibility for missions over which it has little institutional or managerial capacity or control."[492] Although the statements refer rather to political than legal responsibility, it is clear that these cooperation packages also raise questions regarding the international responsibility of the involved organisations. The United Nations has generally resisted allowing the distribution of a United Nations support package financed through "assessed contributions" to AU peacekeeping operations despite calls by the latter on various occasions.[493] The Secretary-General stressed that the "current financial framework for partnerships in peacekeeping operations are not conducive to building a sustainable long-term strategy."[494] The Prodi report called likewise for contributions to AU peacekeeping operations based on assessed contributions.[495] The

[490] Support to African Union peacekeeping operations, *supra* note 475, 11, para. 42. Besides, the "issue of securing sustainable, predictable and flexible financing, however, remains a key challenge, *ibidem.*

[491] The deployment of Ethiopian and Mozambican troops was delayed for months as the AU did not have the necessary funds to sustain the mission. As to AMISOM, the 2008 annual budget was $622 million of which only $32 million had been contributed with pledges over another $10.5 million and €5.5 million, Omorogbe, *supra* note 296, 35, 46, 57.

[492] Report of the African Union-United Nations panel, *supra* note 466, 7, para. 13. In 2011 the African Union established a high-level panel on alternative sources of financing under the chairmanship of the former President of Nigeria, Olusegun Obasanjo, Report of the Secretary-General on United Nations-African Union cooperation, *supra* note 478, 17, para. 65.

[493] See e.g., Security Council, 5776th meeting, *supra* note 487, Statement of South Africa, 8; the representative of the AU invited to the Security Council equally urged to the UN and the AU to address this matter, Security Council, 6409th meeting, UN Doc. S/PV.6409 (2010), 7; Communiqué of the Peace and Security Council, Second Ordinary Session, PSC/PR/Communique (II) (2004), paras. 7, 14; Cf. Report of the Secretary-General on the implementation of Security Council resolution 1625 (2005), *supra* note 462, 11-12, para. 52.

[494] Support to African Union peacekeeping operations (2010), *supra* note 475, 16, para. 61.

[495] Report of the African Union-United Nations panel, *supra* note 466, 18, paras. 63-66. As the report states: "In looking at the options for supporting peacekeeping the first and most obvious one is full access to United Nations-assessed contributions for African Union missions authorized by the Security Council. This would

implications also on a level of responsibility are severe as "the provision of a United Nations support package financed by United Nations assessed contributions would entail a case-by-case authorization by the United Nations Security Council."[496] Moreover, the understanding was that United Nations support packages financed by assessed contributions would be allowed only for short-term periods, ensuring sustainability and for peacekeeping operations of the AU before the eventual transition to a United Nations operation.[497] The Security Council retains a high degree of control over the allocation of a support package, as well as over the to be deployed AU peacekeeping operation since "United Nations support should only be considered in cases where consultations between the (…) Security Council and the (…) Peace and Security Council take place to ensure the political and security objectives of these operations are aligned prior to either body authorizing the establishment and deployment of such an operation."[498] Therefore, the Security Council factually retains a certain

provide predictability which is sustainable over whatever period is necessary. The primacy of the Security Council remains paramount. The key is to reinforce its primacy while encouraging maximum flexibility at the regional level. *Any proposal for the use of assessed contributions must be accompanied by appropriate accountability mechanisms*" and "[t]he panel recommends the use of United Nations-assessed contributions on a case-by-case basis to support United Nations Security Council-authorized African Union peacekeeping operations for a period up to six months. ***Initially, at least, this support should mainly be provided in kind***. *This could include troop transport, troop reimbursement, communications and various forms of logistic support. The panel believes such an arrangement could benefit both the United Nations and the African Union, where the African Union, exercising its ability to respond quickly, would be providing an initial response to a longer-term United Nations commitment. This would require an agreement between the African Union and the Security Council for the mission to transition to the United Nations. Such an arrangement should aim to establish an African Union mission to United Nations standards as far as possible and would clearly facilitate the transition process that would ultimately take place*. (…) Such an arrangement could provide the answer to a more predictable funding arrangement when it is clear that there will be a transition to the United Nations, but it does not when it is either unclear, or the Security Council is undecided. In that case, the African Union is likely to be faced with the prospect of relying on donor contributions as it has in the past. (…) *The panel underscores the value of African ownership and emphasizes the importance of African Union member States increasing their own financial contribution to peacekeeping operations.* The concept of an African Union assessment has been discussed on a number of occasions. The panel believes that this goal should be achieved gradually given the competing demands for resources, the ability of member States to contribute and the current economic situation. A first step in this direction could be to augment the African Union Peace Fund" [Emphasis added], *ibid.*

[496] Support to African Union peacekeeping operations, *supra* note 292, 10, para. 39. Following an authorisation of the Council, "the General Assembly would determine the scope of the support package and the level of assessed contributions that would be provided, as is the case with United Nations peacekeeping operations. Funding authorized by the United Nations would be subject to United Nations management regulations and procedures and would therefore have to be accompanied by a United Nations management and accountability structure", *ibid.*

[497] Support to African Union peacekeeping operations, *supra* note 292, 9-10, paras. 35-37. Support packages were authorised for AMIS (Light and Heavy Support Packages) and AMISOM (logistics support). The "areas included the payment of troop costs and allowances to AMIS troops prior to the transfer of authority to UNAMID and logistics support to AMISOM, Support to African Union peacekeeping, *ibid.*, 9, para. 35. Furthermore, the support packages were authorised between 18 months to 2 years after deployment of the troops, *ibid.*, para.36.

[498] Support to African Union peacekeeping operations, *supra* note 292, 9-10, paras. 35-37. During the deployment of the operation, the AU would also have to fulfil the regular reporting requirements, either under

influence if not a veto about the deployment of an AU operation[499], whereas a lack of financial means constitutes the main problem preventing the AU from effectively acting upon its mandate.[500] In practice, the AU seeks authorisation for all its operations[501], including peacekeeping operations which – as it was established[502] – do not fall under the authorisation requirement of Chapter VIII of the Charter, so that it was suggested that the AU may only anticipate UN support of its envisaged operation if it actually seeks an authorisation of the Council.[503]

A second mechanism in the form of a voluntary funded multi-donor trust fund was established to fund activities in the area of capacity-building for conflict prevention and resolution.[504] It is also highly likely that the UN finally gave in for pragmatic reasons and due to self-interest. The AU-UN Panel on the modalities to support AU peacekeeping observed that:

> It is simply undesirable to expect peacekeeping missions to deploy into uncertain situations without the necessary means. It is a recipe for failure. We are deluding ourselves if we believe that having something on the ground is better than doing nothing. In the absence of the necessary capabilities, such an approach brings a high level of risk, not only of failure but also of raising people's expectations that cannot be fulfilled. Worse still, it undermines the credibility of peacekeeping and weakens the organization that is responsible.[505]

All, in all, there are more than "130 different contributions channeled to the African Union – each with its own reporting and monitoring requirements."[506] Nevertheless, the initial objective "'to financially enable the AU and regional mechanisms to plan and conduct Peace Support Operations has not been fully achieved, it "remains a need for more concerted action between the AU, the EU

Article 54 of the Charter or under Chapter VII and as defined in the Security Council Resolution authorising the operation.

[499] Cf. also Griep, *supra* note 73, 360.

[500] One can call it a gap between the intentions and objectives and the capacity and capability to carry it out in reality. In all larger missions, the authorized or intended force level has never been reached, Derblom, Hagström Frisell, *supra* note 142, 24. That lack of resources has been equally mentioned in various reports of the UN, also with the appeal to states to support the African Union, see *inter alia*, Thematic evaluation of cooperation, *supra* note 65, 9, para. 24 in which it is said that "[w]hile the African Union has the aspiration to become a key-player in peacekeeping, and has launched missions in challenging situations, it needs support in strengthening its capacity to manage and sustain a mission."

[501] See, *infra,* 2.5.3.

[502] See, *infra*, Chapter I, 1.3.

[503] Dersso, *supra* note 486, 73, 81.

[504] General Assembly/Security Council, Report of the African Union-United Nations panel, *supra* note 466, 4. The first new funding mechanism is based on a proposition of the High-Level Panel which said in its report that "[t]he rules for the United Nations peacekeeping budget should be amended to give the United Nations the option on a case-by-case basis to finance regional operations authorized by the Security Council with assessed contributions.", Report of the High-Level Panel, *supra* note 355, 71, para. 272 (f); Department of Peacekeeping Operations and Department of Field Support, *supra* note 208, 6.

[505] Report of the African Union-United Nations panel, *supra* note 466, 8, para.16.

[506] *Ibid*., 17, para. 58.

and the UN."[507] The financial contributions of the UN to the AU in the form of assessed contributions raise the very same questions under the law of responsibility as the contributions of the EU via the African Peace Facility.[508] The UN could also make the provision of financial contributions depending on specific political points or on the inclusion of particular incentives in the concept of operations.

5. *Further institutionalisation of AU-UN relations: Moulding the relations towards a division of labour and stronger cooperation*

In 2010, a further step was undertaken by the United Nations and the AU to enhance the strategic partnership with the establishment of the United Nations-African Union Joint Task Force on Peace and Security.[509] Another new mechanism which was created is the Desk-to-Desk mechanism bringing together the senior leadership and focal points for specific issues of the two organisations.[510] It resorts from recent statements on behalf of the African Union and the 2012 Report of the Chairperson of the Commission that the organisation is willing to take on more responsibility for the maintenance of international peace and security on the basis of certain principles including "African ownership and priority-setting; consultative decision-making, division of labour and sharing of responsibilities." [511]

Another important principle to foster cooperation for the future is "[d]ivision of labour underpinned by complementarity"; establishing a "mutually-agreed division of labor to foster coherence and limit competition."[512] The establishment of AFISMA in Mali proves that the AU is committed to live up to

[507] Joint Africa EU Strategy, Action Plan 2011-2013 Introductory Part, 15; Cooperation between the United Nations and regional and other organizations, Report of the Secretary-General, UN Doc. A/67/280-S/2012/614 (2012), 4, para.4.
[508] See, *infra* 2.3.9.
[509] Several meetings on the level of Under-Secretaries-General of the United Nations and the Commissioner for Peace and Security of the AU have taken place so far. In 2011, the meetings of the Task Force discussed cooperation in Côte d'Ivoire, Libya, the Sudan, South Sudan and Somalia, Report of the Secretary-General on United Nations-African Union cooperation, *supra* note 478, 4, para. 12.
[510] Report of the Chairperson of the Commission on the African-Union-United Nations Partnership: The Need For Greater Coherence, PSC/AHG/3.(CCCXCVII) (2013), 1, para. 2.
[511] He equally said that:"[i]t is critical to provide more effective support to the African continent and its institutions, especially as Africa has demonstrated renewed determination to deal with peace and security issues on the continent and provide the leadership that is required", Security Council, 6702nd meeting, *supra* note 459, 7. In order to achieve these goals, it is also necessary to rely on a "flexible and innovative application of the principle of subsidiarity" under Chapter VIII of the UN Charter, Peace and Security Council, 307th Meeting, PSC/PR/COMM.(CCCVII) (2012), para.11 (ii); Report of the Chairperson of the Commission, *supra* note 460, 24-25, para. 91. The primary responsibility of the Security Council for the maintenance of international peace and security is now undisputed by the AU, see, for example, Annex to the letter dated 14 October 2013 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, Joint communiqué of the seventh annual consultative meeting between members of the Security Council of the United Nations and the Peace and Security Council of the African Union, UN Doc. S/2013/611 (2013), 2, para. 2.
[512] Report of the Chairperson of the Commission, *supra* note 510, 2, para.4 (iv).

its role and to shoulder the primary responsibility for maintaining international peace and security on the African continent. Nevertheless, Mali confirms a certain division of labour in the practice of the AU, the UN and the EU according to which the AU intervenes early in a conflict under conditions in which "the UN and the EU as well declined to take action", thereby acting as an early responder and in a bridging role for a consecutive deployment of a UN operation.[513] Mali highlighted, however, that the AU still lacks the rapid deployment capacities necessary to respond quickly to a crisis when the armed groups conquered further territory in Mali, leading to the French intervention in the form of "Operation Serval".[514] The AU therefore decided to improve its quick reaction capacities through the African Immediate Crisis Reponse Capacity (AICRC).[515] A high priority for the UN not to intervene is the security situation on the ground as well as the set mandate, the UN now generally focuses on traditional peacekeeping and peacebuilding operations (*infra* 1.2.3.)[516]. Security Council Resolution

[513] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 294. Indeed, the AU generally makes an effort to give priority to conflict prevention", Third African Union High-Level Retreat of Special Envoys and Representatives on the Promotion of Peace, Security and Stability in Africa, Cairo, Egypt, 5-6 November 2012, Cairo Declaration, "Transforming the African Peace and Security Landscape in the Next Decade: Appraisal and Opportunities", HL/Retreat/Decl. (III), 2, para.11 (b). The ASF Policy Framework likewise stipulates "in an emergency situation, the AU should take preliminary preventive action, while preparing for a more comprehensive action that could include the participation of the United Nations. The emphasis here is on rapid action and deployment", Report of the Chairperson of the Commission on the Operationalisation of the Rapid Deployment Capacity of the African Standby Force and the Establishment of an "African Capacity for Immediate Response to Crises", PSC/Exp/VI/STCDSS/(i-a)2013 (2013), 3, para.10. The very same division of labour can be seen with regard to the Central African Republic, cf. Letter dated 11 March 2014 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2014/172 (2014), Annex, First progress report of the Commission of the African Union on the situation in the Central African Republic and the activities of the African-led International Support Mission in the Central African Republic, 21, para. 78. The purpose of the EU African Peace Facility is also to "support AU initiatives designed to promote and accelerate the esta-blishment of the appropriate conditions for the UN to intervene and fulfil its international responsibilities", Securing Peace and Stability for Africa. The EU-Funded African Peace Facility (2004), 8. A document published on the basis of the EU-AU partnership from October 2009 mentions that discussions had been initiated on the set up of a triangular UN-AU-EU dialogue building upon the EU-UN and the AU-UN dialogues, however so far apparently without any success, Evolving Roadmap of the Peace and Security Partnership, 14 October 2009, 1, para. 3.

[514] W. Lacher, D. M. Tull, 'Mali: Beyond Counterterrorism', SWP Comments, February 2013, 4-5. See, *infra*, Chapter V, 5.1.4.

[515] The AICRC as a military tool consists of a pool of 5000 troops with operational modules in the form of tactical battle groups of 1500 persons – similar to the EU battlegroup concept – which can be deployed rapidly, operating under centralised command and which will be able to sustain themselves in the field for at least 30 days. It shall provide the necessary time-frame for a comprehensive response, either through a political solution or the adoption of further measures in the form of a mandate consolidation and expansion or under a new mandate by the PSC and/or the UN Security Council, Report of the Chairperson of the Commission on the Operationalisation of the Rapid Deployment Capacity of the African Standby Force and the Establishment of an "African Capacity for Immediate Reponse to Crises", PSC/Exp/VI/STCDSS/(i-a)2013 (2013), 7, para.26 – 8, para.29. The battlegroups will be not provided by the RECs, but they will be pledged by a lead nation – similarly to the method used by NATO – or by a group of a AU member states, *ibid.*, 8, para.30.

[516] Cf. also Report of the Chairperson of the Commission, *supra* note 460, 19, para. 71. As the report states: "The UN and AU need to address the doctrinal gap that is emerging between the two institutions with respect to the deployment of peacekeepers. While the UN appears generally bound by its decades-old practice of not deploying peacekeepers in the absence of peace agreements, the AU is emerging as less risk averse, as

2100 therefore stipulates that the deployment of MINUSMA "shall be subject to a further review by the Council (…) of the security situation in MINUSMA's area of responsibility, specifically with respect to the cessation of major combat operations by international military forces in the immediate vicinity."[517] Nevertheless the mandate of MINUSMA is comparatively robust and allows for the use of military force.[518] Part of this division of labour is this extensive interplay on various levels as it facilitates equally the transition from a peacekeeping operation run by one organisation to an operation run by another organisation.[519]

The same interplay can be witnessed in Somalia. The Security Council agreed in Resolution 2093 "with the Secretary-General that the conditions in Somalia are not yet appropriate for the deployment of a United Nations Peacekeeping Operation, and *requests* that he keeps this under review."[520] In the mean-time, the UN Political Office in Somalia shall be replaced with a new expanded Special Political Mission[521] which will also include the UN Support Office for AMISOM (UNSOA)[522] and which will operate alongside AMISOM[523] "until conditions permit a peacekeeping operation."[524] The Secretary-General proposed four options for the deployment of such a new operation, either as a Joint AU/UN peacekeeping operation, a fully integrated UN peacebuilding mission, a more limited United Nations assistance mission or a UN peacebuilding mission separate from UNSOA.[525] All options focus on civilian measures and foresee the continuation of AMISOM as part of a joint AU-UN operation or independently. Whereas the African Union recommended a joint

demonstrated by its practice of deploying in the absence of a peace agreement. It is convinced that, in certain situations, *peace has to be created before it can be kept*; this is consistent with its policy of *non-indifference*. This is a significant doctrinal gap that should be part of the broader policy discussions because it has practical implications on the questions of division of labor and burden sharing", *ibid.*, 29, para. (vii).

[517] Security Council Resolution 2100, UN Doc. S/RES/2100 (2013), 5, para.8.

[518] *Ibid.*, paras. 16 (a) (i), (c) (i), (iii), (d) (i), 17.

[519] In its Report on the African-led mission in the CAR, the AU emphasised not only that "[b]y deploying MISCA, [it] has, from the outset, envisaged the transformation (…) of this Mission into a UN peacekeeping operation, building on the lessons of past experiences", but the AU also underlined the need of its involvement in the transformation to a UN operation, including in the drafting of a Security Council Resolution for such a purpose, 1st Progress Report of the Commission of the African Union on the Situation in the Central African Republic and the Activities of the African-led International Support Mission in the Central African Republic (2014), 18-19, para. 77; 19, paras. 78, 80; Statement by Mr. Téte António, Permanent Observer of the African Union to the United Nations, Security Council 7128th meeting, UN Doc. S/PV.7128 (2014), 11; Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolution 2127 (2013), UN Doc. S/2014/142 (2014), 12, para. 54; 20-21, paras. 93-94; Letter dated 11 March 2014, *supra* note 513, 21, para. 77.

[520] Security Council Resolution 2093, UN Doc. S/RES/2093 (2013), 5, para.19.

[521] *Ibid.* 5, para.18

[522] *Ibid.*, 6, para.20.

[523] *Ibid.*, 6, para.21

[524] Report of the Secretary-General on Somalia, UN Doc. S/2013/69 (2013), 15, para.72.

[525] *Ibid.*, 16-17, para. 75 (a) – (d).

AU-UN operation, the Secretary-General gave a contrary recommendation and it is worthwhile quoting his reasoning:

> My advice remains that the time has not come for these approaches. In *the current context of combat operations, the African Union has comparative advantages as a provider for military support*. Rehatting forces as a United Nations operation would necessitate changes to the concept of operations and rules of engagement that would be likely *to compromise effectiveness of the military campaign*, potentially resulting in a backslide in security gains and undermining the environment for peacebuilding. A merger of African Union military and United Nations political functions in the current phase would create *constraints to the effectiveness* of both organizations. The option of United Nations or joint African Union/United Nations peacekeeping should be revisited, as conventional combat operations against Al-Shabaab end, in *consultation with the Somali authorities.*"[526] [Emphasis added]

Thus, the statement underlines the division of labour between the two organisations on the basis of "comparative advantages."[527] The Report of the Chairperson of the Commission draws upon this very same idea recommending that the Security Council should give "due consideration to the decisions of the AU and the PSC" because of the proximity and familiarity of the AU with conflict dynamics in its member states.[528] The pledge of the Secretary-General likewise demonstrates that peacekeeping operations have become more professional, and indeed; effectiveness appears to be the key. This division of labour is also enshrined in official AU documents, which likewise underline the need to "achieve approximate coherence between AU and UN integrated management structures."[529] Finally, the statement is in line with the traditional doctrine of peacekeeping as any peacekeeping operation will be only deployed in consultation with the Somali authorities. The Secretary-General's recommendation was therefore the creation of a United Nations assistance mission for the current situation in Somalia.[530] Cooperation and coordination with the AU will be guaranteed, *inter alia*,

[526] *Ibid.*, 18, para. 83. Secretary-General Ban reconfirmed his view in his letter to the Council reporting upon the joint AU-UN mission to Somalia, Letter dated 13 October 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/606 (2013), 1-2. In this regard, see also Letter dated 18 October 2013 from the Secretary-General addressed to the President of the Security Council, Annex, Letter dated 11 October 2013 from the Chairperson of the African Union Commission to the Secretary-General, UN Doc. S/2013/620 (2013), 2.

[527] Division of labour between the two organisations has to be seen as one of at least three implied elements of subsidiarity, which is at the heart of Chapter VIII, the other two being: consultative decision-making and burden-sharing Support to African Union peacekeeping operations (2010), *supra* note 475, 26, para. 95.

[528] According to the report such a practice of the Security Council would be also consistent with Chapter VIII of the UN Charter. Report of the Chairperson of the Commission, *supra* note 460, 12, para. 45.

[529] African Standby Force, Peace Support Operations Doctrine (2006), p.4-13, para. 35. See also P. D. Williams, A. Boutellis, 'Partnership Peacekeeping: Challenges and Opportunities in The United Nations-African Union Relationship', in (2014) 113 *African Affairs*, 254, 263.

[530] *Ibid.*, 19, para. 85. As conventional combat operations against Al-Shabaab end, and in consultation with Somali authorities, the Security Council should revisit the option of United Nations or joint African Union-United Nations peacekeeping, Results of the Secretary-General's technical assessment mission to Somalia,

through a joint planning team and a joint leadership team comprising, *inter alia*, the Special Representative of the Secretary-General (SRSG), the Director of Mission Support, the AMISOM Special Representative of the Chairperson of the AU Commission and the AMISOM Force Commander.[531]

The remaining challenges for the AU and the UN are how they apply Chapter VIII of the UN Charter without prejudicing the role of the Security Council, nor undermining or curtailing the efforts undertaken by the African Union to develop its own operational crisis response capacities and to provide adequate resources. The key-question is:

> What is the appropriate consultative decision-making framework, division of labor and burden-sharing that should be put in place? To date, this question has not been addressed in a consistent manner and, as such, cooperation between the UN and AU has been forced by the exigencies of time.[532]

As for now, the lack of resources of the African Union does not allow them at this stage to fully engage large-scale operations and for the time being this means that even more operations of the African Union might be taken over by the United Nations.[533] Nevertheless, the UN also remains committed to the operationalisation of the APSA as it was confirmed by the Secretary-General in a meeting of the Security Council in February 2014: "The United Nations is keen to deepen the partnership with the AU Peace and Security Architecture."[534]

5. The African Union and ECOWAS

1. *The normative framework of the APSA regulating the relations between the AU and the sub-regional organisations*

The relationship between the AU and ECOWAS in the area of the maintenance of international peace and security developed on the basis of the African Peace and Security Architecture which "emerged out of a desire by African Leaders to establish an operational structure to execute decisions taken in accordance with the authority conferred by Article 5 (2) of the Constitutive Act of the African

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pursuant to Security Council resolution 2093 (2013), Annex to Letter dated 19 April 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/239 (2013), 13, para. 46. The mandate of the proposed new UN mission will focus on the good offices rule of the UN, tailored strategic and policy advice for peacebuilding and statebuilding and assistance to develop Somalia's capacity to promote respect for human rights as well as support to the coordination of the efforts of the international community, Results of the Secretary-General's technical assessment mission, *ibid.* 4-8, paras. 10-20.

[531] *Ibid.,* 8-9, paras. 21-27.

[532] Report of the Chairperson of the Commission, *supra* note 460, 23-24, para. 88.

[533] Cf. Kioko, *supra* note 355, 807, 822.

[534] Security Council 7112th meeting, *supra* note 172, 2.

Union."[535] The legal framework for the relationship between the AU and Regional Economic Communities or, in other words, the subregional African organisations, is the Memorandum of Understanding concluded in 2008.[536] The objectives of the Memorandum which is based on the principles of subsidiarity, complementarity and competitive advantage,[537] include a pledge to contribute to the full operationalization and effective functioning of the African Peace and Security Architecture.[538] In this context, the Memorandum also commits to fostering closer partnerships between the Parties to the Memorandum as well as with the United Nations, its agencies and other relevant international organisations.[539] All Parties thereby pledge "scrupulous observance" with the Constitutive Act of the AU, the PSC Protocol and "other related instruments agreed to at continental level" and they thereby recognise the primary responsibility of the AU for the maintenance and promotion of peace, and security and stability in Africa.[540]

Article XX sets out the modalities of interaction for peace support operations. In accordance with the interpretation of the provisions of Chapter VIII of the UN Charter, subregional organisations are encouraged "to anticipate and prevent conflicts within and among their Member States and (…) to undertake (…) efforts to resolve them, including through the deployment of peace support operations."[541] This provision is analogous to Chapter VIII and; Article XX (2) prescribes an information requirement for the RECs as regards the Chairperson of the Commission, and through him, the PSC, similar to Article 54 of the United Nations Charter.

As the use of regional organisations for peace enforcement operations is within the competences of the United Nations Security Council alone, paragraphs 3 and 4 allow the Union to have recourse to the resources of the RECs including their regional brigades to facilitate the deployment of a peace support operation or as part of a peace support operation outside their areas of jurisdiction

[535] African Peace and Security Architecture (APSA), 2010 Assessment Study, 19, para.48.
[536] Following the first AMANI Africa circle, it was recommended that the AU and the RECs/RMs conclude further Memoranda of Understanding to regulate the operationalization and employment of the ASF, AMANI Africa, Implementation Plan, Draft, African Union Peace Support Operations Division, 11-12.
[537] E. A. Akuffo, 'Cooperating for peace and security or competing for legitimacy in Africa? The case of the African Union in Darfur', in (2010) 19 *African Security Review*, 74, 76.
[538] In this context, ECOWAS also provides information to the AU as part of the Early Warning System under Article 12 of the PSC Protocol and it is obliged to report to the AU on any situation it is seized off under Article 27 of the MCPMRPS, see, *infra* 2.4.2. The very same obligations also arise for ECOWAS and the other subregional organisations under Article 16(3) of the AU Protocol, see also A. T. Soma, 'Les relations entre l'Union Africaine et la Communauté Economique des Etats de l'Afrique de l'Ouest en matière den maintien de la paix', in (2012) 18 *African Yearbook of International Law*, *supra* note 329, 345, 368-369. Soma therefore concluded that the AU is exercising political control over ECOWAS, *ibid.*
[539] Article III (2) (i), (iii), (vi), Article VI (1), (3) of the Memorandum of Understanding on Cooperation, *supra* note 461.
[540] *Ibid.*, Article IV (i), (ii).
[541] *Ibid.*, Article XX (1).

undertaken by the African Union. Therefore, in contrast to Chapter VIII of the United Nations Charter, the element of cooperation is increased within the framework of the APSA as it regulates the relations between the AU and (sub)regional organisations; the former cannot only acquire military contingents to conduct peacekeeping operations under its own leadership, but the AU also has access to all "assets and capabilities, including planning" to facilitate the deployment of a peacekeeping operation and it can equally request the RECs to make them available to other RECs.

2. Weak institutional links, ECOWAS as the stronger actor?

On a political level, the Memorandum also stipulates that the AU shall coordinate the harmonisation of views of the parties in respect of the Memorandum to ensure that African interests and positions as defined at a continental level are effectively pursued in relevant international fora including the United Nations. In this way, the AU can be also seen as occupying "a coordinative instead of [an] executive and implementation role" and therefore "lacking significant executive powers over its member states."[542] The AU is very keen to establish stronger institutional linkage with ECOWAS and other RECs, as evidenced by its 2010 recognition that despite the existence of the Protocol and the MoU, the institutional relationship remains weak, creating "a critical gap" between the AU and RECs.[543]

This critical gap between the two organisations is strengthened by the fact that ECOWAS' internal structure and resources for maintaining international peace and security are particularly well or even better developed than these of the AU.[544]ECOWAS is comparatively influential within the African Standby Force as three of the centres of excellence are based in its member states[545] and it is well aware of its capacities in comparison to the other RECs, stating that it "has developed a comparative advantage in the area of peace-keeping and peace enforcement" and that it "has become a model

[542] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 293-294.
[543] African Peace and Security Architecture (APSA), 2010 Assessment Study, 71-72, para. 208; The Cairo Declaration from November 2012 recognised in a similar fashion that the relationship existing between the AU and the RECs "is not yet as harmonious as provided for under the APSA.", Third African Union High-Level Retreat, *supra* note 513, 2, para.9. There is also a feeling within the AU that the RECs are not always fully committed to leadership by the AU, A. Vines, 'A decade of African Peace and Security Architecture', in (2013) 89 *International Affairs*, 89, 101. Cf. also A. van Nieuwkerk, 'The regional roots of the African peace and security architecture: exploring centre-periphery relations', in (2011) 18 *South African Journal of International Affairs*, 169, 170; J. Akokpari, S. Ancas, 'The African Union and regional economic communities. A partnership for peace and security?', in T. Murithi (ed.), *Handbook of Africa's International Relations* (2014), 73, 76.
[544] ECOWAS is for example less dependent on external financial support, see, *infra* 2.4.2 and 2.4.3.
[545] The Kofi Annan International Peacekeeping Training Center in Ghana concentrates on operational issues; the National Defence College in Ajuba/Nigeria offers training to officers on strategic issues; while the Zambakro Peacekeeping School in Côte d'Ivoire focuses on tactical issues.

for the continent (…) [being] well placed to be the first REC to deliver its brigade" for the ASF.[546] ECOWAS was forced to develop these capacities in particular and thereby made a virtue out of necessity. The prevalence of intra-state conflicts and instability within the region required ECOWAS to foster its capabilities in maintaining peace and security. The organisation then focused on conflict management and resolution as a key activity of its agenda to the detriment of ECOWAS' agenda of economic cooperation and trade liberalization.[547]

In addition to the fact that Mali is a member of ECOWAS, the latter's well developed capabilities also explain why the African Union authorised ECOWAS under the African Peace and Security Architecture to put in place the required military and security arrangements for a military operation in Northern Mali.[548] This authorisation by the AU was in conformity with AU policy which allows for the deployment of peacekeeping operations on a regional level, whereby the AU and the UN should provide "direct financial and logistical assistance and assistance to mobilise material and financial support."[549] However, it is suggested that the PSC authorised ECOWAS to intervene after finding itself too slow to respond.[550]

It is also possible that the common efforts made by the two organisations are a reaction of the uncoordinated action by the organisations in Côte d'Ivoire in 2011. ECOWAS envoys issued public warnings that military force would be used if diplomacy did not succeed whereas the AU was holding on to political efforts, leading an ECOWAS spokesman to declare publically that "African disunity on a solution was undermining the efforts of the regional organization."[551] Indeed, there seems to be the awareness in both organisations that they need to coordinate more and cooperate better in

[546] The ECOWAS Conflict Prevention Framework, Regulation MSC/REG.1/01/08, 11, para. 25.
[547] van Nieuwkerk, *supra* note 543, 169, 179.
[548] Mali/African Union/Peace and Security Council, 323rd Meeting New York, USA, June 12, 2012. Paragraph 14 stipulates "Reaffim[ing] the provisions of Article 16 of the Protocol Relating to the Establishment of the Peace and Security Council on the relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, which are part of the overall security architecture of the Union, as well as the January 2008 Memorandum of Understanding on Cooperation between the AU and the Regional Mechanisms in the Area of Peace and Security, concluded in pursuance of Article 16 of the Peace and Security Council Protocol. Council, within this framework and recalling its earlier support to the activation of the ECOWAS Standby Force, authorizes ECOWAS, in collaboration as appropriate with the core countries, namely Algeria, Mauritania and Niger, to put in place the required military and security arrangements towards the achievement of the following objectives:

(i) ensuring the security of the transitional institutions;
(ii) restructuring and reorganizing the Malian security and defense forces; and
(iii) restoring State authority over the northern part of the country and combating terrorist and criminal networks." [Emphasis added]

[549] Policy Framework for the Establishment of the African Standby Force, *supra* note 460, 15, para.3.6.
[550] Vines, *supra* note 543, 89, 104.
[551] Akokpari, Ancas, 'The African Union and regional economic communities. A partnership for peace and security?', *supra* note 543, 73, 77. See also ECOWAS Peace and Security Report, Issue 1 October 2012, Mali: making peace while preparing for war, 5.

maintaining international peace and security. In April 2013, the PSC requested the AU Commission, in consultation with the President of the ECOWAS, to take the necessary steps for a Lesson Learnt exercise "on the African role in the resolution of the Mali crisis, with a view to reinforcing future coordination and facilitating the operationalization (…) of the joint AU-ECOWAS office in Mali."[552]

These contradictions stem from a certain disjuncture in the understanding of the roles of the RECs within the APSA. On the one hand, relations shall be based on the idea of comparative advantages,[553] but on the other hand, the RECs are seen as subsidiary to the authority of the AU.[554] Despite several proclamations in internal documents of the AU that RECs shall seek the authorisation of the PSC for the deployment of peacekeeping operations (*Infra* 2.5.3.), they are not legally required to do so.[555] Consequently, in practice, the relationship between the AU and ECOWAS is one of equality, in contrast to the normative framework of the AU's relations with the RECs which creates a superior-subordinate relationship.

2.6. Conclusions of Chapter II

The analysis of the relationship between the United Nations and regional organisations, on the one hand, and among regional organisations, on the other hand, reveals a variety of forms of coordination and cooperation which can hardly be classified.

In many cases, the United Nations acted before or simultaneously with regional organisations, which have priority for the settlement of local disputes under Article 52 of the UN Charter.[556] It is again an illustration of the flexibility and pragmatism of the Security Council in practice. Some authors speak in this context of a true variable geometry and that it is proof of the difficulty, even the impossibility

[552] Peace and Security Council, 371st Meeting, Addis Ababa, Ethiopia, 25 April 2013, PSC/PR/COMM.(CCCLXXI), Communiqué, 5, para.16. The President of the ECOWAS Commission also called for "frank reflection" on the ECOWAS intervention in Mali, Press Release, N°:009/2014, 5 February 2014, President Ouedraogo Calls for Frank Reflection on ECOWAS Interventions in Mali. In this regard, it was also recommended by the Experts of the After Action Review of ECOWAS' intervention in Mali that the organisation shall establish a Special Standby Two-Battalion rapid response Force, ready to intervene within 30 days, Press Release, N°:013/2014, 8 February 2014, Experts Call for an effective ECOWAS Standby Force.

[553] Article 16 of the PSC Protocol, para. 1b)
Akokpari, Ancas, 'The African Union and regional economic communities. A partnership for peace and security?', *supra* note 543, 73, 77. The AU emphasised that point once again in its report on peace and security in Africa, declaring: "[T]he PSC Protocol provisions on the primary responsibility of the AU for the promotion of peace, security and stability in Africa should be strictly adhered to. While the RECs/RMs have a critical role to play in the prevention and management of conflicts in their respective regions, the importance of continental leadership and coherence cannot be overemphasized, for Africa's strength, relevance and leadership in the area of peace and security lies in its unity", Assembly of the Union, Twentieth Ordinary Session, 27-28 January 2013, Addis Ababa, Ethiopia, Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa, Assembly/AU/3(XX), 46-47, para. 170.

[555] Memorandum of Understanding on Cooperation, *supra* note 461, Article XX (1).

[556] One could mention for example UNMIK and the DRC, Griep, *supra* note 73, 228-29.

to systematise the relations between universal and regional organisations.[557] However, there is a very clear trend or rather a development towards a veritable moulding of relations between the involved organisations in the form of a division of labour benefitting all organisations and simultaneously allowing them to develop further their respective comparative advantages. The rise of enhanced cooperation between the organisations has changed their relationship in a fundamental way. Whereas some relations were – in the early stages – not free of certain competitive attitudes, the organisations have now realigned their policies towards cooperation instead of confrontation. As all of the five organisations examined in this study had to confront and face a scarcity of materials, troops and funding, this development might not have been driven entirely by the political will of the organisations, but it does not negate the fact that there is now an increased trend towards cooperation. Part of this development is that all four regional organisations seek increasingly the authorisation of the Security Council which includes both the AU and ECOWAS whose constitutional frameworks contain dispositions for military intervention which, if they were to be acted upon with a Security Council authorisation, were to be in clear violation of the UN Charter and international law.[558]

In the broader context of universalism v. regionalism, it can be argued that the conclusions drawn in Chapter I are valid. The two poles of universalism and regionalism within the UN Charter were not only conducive to cooperation, but they have led in the practice of the organisations to a sophisticated framework of relations and cooperation arrangements between all of them in whose context competition has been replaced by cooperation.

Moreover, cooperation now covers all levels from the training of troops to pre-planning to deployment on the ground. UN-AU and EU-AU relations are the most institutionalised, but they have also developed primarily through the practice of the organisations in peacekeeping operations and a

[557] Boisson de Chazournes, *supra* note 185, 79, 401.

[558] NATO acted upon a mandate of the Council in Libya and the EU, AU and ECOWAS have acted upon a mandate of the Security Council in Mali. The EU was granted a mandate to deploy a military operation in the Central African Republic by the Security Council on 28 January 2014 on the basis of Security Council Resolution 2134, *supra* note 215. In a letter of High Representative Ashton, transmitted by the Secretary-General, to the President of the Security Council with regard to the EU military operation in the CAR, she wrote that "[a] mandate by the Security Council is necessary to allow for the adoption of a decision to establish an operation by the Council of the European Union and therefore the deployment of the European Union force. I would therefore be grateful if the Security Council could adopt a resolution providing the European Union force with an appropriate mandate and including a provision authorizing it to use all necessary means to accomplish its mandate", Letter dated 25 February 2014 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2014/45 (2014), Annex, 2. See also E. de Wet, 'The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?', in (2014) 27 *Leiden Journal of International Law*, 353, 354, 368-369; A. Bjurner, P. Wallensteen, 'The Future Relations of the UN and the Regional Organizations', in P. Wallensteen, A. Bjurner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 239, 242.

clear long-term strategy is only visible to some extent in the EU-AU policy and in the EU-UN policy in support of the AU. For all other relationships, they are entirely based on practice, and the role taken by each organisation has varied depending on the specific conflict situation the organisations were confronted with. The nature of the conflict also determines which actors will be involved; the recent example of Guinea-Bissau demonstrates elements of cooperation between not less than five different international organisations in the form of the Joint ECOWAS/AU/CPLP/EU/UN Assessment mission.[559]

As regards the nature of peace operations in Africa, those following a comprehensive peacekeeping and peace-building approach are mostly conducted by the UN.[560] This is because the EU has refused to be engaged with larger scale operations which would definitely overstretch its capacity and the AU has yet been unable to run more demanding operations on its own.[561] Thus, "reciprocal dependence between them (…) has triggered the emergence of a loose security system"[562] in the "triangle of interorganisational relations between the AU, EU and UN." [563] But once again,

[559] Report of the Joint ECOWAS/AU/CPLP/EU/UN Assessment Mission to Guinea-Bissau (2013). The "partner organizations, acting within the framework of the relevant decisions of their respective policy organs, pledge to promote the widest possible consensus among themselves", *ibid.*18. In this regard see also, Report of the Chairperson of the Commission, *supra* note 510, 5, para.14.

[560] So the Report of the Special Committee on Peacekeeping Operations emphasised that "[a]s a system the United Nations has a powerful range of tools at its disposal to address the post-post-conflict needs of States and populations. That capacity to deliver a comprehensive, integrated response is unique to the Organization. To maximize its potential, the United Nations must become the leading global actor in planning and implementing integrated peacekeeping operations and in working with partners in that effort", Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/61/668 (2007), 12, para. 39. But this policy approach does not imply that the UN will expand its activities to the detriment of other (regional) actors. As the Secretary-General specified later on in the report: "Ultimately, the core business of United Nations peacekeeping operations is support to the early provision and reform of security and the rule of law in post-conflict States. Enabling national authorities to assume their sovereign responsibilities and provide equitable, sustainable security and development lies at the heart of that. Failure to achieve that objective can lead, at worst, to a return to conflict or, at best, to protracted large peacekeeping missions. While post-conflict security is fundamentally related to building a domestic political consensus, supporting security reform requires concrete strategies, skills and resources. *It is essential, therefore, that United Nations peacekeeping focus its efforts on that core task*. We have significant capabilities in a number of concrete areas, such as in providing security in volatile areas, in monitoring borders and demarcated lines, in disarmament, demobilization and reintegration and in police and law enforcement reform and restructuring" [Emphasis added], *ibid.*, 15, para. 50. In his report of March 2014 on the CAR, the Secretary-General stated: "A important factor that has influenced my decision to recommend the deployment of a United Nations peacekeeping operation is that the Organization is uniquely positioned to deploy and sustain a multidimensional peacekeeping operation with the full range of capacities that are required to address the deep-rooted nature of the complex crisis", Report of the Secretary-General on the Central African Republic, *supra* note 519, 13, para. 55.

[561] Cf. Yamashita, *supra* note 16, 165, 171. See also Bjurner, 'On EU Peacemaking', *supra* note 256, 89, 95.

[562] Brosig, *supra* note 12, 107, 122; Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 293.

[563] Statement of Rwanda, Security Council, 6919th meeting, UN Doc. S/PV.6919 (2013), 21. Part of this triangle is also the emergence of coherence in exit strategies, the "UN operations had become part of the EU exit strategy

> "looking at all peacekeeping missions deployed in Africa, (...) a security system is developing between these three actors (…) that (…) are dominating this multi-actor game of peacekeeping by forming a variety of different cooperation modes ranging from bridging operations and co-deployment of troops to fully integrated or hybrid missions."[564]

Whereas the UN-AU and EU-AU relations are predominantly partnerships for African capacity-building, the EU-UN partnership is aimed at better operational linkage between the two organisations.[565] The AU and ECOWAS remain prone to being "dominated" in their peacekeeping activities – to a certain extent and not only financially – but also in operational matters by the United Nations and the European Union and in a more limited way by NATO.[566] NATO's positioning towards being an active security provider, including the deployment of military operations in the Euro-Atlantic area, whilst simultaneously acting as a security actor on the global stage through other means such as its various partnership programmes, make it unlikely that NATO will play a more active role in peacekeeping operations on the African continent in the near future.[567] It can be rather expected that NATO will continue to provide limited support to peacekeeping operations in Africa if actively requested by the UN or a regional organisation.

Despite already quite extensive cooperation activities on the African continent between the UN, the AU, the AU and ECOWAS, a formulation of long-term relationships based on a clear strategy remains necessary. [568] The same call was made by Secretary-General Ban to the SC to generally define the role

(…) [and] the UN is in principle part of the AU exit strategy, as was clearly established in the cases of Burundi, Darfur, and Somalia as well as in Mali", Tardy, *supra* note 3, 95, 103.

[564] Brosig, 'The African Union a Partner for Peace', *supra* note 281, 292, 296. See also the Statement of the Foreign Minister of Lithuania, Security Council 7112th meeting, *supra* note 172, 7.

[565] Yamashita, *supra* note 16, 165, 182.

[566] This means that the EU (indirectly) and the AU (directly) have had be approve the initiation of an ECOWAS peacekeeping operation: "It was agreed upon at the EU/ACP Council of Ministers (11 December 2003), and it allows EUR €250 million to be used in (a) support to African-led peace support operations, (b) capacity building of African peace and security architecture. According to EU guidelines, "each operation to be financed from the Peace Facility will have to be initiated by the AU and/or the sub-regional organizations (…). As a general rule, when a subregional organization takes an initiative, this initiative shall have the political approval of the AU.", Capacity Survey on Regional and Other Intergovernmental Organizations, *supra* note 468, 28. Mr. Jean-Marie Guéhenno and Mrs. Elisabeth Lindenmayer confirmed this assessment in my discussions with them. In their opinion, the joint hybrid AU-UN operation in Darfur is a "marriage of convenience" and definitely not a model for the future and command and control is solely exercised by the United Nations.

[567] Although NATO's Senior Civilian Liaison Officer to the UN said that NATO works increasingly with the AU, the statement also shows that NATO will continue to play a supportive role with regard to peacekeeping operations, focusing its attention rather on its network of partnerships, Security Council, 7228th meeting, UN Doc. S/PV.7228 (2014), 57.

[568] This was emphasised within the Security Council when it was meeting on Head of State/Ministerial Level, Security Council, 6621st meeting, UN Doc. S/PV.6621 (2011), Mr. Guido Westerwelle, Minister for Foreign Affairs (Germany), *ibid.,* 21; Mr. Juan Manuel Santos Calderón, President of the Republic of Colombia, *ibid.,* 5; Mr. Jacob Zuma, President of South Africa, *ibid.,* 6-7; Mr. Ali Bongo Ondimba, President of the Gabonese Republic, *ibid.,* 8-9; Mr. Pedro Passos Coelho, Prime Minister of the Republic of Portugal, *ibid.,* 11; Mr. Yang Jiechi, Minister for Foreign Affairs of the People's Republic of China, *ibid.* 17; See also Statement by the

of regional organisations with the UN.[569] The Argentine Presidency of the Security Council in August 2013 put the topic on the agenda of the Security Council once again, emphasising that the topic had not been comprehensively evaluated by the Council since 2010.[570] The ensuing debate in the Security Council highlighted the need to strengthen relations between the UN and regional organisations in a pragmatic, result-oriented manner.[571]

The Council finally adopted a Presidential Statement in which it expressed "its intention to consider further steps to promote closer and more operational cooperation."[572] In this comparatively long Statement, the Council likewise emphasised its willingness to enhance the institutional cooperation between the UN and regional and subregional organisations – via the Secretariat[573] –and it especially

President of the Security Council (2007), *supra* note 479, 1; Security Council Resolution 1631 (2005), *supra* note 452, see especially preamble, paras. 1-2; See also statements by other various members of the Security Council, Security Council, 4970th meeting, UN Doc. S/PV.4970 (2004); Security Council, 4970th meeting, *supra* note 487; Statement of the Secretary-General, Security Council, 5282nd meeting, *supra* note 38, 4-5; Security Council, 5529th meeting, *supra* note 231; Security Council, 5735th meeting, UN Doc. S/PV.5735 (2007); Security Council, 5735th meeting, UN Doc. S/PV.5735 (Resumption 1) (2007); Statement by the President of the Security Council, UN Doc. S/PRST/2007/31 (2007); Security Council, 5776th meeting, *supra* note 487; Security Council, 5776th meeting, UN Doc. S/PV.5776 (Resumption 1) (2007); Security Council, 6153rd meeting, UN Doc. S/PV.6153 (2009); Security Council, 6153rd meeting, UN Doc. S/PV.6153 (Resumption 1) (2009); Security Council, 6178th meeting, UN Doc. S/PV.6178 (2009); Security Council, 6257th meeting, *supra* note 371; Security Council, 6409th meeting, *supra* note 493.

[569] Report of the Secretary-General on the relationship, *supra* note 11, 6-7, para. 8. As pointed out in one of his follow-up reports: "Efforts to work with regional organizations to collectively address the challenges of peace and security must be undertaken in line with Chapter VIII of the Charter and coordinated under the aegis of the United Nations. But without a truly strategic relationship and clear guidance, our efforts to work together will continue to be short-term, ad hoc, more complicated and often more costly", Support to African Union peacekeeping operations (2010), *supra* note 475, 24, para. 90. Feedback from member States showed there was a wish for the Secretary-General to take leadership on this issue before the Security Council which is absorbed in current conflict issues and lacks the significant time necessary to reflect upon the long-term relationships with the AU and other regional organisations, Thematic evaluation of cooperation, *supra* note 65, 11, para. 31. The recommendations of the Secretary-General highlight the step-by-step growing acceptance of the desirability and even of the inevitability of a more defined if not even institutionalised framework of relations between the UN and regional organisations, J. Boulden, 'The United Nations Security Council and Conflict in Africa', in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 13, 25. The Representative of the Chairperson of the AU reiterated this call in the meeting of the Security Council on the topic of cooperation of the UN with regional organisations, Security Council, 7015th meeting, UN Doc. S/PV.7015 (2013), 7.

[570] Annex to the letter dated 1 August 2013 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General, Cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security, Concept note, UN Doc. S/2013/446 (2013), 4.

[571] See e.g. the statement on behalf of the EU, Security Council, 7015th meeting, *supra* note 200, 18. The Representative of the Chairperson of the AU highlighted, in particular, two areas in AU-UN relations which ought to be improved: First of all predictable, sustainable and flexible funding to AU peacekeeping operations authorised by the Security Council and secondly, the need for consultation and effective cooperation between the two organisations, whereby the AU and the PSC could perhaps occupy a privileged position "owing to the fact that the majority of the issues before the Council are African", Security Council, 7015th meeting, UN Doc. S/PV.7015 (2013), 7.

[572] Statement by the President of the Security Council, UN Doc. S/PRST/2013/12 (2013)

[573] *Ibid.*, 3.

underlined the importance of regional and subregional organisations to strengthen their peacekeeping capabilities and the "value of international support to their efforts." The Security Council also made clear that despite the recent practice of UN support packages, regional organisations have "the responsibility to secure human, financial, logistical and other resources for their organizations."[574] In the end, the Council also responded to Secretary-General's call and requested that he provides in his next biannual report to the GA and to the Council recommendations on ways to enhance cooperation between the UN and relevant regional and subregional organisations.[575]

The analysis of the relations among the international organisations within this Chapter allows the drawing of several conclusions regarding the law of international responsibility and its application to peacekeeping operations conducted in cooperation with international organisations. First of all, on a general level, the institutionalisation of relations among these international organisations indicates that it is rather likely that conduct arising in the context of a peacekeeping operation and in violation of international law will entail the responsibility of two or more international organisations. In this context, the legal analysis can only be carried out in the form of a casuistic approach – which simultaneously requires that the criterion for attributing conduct to international organisations is defined in such a way as to include various potential scenarios. Depending on the specific conflict and the involved organisations, the legal significance accorded to specific parts of the cooperation arrangements has to be adapted. In particular, the large degree of control the UN and the EU can exercise over the AU in the form of the financing of AU peacekeeping operations not only raises the question as to whether these actions would be sufficient *per se* to attribute responsibility to both organisations, but it might also justify the holding of these two organisations responsible despite a lack of cooperation or an insufficient basis of cooperation in other areas of a given mission. The triangle of relations between the UN, the EU and the AU also suggests that it is more likely that these three organisations will be jointly responsible in the context of a peacekeeping operation on the African continent. In contrast, ECOWAS and NATO play more of a supporting role in the context of African peacekeeping operations. Outside the framework of APSA, ECOWAS' relations with the other organisations are limited and entirely based on spontaneous practical arrangements. Moreover, NATO's policy is not to engage on the African continent unless asked to do so.

These "predictions" are, however, of a general nature, and cooperation in a specific operation is likely to have a variety of consequences as regards international responsibility of illegal conduct.

[574] *Ibid., 5*.
[575] *Ibid.*, 6.

Chapter III: The Law Applying in Peacekeeping Operations

3.1. International organisations: Definition, classification, legal personality

This Chapter explores the law applying to the conduct of peacekeeping operations during deployment in a conflict situation. The multidimensional nature of current peacekeeping operations means that peacekeeping troops engage in a variety of different activities of which many involve direct interaction with the local population. It was established in the previous chapters that current peacekeeping doctrines emphasise the protection of individuals as well as their basic rights, particularly under human rights and humanitarian law. Nevertheless, violations of international law occur as the following examples from practice illustrate. In 1999, three British soldiers serving in KFOR were investigated for the murder of two men and the malicious injury of three others.[1] In the same year, German soldiers were attacked by two Serbs riding in a passenger car and they killed one and wounded another in self-defence. Several British soldiers were attacked by a Ministry of the Interior police man.[2]

In 2000, the US authorities conducted an investigation regarding abuse committed by members of the 504th Parachute Infantry Regiment which was deployed as part of KFOR. Whereas one Staff Sergeant was sentenced in Germany to life in prison for the murder and rape of an 11 years old girl, the classified report also contains the information that several other members of the platoon beat, threatened and illegally detained civilians in Kosovo; acts which were accepted as facts by both the prosecution and the defence.[3]

[1] N. Wood, 'Kosovo's love affair with Nato keeps tempers down', *The Guardian*, 4 December 2000, available at: http://www.theguardian.com/world/2000/dec/04/balkans1 .

[2] Annex, letter dated 17 June 1999 from the Secretary-General of the North Atlantic Treaty Organization addressed to the Secretary-General, Letter dated 17 June 1999 From the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/692 (1999), 4, para.1 (e).

[3] *Washington Post*, 'Ohio GI Gets Life Sentence for Killing in Kosovo', 2 August 2000; *Washington Post*, 'Army Report Says Soldiers Abused Civilians in Kosovo', 17 September 2000. The arbitrary detention of 43 Serbs was also alleged in a Letter by Yugoslavia to the Security Council, Letter dated 17 April 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/325 (2000), 1. In another letter Yugoslavia stated that three Serbs had been arrested and detained by KFOR in an its underground military headquarters, questioned and not be released for over 90 minutes, Letter dated 26 May 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/497 (2000), 1, para.2. See also the Newspaper articles of the NY Times and Washington Post, Annexes I and II to Letter dated 18 September 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/877 (2000), 2-3.

In Darfur, peacekeepers of UNAMID have been directly attacked and killed,[4] on 17 October 2012 a UNAMID patrol was attacked by unidentified armed men using mortars, resulting in the death of one peacekeeper and a further three being wounded.[5] In other instances, UNAMID convoys carrying civilian and military staff were attacked, leading to the death of one peacekeeper and to two peacekeepers being injured; another attacked was executed by armed men dressed in civilian clothes, also killing two peacekeepers.[6] In South Sudan, a Misseriya youth opened fire on a UNISFA convoy killing the Ngok Dinka Paramount Chief and a UNISFA peacekeeper, the assailant was killed in the ensuing exchange of fire and three other UNISFA peacekeepers were wounded.[7] Finally, regarding Mali, the report of the Secretary-General speaks of attacks on AFISMA and Malian Armed forces.[8]

The law applicable to the conduct of peacekeeping operations constitutes the primary rules upon which the law of international responsibility, as a system of secondary rules, is based. Therefore, any analysis of the international responsibility of a state or an international organisation requires an examination of the applicable primary rules. Consequently, this chapter examines the specific bodies of law applicable in peacekeeping operations and some of the intrinsic problems regarding their application.

An analysis of the law that applies in peacekeeping operations presupposes an examination of the notion of "international organisation" under international law as well as its special characteristics.

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[4] The Guardian, ‚Seven UN peacekeepers killed in Sudan ambush', 13 July 2013, available at: http://www.theguardian.com/world/2013/jul/13/seven-un-peacekeepers-killed-sudan .

[5] Report of the Chairperson of the Commission on the African Union-United Nations Hybrid Operation in Darfur, PSC/PR/2.(CCCXLVIII) (2012), 5, para.22.

[6] Report of the independent expert on the situation of human rights in the Sudan, Mohammed Chande Othman, UN Doc. A/HRC/14/41 (2010), 14-15, para.58. Yet another attacks on peacekeeping convoys led to several wounded and 11 dead peacekeepers, Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2013/607 (2013), 7-8, paras. 29-33.

[7] Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/294 (2013), 3, para.9. This incident actually resulted in the establishment of a joint investigation following the 374th meeting of the AU PSC composed of the Governments of Sudan and South Sudan, the AU and the UN, Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/450 (2013), 2, para.5.

[8] "These [extremist armed] groups are, however, increasingly resorting to asymmetric tactics, including suicide bombings. The Mouvement unicité et jihad en Afrique de l'Ouest and other extremist groups have carried out a number of suicide attacks throughout the north. On 30 March, a suicide bomber struck a Malian armed forces checkpoint in Timbuktu, followed a few hours later by an insurgent attack on the city. On 12 April, a suicide bomber detonated his explosive device in a marketplace in the city of Kidal, killing four AFISMA Chadian soldiers and injuring another three. On 4 May, a complex attack involving a vehicle laden with explosives, small arms fire by the passengers in the vehicle and a motorcyclist wearing a suicide vest targeted a Malian armed forces convoy north of Gao, killing two soldiers. On 10 May, another suicide vehicle-borne improvised explosive device attack took place at the entrance of the camp of the Niger contingent of AFISMA in Ménaka", Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/338 (2013), 5, para.19; 6, para. 24.

When the ILC started working on the Articles on the Responsibility of International Organizations, it had to define "international organisations" as a legal term for the purposes of the project. According to the Articles, the term international organisation refers to "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."[9] A similar definition is proposed in a book by Schermers and Blokker, which defines international organisations as "forms of cooperation founded on an international agreement usually creating a new legal person having at least one organ with a will of its own, established under international law."[10] The common feature in these various definitions is the criteria of "international legal personality" of international organisations.[11]

[9] G. Gaja, First Report on responsibility of international organizations, UN Doc. A/CN.4/532 (2003), 18. This definition was not changed in the following years, cf. International Law Commission, Report on the work of its sixtieth session (5 May to 6 June and 7 July to 8 August 2008), General Assembly Official Records, Sixty-third session, Supplement No.10 (A/63/10) (2008), 263. This definition is in contrast to the original proposition of Special Rapporteur Gaja which was as follows "an organization which includes states among its members insofar it exercises in its own capacity certain governmental functions", cf. H. G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 32, para. 29; Gaja, *ibid.,* 18. In contrast, the *Institut de Droit International* limited its definition "international organisations" in its Resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties" to "an international organization possessing an international legal personality distinct from that of its members" (Session of Lisbon – 1995), the resolution is available online at: http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf. It has to be kept in mind, as emphasized by the International Law Commission that "The definition of "international organization" given in article 2, subparagraph (a), is considered as appropriate for the purposes of draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following articles apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations", International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), General Assembly, Official Records, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10 (2009), 44, para.1. The reason for this limitation was previously laid down in the report of the Commission in 2002 in which it said "The definition of international organizations (…) comprises entities of a quite different nature. Membership, functions, ways of deliberating and means at their disposal vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all intergovernmental organizations, especially with regard to the issue of responsibility into which States may incur for activities of the organization of which they are members. It may be necessary to devise specific rules for different categories of international organizations.", International Law Commission, Report on the work of its fifty-fourth session (29 April - 7 June and 22 July - 16 August 2002), General Assembly Official Records, Fifty-seventh session, Supplement No. 10 (A/57/10) (2002), 230, para. 470.

[10] H. G. Schermers, N. M. Blokker, *International Institutional Law* (2004), 26, para. 33. A very similar definition was proposed by Virally: "[u]ne organisation international est une association d'Etats établie par accord entre ses membres et dote d'un appareil permanents d'organes chargés de poursuivre la realization d'objectifs d'intérêts communs par une cooperation entre eux", M. Villary, 'Définition et classification des organisations internationals: approche juridique', in G. Abi-Saab (ed.), *Le concept d'organisation international* (1980), 45, 52. See generally on this issue, M. Mendelson, 'The Definition of 'International Organization' in the International Law Commission's Current Project on The Responsibility of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 371-389.

[11] One can argue that it is implied in the definition provided by Schermers and Blokker as "creating a new legal person" and "one organ with its own will" implies, the creation of a separate legal entity, Schermers, Blokker, *ibid*., 21, para. 29A; H. G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 37, para. 33. The

International organisations can be subdivided into universal and non-universal organisations. The latter group includes regional, subregional and other organisations. Two criteria allow differentiating between these two types of international organisation; a criterion *ratione personae* and a criterion *ratione materiae*. Universal organisations are generally open to all states if not even to other entities. Universal also means that these organisations act in the interests of the international community of states, even if their competences are limited to a certain specific area.[12]

Universal organisations are consequently relatively homogenous in contrast to the heterogeneity of regional organisations whose conditions for membership and whose competences may be more diverse. It is also difficult to conceptualise regional organisations because the relations they entertain with universal and other regional organisations cannot be analysed from one point of view alone, but necessitate a comprehensive examination;[13] which is reaffirmed by the dynamic and evolving character of these relations.[14]

The definition of international legal personality is important as

> [r]esponsibility is at one and the same time an indicator and the consequence of international legal personality: only a subject of international law may be internationally responsible; the fact that any given entity can incur responsibility is both a manifestation and the proof of its international legal personality."[15]

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focus on legal personality, especially in the definition of the International Law Commission is due to its trigger mechanism of responsibility given that "responsibility under international law may arise only for a subject of international law", Gaja, First Report, *supra* note 9, 8-9. Thus, a breach of an international obligation entailing international responsibility presupposes international legal personality of the breaching entity.

[12] Cf. L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 102. Virally prefers a categorisation according to « organisations universelles » and « organisations partielles » as the term "regional" would be misleading and imprecise, e.g. other factors may be also determinative as the basis for the existence of "regional" organisations, M. Virally, *L'Organisation Mondiale* (1972), 294-95.

[13] The different kinds of relations can include elements of cooperation or coordination, autonomy, supervision up to control, interdependence etc., Boisson de Chazournes, *ibid, 104.*

[14] *Ibid.*, 103. The emergence of regional organisations on the international level contains ramifications for the whole international order. An important point is the question as to whether the increased emergence of regional cooperation contributes to global governance or whether it weakens the coherence of the international order and its universalization (*ibid.*, 104); a trend which can be witnessed similarly in a purely legal sphere through the creation of new, not necessarily regional, legal institutions and the so-called fragmentation of international law. Equally the formation of regional alliances can be seen as an expression of strengthening the diplomatic, economic and other influence and weight of the concerned states at the international level, *ibid.*

[15] A. Pellet, 'The Definition of Responsibility in International Law', in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 3, 6; See also R. Kolb, G. Porretto, S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoire*s (2005), 321 ; Schermers, Blokker (2011), *supra* note 11, 1008, para. 1583; N. M. Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law

The first time the question of the international legal personality of international organisations was dealt with by the International Court of Justice was in the advisory opinion submitted to the Court by the General Assembly concerning *Reparation for Injuries suffered in the service of the United Nations*. After an analysis of the intention of the founders as well as the text of the United Nations Charter, the International Court of Justice said

> the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.[16]

The Court then continued to conclude that "it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[17] In its advisory opinion concerning the *Interpretation of the Agreement of 25*

commission take international organizations seriously? A mid-term review', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011), 313, 316 ; J. Crawford, *Brownlie's Principles of Public International Law* (2012), 203; J. D'Aspremont, 'The Limits to the Exclusive Responsibility of International Organizations', in (2007) 1 *Human Rights & International Legal Discourse*, 217, 218; For a quite comprehensive examination of the question of legal personality and examples, cf. C. Eagleton, *International Organization and the Law of Responsibility,* Collected Courses of the Hague Academy of International Law, Vol. 076 (1950), 320, 326-45.

[16] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* (11 April 1949), 9. That international organisations possess international legal personality was already recognised earlier. In Oppenheim's treatise on international law, it was stated that "the conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. And since now the Family of Nations has become an organised community under the name of the League of Nations with distinctive international rights and duties of its own, the League of Nations is an International Person sui generis besides the several States. But apart from the League of Nations, sovereign States exclusively are International Persons – i.e. subjects of International Law", R. F. Roxburgh (ed.), '*International Law: A Treatise. Vol. 1 - Peace'* by L. Oppenheim (1920), 125, para. 63. But Oppenheim nevertheless held on to a state-centric system of international law with the League of Nations as the only exception: "Since the Law of Nations is based on the common consent of Individual States, and not of individual human beings, States solely and exclusively (apart from the League of Nations) are the subjects of International Law", *ibid.* 17-18, para. 13. The accompanying footnote qualifies the League as a bearer of rights and duties. The slow emergence of international organisations as legal persons on the international level is equally illustrated in Oppenheim's work, as the first edition of the Treatise omits the qualification in brackets regarding the League of Nations (1st edition, 18, para. 13).

[17] *Reparation, ibid.,* 9. Possession of international legal personality also entails an autonomous position of the international organisation towards its member States. The ICJ declared in this matter that the "object [of constituent instruments] is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals", *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion* (8 July 1996), para. 75; See generally, see T. Gazzini, 'Personality of International Organizations', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011), 33-40 and especially, 38. It is therefore also generally accepted that international organisations are bound by customary international law, C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (2012), 424. Several cases of human rights abuses in the past years committed by staff of international organisations also raise the question as to whether such independence is necessary or desirable, see generally, N. M. Blokker, 'International Organisations as Independent Actors: Sweet

March 1951 between the WHO and Egypt, the Court, while referring to the *Reparations* decision, elaborated upon this and commented 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"[18], thus recognising explicitly that international organisations have obligations under international law and implicitly that those obligations can be invoked by an injured party.[19]

Nevertheless, the specific features of the international legal personality of international organisations have to be kept in mind while analysing their responsibility under international law. The International Court of Justice declared in its *Reparation* advisory opinion that the fact that an international organisation has legal personality is "not the same thing as saying that it is a State, which it is certainly not, or that its legal personality and rights and duties are the same as those of a state"[20] and "[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[21] In this sentence the Court developed two fundamental principles applicable to international organisations. First of all, the ICJ established the "principle of speciality" which is the limitation of the powers of an international organisation to those enshrined in its constitutive instruments.[22] The doctrine of "implied powers" is connected to the principle of specialty; the powers of international organisations on the basis of their constitutive instruments include these implied powers as well, which are necessary for an international organisation to exercise its functions.

Memory or Functionally Necessary?', in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 37-50.

[18] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion* (20 December 1980), para.37.

[19] The concept of an obligation comprehends the invocation of the non-respect of the obligation by the injured party, cf. B. Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-keeping Forces', (1976) 32 *Revue Egyptienne de Droit International*, 59, 374-5. The Court left open the extent and identity of norms by which an international organisation is bound, which has often been misinterpreted in practice, cf. B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen* (2006), 55-56.

[20] *Reparation, supra* note 16, 9.

[21] *Ibid.,* 10.

[22] P. Daillier, A. Pellet, *Droit international public* (2002), 593. The first time the ICJ explicitly referred to it as the "principle of speciality" was in the *Legality of the Use, supra* note 17, para. 25.
The notion of personality is merely descriptive, "neither rights nor obligations flow automatically from a grant of personality", J. Klabbers, *An Introduction to International Institutional Law* (2002), 57. Generally on the issue of international legal personality, see A. Clapham, 'The Subject of Subjects and the Attribution of Attribution', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowland-Debbas* (2010), 45, especially 47-53.

However, the attribution of responsibility in a specific situation has to be distinguished from the determination of the legal personality of the respective entity: "[S]eparate personality is [not] necessarily determinative of whether member states have a concurrent or residual liability."[23] On the basis of the fact that the UN and the four regional organisations which are part of this study possess international legal personality,[24] the following parts will examine the extent to which and in what ways they are bound by international norms during the deployment of peacekeeping operations.[25]

3.2. The applicable international law to peacekeeping operations of international organisations

1. Introduction: the dual nature of peacekeeping operations

In the case of peacekeeping and peace enforcement operations under the authority of international organisations, members of the military personnel are under "double control" as troop contributing states retain their control and authority regarding matters of discipline, finances, promotions and punishment, despite having transferred operational command and control over their troops for the conduct of the operation to the respective international organisation. Therefore, the "organic link" between the peacekeeping forces and their sending states is normally not completely dissevered and the troops remain bound by the international law obligations of their state even while exercising functions of the international organisation, as long as the former continues to exercise this form of limited control.[26] The fact that peacekeeping forces possess this dual nature does not have an immediate bearing upon the question of responsibility, as the attribution of conduct has to be distinguished from the applicable legal framework.[27]

The dual nature of peacekeeping operations results from the

> historical development of international law, its primary subjects are States. It is on States that most obligations rest and on which the burden of compliance principally lies. For example, human rights treaties, though they confer rights upon individuals, impose obligations upon States. If other legal

[23] Cinquième Commission [R. Higgins], 'The Legal consequences for member-states of the non-fulfilment by international organizations of their obligations towards third parties', (1995) 66 Part I Yearbook Institute of International Law, 249, 257.
[24] *Infra*, Chapter II.
[25] In practice, one would normally first of all examine the attribution of conduct to an entity, in order to establish its responsibility, and then seek to determine the infringed legal norm. However, as the methodology of this study is a top-down approach according to which the analysis of specific case-studies is at the very end, it appears preferable to analyse the applicable law in peacekeeping operations at this point.
[26] Kolb, Porretto, Vité, *supra* note 15, 252.
[27] As a set of secondary rules, the attribution of conduct is based on the violation of primary rules in the form of the applicable legal framework to peacekeeping operations.

> persons have obligations in the field of human rights, it is by derivation or analogy from the human rights obligations that States have.[28]

Thus, the emergence of international organisations led to the continuing transfer of competences from states to these bodies, but in the majority of cases, states retain some form of control as they are unwilling to completely transfer certain aspects of their sovereign rights. It is particularly in the context of their armed forces and the broader but related areas of defence and security that states are inclined to safeguard their sovereignty, and thereby also their national interests.

Consequently, it is not surprising that several arguments brought forward and theories developed to determine the law applicable to international organisations, particularly in the human rights law context, rely on derivation or analogy; binding the international organisation indirectly through the obligations of states. Other approaches seek to bind international organisations directly, on the basis of their own international legal personality. In addition to human rights law, international humanitarian law is also relevant insofar as it may be applicable during the specific context of a peacekeeping operation.[29] The next part examines the application of human rights law to international organisations.

2. Application of International Human Rights Law to International Organisations

1. International organisations as bound by the human rights obligations of their members

There are different doctrinal approaches used to argue for international organisations to be bound by the human rights of their member states' obligations. The majority of states have ratified international and regional human rights treaties, including the ICCPR, the ECHR, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[30] The above-mentioned doctrinal approaches seek to overcome the principle of relativity as it applies to international treaties on the basis of Article 34 VCLT and thus also for the various human rights

[28] J. Crawford, 'The system of international responsibility' in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 17, 17.

[29] Refugee law might also be relevant, but its scope of application is limited to people having fled their home countries and it contains obligations for these states on whose territories these people have fled. It could therefore only be applicable if people were to have fled to a country on which a peacekeeping operation is deployed and unless the peacekeeping operation in question were to administer this country, the peacekeeping operation could simply not be bound by the provisions contained of refugee law which presuppose the exercise of governmental authority, see Article 1 and, e.g. Article 18 of the 1951 Refugee Convention.

[30] Another relevant instrument is the Universal Declaration of Human Rights which although it is not a treaty has at least partially become customary international law, see, *infra* 3.2.2.4.

treaties of which states exclusive are members.[31] One doctrinal approach is to consider international organisations as successors or substitutes for the international human rights instruments to which their member states are parties.[32] In other words, the question is whether international organisations can be and are bound by the existing international obligations of their members or "whether, since they are separate subjects of international law, they may in principle disregard any such pre-existing obligations."[33] In its judgments in the cases of *Kadi* and *Yusuf,* the Court of First Instance ruled on this very specific question that

> unlike its Member States, the Community as such is not *directly bound* by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law[34] [Emphasis added].

The Court then concluded that the obligation to implement the Security Council Resolutions is not derived from the basis of general international law, but from internal EU law.[35] Another problem with

[31] As a fundamental principle of international law, it is also arguably in any case valid on a customary law basis.

[32] See, in this regard, T. Ahmed, I. de Jesùs Butler, 'The European Union and Human Rights: An International Law Perspective', (2006) 17 *The European Journal of International Law*, 771-801; Critical of this theory, F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations' in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 129, 132.

[33] O. De Schutter, 'Human Rights and the Rise of International Organisations : The Logic of Sliding Scales in the Law of International Responsibility in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51, 58.

[34] T-135/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005], para. 192; T-306/01, Ahmed Ali Yussuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, [2005], para. 242. The legal office of the United Nations held an identical view regarding the question as to whether the United Nations is bound by the *Convention Concerning Freedom of Association and Protection of the Right to Organise* (1948), Legal Aspects of the Establishment of a Trade Union at the Geneva Office of the United Nations, *United Nations Juridicial Yearbook* (1973), 171, 171, para.2. Interestingly, the Legal Office however, submits that the Universal Declaration of Human Rights is "an instrument that is, as far as relevant, applicable to the United Nations itself.", *ibid.*, 171, para.3. This *primary facie* contrary argumentation is arguably due to a different legal underpinning of the UDHR which was adopted as a Declaration by the General Assembly and is therefore also part of internal UN law. Generally, any binding effect upon the United Nations necessitates an act of implementation as is evident from Judgment no.15 of the United Nations Administrative Tribunal to which the memorandum refers, *Robinson v. the Secretary-General of the United Nations*, Judgment no. 15 (1952), paras. 11-12. Moreover, the right to assembly concerns the relationship between the United Nations and its personnel, the internal sphere of the organisation, which corresponds to the classic relationship between state and its citizens. It leaves unanswered the question of obligations of members of staff of the UN which includes peacekeeping forces toward third persons and thereby the external sphere.

[35] *Yassin Abdullah Kadi, ibid*., para. 207; *Ahmed Ali Yussuf, ibid.*, para. 257. To this end "the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was

the theory of succession is that it requires all member states of a given organisation to be bound by the very same obligations which are supposed to be imposed on the organisation; a requirement which becomes more and more theoretical, the more members a given organisation has.[36] Otherwise, there might be cases in which the nationality of the peacekeeper, be it for example French or Nigerian, would determine the applicable law. This theory is also problematic as it does not resolve the problem of international organisations not possessing territories of their own. [37]

Another attempt to make the obligations of member states applicable to international organisations is on the basis of the principle of *nemo plus juris transferre potest quam ipse habet*.[38] The idea is that "as no one can transfer more powers than he has, the Member States were not competent to transfer any powers conflicting with (…) treaties" concluded prior to the establishment of the international organisation.[39] As such international organisations never had the power to contravene the respective treaty or to act against it.[40] However, this argument is problematic for the following

established, to adopt all the measures necessary to enable its Member States to fulfil those obligations", *ibid.*, para. 204, respectively para. 254.

[36] P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (1998), 342; in favour of this opinion, see M. Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales ', in Société française pour le droit international/Institut International des droits de l'homme, Journée d'études de Strasbourg. La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme (2009), 7, 25-8 ; An opposing opinion was issued, e.g. by the Venice Commission, European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo : Possible Establishment of Review Mechanisms, Opinion no. 280/2004, CDL-AD (2004)033, 15, para.78.

[37] L. Cameron, 'Human Rights Accountability of International Civil Administrations to the People Subject to Administration', in (2007) 1 *Human Rights & International Legal Discourse*, 267, 279.

[38] Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales', *supra* note 36, 7, 24. He specifies that according to this theory an international organisation can either be directly bound or at least be obliged to exercise due diligence which implies an interdiction to put their member states in a situation contrary to their treaty obligations ; See also De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 62; Dold, *supra* note 19, 53-54; A. Peters, 'Article 25', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), The Charter of the United Nations. A Commentary. Volume I (2012), 787, 820 mn. 105.

[39] H.G. Schermers, 'The European Communities Bound by Fundamental Human Rights', (1990) 27 *Common Market Law Review*, 249, 251; H. G. Schermers, N. M. Blokker, *International Institutional Law* (1995), 988 § 1578. The very same opinion as applying in respect of the United Nations was expressed by Judge Fitzmaurice in his dissenting opinion to the *Namibia* Advisory Opinion: "[F]or derived powers cannot be other or greater than those they derive from.", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971)* (Judge Fitzmaurice, Dissenting Opinion), para. 65. In his dissenting opinion, Judge Fitzmaurice refers to the previous case-law of the Court, especially its decisions in the *Voting Procedure* and the *Oral Petitions* case, but the statement has nevertheless to be read with caution as all these cases concern powers of the United Nations as deriving from the League of Nations which is either, depending on one's perspective, a case of succession or a case of an indirect transfer of competences by the member-states – via the previously established League of Nations.

[40] The same position is taken by Tondini who equally writes that "it is logically sound (…) that an international organisation should be held accountable in respect of the violations of the human rights standards it promotes and universalizes.", M. Tondini, 'The 'Italian Job' : How to Make International Organisations Compliant With Human Rights and Accountable For Their Violation by Targeting Member States' in J. Wouters, E. Brems, S. Smis

reasons. First of all, it applies only when the respective international organisation is established after the ratification of the treaty in question. [41] Even more crucial is that this doctrine "should correspond to any international obligation of any Member State of the organisation, without it being necessary that all Member States are bound by the said obligation."[42] It is, as a result, not working in practice, especially for those organisations with an evolving membership such as the European Union.[43] Supporters of this theory argue, however, that international organisations – as entities of delegated power – cannot dispose of a decision-making authority to define autonomously their position regarding the application of general international law.[44]

In the *Reparations* case, the ICJ also held that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights." [45] Moreover, on the basis of the principle of speciality (*infra* 3.1.), there will be cases in which international organisations simply lack the competence to act in the field of human rights. Explicitly referring to the principle of speciality, the ICJ declared that "international organizations (…) do not, unlike States possess a general

(eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 169, 192-3. He criticizes, however that "this theory hardly explains the concrete level of protection to be granted and does not eventually solve *the problem*, i.e. the exercise of accountability, not simply the mere confirmation of its existence." (ibid., 193); For the latter, see also E. Abraham, 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo', (2002-2003) 52 *American University Law Review*, 1291, 1312-3; H. Ascensio, 'Le Règlement des différents liés à la violation par les organisations internationales des normes rélatives aux droits de l'homme', in Société française pour le droit international/Institut International des droits de l'homme, *Journée d'études de Strasbourg. La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (2009), 105, 119-20; L. Condorelli, 'Conclusions générales', in Société française, *ibid.*, 127, 129.

[41] Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales', *supra* note 36, 7, 25.

[42] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 64; also F. Naert, 'Binding International Organisations to Member State Treaties', *supra* note 32, 129, 134; Forteau, *ibid.*, 7, 25. Forteau also points out that this theory has not been accepted in jurisprudence so far (*ibid.*, 24).

[43] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 65-66. It is also argued that the principle of relativity of treaties as enshrined in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Article 34 and also Article 35) finds itself in tension with the application of this principle. However, as rightly pointed out by Klein, this Convention applies only to international agreements concluded between international organisations and states or concluded between international organisations, Article 2 (1) a. of the Convention; Klein, *supra* note 36, 344. The Convention leaves, however, unaffected any customary rule as pertaining to the principle of relativity of treaties as applying to international organisations; furthermore it has not (yet) entered into force.

[44] Klein, *supra* note 36, 346; Also B. Rouyer-Hameray, *Les compétences implicites des organisations internationales* (1962), 12 ; also N. B. Krylov, 'International Organizations and New Aspects of International Responsibility', in W. E. Butler (ed.), *Perestroika and International Law* (1990), 221, 221-2; This view seems to be based on the view that sovereignty corresponds to "freedom within the law (including freedom to seek to change the law", cf. J. Crawford, 'Sovereignty as a legal value', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 117, 122. Also for a broader discussion of sovereignty of international organisations, M. Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', (1995) 36 *Virginia Journal of International Law*, 53, 61-65. However, as an actor in its own right under international law, it appears questionable why an international organisation could not persistently object to be bound by a specific rule.

[45] *Reparation, supra* note 16, 8.

competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[46] Finally, this theory is completely impractical in its concrete application, as the nationality of a peacekeeper would also determine the applicable law.[47]

The problems related to these particular theories support the analysis of the obligations of international organisations by human rights obligations through other methods.

2. The specific case of accession to human rights treaties

The accession of international organisations to human rights treaties[48] also raises its own problems.

The absence of a real territorial basis, and of an administrative structure similar to governmental structures and the general limitation of powers of international organisations to those necessary for the fulfillment of their mandates, renders the conformity of action by the international organisation with conventional requirements very difficult, if not impossible.[49] It means that "whereas the organisation may be obliged to adopt certain measures, to the extent that human rights treaties impose certain positive obligations, it would only have to do so to the extent that this does not lead the organisation to go beyond the principle of speciality."[50] It is debated in the doctrine what kind of obligations an accession to an international human rights treaty would entail for an international organisation.

On the one hand, it is suggested that accession to an international human rights instrument would not lead to a transfer of additional powers to the international organisation, however it could affect

[46] *Legality of the Use, supra* note 17, para. 25
[47] Cameron, *supra* note 37, 267, 279.
[48] So far, it is only possible for the European Union under the European Convention on Human Rights. It is suggested that "[t]he fact that human rights conventions are not open to international organisations shows the persistence of the conviction that international organisations are not concerned by the questions of violations of fundamental rights of individuals", L. Condorelli, 'Le Conseil de Sécurité, les sanctions ciblées et le respect des droits de l'homme', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowland-Debbas* (2010), 73, 75.
[49] Klein, *supra* note 36, 319. This is also an argument raised by the UN against its non-accession to the Geneva Conventions, notwithstanding the question of the possibility for non-states to accede to these instruments (*ibid.*). A specific argument raised by the UN is its incapacity to satisfy the requirement as regards the repression of grave violations of the Conventions, however as argued also by other authors, the United Nations could establish a judicial organ charged with that function similarly to the ICTY and the ICTR (*ibid.*, 320); See R. D. Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', (1995) 17 *Michigan Journal of International Law*, 53, 68-9.
[50] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 114. On this specific point see also, *infra* 3.2.2.6.

the exercise of any powers which had been attributed by the states to the extent that the organisation has positive obligations to protect the human rights which are enshrined in the treaty. The other view is that due to the principle of specialty, the accession to human rights treaties would only impair negative obligations on the acceding international organisation as it should not lead to the transfer of additional powers to the organisation.[51] The argument made for the second view is that otherwise the international organisation would exercise powers which were not attributed to it, and that it should also only use the powers for the purposes for which they have been attributed. According to this view, the accession is equivalent to a change of the mandate of the organisation.[52]

In the near future, the EU will accede to the ECHR and it can be expected that the jurisprudence of the European Court of Human Rights will shed some light on these briefly mentioned and other related issues, (see also *infra* 3.2.2.6.2.2.).

3. Human rights obligations of international organisations as part of general international law

Apart from the theories which rely on binding international organisations through the obligations of their respective members, international organisations can be bound directly by human rights obligations as part of general international law. This includes, "general principles of (international) law" as well as customary international law. In contrast to the previously analysed theories, this approach has the advantage that the respective norms are directly applicable and that there is no need to use analogies or other legal methods. In contrast to the Bulletin on International Humanitarian law issued by the Secretary-General, there is not such a bulletin on human rights law which would have also facilitated the identification of certain human rights norms which could be applicable to peacekeeping forces.[53]

[51] The European Convention, The Secretariat, Report from Chairman of Working group II "Incorporation of the Charter/accession to the ECHR to Members of the Convention", CONV 354/02 (2002), 115.

[52] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 115-6; Similarly, while referring explicitly to the EU, A. von Bogdandy, 'The European Union as a human rights organization? Human rights and the core of the European Union', (2000) 37 *Common Market Law Review*, 1307, 1317. One has, however, to keep in mind that In order to accede to a Human Rights treaty, the international organisation does not need to possess competence in this specific area. Moreover, this argumentation fails to oversee the principle of implied powers as applicable to international organisations.

[53] K. Grenfell, Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 57, 58. Statements by political or political bodies are limited to human rights obligations of States participating in a UN operation, *ibid.* In the "Brahimi Report", it was held that the carried out peacekeeping missions would have been easier with a "common United Nations justice package" consisting of an "interim legal code", Panel on United Nations Peace

4. Human rights obligations of international organisations on the basis of customary international law

In order for a customary law norm to exist, there has to exist state practice and the belief that certain conduct is obligatory due to the existence of a rule of law requiring this very conduct (*opinion iuris sive necessitatis)*.[54]

In the Nicaragua case, the ICJ held that

> this opinion juris may, though with all due caution, be deduced from, inter alia (…) the attitude of States towards certain General Assembly resolutions (…) The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[55]

Specifically in the field of human rights, it has also been suggested that official declarations and participation in the negotiation of human rights conventions should be included as practice of States.[56] In favour of this proposition, it is suggested that one can hardly distinguish between the state practice and *opinion iuris*; the relevant state practice is legally significant as testifying to the emergence of a rule and the *opinio iuris* can only be detected and recognised on the basis of the state practice.[57]

Operations, Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 and S/2000/809 (2000), 14 para. 81.

[54] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands),* Judgment (20 February 1969), para. 77.

[55] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment (27 June 1986), para. 188. One has to note, however, that in this case, the Court was dealing with the identification of a negative customary law obligation: the prohibition of the use of force (*ibid.*), for which the examination of *opinio iuris* is more important as state practice cannot consist in active acts.

[56] Cf. also, for a similar theory, Tondini, 'The 'Italian Job': How to Make International Organisations Compliant With Human Rights', *supra* note 40, 169, 191-192.

[57] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 69. As explained by Dupuy: "La seconde observation est celle de l'interdépendance manifeste sinon même de l'union inextricable entre l'un et l'autre élément [du droit coutumier]. La pratique n'est, dans la grande majorité des cas, qu'abstraitement et artificiellement distinguable de l'*opinio juris.* Elle en est, *elle-même*, la manifestation tangible : l'élément matériel n'est pas un préalable à l'apparition de l'élément psychologique parce que, lui-même, il constitue la preuve de la conviction juridique des Etats. La coutume est l'expression d'une *opinio juris* manifestée dans et par une pratique", P.-M. Dupuy, *L'unité de l'ordre juridique international*, *Cours général de droit international public*, Recueil des cours de l'Académie de La Haye, Volume 297 (2002), 9, 166. In the Nicaragua case, the ICJ effectively accepted votes and statements made by states in the GA condemning the use of force as both state practice and *opinio iuris*, H. Charlesworth, 'Law-making and sources', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 187, 194. In the end, as Charlesworth asserts, the definition of *opinion iuris* is circular as "it seems to require that states believe (mistakenly) that something is already law before it can become law", *ibid.*

Besides, human rights are traditionally concerned with the relationship between states and their nationals. The international community, and thereby the other states, have therefore normally reacted less frequently to violations of these rights than to violations of rules directly pertaining to inter-state relations as the latter directly touch upon their interests.[58] This argument might have lost a degree of its pertinence due to the development of the concepts of humanitarian intervention and the responsibility to protect.

Other authors argue for a shifting of the importance of state practice or *opinio iuris*; the more strongly one is identified, the weaker the other may be.[59]

Several human rights have without doubt a customary status, such as the prohibition of torture or prolonged arbitrary detention. Equally, the UDHR, or at least part of it, has been transformed into customary law.[60]

The proof of an existing customary norm on the basis of state practice and *opinio iuris* is nevertheless problematic in the context of the present study. As human rights primarily address states and have attained customary status because of State practice and *opinio iuris*, "the question (…) remains whether an international organisation can be bound by customary norms, which have become binding because of *State* practice."[61] One can argue that the substance of each customary norm indicates its addressees; human rights law was conceived as binding states in the exercise of their power towards their citizens so that it would be – following this doctrine – not applicable to international organisations which are not in direct contact with human beings.[62] In response, it can be said that this doctrine blurs the difference between customary and treaty norms, as it applies the principle of relativity de facto to the formation of customary law. It therefore appears that, in

[58] O. Schachter, *International Law in Theory and Practice. General Course on Public International Law*, Recueils des cours de l'Académie de La Haye, Volume 178 (1982), 12, 334. Schachter also writes that "Arbitral awards and international judicial decisions are rare except in tribunals based on treaties such as the European and Inter-American courts of human rights", *ibid.*; Similarly, C. Tomuschat, *Human Rights. Between Idealism and Realism* (2003), 34. He adds that in the field of human rights, the identification of certain basic, fundamental rights as customary law "is not so much based on actual stocktaking of the relevant state practice but rather on deductive reasoning: if human life and physical integrity were not protected, the entire idea of a legal order would collapse", *ibid.*, 35.

[59] F. Kirgis, 'Customs on a Sliding Scale', (1987) 81 *The American Journal of International Law*, 146, 149.

[60] E. De Brabandere, 'Human Rights Accountability of International Administrations : Theory and Practice in East Timor' in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 331, 336; J. Wouters, E. Brems, S. Smis (eds.), 'Introductory Remarks', in J. Wouters, E. Brems, S. Smis (eds.), *ibid.*, 1, 6; Tomuschat, *supra* note 58, 4.

[61] Brabandere, *ibid.*, 331, 337; B. Fassbender, 'Sources of human rights obligations binding the UN Security Council', in P. H. F. Bekker, R. Dolzer, M. Waibel (eds.), *Making Transnational Law work in the Global Economy* (2010), 71, 79-80.

[62] A. Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen', (1977) 37 *Heidelberg Journal of International Law*, 107, 110-13.

practice, customary law is binding on all legal entities, including international organisations as long as there is no formal objection.[63]

Moreover, evolutionary interpretation has always been used in international law and it is now accepted that international organisations are bearers of rights and obligations under international law and this includes customary international law.[64] The fact of their coming into being later than states, and their resulting non-participation in the formation of certain rules, should not be decisive.[65] Any newly created state, such as the recent example of South Sudan shows, would be deemed bound by the whole body of customary law and there is no reason why it should be different for an international organisation.[66] The only legitimate argument to restrict the application of customary human rights law to international organisations cannot be derived from the customary nature of the norm, but is based on the principle of speciality; international organisations operating in specific fields which do not come into contact with individuals may not be bound by human rights. If their constituent instruments do not contain competences to operate in such a field,[67] the international organisation will be prevented to act[68] and it is on the basis of these internal rules of

[63] Cf. De Brabandere, 'Human Rights Accountability of International Administrations', *supra* note 60, 331, 337; C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law*, Recueil des cours de l'Académie de La Haye, Volume 281 (1999), 9, 134-135 ; see also B. Kondoch, 'Human rights law and UN peace operations in post-conflict situations', in N. D. White, D. Klaasen (eds.), *The UN, human rights and post-conflict situations* (2005), 19, 36-41; V. Gowlland-Debbas, The Security Council and Issues of Responsibility under International Law, Recueil des cours de l'Académie de La Haye, Volume 535 (2012), 185, 366; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 394; A similar opinion is expressed by F. Morgenstern, *Legal Problems of International Organizations* (1986), 32.

[64] Cf. equally *Interpretation of the Agreement, supra* note 18, para.37.

[65] On the "modernisation" and application of customary human rights law to international organisations in light of the fact they did not participate in the development of previously existing customary norms, cf. I. R. Gunning, 'Modernizing Customary International Law: The Challenges of Human Rights', in (1990-1991) 31 *Virginia Journal of International Law*, 212, 213, 221-27. Alvarez also points out – correctly – that the formation of customary law has be transformed and institutionalised due to the participation of international organisations, J. E. Alvarez, 'International Organizations: Then and Now', in (2006) 100 *American Journal of International Law*, 324, 332.

[66] Against such a view, J. Klabbers, 'International Institutions', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 228, 235.

[67] The same argument is also made by G. Porretto, S. Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organizations*, Research Paper Series No.1, CUDIH, Geneva (2006), 45-46, and N. Quénivet, 'Human Rights Law and Peacekeeping Operations', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 99, 125. Cf also F. Mégret, F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', in (2003) 25 *Human Rights Quarterly*, 314, 317. For a contrary view, Peters, 'Article 25', *supra* note 38, 787, 824 mn. 119. Clapham and Cameron assert likewise that customary (human rights) law binds international organisations on the basis that international organisations are bearers of rights and obligations, combining thus legal personality with the principle of specialty, A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), 69; Cameron, *supra* note 37, 267, in particular 275-277.

[68] Of course, there would always be the possibility of acts *ulta vires* by an agent or organ of the organisation.

the organisation that human rights law would not be wholly or partially applicable.[69] In other words, it is argued that, human rights can only bind an organisation so far as it has relevant competences.[70] It also has to be strongly emphasised that in peacekeeping operations another limitation arises in the form of the mandate handed out by the Security Council. More broadly, and taking into account domestic legal theory, this interpretation also conforms to the idea of "*Funktionsnachfolge*."[71] Another approach in doctrine relies on an argument similar to the transfer of power of states to international organisations, stating that customary law applies to all subjects of international law, and consequently to international organisations which possess international legal personality.[72]

Moving away from the application *in abstracto* of human rights law, it is noted that an international organisation is only bound in a specific situation to the extent that the organisation "exercises

[69] As the articles on the responsibility of international organisations illustrate rules of an international organisation may have an external effect (*Außenwirkung*) to the extent that they contain obligations under international law. A disposition of a constituent instrument of an international organisation granting that organisation the competence to engage with human beings will consequently be coupled with the corresponding obligation under international law. Another specification which has to be made is that in the scenario of an international organisation possessing competence under human rights law, one has equally to distinguish between rights and obligations. Prohibitive norms such as the prohibition of torture will obviously entail an obligation not to torture which does not exclude the possibility that the organisation is equally bound by a positive obligation to prevent torture; O. Engdahl, Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 66, 69.

[70] De Brabandere, 'Human Rights Accountability of International Administrations', *supra* note 60, 331, 338.

[71] See e.g. W. Hummer, 'Untergang, „Entkernung" und Funktionsnachfolge Internationaler Organisationen – dargestellt am Beispiel der EGKS und der WEU', in F. Zehetner (ed.), *Festschrift für Hans-Ernst Folz* (2003), 117 – 144. This theory has been criticised as lacking a legal basis in both treaty and customary international law, Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 121.

[72] H. G. Schermers, 'The Legal Bases of International Organization Action', in R.-J. Dupuy (ed.), *Manuel sur les organisations internationals – A Handbook on International Organizations* (1998), 401, 402. According to Schermers it is based on three different strings of argumentation: "It can safely be submitted that international organizations are bound by international customary law, either on the ground that all subjects of international law are so bound, or on the ground that the member States were bound by international customary law when they created the organization and thus may be presumed to have created the organization as being so bound, or on the ground that the rules of customary law are at the same time general principles of law to which international organizations are bound" (*ibid.*). The second element of his argument is however problematic regarding specific rules of customary law, as under this hypothesis an international organisation would not be bound by a specific rule of customary law which did not exist at the time of foundation of the organisation which however does not impair upon the international organisation being bound by these specific rules if they are to all subjects of international law. A similar argument is elaborated up by Tomuschat who says that "customary international law has evolved through practice in dealings between States. Consequently, it could be argued that international organizations, being autonomous subjects of international law, cannot be bound by such rules in whose foundation they did not participate (...) Substantively, international organizations may be characterized as com[mon] agencies operated by States for the fulfillment of certain common tasks. Now, if States acting individually have been subjected to certain rules thought to be indispensable for maintaining orderly relations within the international community, there is no justification for exempting international organizations from the scope *ratione personae* of such rules. International organizations cannot have more or more extended rights than States.", Tomuschat, *supra* note 63, 9, 134-5.

functions in a way that can be equated with the exercise of jurisdiction by a State."[73] This is less problematic for international organisations which administer a territory because they exercise functions and powers which are traditionally prerogatives of states and these comprehensive powers facilitate the establishment of jurisdiction.[74] In contrast, the establishment of jurisdiction for situations in which an international organisation is not administering a territory is complex.[75] It is also important to consider customary human rights norms as being part of the customary law of the international organisation itself, and particularly of the United Nations. This proposition is however problematic as the relevant practice by international organisations since the foundation of the UN is limited, and comprises only two cases of international administration.[76]

Further controversy has arisen from the identification of the specific norms which are part of customary human rights law. In some parts of legal scholarship it is opined that the whole corpus of human rights law as incorporated in the Universal Declaration on Human Rights is applicable,[77] while others are of the view that only a few specific fundamental norms are part of customary human rights law.[78] In any case, it is not disputed that the most fundamental norms are deemed to be of a customary nature, for example, violations of the rights of life through murder, torture and arbitrary detention.[79] Other authors suggest that even the right to an effective remedy is of a customary

[73] J. F.Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 51, 67.

[74] Cf. also Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales', *supra* note 36, 7, 14-16.

[75] As the jurisprudence on extra-territorial application of human rights instruments to states shows, there is no consensus on the exact requirement, but it is a rather casuistic assembly. An additional layer of difficulty resides in the mere fact that this jurisprudence cannot be transferred and applied, *mutatis mutandis* to international organisations, *infra* 3.2.2.6.

[76] De Brabandere, 'Human Rights Accountability of International Administrations', *supra* note 60, 331, 337.

[77] B. Simma, P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', in (1988-1989) 12 *Australian Yearbook of International Law*, 82, 84-85; M. G. Kaladharan Nayar, 'Introduction: Human Rights: the United Nations and United States Foreign Policy', in (1978) *Harvard International Law Journal*, 813, 816-817; T. Buergenthal, 'The Evolving International Human Rights System', in (2006) 100 *American Journal of International Law,* 783, 787.

[78] Supporters of this restrictive view include, for example the relatively persuasive arguments by Schachter, *supra* note 58, 12, 333-342; O. Schachter, 'New Custom : Power, *Opinio Juris* and Contrary Practice', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st century : Essays in honour of Krzystof Skubiszewski* (1996), 531, 538-40 ; also R. K. M. Smith, *Textbook on International Human Rights* (2012), 38-39; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 82 – 89; Rehman considers the majority of the dispositions in the UDHR to be representing customary human rights law , J. Rehman, *International Human Rights Law. A Practical Approach* (2010), 80-81.

[79] A. Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution', in (1994) 43 *International and Comparative Law Quarterly,* 537, 544; C. Bongiorno, 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor', *in (2002) 33 Columbia Human Rights Law Review*, 623, 644-45. De Schutter takes an intermediate position and considers the UDHR to be applicable to international organisations as an expression of general principles of law as well as emerging customary obligations, O. De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of

nature and applicable to international organisations, which would presuppose a previous violation of another right.[80]

5. Human rights obligations of international organisations on the basis of general principles of law

Human rights obligations also stem from general principles of law. Although they are not a subsidiary source of international law[81], they are less relevant in practice due to their often rather vague nature. Indeed, legal certainty is lacking in "elementary considerations of humanity." [82] Furthermore, many norms considered as falling in this category will simultaneously constitute customary norms, so that the consideration of general principles of law in the present study will rather be limited.[83] The acceptance that general principles are one of the foundations of international law also leads to the conclusion that certain equally fundamental human rights norms must play an equal part.[84] Other

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Sliding Scales in the Law of International Responsibility in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51, 72-3.

[80] Presupposing a previous violation of another right, K. Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap', in (2004) 25 *Michigan Journal of International Law*, 1159, 1162; D. Shelton, *Remedies under International Human Rights Law* (2006), 123-30, 181-82.

[81] Judicial decisions and the "teaching of the most highly qualified publicists of the various nations" constitute subsidiary sources of international law, according to Article 38 of the statute of the ICJ.

[82] Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 130. The citation is from the *Corfu Channel* Judgment of the ICJ, *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of April 9th, 1949, 22. The Court recognised "obligations (…) based on certain general and well-recognized principles, namely: elementary considerations of humanity." The ICJ referred to this particular quote in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), para. 79. It held that "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case, that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." As correctly observed by De Schutter, these statements have to be read with caution as they refer to general principles of international law as well as to customary law but arguably these statements qualify "human rights among the 'general principles of law recognized by civilized nations'", De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 72.

[83] The ICJ referred e.g. to the fundamental principles enunciated in the UDHR, *The Corfu Channel Case, ibid.*, 22. The ILA emphasises equally this interface between the different sources of law, International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, Third Report consolidated and enlarged version of recommended rules and practices ("RRP-S"), 11. Customary IHL is deemed to apply, *mutatis mutandis*, to take into account of the competences and resources of international organisations, *ibid.*, 14. In the 2004 report, the ILA goes further and states that ""Human Rights (…) becom[e] increasingly an expression of the common constitutional tradition of States, [and] can become binding upon IO-s in different ways; through the terms of their constituent instruments; as customary international law; or as general principles of law (…) The consistent practice of IO-s points to a recognition of this.", International Law Association, Berlin Conference (2004), Accountability of International Organisations, 22.

[84] M. Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces', in (1998) 11 *Leiden Journal of International Law*, 229, 236

arguments present general principles of international law as a tool to fill gaps in the law, so-called *non liquet* situations, equating them therefore with something akin to a *technique juridique* than with primary rules of international law.[85]

It is suggested that general principles are used to promote "values that international law seeks to promote and protect,"[86] focusing on human dignity and its position under international law.[87]

Other approaches suggest that certain procedural rights, for example the presumption of innocence and the right to a fair trial, are included, but it remains unclear what this entails.[88] Oswald suggests that there are certain criteria to comply with in relation to the treatment of detainees, including dignity and humanity.[89] However, as has been pointed out, these principles are derived from various human rights and IHL treaties.[90]

Arguments of legal theory are equally important while trying to connect general principles and the United Nations Charter as the constitution of the international order.[91] Brownlie submits that the Security Council is limited in its actions under Chapter VI and Chapter VII as human rights "form part of the concept of international public order."[92]

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[85] A. Boyle, C. Chinkin, *The Making of International Law* (2007), 285-86; H. Thirlway, 'The Sources of International Law', in M. Evans (ed.), *International Law* (2010), 99, 108-109;

[86] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (8 July 1996) (Judge Higgins, Dissenting Opinion), para. 41. Judge Tanka was even more explicit, he wrote in his dissenting opinion in the *South West Africa Judgment "*the concept of human rights and their protection is included in the general principles mentioned in that Article [38]*", South West Africa Case (Ethiopia v. South Africa),* Judgment of 18 July 1966, Second Phase (Dissenting Opinion, Judge Tanaka), 296.

[87] Boyle, Chinkin, *supra* note 85, 289; Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 130.

[88] Rehman, *supra* note 78, 24.

[89] B. Oswald, 'The Treatment of Detainees by Peacekeepers: Applying Principles and Standards at the Point of Detention' (2008) in R. Arnold (ed.), *Law Enforcement Within The Framework of Peace Support Operations* (2008), 197, 206-08.

[90] Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 130; The Martens Clause is illustrative of similar concerns in the field of international humanitarian law, should parties denounce the Geneva Conventions, they will still be bound "by principles of the law of nations, as they result from the usages established among civilized peoples, the laws of humanity (…) This provision thus guarantees that *international customary law* will still apply for states no longer bound by the Geneva Conventions as treaty law." [Emphasis added], T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 *American Journal of International Law*, 78, 80.

[91] Cf. Fassbender, 'Sources of human rights obligations binding the UN Security Council', *supra* note 61, 71-92. It is also assumed that, International organisations have to apply the main substantive dispositions of general law-making treaties such as the Geneva Conventions, and regional organisations have to obey with the main substantive dispositions of regional law-making treaties such as the European Convention on Human Rights. The legal foundation of these obligations is not their treaty character, "but rather in its character as a general principle of law codified by treaty". Schermers, Blokker (2011), *supra* note 11, 998, para. 1575; 1001, para. 1577.

[92] I. Brownlie, 'The Decisions of Political Organs of the United Nations and the Rule of Law', in R. St. J. MacDonald (ed.), *Essays in Honour of Wang Tieya* (1993), 91, 102.

Facing all these difficulties and taking into account that these principles are inferred from human rights and humanitarian law, it is therefore preferable to discard any further attempt to apply human rights norms as being solely based on general principles. As it was pointed out, general principles are often intertwined with customary law, so that an implicit application to the conduct of international organisations, particularly in the field of human rights and humanitarian law cannot be excluded, but legal certainty, which itself could possibly be considered as a general principle, supports a restrictive approach. Therefore, the analysis of the applicable law to international organisations will be limited to customary international law. The analysis also showed that customary international law contains some problematic features such as the identification of state practice and *opinio iuris*, but there is general agreement concerning the most fundamental human rights norms which are also accepted in practice by international organisations.

6. The "territorial problem" of human rights application and their extraterritorial application

The application of human rights to international organisations is problematic for another reason which is the application *ratione loci* or the territoriality of human rights. Human Rights were traditionally granted by states to their citizens to give those rights against the state and also protection by the State, and thus they are based on a vertical relationship between the bound human rights granting entity and the individual on the basis of the territory over which states exercise jurisdiction. A state may also have to respect its human rights obligations outside its own territory if it

> through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory].[93]

With regard to the application of human rights law to international organisations,

> large areas of international law are patently inapplicable to international organizations, which have no territory, confer no nationality and do not exercise jurisdiction in the same sense as States. Other rules (…) either lack relevance (…) or meet practical difficulties of implementation.[94]

[93] *Bankovic and others v. Belgium and others*, Admissibility, Decision of 12 December 2001, para. 80.
[94] Morgenstern, *supra* note 63, 4.

Consequently, the traditional application of human rights *ratione loci* is impossible in the context of international organisations, which *per se* are aterritorial, and rather operate on the territories of states, except in circumstances where there is territorial administration by an international organisation in which they exercise competences and rights similar to a state.[95]

Nevertheless, "the territorial-extraterritorial divide [of states] (…) [is] useful, since it concerns a situation where states do not exercise the same powers that relate to their own territories – a situation similar to that of international organizations leading peace operations."[96]

It is therefore that the exercise of jurisdiction by international organisations under human rights law can be compared to the extra-territorial exercise of jurisdiction under human rights law by states. Excluding the scenarios of complete occupation of another territory by a state or international administration of a territory, both a state and an international organisation consequently exercise jurisdiction in very specific circumstances if they operate extraterritorially; the extent of their power over the population is limited.

Thus, it appears possible to apply the jurisprudence of international courts and tribunals for the extraterritorial exercise of jurisdiction by states in analogy to international organisations. However, it has to be emphasised that it is unclear whether this nexus in the form of "jurisdiction" applies first of all under customary law and secondly to international organisations. Engdahl suggests that the practice of the European Court of Human Rights perhaps reflects – at least – regional customary law and that "[t]he applicability of human rights for international organizations would most certainly require some form of nexus towards individuals, and possibly also a requirement established with regard to some sort of effective control in customary law."[97]

The question is how to apply "jurisdiction" as it has developed in a territorial context to international organisations. One possibility is to interpret "jurisdiction" in a functional sense. As argued by Besson, jurisdiction is both a normative threshold, triggering the application of human rights, but it also provides the conditions for the corresponding obligation to be feasible for the duty-bearer (functional element), although it has territorial, temporal and personal dimensions which are derived from the exercise of jurisdiction.[98] Peacekeeping operations normally operate in certain defined

[95] G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 235.
[96] Engdahl, Applicability/Application of Human Rights Law to IOs involved in Peace Operations', *supra* note 69, 66, 69.
[97] In his view, it is less clear "whether or not the requirement of effective control also applies to the African Union", Engdahl, *ibid.*, 66, 70.
[98] S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amount to', in (2012) 25 *Leiden Journal of International Law*, 857, 863.

areas of a state and although they do not normally assume all governmental powers in these areas they will exercise these functions under their mandate to guarantee peace and security for the local population. Therefore, as is also suggested by Naert, it has been proposed to equate the territory of an international organisation with that of its Member States.[99] In addition to this interpretation, Naert, however, argues that the notion of jurisdiction in its traditional conception is inapplicable and must be replaced by a criterion of functional jurisdiction.[100]

The analysis will therefore proceed on the basis of the case-law of international courts and tribunals as developed in the *contexte étatique.*

1. Extraterritorial jurisdiction under human rights law

Generally speaking, the application of international humanitarian law as well as international human rights are triggered through factual considerations on the basis of human interaction, "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction."[101]

Whereas the threshold for the application of IHL is comparatively simple, consisting in the existence of an armed conflict of either an international or an internal character;[102] to define the threshold for the application of human rights law is more complicated. On the one hand, this is due to conceptual misunderstandings, on the other hand it is by reason of divergent judgments between international human rights bodies or even within the very same – the European Court of Human Rights offers a prime example of the diversity in the jurisprudence on this issue.[103]

Regarding extraterritorial jurisdiction, one can distinguish between two principal models of the exercise of jurisdiction. Under the first model, extraterritorial jurisdiction is based on the factual connection between the state and the territory in which the relevant act took place – a spatial

[99] If one state acts extra-territorially, it is also exercising jurisdiction on the territory of another international entity and in that sense, the state also appears to be acting aterritorially – regarding its own territory outside of which it is acting.
[100] Naert, *supra* note 63, 525-526, 545; J. Lett, 'The Age of Interventionism: The Extraterritorial Reach of the European Convention on Human Rights', in R. Arnold, G.-J. A. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International* Law (2006), 111, 120.
[101] *Case of Al-Skeini and Others v. The United Kingdom,* Grand Chamber, Judgment 7 July 2011, para.137.
[102] Cf. M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2011), 66-69.
[103] Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 116. The extra-territorial effect of human rights is increasingly recognised also for economic, social and cultural rights, see Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2012); Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012).

connection.[104] According to the second model, there is a factual connection between the state and the individual – a personal connection due to the exercise of state agent authority.[105] Both models rely on the specific circumstances in question.[106]

In this context, the exercise of jurisdiction in a form of authority or control over the person or a given territory has to be distinguished from the attribution of conduct, two different overlapping concepts which are often conflated in practice.[107] Jurisdiction for the purposes of human rights must also be distinguished from state jurisdiction to prescribe and enforce its domestic law.[108]

Territorial jurisdiction in the form of the first model amounts, according to the ECtHR in *Al-Skeini*, to "the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government."[109]

In contrast, "personal jurisdiction" is tantamount to "the use of force by a State's agents operating outside its territory [which] may bring the individual thereby under the control of the State's authorities."[110]

The European Court of Human Right's jurisprudence has stretched the spatial model to ever diminishing areas including mere places[111] and thereby has often even relied on a simultaneous

[104] See, e.g., *Legal Consequences*, *supra* note 127, paras. 107-13; Human Rights Committee, General Comment No. 31 (80), The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.10; *Case of Loizidou v. Turkey* (Preliminary Objections), Grand Chamber, Judgment, 23 March 1995, para.62; *Case of Loizidou v. Turkey*, Judgment, Grand Chamber, Merits, 18 December 1996, para.52; *Case of Issa and Others v. Turkey*, Second Section, Judgment, 16 November 2004, paras.69-70.

[105] *Issa, ibid.*, para. 71. It was confirmed in several other casees, i.e. *Case of Pad and Others v. Turkey*, Third Section, Decision as to the Admissibility, 28 June 2007, paras. 53-54; *Isaak and Others v. Turkey*, Third Section, Decision as to the Admissibility, 28 September 2006, under the heading 2. (b) (ii); *Case of Solomou and Others v. Turkey*, Fourth Section, Judgment, 24 June 2008, paras. 44-45, 51; M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', in (2012) 23 *European Journal of International Law*, 121, 122.

[106] Cf. Naert, *supra* note 63, 645-46.

[107] K. M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), 186.

[108] M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', in (2012) 23 *European Journal of International Law*, 121, 123. For an overview of the different definitions/concepts of jurisdiction, see Gondek, *supra* note 102, 47-54, 56-57.

[109] *Al-Skeini*, *supra* note 101, 135.

[110] *Ibid.*, para.136.

[111] The test thereby becomes very artificial, Cf. M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), 128-30; 151-60; 171. The Committee against Torture specified in its General Comment 2 that territory includes smaller places as well: "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. (…) during military occupations or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control". Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/CG/2 (2008), 5 para. 16

application of both models of jurisdiction. In the case of *Medvedyev and Others*, involving a captured Cambodian ship on the high seas by a French navy vessel, the Court considered that France had "full and exclusive control over the *Winner* [the ship] and its crew, at least *de facto.*"[112] In similar fashion, the Court also relied in the previously mentioned *Al-Skeini* case of a mixed model of jurisdiction, adding that "the UK exercised authority and control over individuals killed in the course of such security operations."[113]

As regards the detention of Iraqis by British soldiers being part of the Multi-National Force (MNF), the Court held likewise that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction."[114]

The Court therefore limited the exercise of jurisdiction to cases based on a mixed model of jurisdiction;[115] on the basis of public powers and in the exercise of specific security operations which is not only at odd with previous jurisprudence of the Court but equally illogical[116] if "simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first."[117] However, in the case of *Andreou v. Turkey*, the ECtHR was seized by the case of Mrs. Andreou who was hit by a bullet in the abdomen during a manifestation outside the UN buffer zone near Dherynia, close to the Greek-Cypriot National Guard checkpoint emanating from Turkish Armed Forces. She was injured severely and lost one of her kidneys in the following surgery.[118] The Court held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the jurisdiction]' of Turkey."[119]

The threshold for the spatial test also covers a spectrum, "ranging from the more entrenched and visible exercise of de facto government, administration, or public powers, to the more borderline

[112] *Case of Medvedyev and Others v. France*, Judgment, Grand Chamber, 29 March 2010, para.67.
[113] *Al-Skeini*, *supra* note 101, 60, para.149.
[114] *Case of Al-Saadoon and Mufdhi v. The United Kingdom,* Fourth Section, Decision as to the Admissibility, 30 June 2009.
[115] *Al-Skeini*, *supra* note 101, 58-59, paras. 141-142; 60, para.149; A. Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?', in (2013) 18 *Journal of Conflict & Security Law*, 233, 249.
[116] Larsen, *supra* note 107, 211.
[117] H. Hannum, 'Bombing for Peace: Collateral Damage and Human Rights. Remarks', in (2002) 96 *American Society of International Law Proceedings*, 96, 98. See also A. Orakhelashvili, 'Human rights protection during extra-territorial military operations: perspectives at international and English law', in N. White, C. Henderson (eds.), *Research Handbook on International Conflict and Security Law* (2013), 598, 608.
[118] *Georgia Andreou against Turkey*, Fourth Section, Decision as to the Admissibility, 3 June 2008, 2-3.
[119] *Ibid.*, 11, 2nd paragraph.

cases of less permanent or overt state control as in Issa and Ilascu."[120] The jurisprudence of the ECtHR regarding the exercise of personal jurisdiction is equally wide and varied which led Milanovic to conclude that it "simply boils down to the proposition that a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate."[121]

The jurisprudence of the Court further shows that its notion of "jurisdiction" depends on the specific circumstances of a case; so the Court decided in *Al-Skeini* that "in determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area."[122] In *Issa*, the Court considered that "as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq."[123]

According to the jurisprudence of the Human Rights Committee under the ICCPR, the Covenant can be applicable extraterritorially as "it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State."[124] In its General Comment No. 31 the Committee further elaborated the notion of jurisdiction and held that "[t]his principle [of jurisdiction] also applies to those within the *power or*

[120] Milanovic, *supra* note 111, 141.

[121] His entire critique reads as follows: "What, then, have we learned about the personal model? It cannot be limited to physical custody. It cannot be limited on the basis of nationality or some special status of the victim, or indeed of the perpetrator. It cannot be limited only to lawful exercises of state power over individuals, nor to extraterritorial acts to which the host state consents, nor indeed to acts committed under the colour of law. It cannot, in short, be limited on the basis of any non-arbitrary criterion. 'Authority and control over individuals' as a basis for state jurisdiction simply boils down to the proposition that a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate.
In other words, the main feature of the personal model of jurisdiction — its ability to cover individuals who would be unprotected by the spatial model — is also its main fault. It quite literally collapses, and serves no useful purpose as a threshold for the application of human rights treaties. Unless the personal model is limited artificially on the basis of some essentially arbitrary criteria, there is no threshold", Milanovic, *supra* note 111, 207; also M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans, M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 73, 75; U. Karpenstein, F.C. Mayer, *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar* (2012), 48-49, mn. 24.

[122] *Al-Skeini*, *supra* note 101, para.139.

[123] *Case of Issa, supra* note 104, para.74.

[124] Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.12/52, López Burgos v. Uruguay, Annex XIX to Report of the Human Rights Committee, Supplement No. 40, UN Doc. A/36/40 (1981), 182-183, para.12.3; Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.13/56, Celiberti de Casariego v. Uruguay, Annex XX, *ibid*, 188, para.3; Appendix, Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure, Communication No. R.13/56, Christian Tomuschat, *ibid.*, 189, 2nd paragraph; D. McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in F. Coomans, M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 41, 55. The validity of such an interpretation can be already inferred from the travaux préparatoires, Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General, UN Doc. A/2929 (1955), chapter V, 48, para.4.

effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation"[125] [Emphasis added].

The distinction between "power or effective control" suggests that the Human Rights Committee subscribes to both the spatial and the personal model of jurisdiction, but the Committee has never properly elaborated further upon its interpretation of "jurisdiction".[126] The ICJ endorsed the view of the Human Rights Committee regarding the extraterritorial application of the ICCPR in its *Wall Case* advisory opinion.[127] The Human Rights Committee pronounced itself briefly and indirectly on the question of jurisdiction of international organisations in the case of *H.v.d.P. v. the Netherlands*, an employee of the European Patent Office who had claimed to be a victim of discrimination. The Committee said that "the author's grievance (…) cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or any other State party."[128]

The Inter-American Commission on Human Rights likewise held that jurisdiction "may, under given circumstances, refer to conduct with an extraterritorial locus where the person is concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad."[129] Also in other cases, the Commission has adopted a wide approach to jurisdiction. It held in *Alejandre* that the shooting down of two civilian light aeroplanes in

[125] Human Rights Committee, General Comment No. 31 (80), *supra* note 104, para.10. In its Concluding Observations regarding the Fourth Periodic Report submitted by Belgium, The Commission stated: "The State party should respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for example in the case of peacekeeping missions or NATO military missions, and should train the members of such missions appropriately.", Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Belgium, UN Doc. CCPR/CO/81/BEL (2004), 2, para.6.

[126] Larsen, *supra* note 107, 181.

[127] Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel, UN Doc. CCPR/C/79/ADD.93 (1998), 3, para.10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004), 47-48, paras. 110-111.

[128] V. Considerations of Communications under the Optional Protocol, in Report of the Human Rights committee, UN Doc. A/42/40 (1987), 107, para.403. A vaguely similar case was brought before the European Court by the wife of Rudolf Heß against his continued detention following his conviction in the Nurnberg Trials. The Commission declared the application inadmissible because changes to the administration of the prison " can only be made by the unanimous decision of the representatives of the Four Powers in Germany or by the unanimous decision of the Four Governors. Administration and supervision is at all times quadripartite, including the day to day "civil administration" of the prison and the responsibility for providing the military guard (…) The Commission concludes that the responsibility for the prison at Spandau, and for the continued imprisonment of Rudolf Hess, is exercised on a Four Power basis and that the United Kingdom acts only as a partner in the joint responsibility which it shares with the three other Powers", *Ilse Hess v. United Kingdom*, Commission, Decision on the admissibility of the application, 28 May 1975, 73-74.

[129] Case 10.951, Coard et al. v. United States of America, September 29, 1999, para.39.

international airspace by a Cuban military aircraft "agents of the Cuban State, although outside their territory, placed the civilian pilots (…) under their authority."[130] In a case concerning the US military action in Panama, the Commission had decided likewise in a very short and unequivocal comment "[w]here it is asserted that a use of military force has resulted in noncombatants deaths, personal injury, and property loss, the human rights of noncombatants are implicated."[131]

The border between the exercise of jurisdiction and the attribution of conduct can be rather fluid as "often in order to assess jurisdiction, the link between the acts or omissions at stake and state agents needs to be assessed at once and at the same time, hence the difficulty in keeping them apart."[132] For the purposes of applying the law of responsibility, a distinction is rather simple. Whereas any human rights body starts its analysis with establishing whether jurisdiction is given in the respective case, the law of responsibility starts with the attribution of conduct and, thus, jurisdiction will be dealt with in the following requirement which is the breach of an international obligation.[133]

Jurisdiction under human rights law has also to be distinguished from jurisdiction under general international law:[134] "It is this notion of jurisdiction—not the jurisdiction to prescribe rules of

[130] Case 11.589, Alejandre Jr., Costa, De la Peña, Morales v. Cuba, September 29, 1999, para.25.

[131] Case No. 10.573, Salas and others v. United States [US Military Action in Panama], October 14, 1993, Analysis, para. 6.

[132] Besson, 'The Extraterritoriality of the European Convention on Human Rights', *supra* note 98, 857, 877. One can distinguish between the two in the following way: "[S]tate jurisdiction and attribution are distinct concepts. Ultimately, the latter is an issue of state control over the perpetrators of human rights violations, while the former is a question of a state's control over the victims of such violations through its agents, or, more generally, control over the territory in which they are located.", Milanovic, *supra* note 111, 51-52. Cf. also L. Boisson de Chazournes, V. Pergantis, 'À propos de l'arrêt Behrami et Saramati: Un jeu d'ombre et de lumière dans les relations entre l'ONU et les organisations régionales ', in M. Kohen, R. Kolb, D. L. Tehindrazanarivelo (eds.), *Perspectives of International Law in the 21st century/Perspectives du droit international au 21e siècle* (2011), 191, 196.

[133] Indeed, attribution may even be a requirement to assess jurisdiction as correctly explained by the example of Cyprus by Milanovic: "As a matter of principle or logic, there is no hierarchical relationship between the issues of attribution and state jurisdiction—they are conceptually independent of each other. In some cases, however, attribution can actually be a prerequisite or a preliminary question for the existence of state jurisdiction. When a state exercises jurisdiction, i.e. control over a foreign territory or individuals, it by definition needs to do so through its own agents, i.e. persons whose acts are attributable to it. Turkey could not have had jurisdiction over northern Cyprus without having its soldiers there, nor could Russia have had jurisdiction over a part of Moldova without a military presence. For example, had it been disputed in Loizidou that Turkey had soldiers at all in northern Cyprus; the Court would first have had to establish whether this was the case before examining whether Turkey had control over that part of the island.
In that sense, attribution of the conduct of Turkish troops in Cyprus to Turkey was a question that logically preceded the issue of Turkey's jurisdiction over northern Cyprus", Milanovic, *ibid.*, 51-52; Cf. O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', in (2006) 6 *Baltic Journal of International Law*, 185, 188-192.

[134] Larsen, *supra* note 116, 173; Milanovic, *ibid.*, 27. In other words, jurisdiction under general international law has the function to determine whether a claim made by a state to regulate some specific conduct is lawful or unlawful, B. H. Oxman, 'Jurisdiction of States' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008-), online edition, [www.mpepil.com], paras. 1, 9; De Schutter, *ibid.*, 185, 195-197. The

domestic law and to enforce them, but control over a territory and persons within it—that pervades international human rights treaties."[135] Hence, in a certain way, one can apply "jurisdiction" *mutatis mutandis* to international organisations.[136] The Draft Accession Agreement of the EU to the ECHR likewise foresees the application of the same standard of jurisdiction to the EU for acts outside the territories of member states of the EU as for extraterritorial acts of a member state to the Convention.[137]

In summary, the practice of international courts and tribunals in defining "extraterritorial jurisdiction" is very varied and arguably also based on pragmatic reasons. If one bears in mind that at least in part of the jurisprudence, "territorial jurisdiction" has been shrunk to include small geographical areas or even conflated with the personal notion of jurisdiction, it so appears that "jurisdiction" is, indeed, used rather functionally. Consequently, there are no arguments against an application of both models of jurisdiction to international organisations whereby the exact threshold for the exercise of jurisdiction will depend on the specific circumstances of the case.[138] The limitation of extraterritorial jurisdiction to certain specific circumstances is based on the idea that there has to be a sufficient nexus between the state, or in the case of the present study the international organisation, and the local population. Therefore, the question arose as to whether the human rights

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ICJ also held that the basis of state liability for acts affecting other states is "physical control" over territory and not sovereignty, *Legal Consequences for States, supra* note 39, para. 118.

[135] Milanovic, *supra* note 111, 32. Also L. G. Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case', in (2006) 4 *European Human Rights Law Review*, 73, 91. For a comprehensive analysis and several examples of this notion of jurisdiction, in treaty law, see *ibid.* 32; See also H. Lauterpacht, *International Law and Human Rights* (1968), 317, 364. For a codification in treaties, cf. e.g. Article 5 (2) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997); Principle 2 of the Rio Declaration on Environment and Development (1992).

[136] Cf. Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012), in (2012) 34 *Human Rights Quarterly*, 1084, 1122. Specifically for the context of a peacekeeping operation, cf. A. Tzanakopoulos, *Disobeying the Security Council. Countermeasure against Wrongful Sanctions* (2011), 28.

[137] "Insofar as the term 'everyone within their jurisdiction' appearing in Article 1 of the Convention refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons within the territories of the member States of the European Union to which the TEU and the TFEU apply. Insofar as that term refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons which, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.", EU/Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg, 5 April 2013, 5-6, para. 6. See generally, M. den Heijer, A. Nollkaemper (eds.), 'SHARES Briefing Paper – A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights (2014)', available at www.sharesproject.nl.

[138] Further light will be shed upon this issue by the jurisprudence of the European Court of Human Rights once the EU has officially become a party to the Convention.

to be protected extraterritorially are also limited to these rights which would be relevant in the exercise of extraterritorial jurisdiction.

2. The tailored application of human rights law to peacekeeping forces

1. From Bankovic to Al-Skeini

The applicants in the Bankovic case before the European Court of Human Rights argued that the extraterritorial application of human rights obligations of states can be "divided and tailored." Although the Court in *Bankovic* denied any such application of the European Convention,[139] this topic has since then been discussed rather extensively in academic writing and the discussion was rekindled following the judgment of the European Court of Human Rights in Al-Skeini.[140] Referring to *Bankovic*, the Court held that

> whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are *relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be "divided and tailored[141] [Emphasis added].

Interestingly, the ECtHR had already cited extensively in its *Beric* judgment[142] from a report of the Venice Commission in which it was stated "[i]t would have been unrealistic to have insisted on immediate full compliance with all international standards governing a stable and full-fledged democracy in a post-conflict situation such as existed in BiH following the adoption of the [Peace] Agreement"[143] so that one might be inclined to think that the Court was slightly testing the water in *Beric*.[144] Nevertheless, the cryptic formulation of the ECtHR has already instigated a debate about the

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[139] *Bankovic, supra* note 93, para.75.
[140] *Al-Skeini*, *supra* note 101.
[141] *Ibid.*, para.137.
[142] *Berić and others v. Bosnia*, Fourth Section, Decision as to the Admissibility, 16 October 2007, para.17.
[143] European Commission for Democracy Through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, Venice, 11 March 2005, 23, para.97. According to an interesting example of state practice, customary human rights law are not only all binding on US forces but also on all "U.S. forces during all overseas operations.", A. Gillman, W. Johnson (eds.), Operational Law Handbook, The Judge Advocate General's Legal Center & School (2012), 47-48, paras. III. A.-B.; 51 D. 1. In similar fashion Cerone questions the validity of the territorial limitation for states to be bound by human rights law under customary human rights law, J. Cerone, 'Legal responsibility framework for human rights violations post-conflict', in N. D. White, D. Klaasen (eds.), *The UN, human rights and post-conflict situations* (2005), 42, 48.
[144] One author asserts that a tailored application of the ECHR can be drawn from the Cyprus v. Turkey case as the Court based its opinion that Turkey has to guarantee the entire range of substantive rights on the fact that Turkey was also controlling the local administration which was surviving by virtue of Turkish military support, *e contrario*, in other cases, the application would be limited, O. Engdahl, 'The Future of Human Rights Law in

interpretation; whether the judgment of the Court allows the "cherry-picking" of rights or not.[145] The concurrent opinion by Judge Bonello and the follow-up judgment in *Hirsi Jamaa* confirm that the Court did have "cherry-picking" in mind.[146] However, if one distinguishes between the obligations of a state on a general level and in a specific given case of alleged violations, *Al-Skeini* fits very well within the general practice of the Court as in any given case of alleged violations of human rights, the only human rights which actually matter are those which have allegedly been infringed. The Court also limited its view to the cases of people being under the authority of a state agent, so that, as it is also suggested by Miltner, for cases of control over a territory (territorial jurisdiction), a state party still has to guarantee all substantive rights of the Convention.[147]

Perhaps the Court had also the pending accession of the EU to the Convention in mind, while elaborating its judgment. The accession will extend the jurisdiction of the Court to cover acts of the EU and its organs and, as has been established (*infra* 3.1.), the competences of international organisations are limited due to their own respective constitutive framework so that a tailored application of human rights is the only feasible option to apply human rights obligations to international organisations without exposing them to the risk of acting *ultra vires*. It is therefore submitted that, notwithstanding the cryptic judgment of the ECtHR in *Al-Skeini*, human rights can only be applied in a tailored and divided fashion to international organisations.

Peacekeeping operations generally elude, in a certain way, the regulation of human rights. They are established to promote peace and security, but they are not "human rights protecting operations" despite the recent emphasis on the protection of civilians in the mandates of operations. Hence, there may be a certain dichotomy between the human rights obligations of the peacekeepers and

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Peace Operations', in O. Engdahl, P. Wrange (eds.), *Law at War: The Law as it Was and the Law as it Should Be. Liber Amicorum Ove Bring* (2008), 105, 109.

[145] Against: A. Cowan, 'A New Watershed? Re-evaluating *Banković* in Light of *Al-Skeini*', in (2012) 1 Cambridge Journal of International and Comparative Law, 213, 222. In contrast, Miltner asserts that the judgment amounts to cherry-picking of Convention rights, B. Miltner, 'Revisiting Extraterritoriallity After *Al-Skeini*: The ECHR and Its Lessons', in (2012) 33 *Michigan Journal of International Law*, 693, 697. Cf. also F. Naert, 'The European Court of Human Rights' *Al-Jedda* and *Al-Skeini* Judgments: an Introduction and Some Reflections', in (2011) 50 *Military Law and the Law of War Review*, 315, 317; Larsen, *supra* note 107, 81; R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', in (2007) 40 *Israel Law Review*, 503, 519-20; M. Szydlo, 'Extra-Territorial Application of the European Convention on Human Rights after *Al-Skeini* and *Al-Jedda*', (2012) 12 *International Criminal Law Review*, 271, 290.

[146] *Case of Hirsi Jamaa and Others v. Italy*, Grand Chamber, Judgment, 23 February 2012, para.74; *Case of Al-Skeini and Others v. The United Kingdom,* Grand Chamber, Judgment 7 July 2011 (Judge Bonello, Concurring Opinion), paras. 32-33. In his view, however, the State has the obligation to ensure the observance of these rights which it is in a position to ensure, instead of the relevant rights. As he asserts: "Extraterritorially, a Contracting State is obliged to ensure the observance of all those human rights which it is in a position to ensure (…) I believe that it ill suits the respondent Government to argue, as they have, that their inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all."

[147] As confirmed in *Case of Hirsi Jamaa, ibid.*, para.74. Miltner, *supra* note 145, 693, 697-698.

their mandate on the basis of a Security Council resolution.[148] Germany observed in the *Behrami/Saramati* case that "account must be taken of the special difficulties under which such operations are normally deployed."[149] Furthermore,

> [m]ore often than not, peace operations start after an armed conflict has brought death and destruction. Governmental institutions may not function properly, the infrastructure has suffered heavy damage, law and order have broken down, and the economic situation is disastrous (…) Accordingly, everyone knows that when a peace operation is launched the situation in the country concerned normally does not correspond to the standards of the International Covenant on Civil and Political Rights or those of the European Convention (…) In conclusion, it must be acknowledged quite frankly that at least during a first stage of a peace operation, the standards of the Convention can hardly ever be maintained to a full extent.[150]

Other arguments raised are that a limited application of human rights law would prevent peacekeeping forces from being exposed to "unworkable burdens with "undue risk", thereby compromising any "effective protective action" and consequently the whole mandate of the operation.[151] The very same arguments are invoked for a similar limited application of IHL to peacekeeping forces.[152] A wider debate has arisen as regards the possibility of a "sliding scale of obligations" for armed groups whom, in contrast to states, are unable to respect all rules.[153]

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[148] It is suggested by Larsen that a potential conflict arising out of a mandate to "protect civilians under immediate threat" with the human rights obligations of the peacekeepers has to be considered as two non-related issues as the mandate in the form of a resolution is nothing more than an authorisation to use force to protect civilians but not an obligation to do so, Larsen, *supra* note 107, 392.

[149] Observations of the Federal Republic of Germany concerning application no. 78166/01: Saramati v. France, Germany and Norway, 18, para.38.

[150] *Ibid.*, 18, paras. 38-39; 19, para. 42.

[151] R.O. Weiner, F.N. Aolain, 'Beyond the Laws of War: Peacekeeping in Search of a Legal Framework', in (1995-1996) 27 *Columbia Human Rights Law Review*, 293, 320, 352-353. See also D. Lorenz, *Der territoriale Anwendungsberich der Grund- und Menschenrechte – zugleich ein Beitrag zum Individualschutz in bewaffnete Konflikten* (2005), 105; U. Erberich, *Auslandseinsätze der Bundeswehr und Europäische Menschenrechtskonvention* (2004), in particular 5-31; See also especially Naert, *supra* note 63, 556-557; 564-565; Clapham, *supra* note 67, 68.

[152] Excluding e.g. the dispositions on mandatory jurisdiction, Weiner, Aolain, *ibid*., 293, 320, 352-353.

[153] As Sassòli points out, equality of the parties engaged in an internal armed conflict is a fiction and applying a sliding scale does not diminish the level of protection provided to civilians in armed conflict as most violations are violations of the most fundamental norms that "every human being can respect in every situation", M. Sassòli, 'Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?', in (2011) 93 *International Review of the Red Cross*, 426, 430-31. Opponents such as Yuval Shany acknowledge that the diffusion of IHL norms applicable in international armed conflicts to internal armed conflicts has set the normative bar higher and thereby increased the compliance gap of belligerents, but a capacity-based criterion of application is nevertheless false. It should be focused on the main *raison d'être of IHL* which is the "protection of humanitarian values" and not "full compliance with its norms" which is a mere means to an end. The problem with a capacity-driven application of IHL is that it fails to incentivise belligerent parties to actually increase their compliance with the framework of IHL, Y. Shany, 'A rebuttal to Marco Sassòli', in (2011) 93 *International Review of the Red Cross*, 432, 432-33. Shany concedes that IHL standards should be

Regarding the precise obligations of international organisations, some authors submit that the Security Council, for example, would only have "due diligence" obligations regarding the application of human rights law,[154] and as such could not be held responsible for a failure to prevent a massacre or genocide, but only for the failure to conduct itself adequately.[155] In academic writing it is also suggested that it is necessary to distinguish between positive and negative obligations depending on the degree of control exercised over a given territory; negative obligations can always be respected by the control exercised by a state over its agents. [156]

2. *Derogations under human rights law as another method to divide and tailor the application of human rights law*

Other arguments for a limited application of human rights law to international organisations rely on the possibility of derogations under human rights treaties. In *Al-Skeini*, the European Court of Human Rights implicitly opened the door for extraterritorial human rights law derogations, referring to the

realistic and "in touch with battlefield conditions and material capacities." Thus, he suggests a "common but differentiated framework for some IHL standards", *ibid.*, 434. On this matter, see generally, G. Blum, 'On a Differential Law of War', in (2011) 52 *Harvard International Law Journal*, 163, esp. 185 – 216. As Blum rightly points out certain standards in IHL actually provide for a common but differentiated responsibilities framework; a technologically advanced country will be judged on a higher threshold for taking all "feasible precautions" to prevent or reduce the loss of civilian life in an armed attack, for example, one could imagine the use of satellite images or the use of drones, whereas these means will not be available to a developing country, cf., *ibid.*, 194. See also, R. Provost, 'The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany', in (2011) 93 *International Review of the Red Cross*, 437, 438-441. A symmetric application of IHL to all participants has also been challenged by legal philosophers on moral grounds. Cf. e.g. H. Shue, 'Laws of War, Morality and International Politics: Compliance, Stringency, and Limits', in (2013) 26 *Leiden Journal of International Law*, 271-292.

[154] K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (2004), 381-82. It is generally recognised under international law that due diligence obligations vary, depending on the particular circumstances as well as the means at disposable of the respective actor, i.e. precautionary measures before military attacks in the framework of IHL. For the context of peacekeeping operations, cf. Report from the Special Representative of the Secretary-General in the Congo on the Situation in Orientale and Kivu Provinces, UN Doc. S/4745 (1961), 7; Eagleton, *supra* note 15, 320, 400.

[155] A. Peters, 'Functions and Powers. Article 24', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I (2012),* 761*,* 774 mn. 38; See R. A. Opie, 'Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility', in (2006) *New Zealand Law Review*, 1, 22; Cf. also N. Elaraby, 'Some Reflections on the Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2 (4) Revisited in the Light of Recent Developments', in T. Eitel, J. A. Frowein, K. Scarioth et. al. (eds.), *Verhandeln für den Frieden. Liber Amicorum Tono Eitel* (2003), 41, 56, who argues that "benign neglect of breaches of the peace and acts of aggression" by the Security Council, could constitute a deviation from the rule of law. In contrast, Gaja argued in his third report that in such a scenario, the UN would also be responsible for the failure to act, G. Gaja, Third report on responsibility of international organisations, UN Doc. A/CN.4/553 (2005), 4, para.10. Peters responding to this argument says, that it is only a norm *lege ferenda* but that it is perfectly possible "that the Council's responsibility will harden into a legal obligation of conduct", Peters, *ibid.*, 761*, 774-75 mn. 40;* Peters, 'Article 25', *supra* note 38*, 787*, 850 mn. 199.

[156] Milanovic, *supra* note 111, 141; De Schutter, *supra* note 133, 185, 245. This reasoning can also be applied to international organisations. Excluded are, obviously, cases of acts contravening instructions by agents.

ICJ and its judgment in the *Wall Case*, stating "the International Court of Justice appeared to assume, that even in respect of extra-territorial acts, it would be in principle possible for a State to derogate from its obligations under the International Covenant on Civil and Political Rights."[157] As human rights law serves to protect the individual, it would be, indeed, illogical to allow states to further limit their obligations on their own territory than when they act extraterritorially.[158]

Of course, these arguments can be only transposed to a certain extent from the territorial context of states to the "aterritorial context" of international organisations, but the draft accession agreement of the EU to the European Convention on Human Rights provides likewise that the changes foreseen to the Convention "may be interpreted as allowing the EU to take measures in derogation from its obligations under the Convention in relations to measures taken by one of its member States in time of emergency in accordance with Article 15 of the Convention."[159] Hence, also from the perspective of derogations under human rights law, there are good arguments for limiting the application of human rights law to international organisations to what is feasible under their mandate and thereby also in the context of peacekeeping operations.[160] A particular problem is posed by the fact that the UN could invoke the Charter and Security Council resolutions "to the extent that they reflect an

[157] *Al-Skeini*, *supra* note 101, para. 90. Larsen concludes after a lengthy analysis that such a derogation is not *lex lata*, Larsen, *supra* note 107, 299-311. Furthermore, he asserts that the *travaux préparatoires* of the Convention do not mention the issue of extraterritorial derogations, *ibid.*, 306.

[158] K. M. Larsen, ''Neither Effective Control nor Ultimate Authority and Control': Attribution of Conduct in *Al-Jedda*',in (2011) 50 *Military Law and the Law of War Review*, 347, 362.

[159] EU/Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg, 5 April 2013, 19, para.28; EU/Council of Europe, Fourth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 8 January 2013, 5-6, para.23.

[160] F. Naert, 'Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 45, 49-50; Naert, *supra* note 63, 584. Cf. House of Lords, R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), Decision of 12 December 2007, Opinion of Lord Bingham of Cornhill, para. 32; Lord Brown of Eaton-Under-Heywood, para. 150; *Bankovic, supra* note 93, para.62. It is argued in doctrine that rights which are non-derogable under human rights treaties are also non-derogable under customary human rights law, Seiderman suggests that the four non-derogable rights common to the main international human rights treaties are considered as including the same limitation under customary human rights law, I. D. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (2001), 81. Meron was a little more hesitant and held these rights might also be non-derogable under customary law, T. Meron, *Human Rights in Internal Strife: Their International Protection* (1987), 59. It would be unlikely that states take a more liberal approach regarding jurisdiction under customary law. Duffy also asserts that it is unlikely, in practice, that customary law is broader in scope than the non-derogable core of treaty rights. H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005), 296.

international law obligation – to justify what might otherwise be regarded as non-compliance."[161] The general and particularly the recent practice of the UN and regional organisations shows a strict adherence to international human rights standards,[162] but nevertheless the Security Council could at least theoretically derogate from these human rights in a resolution which does not involve rules of *jus cogens*.

In conclusion, the application of human rights law to international organisations is, indeed, tailored and limited to these rights as they are not only relevant in the specific circumstances, but as they may also be protected by the powers of the respective international organisations. This division of human rights law in its extraterritorial application is intrinsically linked to the question of jurisdiction. The following part of this chapter analyses the application of international humanitarian law into peacekeeping operations of international organisations. It illustrates very clearly that further difficulties arise in determining the applicable law in peacekeeping operations in addition to those encountered in the human rights law context. A particular problem is posed by the relationship between human rights and humanitarian law.

3. Application of International Humanitarian Law

International Humanitarian Law regulates the conduct of hostilities in armed conflict. The aim of international humanitarian law is to limit the effects of war on people and property and to protect particularly vulnerable persons.

[161] International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637/Add.1 (2011), 36, para. 3.

[162] An empirical analysis of the practice of the Security Council came to the conclusion that the UN is not only increasingly intervening in conflicts with high levels of violence against civilians but that it has also increased the protection standard accorded to the civilian population, L. Hultman, 'UN peace operations and protection of civilians: Cheap talk or norm implementation?', in (2012) 50 *Journal of Peace Research*, 59, 66-71. Moreover, there is an emerging convergence regarding the protection of civilian doctrines between the UN, the EU and the AU. In this context, the approach developed by the EU towards the protection of civilians has been heavily influenced by the practice of the UN and "is in accordance with UN doctrines", M. Dembinski, B. Schott, 'Converging Around Global Norms? Protection of Civilians in African Union and European Union Peacekeeping in Africa', in (2013) 6 *African Security*, 276, 282-284. The AU is currently developing an operational concept for the protection of civilians, in close cooperation with the UN and as funded by European and other donors, Dembinski, Schott, *ibid.*, 286. Interestingly, as noted by both authors, the approach of the AU for the protection of civilians "is notably robust" (*ibid*., 287) which could be seen as further proof of the emerging division of labour between the UN, the EU and the AU on the African continent.

1. Application ratione personae of IHL to activities of international organisations

The UN and the regional organisations which are part of the present study possess international legal personality and they therefore can be addressees of norms of international humanitarian law.[163] Regarding the United Nations particularly, the purposes and principles of the UN Charter, its mandate for maintaining international peace and security, and its competence to deploy military forces, which can become involved in conflict situations amounting to an armed conflict, lead to the conclusion that international humanitarian law is applicable.[164]

The *Institut de droit international* started to address in earnest the issue of the application of international humanitarian law in the context of the United Nations in 1971. The issued resolution considered humanitarian rules of international humanitarian law, including the Geneva Conventions, to be applicable "as of right" to the United Nations, entailing an obligation to comply with international humanitarian law in all circumstances when engaged in hostilities.[165]

Other international organisations are bound by international humanitarian law if they possess international legal personality, have the capacity under their respective constitutive instrument to deploy military forces[166] and if they do deploy military forces; a corollary of the capacity to use

[163] T. Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 15, 17. See generally, M. Zwanenburg, 'United Nations and International Humanitarian Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008-), online edition, [www.mpepil.com); J. Peck, 'The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?', in (1995) 21 *Syracuse Journal of International Law and Commerce*, 283-310.

[164] Kolb, Porretto, Vité, *supra* note 15, 124. In this regard, it does not matter if force is used; "la capacité matérielle d'avoir recours à des forces armées entraîne la capacité subjective d'être destinataire de normes du droit international humanitaire", (*ibid.*, 124-5.); See also Peters, 'Article 25', *supra* note 38, 787, 827 mn. 129 – 828 mn. 132.

[165] *Institut de Droit International*, Resolution (Session of Zagreb – 1971), Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Article 2. See also, *Institut de Droit International*, Resolution (Session of Wiesbaden – 1975), Conditions of Application of Rules Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May be Engaged and *Institut de Droit International*, Resolution (Session of Berlin – 1999), The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, notably paras. II, IX, and XI.

[166] K. E. Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 45, 53; E. David, *Principes de droit des conflits armés* (2008), 225-26, paras. 1.192–1.193; 234, para. 1.202. Thus, IHL applies to peacekeeping forces. Also, J. P. Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict', in (2001) 50 *Air Force Law Review*, 1, 37; The Secretary-General reconfirmed that the Bulletin on IHL "is binding upon all members of United Nations peace operations (…) [and]signal[s] formal recognition of the applicability of International Humanitarian Law to United Nations peace operations.", Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc. A/56/326 (2001), 9, para. 19 ; For the AU, Status of Mission Agreement (SOMA)

military force is to be titular of rights and obligations of international humanitarian law.[167] Therefore, the objective capacities of the organisations determine their subjective capacities to be bound by IHL and the precise legal content incumbent upon them.[168] Nevertheless, the UN Charter has also an effect on regional organisations deploying military troops as part of a UN operation or on the basis of a Security Council authorisation. The Charter confers on the United Nations both the responsibility to maintain international peace and security, and to develop and encourage the respect of human rights and fundamental liberties. Therefore, in practice, the mandates provided by the Security Council will contain the requirement to respect the applicable human rights and international humanitarian law.

2. Application ratione materiae of IHL

In contrast to human rights law, IHL does not presuppose the exercise of jurisdiction over a given territory; it is based on a predominantly horizontal relationship protecting the subjects of the parties to the conflict on the grounds of the mutual interest of all parties.

Depending on the nature of the conflict, different regimes of international humanitarian law are applicable. International armed conflicts are – under the Geneva Conventions – conflicts between opposing states,[169] whereas non-international armed conflicts covers all other cases of armed violence.[170] The regime applying to international armed conflict is the most developed, establishing categories of protected persons which do not exist in internal armed conflict.

In doctrine it is debated whether the involvement of international organisations in an armed conflict leads to a qualification of this particular conflict as international or as non-international. There is generally agreement that the law of international armed conflict is applicable if international troops

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on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC) (2004), para. 8 a), available online at: http://www.africa-union.org/Darfur/Agreements/soma.pdf ; for NATO, M. H. Hoffman, 'Peace enforcement actions and humanitarian law: Emerging rules for "interventional armed conflict"', in (2000) 82 *International Review of the Red Cross*, 193, 198-200; A Faite, J. L. Grenier (eds.), Report of the Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and Human Rights Law to UN Mandated Forces (Geneva, 11-12 December 2003), 24-26; Press Conference by NATO Spokesman, Jamie Shea and Air Commodore David Wilby, SHAPE, NATO HQ 26 March 1999, available online at: http://www.nato.int/kosovo/press/p990326a.htm.

[167] Kolb, Porretto, Vité, *supra* note 15, 127-8; this was equally recognised by the latest resolution of the *Institut de droit international*, cf. *Institut de Droit International, supra* note 165, para. II.

[168] V. Falco, 'The Internal Legal Order of the European Union as a Complementary Framework for Its Obligations under IHL', in (2009) 42 *Israel Law Review*, 168, 188.

[169] And certain specific exceptions under Article 1 of Additional Protocol 1 to the Geneva Conventions.

[170] Such as a state versus an armed group or armed groups against each other.

confront a state,[171] which would amount to an international conflict *sui generis*, because in the final analysis it is not very different from a group of states involved in an armed conflict against another state. [172]

The issue is unresolved if one takes the example of the use of force by an international organisation against an organised armed group. The predominant view extends the application of the law of international armed conflict in which an international organisation takes part, to the opponent, notwithstanding if it is a state or an armed group.[173] Some authors agree that the status of an

[171] Kolb, Porretto, Vité, *supra* note 15, 183; Sams, 'IHL Obligations of the UN and other International Organisations, *supra* note 166, 45, 63; Faite, Grenier, *supra* note 166, 63. As states contributing troops to a peace-keeping operation or a peace enforcement operation remain themselves bound in their obligations under IHL, an involvement in such a military operation will consequently also constitute an armed conflict between the troop contributing State and the targeted State, cf. H. P. Aust, 'Article 2 (5)', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 235, 247 mn. 26 with further references. For the general application of IHL to the United Nations and other international organisations, see, C. Wickremasinghe, G. Verdirame, 'Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations', in C. Scott (ed.*), Torture as Tort. Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 465, 473; F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), *International Law as Law of the European Union* (2012), 189, 197.

[172] Another argument made is that under an evolutionary interpretation of Common Article 2, an IAC exists "whenever two or more entities endowed with an international legal personality resort to armed force", Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 19. It is therefore also unproblematic if an International Organisation intervenes in a NIAC in favour of rebel armed forces against the government as the respective organisation would be opposed to the government of the state. Recent examples include NATO's Intervention in Kosovo and in Libya, see V. Koutroulis, 'International Organisations Involved in Armed Conflict: Material and Geographical Scope of Application of Humanitarian Law', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 29, 32; ICRC, Update no. 99/02 on ICRC activities in Kosovo, 24 March 1999, Kosovo crisis: ICRC transfers released detainees, 25 June 1999, especially last para.; *Prosecutor v. Vlastimir Đorđević*, Judgment, Case No. IT-05-87/1 "Kosovo", Tr. Ch. II, 23 February 2011, 629, para. 1580. In contrast, jurisprudence and the doctrine were quite hesitant regarding the application of IHL to the United Nations in the 1950's, cf. the jurisprudence of troop-contributing countries in the Korea Operation from 1950 on the basis of SC Resolution 84, as cited in Schmalenbach, *supra* note 154, 187-191; See Security Council Resolution 84, UN Doc. S/RES/84 (1950), Committee on Study of Legal Problems of the United Nations, 'Should the Laws of War Apply to United Nations Enforcement Action?', in (1952) 46 *Proceedings of the American Society of International Law*, 216, 220.

[173] Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63. Greenwood also speaks of an inherent tension between the understandable desire of the United Nations and contributor states to insist upon punishment of those who attack their personnel and the neutrality of the law of international armed conflict treating all parties to a conflict equally, C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', in (1998) 1 *Yearbook of International Humanitarian Law*, 3, 26. This view excludes the potential simultaneous application of the Convention on the Safety of United Nations and Associated Personnel but it is nevertheless a valid argument which is relevant for other international and regional organisations. However, the ICTY in Tadić held that: "The customary international law doctrine of recognition of belligerency allows for the application to internal conflicts of the laws applicable to international armed conflict, thus ensuring that even in a non-international conflict individuals can be held criminally responsible for violations of the laws and customs of war", *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1, Tr. Ch., 10 August 1995; See also, T. Meron, 'International Criminalization of Internal Atrocities', in (1995) 89 *American Journal of International Law*, 554, 564-65; A. Aust, *Handbook of International Law* (2010), 237-38.

international organisation is sufficient to elevate the conflict to an international armed conflict.[174] This view is popular from a human rights point of view as it increases the level of protection for all parties involved in the conflict.[175]

This approach might better be suited to accommodating the reality of a peacekeeping operation. Modern peacekeeping operations often operate in conditions between war and peace where there might be fighting in one part of a country and relative peace in other parts of the country perhaps with only very few skirmishes.[176] Therefore, under the law of internal armed conflict, one would arrive at the paradoxical situation that IHL might be applicable in one part of the territory, but not in the rest of the country.[177]

The opposing opinion is that "there is no reason to think that the involvement of a UN force in a situation of armed conflict will of itself render the conflict 'international' for the purpose of the application of the *ius in bello*."[178] They therefore argue for an application of the law of internal

[174] Kolb, Porretto, Vité, *supra* note 15, 184; Schmalenbach, *supra* note 154, 363. With regard to the two opposing opinions and with further arguments, see the debate between David and Engdahl, E. David, O. Engdahl, 'How does the involvement of a multinational peacekeeping force affect the classification of a situation?', in (2013) 95 *International Review of the Red Cross*, 659-679.

[175] But, as "attractive [it is] in terms of protection, since it means that victims of the armed conflict would benefit from the more detailed provisions of the law governing international armed conflicts, it may however be inconsistent with the operational and legal realities. In particular, it would require the assignment of duties to parties that are unwilling or unable to comply with some of those duties; to give just one example, there is nothing to suggest that international forces involved in a non-international armed conflict (NIAC) would be willing to grant prisoner of war status to captured members of organised non-State armed groups, as would be required under IHL applicable in international armed conflict (IAC)", C. Beerli, 'Keynote address', S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 9, 11.

[176] M. Odello, R. Piotrowicz, 'Legal Regimes Governing International Military Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 25, 41; Contrary Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 19.

[177] Geographically limited armed conflicts can, of course, also arise in conflicts not involving international organisations on either side. Under the law of international armed conflict, the application of IHL is not restricted to the vicinity of actual hostilities, but it applies, arguably, to the whole territory of the parties to the conflict on the basis of Article 6 (2) Fourth Geneva Convention and Article 3 (b) of Additional Protocol 1, which both speak of "the territory of Parties to the conflict." Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 65; ICTR decided in Akayesu that "Common Article 3 must be also applied in the whole territory of the State engaged in the conflict", *The Prosecutor v. Jean-Paul Akayesu*, Judgment, Case no. ICTR-96-4-T, T. Ch. I, 2 September 1998, paras. 635-636.

[178] H. McCoubrey, N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1997), 172. However David argues that the governments as well as the rebels, being as they are part of the population, are constitutive elements of a state, so in a NIAC they can both claim to represent the state as the *de facto* government. Therefore there is some appeal for such a view in a case where the conditions on the ground do not allow a decision as to which side is effectively representing the government, David, *supra* note 166, 160-61, 179-80. This view can nevertheless also be problematic as Libya illustrates. France, Italy, Germany and Australia recognised the National Transitional Council (NTC) as the legitimate government of Libya (until July 2011), whereas other NATO members had not done so, giving rise to questions whether the conflict had multiplied on the level of the troop contributing states, to the NATO operation, depending on whether they

conflict if the conflict involves an international organisation on one side and an armed group on the other side.[179] Thus, one must analyse "each belligerent relationship to determine [the] applicable law."[180] Once again, it is however questionable whether such a view is compatible with modern armed conflicts. Such a distinction would lead to an obligation of any international organisation to provide different standards of treatment depending on the adversaries, which is impractical in modern armed conflicts. It would also emphasise the separation of the two legal regimes which is less relevant in customary humanitarian law.[181] On the other hand, if an armed conflict involves a state and an international organisation as a coalition and an armed group as an opponent, members of the latter would be exposed to different treatment depending on whether they are in the hands of

had already accepted the rebels as the new government or not, Koutroulis, 'International Organisations Involved in Armed Conflict', *supra* note 172, 29, 34-35.

[179] David, *supra* note 166, 177; J. Cerone, 'Legal responsibility framework for human rights violations post-conflict', *supra* note 143, 42, 69. This view should be qualified and the example should rather be an international organisation and a state involved jointly in an armed conflict against an armed group. Recent peacekeeping practice suggests that the United Nations and regional organisations rely on the consent of the host-state and act with its agreement if not in support of the government, cf. e.g. South Sudan or Mali. Naert subscribes to this view. He argues that the opponent of a peacekeeping operation defines the applicable law, if it is a state, it will be an international armed conflict, Naert, *supra* note 63, 483-484. In many NIAC between a state and an armed group, an international organisation will intervene on the government's side but they may limit their support to logistic support or intelligence activities as well as participation in the planning and coordination of military operations carried out by the government. The legal dilemma has been how to align these functions with the law of armed conflict. The ICRC therefore developed a functional approach of 4 conditions which complements the classic criteria for the determination of a NIAC:
1. There is a pre-existing NIAC,
2. The multinational forces' intervention is carried out in support of one of the parties engaged in the pre-existing armed conflict,
3. The support consists of actions objectively displaying the involvement of multinational forces in the collective conduct of hostilities,
4. The actions in question reflect the decision by the concerned TCCs or the IOs to support a party involved in the pre-existing NIAC
Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 21; Cf. also M. Zwanenburg, 'International Organisations vs. Troops Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict During Peace Operations?', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility (*2011), 23, 25.

[180] Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63; Faite, Grenier, *supra* note 166, 63-64.The ICRC has consistently taken this position, ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts, Report for the 31st International Conference of the Red Cross and Red Crescent, Doc. 31IC/11/5.1.2. (2011), 31, last para.; also Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 17-18; Naert acknowledges that a conflict opposing an international organisation and an armed group "does not really fit" within the categories of international or internal armed conflict, but that such conflict would fall within the category of an internal armed conflict, Naert, 'The Application of International Humanitarian Law and Human Rights Law', *supra* note 171, 189, 197-98.

[181] Cf. also Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63; also R. Kolb, *Droit humanitaire et opérations de paix internationale* (2006), 57-58.

forces of the organisation or of the state and there would be an application of the traditional rules of intervention by a third state.[182]

The practice seems to favour the application of the law of international armed conflict, thus the bulletin of the Secretary-General, which foresees the application of international humanitarian law, refers to the law of international armed conflict in Article 1 of bulletin.[183] In the same regard, the Convention on Safety of United Nations Personnel (1994), speaks of the law of international armed conflict (Article 2, para.2).[184] This disposition was specifically accepted during the negotiations as "il a été généralement admis qu'il était impossible à l'Organisation d'être impliquée dans un conflit armé interne, car une fois qu'elle ou le personnel associé s'engage dans un conflit contre une force locale, le conflit prend, par définition, une envergue 'internationale.'"[185] Other examples of practice are less clear. With regard to Somalia, the United Nations and the United States argued that the law of non-international armed conflict was applicable, but one has to keep in mind that Somalia was a so-called "failed state" with no effective government so that the armed opposition resembled an armed group rather than a government.[186] Concerning the Democratic Republic of Congo, the United Nations considered itself bound by the whole body of international humanitarian law.[187] However this particular question of the nature of an armed conflict between an international organisation and an armed group might be left undecided, as many treaty rules applicable in international armed conflicts, especially concerning the conduct of hostilities, are equally applicable in non-international conflicts on the basis of customary humanitarian law.[188]

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[182] Sams, *ibid*., 45, 63-64; *Military and Paramilitary Activities, supra* note 55, para. 219; *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 320.

[183] See also Article 2 (2). Kolb, Porretto, Vité, *supra* note 15, 186; Statements by several states during the elaboration of the 1994 Convention also indicate that a conflict involving UN troops falls under the regime of the law of IAC, Report of the Ad Hoc Committee on the Work Carried Out During the Period from 28 March to 8 April 1994, UN Doc. A/AC.242/2 (1994), 43, paras. 166-170.

[184] The application of both the bulletin as well as the Convention is not mutually exclusive. The legal determination whether an armed conflict exists is a factual consideration and taking into account the saving clause of the Convention in Article 20(a)), both regimes can apply.

[185] P. Kirsch, 'La Convention sur la sécurité du personnel des Nations Unies et du personnel associé', in C. Emanuelli (ed.), *Les casques bleus : policiers ou combatants ?/Blue helmets : policemen or combattants?* (1997), 47, 56.

[186] Kolb, Porretto, Vité, *supra* note 15, 187-188.

[187] Greenwood, supra note 173, 3, 26; Kolb, Porretto, Vité, *supra* note 15, 187-188; D. W. Bowett, *United Nations Forces: A Legal Study* (1964), 509-10.

[188] For instance, Article 3 is applicable in international as well as in non-international armed conflicts, *Military and Paramilitary Activities, supra* note 55, para. 218; *Prosecutor v. Dusko Tadić a/k/a "Dule*", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, App.Ch., 2 October 1995, para. 102. Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63. Bothe does not even specify whether the law of international or internal armed conflict is applicable to the United Nations, but simply deems IHL applicable, M. Bothe, 'Peacekeeping', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1171, 1190 mn. 28; Beerli, 'Keynote address',

3. The relationship between human rights and international humanitarian law

In peacekeeping operations, situations may arise in which peacekeepers find themselves confronted with attacks involving the use of potentially deadly force. Such a scenario is independent from the question as to whether a peacekeeping operation has a mandate to use military force for purposes other than self-defence,[189] and it may trigger the application of international humanitarian law which therefore raises the question of the ways in which the two bodies of law, human rights law and international humanitarian law, can be reconciled in such a situation.

Although Grotius recognised that certain laws are not applicable in "the midst of Arms, provided they are only those Laws that are Civil and Judicial, and proper for Times of Peace", he nonetheless recognised that "there are some Things which it would be unlawful to practise even against an Enemy"[190] thereby "depicting international law as the graduate development of universal principles of justice."[191] Grotius referred to Seneca,[192] which illustrates that the legal regulation of warfare is not a particularly recent invention of mankind but can be traced back to ancient times. Justice is also one of the arguments presented to explain why human rights law is applicable in times of armed conflict. It is now generally understood that both IHL and human rights law are applicable during armed conflict; they are complementary and not alternative.[193] Whereas, mostly in Europe this view is not only accepted but also supported, in contrast the American and Israeli position is that human rights law does not or should not apply in times of armed conflict.[194] In cases of overlap, the American perspective is that IHL applies as *lex specialis*.[195]In the past decades, an approximation and

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supra note 175, 9, 11. Beerli qualifies her statement, asserting that there are differences in the law applicable to persons deprived of their liberty in the law applicable to IAC and NIAC, *ibid.* As the Geneva Conventions are not open to ratification by international organisations the majority of the legal analysis is based, should international humanitarian law be applicable, on the application of the customary humanitarian law study by the ICRC.

[189] One example of such a mandate is the mandate of the intervention brigade in MONUSCO

[190] H. Grotius, *De iure belli ac pacis (1625)* in the edition of R. Tuck (ed.), *The Rights of War and Peace. Book 1. Hugo Grotius* (2005), 102-103, para. XXVII.

[191] Crawford, *supra* note 15, 7.

[192] Grotius, *supra* note 190, 102-103, para. XXVII.

[193] Crawford, *supra* note 15, 654; O. Ben-Naftali, 'Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux', in 'O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011), 3, 4 – 6.

[194] G. D. Solis, *The Law of Armed Conflict. International Humanitarian Law in War* (2010), 24; F. J. Hampton, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', in (2008) 90 *International Review of the Red Cross*, 549, 550; L. Doswald-Beck, S. Vité, 'Le droit international humanitaire et le droit des droits de l'homme', in (1993) 75 *International Review of the Red Cross*, 99, 112. The Israeli position is probably based on political considerations regarding the Occupied Territories.

[195] Solis, *ibid.*, 24; M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', in (2005) 99 *American Journal of International Law*, 119, 133. The U.S. position seems to be adjusting; the Operational Law Handbook refers to an emerging view according to which

partial convergence of IHL and human rights law occurred;[196] both fields of law are concerned with the protection of the human person[197] which has become a major issue in international law, as well as in international relations.[198] This is despite the different origins of both fields. Human Rights have grown out of constitutional, and thereby domestic, law in contrast to international humanitarian law which has a firm foundation in international law.[199]

The International Court of Justice elaborated at length on the relationship between human rights law and international humanitarian law in the *Wall Case*:

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the application of both regimes is overlapping and complementary, A. Gillman, W. Johnson (eds.), *Operational Law Handbook, The Judge Advocate General's Legal Center & School* (2012), 46-47, paras. B. 1. – 3. A similar assessment was included in the Fourth Periodic Report of the USA to the United Nations ICCPR Committee: "Under the doctrine of lex specialis, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in international humanitarian law, including the Geneva Conventions of 1949, the Hague Regulations of 1907, and other international humanitarian law instruments, as well as in the customary international law of armed conflict. In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing", Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (2011), para. 507.

[196] It is not evident there is a "going back to a complete separation of the two realms.", C. Droege, 'Elective affinities? Human rights and humanitarian law', in (2008) 90 *International Review of the Red Cross*, 501, 548.

[197] There are of course, conceptual differences. Human Rights are primarily rights that individuals enjoy as a measure of protection against their own national state. International humanitarian law regulates the conduct of warfare and therefore includes many prohibitive norms, in other words, obligations for individuals. Whereas human rights law is also made up largely of general principles, IHL consists mainly of specific norms. Regarding their application, human rights law applies to all, within the territory and under the jurisdiction of a state, and IHL establishes different layers of protection depending on nationality, as well as special statuses such as combatant or civilian; Solis, *supra* note 194, 26.

[198] A noticeable paradigm shift can be traced within the United Nations, the concepts of "Human Security" and "Responsibility to Protect" made their appearance, General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), paras. 138, 143. The latter was endorsed by the Security Council in Resolution 1674 (2006), para. 4 and Resolution 1874 (2009), para. 4, Security Council Resolution 1674, UN Doc. S/RES/1674 (2006), Security Council Resolution 1874, UN Doc. S/RES/1874 (2009). The Council also increasingly recognised the need to protect civilians in times of armed conflict, see e.g. Resolution 1296, especially paras. 2, 5, and Resolution 1738, especially paras. 5-6, Security Council Resolution 1296, UN Doc. S/RES/1296 (2000), Security Council Resolution 1738, UN Doc. S/RES/1738 (2006). See also, N. Krisch, 'Article 39', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1272, 1284 mn. 22 – 1285 mn. 24. On human security, cf. C. True-Frost, The Security Council and Norm Consumption', (2007) 40 *New York University Journal of International Law & Politics,* 115, 138 – 74.

[199] A. A. Cançado Trindade, 'Desarrollo de las relaciones entre el derecho internacional humanitario y la protección internacional de los derechos humanos en su amplia dimensión', in (1992) *16 Revista Instituto Interamericano de Derechos Humanos*, 39, especially 45-49; R. Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?', in (2003) 14 *Criminal Law Forum*, 153, 156-157; J.-M. Henckaerts, 'Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum', in (2007) 1 *Human Rights & International Legal Discourse*, 95, 97-100. See also Henckaert for a compilation of state practice and UN practice acknowledging the application of human rights in times of armed conflict, *ibid.*, 106-09; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Administration of Justice, Rule of Law and Democracy, Working paper on the relationship between human rights law and international humanitarian law by Francoise Hampson and Ibrahim Salama, UN Doc. E/CN.4/Sub.2/2005/14 (2005), 12-14, paras. 41-50.

> the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[200]

This slightly cryptic judgment did not elucidate the position of the ICJ, but instead created confusion.[201] It was interpreted as a statement on the relationship between the two regimes *per se* and not as a pronouncement on how to establish the applicable legal framework in a specific context. In that regard, the advisory opinion of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons Case* was clearer. The Court explicitly examined the relationship between one specific norm, the right to life under the ICCPR, and its application in times of armed conflict under international humanitarian law.[202] This norm-by-norm approach is well justified, as one cannot automatically presume that a specific norm of international humanitarian law will be *lex specialis* as regards the corresponding human rights norm.[203] Given that there are different human rights instruments, one

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[200] *Legal Consequences*, *supra* note 127, para. 106. The Court reconfirmed its finding in *Congo v. Uganda*, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 216.

[201] A better analysis of the relationship is contained the *Abella Case* of the Inter-American Commission on Human Rights, Case 11.137, Juan Carlos Abella v. Argentina, November 18, 1997, paras. 157-170. For a good overview of the many inter-related intrinsic problems regarding the application of IHL and human rights law which cannot be addressed here, see D. Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', in (2013) 2 *Cambridge Journal of International and Comparative Law*, 180, 181-182.

[202] *Legality of the Threat or Use of Nuclear Weapons, supra* note 82, para. 25. The Court held: "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, *the right not arbitrarily to be deprived of one's life applies also in hostilities*. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex .specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."

[203] One example of where human rights law is *lex specialis* and thereby complementing the application of IHL is as follows: A detailed analysis of case-law shows that human rights law as informing IHL necessitates an arrest whenever possible, as well as to plan a military or police operation in a way which will increase the success of an arrest. As such, human rights law goes beyond the tests of necessity and proportionality in international humanitarian law. Lethal force has been seen as excessive when the suspects were seen as harmless, even in situations where arrest was not possible, but this test of proportionality is also intrinsic to IHL, L. Doswald-Beck, 'The right to life in armed conflict : does international humanitarian law provide all the answers ?', in (2006) 88 *International Review of the Red Cross*, 881, 883-87, 890; H. Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', in (2006) 11 *Journal of Conflict & Security Law*, 265, 280-81; Another example is the right of *habeas corpus* which is inexistent under IHL for detainees, but as derived from human rights law, it allows detainees to challenge their detention in court, Henckaerts, *supra* note 199, 95, 119; Certain armed related activities call, however, for a derogation

might also allow derogation in specific cases which would allow the application of IHL, whereas in another instrument the same right might be regulated more restrictively.[204] Furthermore, depending on the norms in question, an interpretation might also allow an alignment of the two norms, preventing a norm conflict according to which one norm is superseded by another.[205] Therefore, the norm deemed to be *lex specialis* is the norm with the "more precise or narrower material and/or personal scope of application that prevails", in other words the one which has the larger "common contact surface area" with the given situation.[206]

The nature of the armed conflict is also determinative for the relationship between two specific norms. Human rights are more likely to fill the lacunae in respect to the protection of persons in non-international armed conflict than in international armed conflicts.[207] There are also other areas of law which can be identified as falling more squarely under IHL or human rights law.[208] In relation to

from Article 5 of the ECHR, so it is submitted that it is generally accepted that IHL is *lex specialis* in international armed conflicts regarding the detention and internment of POWs and civilians, A. Reidy, 'La pratique de la Commission et de la Cour européennes des droits de l'homme en matière de droit international humanitaire', in (1998) 80 Revue Internationale de la Croix-Rouge, 551, 556-58, 561, 564; Erberich, *supra* note 151, 44-48; Krieger, *ibid*., 265, 271. Krieger also favours an analysis of the relationship between a norm of human rights and a norm of international humanitarian law in each individual case (*ibid.*). See also J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations', in (2006) 39 *Vanderbilt Journal of Transnational Law,* 1447, 1453-54; Milanovic, *supra* note 111, 232-235; Naert, 'The Application of International Humanitarian Law and Human Rights Law', *supra* note 171, 189, 208; R. Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY', in (2010) *Journal of Conflict & Security* Law, 511, 514. Cf. also *Case of Varnava and Others v. Turkey*, Grand Chamber, Judgment, 18 September 2009, para. 185; *Case of Al-Jedda v. The United Kingdom*, Judgment, Grand Chamber, Judgment, 7 July 2011, para. 107.

[204] Cf. i.e. Article 7 ICCPR and Article 5 ECHR.

[205] The Nuclear Test Case is an example as IHL was used to interpret "arbitrary" in the context of the prohibition of arbitrary prevention under Article 6 ICCPR, M. Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law', in 2010 (14) *Journal of Conflict & Security Law*, 459, 468; Cf. Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 3; Human Rights Committee, General Comment No. 31 (80), *supra* note 104, para. 11;

[206] M. Sassòli, L.M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', in (2008) 90 *International Review of the Red Cross*, 599, 604.

[207] Solis, *supra* note 194, 25. However, differences exist there as well regarding the aim of the two regimes of laws. As Meron explains "significant differences remain. Unlike human rights law, the law of war allows (...) the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage (…) As long as rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.", T. Meron, 'The Humanization of Humanitarian Law', in (2000) 94 *American Journal of International Law*, 239, 240; Naert, *supra* note 63, 622-624; Krieger, *supra* note 203, 265, 274-75.

[208] Roberts considers the concurrent application of IHL and HR to be relevant in occupations or with respect to detention rather than in armed conflicts, A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in (2006) 100 American Journal of International Law, 580, 594-95, 599-601. Watkin, who also has recourse to a case-by-case approach, suggests that the use of force for policing in a situation of occupation would be rather subject to norms of human rights law, but that combat action is governed by IHL,

peacekeeping, it is argued that human rights apply in non-coercive operations and both bodies of law apply in coercive operations; however the correct criterion is an assessment of whether an armed conflict exists.[209]

The competences of all international organisations are determined by their constitutive instruments, and these may contain only limited competences in the area of human rights law, so that it is even more important to determine the normative relationship between IHL and human rights law on a case-by-case basis.

Finally, an issue which has been more or less neglected in academic writing is the distinction between jurisdiction under human rights and humanitarian law for international organisations. It appears from the very few publications on this topic that the application of the regime of human rights law may be simply dismissed due to a lack of jurisdiction under human rights law, which would leave IHL as the only applicable body of law.[210]

Naerts also asserts – on the basis of an analysis of the situation in Iraq in 2003 – that the Security Council can, by passing a resolution, set aside some provisions of IHL on the basis of Article 103 of the UN Charter.[211]

K. Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', in (2004) 98 *American Journal of International Law*, 1, 24-34, especially 26, 28.

[209] N. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 102, 118.

[210] The example provided by Lattanzi is the *Bankovic* case. She argues that the case did not deal with the exercise of public authority, as a subject of domestic law over an individual which would correspond to extraterritorial human rights law jurisdiction, but rather the, "question de comportements lésant des droits individuels réalisés par l'Etat en tant que sujet du droit international et agissant donc sur le plan des relations internationales, c'est-à-dire dans l'exercise d'une prérogative souveraine ainsi dite externe (…) Il s'est agi, donc de l'exercice d'un pouvoir de gouvernement dans les rapports avec un autre Etat, tel que l'est certainement un acte de conduite des hostilités entre Etats – la nouvelle Yougoslavie et les Pays de l'OTAN – mais sans que, d'aucune façon, ne se soit réalisée une situation de 'persons in the power of a party to the conflict', voire de juridiction de la part des Etats membres de l'OTAN sur les résidents sur le territoire yougoslave." Thus, it was not about the application of converging rights of the two systems nor the specific rights of the human rights system, F. Lattanzi, 'La frontière entre droit international humanitaire et droits de l'homme', in E. Decaux, A. Dieng, M. Sow (eds.), *From Human Rights to International Criminal Law. Studies in Honour of an African Jurist, the Late Judge Laïty Kama/ Des droits de l'homme au droit international pénal. Etudes en l'honneur d'un juriste africain, feu le juge Laïty Kama* , 519, 569-70 ; Similarly, see Milanovic, *supra* note 205, 459, 461. The same problem is mentioned – in passing – by Doswald-Beck. Referring to the decision of *Issa* of the European Court, she says that human rights law, as laid down in treaties, may not apply due to a lack of jurisdiction if there is no actual control of the territory, *Case of Issa, supra* note 104, paras. 68-74; Doswald-Beck, *supra* note 203, 881, 899.

[211] Naert, *supra* note 63, 500-502; F. Naert, 'Detention in Peace Operations: The Legal Framework and Main Categories of Detainees', in (2006) 45 *Military Law & Law of the War Review*, 51, 54; M. Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', (2004) 86 *International Review of the Red Cross*, 745, 755-57, 763-68; The experts, by a wide margin, of the ICRC Report equally agree, ICRC, Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory, Report (2012), 83.

In summary, the relationship between IHL and HR has to be analysed in the context of a specific norm and the application of both fields of law may also be dependent on external factors – in terms of the respective norms – such as jurisdiction or the superseding powers of the Security Council.

4. Application of the law of occupation to peacekeeping operations

The law of occupation as a specific regime of international humanitarian law applies to situations in which a state exercises control and powers over a territory amounting to those of the government whose territory it occupies. As there have been instances where the United Nations has administered international territories,[212] the question of whether an international organisation could be falling under this particular regime of law is relevant. The application of the law of occupation is triggered by Article 42 of The Hague Convention (IV) Respecting the Laws and Customs of War on Land,[213] according to which a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."[214] The occupier assumes the role of sovereign of the territory but he is barred from changing the law in force and has to take all measures in his power to restore and ensure, as far as possible, public order and safety according to Article 43 of the Convention.[215]

These two articles demonstrate why it is highly doubtful that the law of occupation can be applied to an international organisation. First of all, international administration by an international organisation is normally based on cooperation with and consent of the government of the respective

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Another question that is beyond the scope of this study is how a Security Council derogation of human rights which involves the application of IHL in a given situation would affect the application of the "IHL component" as any effect of such a derogation on IHL could be seen as conflating jus ad bellum with jus in bello.

[212] e.g., East Timor, Kosovo.

[213] Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[214] Thus it is a question of fact: "The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.", United States Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others (the Hostages Trial)*, Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Vol. VIII WCR 34, 55. The UK Manual uses a two-step test to determine whether a state of occupation exists in a given area, of which the first part is that "the former government has been rendered incapable of publicly exercising its authority", The Joint Service Manual of the Law of Armed Conflict (2004), para. 11.3; G. H. Fox, *Humanitarian Occupation* (2008), 230; H. McCoubrey, N. D. White, *International Law and Armed Conflict* (1992), 280.

[215] Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. It therefore "serves as a restraint against occupiers assuming powers of the displaced sovereign", M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16 *European Journal of International Law*, 661, 671-72. For the present purposes, it is also not necessary to refer to further dispositions pertaining to the law of occupation.

state.[216] Therefore, under normal circumstances, an international organisation is not forcefully taking over a territory against the wishes of the government;[217] it is a situation of *occupatio pacifica* in contrast to *occupatio bellica*.[218]

Moreover, the mandate of an international organisation, for example, the mandate of UNMIK, expressly includes a mandate of transformative authority which goes beyond safeguarding the *status quo.*[219] Consequently, a large part if not the majority of doctrine denies an application of the law of occupation to international organisations.[220] As a reply to that argument, one can say that relying on "consent" corresponds to relying on an argument derived from *jus ad bellum*, and that the application of the law of occupation is determined by a factual analysis under *jus in bello.* This counter-argument is valid,[221] however many organisations are legally not able to occupy a territory in the absence of competences under their internal law;[222] any such act would correspond to the international organisation acting *ultra vires*.[223] It is also not convincing in this regard to argue that an

[216] Therefore the UK manual excludes the application of the law of occupation to cases of international administration of territory by the United Nations or another international organisation, The Joint Service Manual of the Law of Armed Conflict (2004), para. 11.1.2. The ICTY applied a similar test, demanding equally that "the occupied authorities (…) have been rendered incapable of functioning publicly." Additionally, the Tribunal's standards require the surrender, defeat or withdrawal of the forces of the occupied authority, *Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Stela",* Judgment, Case No. IT-98-34-T, T. Ch., 31 March 2003, para. 217. It is noteworthy that the Tribunal speaks of its criteria as "guidelines" (*ibid.*).

[217] Proponents of the responsibility to protect would argue differently.

[218] Schmalenbach, *supra* note 154, 358-362.

[219] Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 68; S. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', in (2005) 16 *European Journal of International Law*, 695, 700. It is difficult to compare the United Nations especially to an occupying force because of criteria such as the mission's legitimacy, its mandate and its mode of functioning, Sams, *ibid, 66.* Stahn observes correctly that the administration of a territory by an international organisation is *"*to some extent, a counter-model to the classic concept of occupation. It is not a state-centred form of administration which is triggered by factual events (i.e. the effective authority over territory), but an arranged form of authority that is carried out by or under the auspices of international actors", C. Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (2008), 155.

[220] The "generally accepted view is that occupation law does not apply to nation-building missions because the UN lacks the essential attributes of statehood necessary to comply with the law's many obligations.", Fox, *supra* note 214, 219; S. Wills, 'Continuing Impunity of Peacekeepers: The Need For a Convention', (2013) *Journal of International Humanitarian Legal Studies*, 1, 8-9.

[221] But it also should be noted that in academic writing there has been a debate that has endured for decades as to whether the distinction between *jus ad bellum* and *jus in bello* is always necessary and that arguments *of jus ad bellum* for the non-application of the law of occupation have been already raised in 1946, tracing the debate and arguments on the distinction between Jus ad Bellum and Jus in Bello, see J.H.H. Weiler, A. Deshman, 'Far Be It From Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus and Bellum and Jus in Bello', in (2013) 24 *European Journal of International Law*, 25-61. *In 1946 it was already questioned whether all Hague Rules on occupation should apply to peace-loving nations occupying an aggressor's country, Ibid.32;* E. A. Korovin, 'The Second World War and International Law', in (1946) 40 *American Journal of International Law*, 742, 753.

[222] Internal law means the Constituent treaty as well as other relevant documents pertaining to its functioning on an external level.

[223] From the perspective of the law of international responsibility, "consent" is a circumstance precluding wrongfulness.

international organisation may be bound by Security Council Resolutions and Article 103 of the United Nations Charter similarly to a state.[224] Under such an argument, the United Nations could – on the basis of a resolution under Chapter VII – compel another international organisation to act even if the act would be in violation of its own internal law.[225]

Furthermore, taking the example of UNMIK in Kosovo, the law of occupation simply does not cover *ratione materiae* cases of civil administration of a territory through peaceful means by an international organisation. On the basis that these administrations are civil, they already exclude the application *ratione materiae* of the law of occupation and the consent of the government on whose territory the operation is deployed would not amount to an argument *jus ad bellum* against the *jus in bello* body of the law of occupation.[226]

In practice, the United Nations has never acknowledged the application *de jure* of the law of occupation nor applied this body of law in practice, including situations where, arguably, the conditions for the application of the law of occupation were fulfilled. [227] A report of an expert

[224] International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011), 170, para. 2.

[225] It is of course, only a hypothetical consideration and it does not touch upon any question of responsibility by the United Nations and/or the other organisation in question. The law of occupation can be also modified by the Security Council under Chapter VII of the Charter and the general principle of Charter supremacy arising from its Article 103, D. J. Scheffer, 'Beyond Occupation Law', (2003) 97 *American Journal of International Law*, 842, 852.

[226] Stahn, *supra* note 219, 473. KFOR was in charge of military tasks, thus unless one argues to extend the application of the law of occupation to all international organisations being involved in the administration of a territory, it is another argument against the application. Stahn argues for an application of the law of occupation by analogy, *ibid.* 474. Some expert also consider that the law can be de facto applicable – fulfilling the criteria under Article 42 of Hague Convention (IV) - if the international administration is split in a civil administration and affiliated armed forces), in such circumstances all the partners involved shall be considered as occupying powers for the purposes of IHL, ICRC, Expert Meeting, *supra* note 211, 79-80.

[227] On the contrary, regarding the administration of the Gaza Strip by UNEF, the UN has opined "The occupier has a duty (…) of administering the country according to existing laws and existing rules of administration (…) the forgoing is enough to indicate what the situation would be if the Force were an occupying army – which it is not, and which it has been stated explicitly it is not", Brief on UNEF Function in the Gaza Strip, 8 August 1957, UN Archives N.Y., File No. S-0530-0101, UN Emergency Force I, Box DAG-13/3.11.0.0-101; Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 68-69. Security Council Resolutions 1031 (1995), 1037 (1996), 1244 (1999), 1272 (1999) likewise do not contain any reference to the law of occupation, Security Council Resolution 1031, UN Doc. S/RES/1031 (1995), Security Council Resolution 1037, UN Doc. S/RES/1037 (1996), Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), Security Council Resolution 1272, UN Doc. S/RES/1272 (1999). The expert report of the ICRCR also states that the law of occupation was never applied de jure to the UN administration of territory, but the majority of experts believe that the law of occupation could be de jure applicable as the criteria listed in Article 42 of the Hague Regulations also do not list the objectives of the occupation as long as there is no consent by the sovereign, ICRC, Expert Meeting, supra note 211, 78-80, 84. Four possible scenarios were devised for the de jure application to United Nations administration of territory as a result of: "1) UN invasion of a territory, 2) UN intervention in a failed State, 3) the handover of territory by a coalition of States who had taken control of

meeting of the ICRC also showed the incertitude in legal scholarship regarding the application of the law of occupation to peace operations. Although the majority of experts agreed that in certain circumstances the law of occupation might be applicable to operations under UN command and control, they were equally divided on the details.[228]

In summary, the arguments against an application of the law of occupation to peacekeeping operations are convincing and in practice, the law of occupation has equally never been applied in the peacekeeping context.

3.3. Conclusions

The inquiry into the applicable law in respect to peacekeeping operations has shown that the legal framework is rather complex. Both international human rights and international humanitarian law can be applicable whereby both fields of law raise certain issues. Besides the debate over the applicable body of humanitarian law to peacekeeping operations, the exercise of jurisdiction by international organisations under human rights law is also problematic. It was argued that the two models of jurisdiction developed in the jurisprudence of international courts and tribunals are also applicable to international organisations. The unclear customary status of many dispositions further complicates the picture.

These two models of jurisdiction under human rights law may have a connotation in the context of the question of joint responsibility of international organisations for peacekeeping operations. It is imaginable that in the context of a specific peacekeeping operation deployed in the field, one organisation may be exercising territorial jurisdiction over a given area, whereas a second international organisation is exercising personal jurisdiction over one or several people within this area. Nevertheless, this exercise of jurisdiction by both organisations already presupposes that the conduct in violation of international law was in fact also attributed to both organisations. It therefore increases the potential for joint responsibility of two or several organisations as the attribution of

another State, or 4) the withdrawal of the host State's consent to UN presence on its territory", *ibid.,* 79. See also the background paper by Steven Ratner, *ibid.*, Appendix 2, 96 – 104.

[228] Some declared the law to be applicable in situations in which the UN missions exercise functions and powers of a territory similar to an occupant, however there was disagreement whether the law of occupation would be applicable *de jure* or *de facto*, and one expert also stated that the applicable law of a UN mission is primarily determined by the Security Council mandate. The Mandate and the SC Resolution were also seen by some experts as the determinative criteria for the application of the law of occupation, though this was disputed by the majority as it would be against the strict separation of *jus in bello* and *jus ad bellum*. Classic criteria should also be used for UN operations of which "effective control was the key concept." The experts also agreed that the SC could set aside at least these dispositions of the law of occupation – by the virtue of Article 103 – which were not pertinent for implementing the resolution and which are not contrary to *jus cogens*, ICRC, Expert Meeting, supra note 211, 33-34.

conduct could also be based on different violations of primary norms. In other words, one could imagine a scenario in which the Security Council – and thereby the UN – was bound to prevent a certain conduct based on an exercise of territorial jurisdiction and in which a regional organisation was obliged to abstain from a certain conduct on the basis of personal jurisdiction over a person.

Chapter IV: From the broader legal framework to international responsibility

4.1. Introduction

"In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of process. If one consolidates the past and calls it law, he may find himself outlawing the future."

- Judge Manfrech Lachs, President of the ICJ.[1]

The present study started with an examination of legal framework for the maintenance of international peace and security under the United Nations Charter. The analysis showed that the legal framework is construed around a careful compromise between a universalist and a regionalist perception of collective security, in which the United Nations is the central pillar, although in practice roles can be reversed. This study inquired into the concept of peacekeeping as it was developed under the United Nations Charter, as well as cooperation with regional organisations, and it placed emphasis on this "collective security compromise", as it is echoed within each of the chapters of the United Nations Charter analysed.[2] The Security Council is very adept at handling the legal framework with its corresponding margin of appreciation and has shown a high degree of flexibility and pragmatism in the conduct of peacekeeping operations, as well as in its relations with regional organisations.

Finally, cooperation between the United Nations and regional organisations has become a reality and a fact. All indications point towards even more cooperation between the United Nations and regional organisations, both on a vertical and on a horizontal level. This was last illustrated during the open debate organised under the Rwandan presidency of the Security Council in July 2014.[3] Based on a concept note prepared by Rwanda,[4] the members of the Security Council, representatives of other

[1] "The Twenty-fifth Anniversary of the International Law Commission", speech delivered at a Special Commemorative Meeting of the United Nations General Assembly (12 October 1973).
[2] It has to be clarified that under Chapter VII it is due to the practice of the Security Council which has established the concept of peacekeeping.
[3] Security Council, 7228th meeting, UN Doc. S/PV.7228 (2014). See, in particular the statements by the Secretary-General, the EU, the AU and NATO, 2-4, 4- 6, 6-9, 56-57. See also M. Brosig, D. Motsama, 'Modeling Cooperative Peacekeeping. Exchange Theory and the African Peace and Security Regime', in (2014) 18 *Journal of International Peacekeeping*, 45, 51.
[4] Concept note, July 2014 Security Council open debate on the theme "United Nations peacekeeping operations: the United Nations and regional partnership and its evolution", Annex to Letter dated 3 July 2014

member states and international organisations debated about necessary steps for strengthening the relations between the UN and regional organisations with regard to peacekeeping operations and maintenance of international peace and security.

In the unanimously adopted Resolution 2167 following a long debate the Security Council expressed "its determination to take effective steps to further enhance" its relationship with regional and subregional organisations.[5] More importantly this resolution proves that the Security Council has truly embraced the loose security system based on the triangle of organisational relations between the UN, the AU and the EU (*infra* 2.6). In its resolution, the Security Council welcomed recent developments regarding cooperation between the UN, the AU and the EU, as well as the "strong cooperation initiatives" on an operational level between these three organisations.[6] It went even further and requested the Secretary-General to produce, in close consultation with both the AU and the EU, an assessment report and recommendations on the progress of the partnerships between the UN and relevant regional organisations in peacekeeping operations no later than 31 March 2015.[7] Therefore, this resolution may well be the starting point for further enhanced cooperation between international organisations in peacekeeping operations which will ultimately also increase the likelihood of joint responsibility of international organisations for violations of international law committed during the deployment of peacekeeping operations. The Security Council underlined that there is also a need to enhance the UN and regional organisations' joint planning and joint mission assessment processes.[8] Another measure envisaged is an increased exchange of staff members between the UN and the AU in order to enhance the capacities of the latter, for instance, in mission planning and management.[9]

Another trend that can be observed with respect to the cooperation between the UN and regional organisations is the increase in the deployment of multiple simultaneous peace operations in the same conflict, which rose from 10% of all peace operations in 1992 to 70% of all peace operations in

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from the Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General, UN Doc. S/2014/478 (2014), see in particular 6-7.

[5] Security Council Resolution 2167, UN Doc. S/RES/2167 (2014), 4, para. 2. See also Secretary-General's remarks at Summit on UN Peacekeeping, available at http://www.un.org/sg/statements/index.asp?nid=8060.

[6] *Ibid.*, 4, para. 7; 5, para. 11. The Secretary-General also set apart these three organisations from other organisations by speaking of "We – the United Nations, the AU and the EU, together with other key partners", Security Council, 7228th meeting, *supra* note 3, 3. Cf also the statements of the EU and of Ireland, *ibid.*, 5, 52.

[7] Security Council Resolution 2167, *supra* note 5, 7, para. 28.

[8] *Ibid*., 5, para. 14. See also the statements of the Secretary-General and the EU, Security Council, 7228th meeting, *supra* note 3, 2, 4.

[9] Security Council Resolution 2167, *supra* note 5, 6, paras. 18-19.

2007.[10] The time-frame for the evolution of cooperation between the UN and regional organisations in peacekeeping operations has been remarkably short, and the presented facts suggest that cooperation between the organisations will continue to develop at such a pace that the necessity for legal regulation of the joint responsibility of international organisations will be even further enhanced. Whereas the EU started deploying troops in crisis management operations in 2003, the African Union, although the legal successor of the OAU, has existed only since 2000, so that it is to be expected that these two organisations in particular will further enhance and institutionalise their cooperational framework with other organisations, as well starting a new wave of activism. This assessment is made against a background in which one cannot see any trend in international relations toward a decrease of threats to international peace and security, nor a decrease to internal or international armed conflicts. In particular, the African continent unfortunately remains a nursery for conflicts, as the recent examples of Mali and the Sahel Region and the Central African Republic underline.[11]

The analysis further highlighted the problems and challenges existing in this particular domain of international law. One can truly say that certain areas of international law resemble something of a *terra incognita* when it comes to their application to international organisations.[12] There are several reasons, which include the lack of practice by international organisations in the period of the Cold War. The opposing two blocs in the Security Council prevented the system of global collective security from operating as it was supposed to.

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[10] A. Ballas, 'It Takes Two (or More) to Keep the Peace: Multiple Simultaneous Peace Operations', in (2011) 15 *Journal of International Peacekeeping*, 384, 385. In Bosnia Herzegovina, for example, four international organisations deployed their own peace operations at overlapping time-periods from 1995 onwards: The United Nations with UNPROFOR and UNMIBH, NATO with SFOR and IFOR, the OSCE's Mission to Bosnia-Herzegovina as well as the EU with EUPM and EUFOR.

[11] In 2012, the SC held 90 meetings on African issues which account for 68% of the Council agenda, Highlights of the Security Council Practice 2012, available at: http://www.un.org/en/sc/inc/pages/pdf/highlights/2012.pdf. The percentage was exactly the same for the year 2011, Annex to the letter dated 2 April 2013 from the Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General, Concept note for briefing in the Security Council: Prevention of conflicts in Africa: addressing the root causes, Monday, 15 April 2013, UN Doc. S/2013/204 (2013), 2, para. 2. Africa is also the continent in which cooperation between the United Nations and regional organisations have been "most tested" and the nature of the UN's experience, in particular the failures of Somalia and Rwanda in the 1990s has influenced significantly the general approach of the UN to peacekeeping operations, J. Boulden, 'Introduction, in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 1, 3. Another continent, South America is now coming of age regarding its contributions to international peacekeeping; for a good overview, cf. K. M. Kenkel (ed.), *South America and Peace Operations. Coming of age* (2013).

[12] One may cite in this context Brownlie, who declared in 2005 in his chapter on the responsibility of states for the acts of international organisations that "[t]he subject chosen for this contribution meets the need of brevity because not very much is known about it. Most works of reference ignore it", I. Brownlie, 'The Responsibility of States for the Acts of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 355, 355.

Moreover, the "humanisation" of international law, in the form of the emergence of international human rights law, expanded the reach of norms protecting the individual to the areas of activities of international organisations.[13] However, these norms are transported from the homogeneous "*contexte étatique*" to the heterogeneous area of international organisations. The lack of adjudicative power by International Courts and Tribunals over international organisations likewise prevented further elucidation of the applicable legal rules. The consolidation of peacekeeping operations, and the multiplication of tasks, functions and actors, contributed to the difficulty in dismantling and analysing these operations, and in determining the applicable legal framework, as well as the responsible entities. A further factor is the uniqueness of each of the organisations; each of them is an organisation *sui generis*. Thus, their relations with other organisations are based on their unique legal make-up, complicating any attempt to draw conclusions of general validity outside of their specific context. The assessment on an inter-organisational level is also true on an operational level for each and every peacekeeping operation.

It is against this comprehensive background that the study approaches the legal framework of international responsibility applicable to international organisations, as well as the practice of the United Nations therein. It is necessary to address whether the developed rules are appropriate to regulate the specific context of international organisations cooperating in peacekeeping operations. It was concluded in Chapter II that the cooperation between international organisations in peacekeeping operations has reached a level where cases of joint responsibility are not only likely to

[13] Cf. generally T. Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, Collected Courses of The Hague Academy of International Law, Vol. 301 (2003), 9-489; T. Meron, *The Humanization of International Law* (2006). Regarding the practice of international organisations to compensate individual victims, "[i]t has [e.g.] always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore", Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics, in, *United Nations Juridicial Yearbook* (1965), 41; indeed, it was not conceived in the early days that the Security Council, in the exercise of its competences and powers regarding the maintenance of international peace and security might interfere with an individual's rights, C. Tomuschat, 'The European Court of Human Rights and the United Nations', in A. Føllesdal, B. Peters, G. Ulfstein (eds.), *The European Court of Human Rights in a National, European and Global Context* (2013), 334, 335; M. Bothe, 'Security Council's Targeted Sanctions against Presumed Terrorists', in (2008) 6 *Journal of International Criminal Justice*, 541, 541.

occur,[14] but where international organisations are acting as equal partners, and therefore not in a subordinate-superior relationship.

1. The Law of Responsibility of International Organisations and the practice of the United Nations

As peacekeeping was invented by the UN as a tool for conflict regulation, most of the existing practice in this particular area, which has been likewise analysed by the ILC for the elaboration of the ARIOs, derives from UN operations.

Activities in the domain of international peace and security and particularly peacekeeping operations, have a great impact on the lives of the people, especially in the case of deployment of troops on the ground. Violations of human rights law and international humanitarian law and international responsibility of international organisations for these acts are consequently not a mere hypothetical possibility, but part of the reality. These acts may be committed in a private or in an official capacity, alone or by a group of individuals and they can include acts such as sexual exploitation, arbitrary detention or murder, or even the unintentional killing of civilians in the exercise of the mandate of an operation.

Sixty-seven United Nations peacekeeping missions have taken place since the establishment of the UN in 1945. Consequently, there has been a certain practice and some cases dealing with the responsibility arising for peacekeeping missions.[15] The United Nations declared at an early stage that it would be responsible for all damages occurring during the deployment of peacekeeping forces[16] and that it would pay for any damages caused,[17] despite emphasising that this is only motivated by

[14] Cf. A. Clapham, 'The Subject of Subjects and the Attribution of Attribution', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowland-Debbas* (2010), 45, 58.

[15] As the UN Legal Counsel wrote on 3 February 2004 to the Director of the Codification Division, it is "in connection with peacekeeping operations where principles of international responsibility (…) have for the most part been developed in a fifty-year practice of the Organization", cf. G. Gaja, Second Report on responsibility of international organizations, UN Doc. A/CN.4/541 (2004), at 16 fn.52.

[16] M. Hartwig, *Die Haftung der Mitgliedstaaten für Internationale Organisationen* (1993), 233. As one example, cf., the agreement concluded between the United Nations and the United Arab Republic (now: Arab Republic of Egypt) concerning traffic accidents involving either UAR or UNED vehicles, Exchange of Letters constituting an Agreement between the United Nations and the Government of the United Arab Republic concerning the Settlement of Claims between the United Nations Emergency Force and the Government arising out of Traffic Accidents. Gaza, 14 October 1959 and Cairo, 15 September and 17 October 1960, United Nations Treaty Series 388, 144-8.

[17] According to U.N.E.F. Regulation 15 the Secretary-General "shall make provisions for the settlement of claims arising with respect to the Force". In practice, claims arising against U.N.E.F. and the United Nations Force in the Congo were settled by the U.N., cf. F. Seyersted, 'United Nations Forces Some Legal Problems', (1961) 37 *British Yearbook of International Law*, 351, 420; also M. Tondini, 'The 'Italian Job': How to Make International Organisations Compliant With Human Rights and Accountable For Their Violation by Targeting Member States'

the "moral responsibility" of the organisation and underlining that it was not under a legally binding obligation.[18] Although later on certain statements speak of "liability", others mention that the practice emerged from a "policy" or from "considerations of equity and humanity."[19]

Several arguments can be made against any generally applicable legal rule which could be derived from the practice of the United Nations. First of all, the practice of one single organisation cannot fulfil the requirements necessary to ascertain a rule of customary law applicable to all international

in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 169, 180.

[18] The International Law Association also stated that "[t]here is no evidence of a presumption in law that the UN bears exclusive or primary responsibility for the tortious acts of peacekeeping operations and the law remains underdeveloped"., International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, Third Report consolidated and enlarged version of recommended rules and practices ("RRP-S"), 10. This is independent of any general rule regarding the attribution of conduct of organs or states placed at the disposal of an organisation on the basis of effective control, as the ILA rightly points out, *ibid.*, 16. However, it is also emphasised that "[t]here is no consensus on the modalities and degree of control required for attribution" (*ibid.*, 16). The ILA reaffirmed this view in 2004 notwithstanding the (then) already published two reports by ILC Special Rapporteur Gaja, International Law Association, Berlin Conference (2004), Accountability of International Organisations, 21; Further criticism came from the IMF, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/582 (2007) (International Monetary Fund), 7.

[19] Hartwig, *supra* note 16, 233; So it was articulated by the United Nations Secretary-General in his letter to the Minister for Foreign Affairs of Belgium that "[the United Nations] has stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties. It is pointed out that, under these principles, the United Nations *does not assume liability for damage to persons or property which resulted solely from military operations* or which, *although caused by third parties,* has given risen to claims against the United Nations" [Emphasis added], Text of the Exchange of letters Dated 20 February 1965 between the Secretary-General of the United Nations and the Minister for Foreign Affairs of Belgium concerning the Settlement of Claims lodged against ONUC by Belgian Nationals, (1965), in UN Doc. S/6597, Annex 1. Even clearer, U Thant stated in another letter that "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition (…) it is reinforced (…) by considerations of equity and humanity which the United Nations cannot ignore", also in UN Doc. S/6597. For the French version, cf. J. J.A. Salmon, 'Les Accords Spaak – U Thant du 20 Février 1965', (1965) XI *Annuaire français de droit international*, 468, 495-97. In this context, it was expressed that "[t]he international liability of the United Nations for the activities of the United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organizations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization) and its liability in compensation. In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties"; cf. Report of the Secretary-General, Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters, Un Doc. A/51/389 (1996), paras. 6-7.

organisations, even if one were to presume that the required element of *opinio iuris* were to be present within the other organisations.[20]

Moreover, the practice of the United Nations consists mostly of compensation cases under the domestic law of individual states; under which the conditions for a settlement, including the criterion of attribution, may differ from those applying under international law. Many of these cases under domestic law also included qualifications and limitations such as the use of statutes of limitation, restricting the period to present claims.[21] The United Nations often only assumed responsibility on the international, external level, towards the victims, while recovering the compensation paid from the respective troop contributing states.

Under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government"[22], one has to distinguish between attribution of conduct and attribution of responsibility; whereas the UN might assume the responsibility on an international level, the conduct would have been attributed to the member state and not the organisation. It is even questionable whether the practice of the UN is in conformity with the rules laid down in the ARIO.[23] The practice is also centred on the relationship between the United Nations and individual Member States.

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[20] A contrary view on this issue is taken by Larsen who argues that the UN practice has been extensive and consistent enough as well as carried out with *opinio iuris* to qualify as international customary law, K. M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), 101.

[21] K. Grenfell, 'Effective Reparation for the Victims of Wrongful Acts Committed During UN Peace Operations: How Does It Work Concretely?', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 126, 130-32; General Assembly Resolution 52/247 Third-party liability: temporal and financial limitations, UN Doc. A/RES/52/247 (1998), particularly, 2-3, paras. 8-11; Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations, UN Doc. A/51/903 (1997), particularly, 5-11, paras. 12-46.

[22] Contribution Agreement between the United Nations and [Participating State] Contributing Resources to [The United Nations Peacekeeping Operation], Annex to Administrative and Budgetary Aspects of the Financing of The United Nations Peace-keeping Operations: Financing of the United Nations Peace-keeping Operations, Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment, Note by the Secretary-General, UN Doc. A/50/995 (1996), 6, para.10; Model Memorandum of Understanding Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation], Annex to Administrative and Budgetary Aspects of the Financing of The United Nations Peace-keeping Operations: Financing of the United Nations Peace-keeping Operations, Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment, Note by the Secretary-General, UN Doc. A/51/967 (1997), 7, para. 10.

[23] The Articles limit the responsibility of an international organisation to acts in an official capacity, but *ultra vires* acts in the exercise of an official capacity are covered, cf. Article 8 of the articles. International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011), 85, para. 3 of the commentary; *mutatis mutandis* also, International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), General Assembly, Official Records, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10 (2009), 62-63, para. 2 of the Commentary. The United

It has also been pointed out that the lack of practice in a given area may be an indication that a "particular situation cannot be covered by a general rule due to the diversity of international organizations."[24] The Special Rapporteur of the ILC himself acknowledged the lack of practice. It is partly in consequence of the fact that only 18 international organisations reported their practice, and he therefore commented that the practice did not add to the previous knowledge.[25]

2. The ILC Articles on Responsibility of International Organizations

The following part analyses the question as to whether the articles developed by the International Law Commission are suitable to be applied in the context of peacekeeping operations. Bearing in mind the enhanced cooperation between international organisations, it is important to analyse and to ascertain whether the different possibilities of the attribution of conduct and of responsibility to international organisations as contained in the articles of the ILC are suitable to regulate the conduct of international organisations cooperating in peacekeeping operations. The sixty-five Articles on Responsibility of International Organizations as adopted by the International Law Commission in 2nd reading in 2011 contain several dispositions which set out the various methods to attribute conduct or simply responsibility to international organisations. The first article which will be examined is Article 7 which deals with the attribution of conduct to international organisations in the case of

Nations has – under certain conditions – also recognised responsibility for off-duty acts: In this connection, the Secretariat notes that the 1986 opinion quoted by the ILC does not reflect the consistent practice of the Organization. In 1974, the Office of Legal Affairs advised the Field Operations Service as to whether the United Nations Emergency Force (UNEF) Claims Review Board was authorized to handle and settle claims in respect of tortious acts committed during the Force members' off-duty periods. It advised that "there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognize as engaging its responsibility", and made a distinction between off-duty acts of Force members in circumstances closely related to the functions of the Force member (i.e., the use of a Government-issued weapon), and actions entirely unrelated to the Force member's status as such. Accordingly, the test for the attribution of the act was whether it related to the functions of the Organization, irrespective of whether the Force member was on or off duty at the time, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637/Add.1 (2011), 15-16, para.4. NATO's Status of Force agreement contains a similar disposition, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 4 April 1949, Article VIII.

[24] International Law Association, Sofia Conference (2012), Study Group on the Responsibility of International Organizations, 8. Generally on criticism of the ILC articles due to their "copy/paste nature" from the articles on State Responsibility, see, *ibid.*, 9-11; Germany took the view that, "there is no customary international law on the responsibility of international organizations", International Law Commission, Responsibility of international organizations, Comments and observations received from Governments and international organizations, UN Doc. A/CN.4/556 (2005), 47. See, Germany, *ibid.*, 63, section D. regarding the practice of the UN to assume responsibility for peacekeeping operations.

[25] Gaja, Second Report, *supra* note 15, 2, para.2. The AU and ECOWAS did not submit any comments regarding their practice. This lack of practice was also criticised in the joint submission of 14 international organisations which declared that the articles would not sufficiently take into account of the diversity of international organisations, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 10-11, para.2.

organs of states or organs or agents of international organisations seconded to another international organisation.

1. Article 7 of the Articles on the International Responsibility of International Organizations

Article 7 prescribes that "[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."[26]

As explained in the previous chapter (*infra*, 3.2.1.), states retain a certain amount of control over peacekeepers which are not fully seconded to an international organisation so that peacekeeping operations are deemed to fall under the provision of Article 7.[27] Although this article also covers the conduct of an organ of an international organisation placed at the disposal of another international organisation, the practice in this area is rare; the commentary to the article lists one example.[28] All cases in the context of peacekeeping operations dealing with the international responsibility of a state or an international organisation have been decided on the basis of a criterion of control, but the jurisprudence is varied to say the least.

The controversial *Behrami* case deviated completely from the criterion of "effective control" but held that "the United Nations Security Council retained ultimate authority and control so that operational

[26] For a good general overview of the origins, history and content of Article 7, see B. Montejo, 'The Notion of 'Effective Control' under the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 389-404.

[27] Report of the International Law Commission, Sixty-third session, *supra* note 23, 85, para.1; The position of the ILC contains a "slight divergence" from the official UN position according to which peacekeeping forces are "subsidiary organs" of the United Nations, without "any significant differences." The practice of the UN corresponds rather to Article 8 than to Article 7. Regarding UN authorised operations, the troops deployed do not become organs of the UN so that attribution must be based on Article 7. Tomuschat, 'The European Court of Human Rights and the United Nations', *supra* note 13, 334, 344-50; A. Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link', in (2012) 9 *International Organizations Law Review*, 77, 78. Sari criticises the distinction between Articles 6 and 7 as unconvincing as any organ seconded by a State to an international organisation remains to a certain extent under the control of the seconding entity as otherwise it would "cease to exist as own of its organs." Therefore, she submits that Article 6 could be applicable to national contingents in peace operations, *ibid.79-80*. In contrast, Shraga supports the distinction between Article 6 and Article 7, D. Shraga, 'ILC Articles on Responsibility of International Organizations: The Interplay between the Practice and the Rule (A View from the United Nations)', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 202-205.

[28] Report of the International Law Commission, Sixty-third session, *supra* note 23, 91, para.16.

command only was delegated."[29] The European Court of Human Rights set out the chain of command in detail:

> Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international security presence, KFOR. NATO fulfilled its command mission via a chain of command (from the NAC, to SHAPE, to SACEUR, to CIC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.[30]

On the basis of this analysis, the Court concluded that "[t]his delegation model demonstrates that, contrary to the applicants' argument (…), direct operational command from the UNSC is not a requirement of Chapter VII collective security missions."[31] The Court thus attributed the conduct of a UN authorised operation to the United Nations contrary to the "practice" of the United Nations.[32] The Court confirmed its jurisprudence in *Kasumaj v. Greece*[33] and *Gajic v. Germany.*[34] In *Berić and others v. Bosnia*,[35] the Court, although quoting extensively from *Behrami,* relied on the notion of "effective overall control".[36] In yet another case, *Stephens v. Cyprus, Turkey and the United Nations*, the European Court first of all denied the attribution of the alleged violations to the two respective states and then carried on to declare that as to the complaints directed against the UN ''UNFICYP,

[29] *Agim Behrami and Bekir Behrami against France, Ruzdhi Saramati against France, Germany and Norway*, Decision on Admissibility, 2 May 2007, para. 133. Crawford asserts that the Chamber "seemed to employ more formalistic criteria to determine responsibility", J. Crawford, *State Responsibility. The General Part* (2013), 198. For further critique of the judgment, see the references on page 199, fn. 174.
[30] *Ibid.*, para. 135.
[31] *Ibid.*, para.136.
[32] Report of the International Law Commission, Sixty-third session, *supra* note 23, 89, para. 15 and fn.115 for selected publications criticising the decision. It will not be dealt with further here, as Behrami will be one of the case-studies.
[33] *Kasumaj v. Greece*, First Section, Decision as to the Admissibility, 5 July 2007.
[34] *Gajic v. Germany*, First Section, Decision as to the Admissibility, 28 August 2007, para.1.
[35] *Berić and others v. Bosnia*, Fourth Section, Decision as to the Admissibility, 16 October 2007
[36] *Ibid.* 15-16, paras. 27-28. It has to be emphasised that the Court does not pronounce itself on the utilised criterion of jurisdiction which is the first step before determining the attribution of conduct. In Behrami/Saramati, the Court also relied on the notion of "effective overall control" to establish that the applications were under the jurisdiction of KFOR/UNMIK. Cf. generally, C. A. Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision', in (2010) 42 *New York University Journal of International Law and Politics*, 501–548.

which has control over the buffer zone, is a subsidiary organ of the UN created under the UN Charter and is under the *exclusive control and command* of the UN"[37] [Emphasis added].

In the UK, the House of Lords was seized by a case regarding the actions of British troops after the Iraq Invasion in 2003. In *Al-Jedda,*[38] the Court distinguished the facts of the case presented to it from the *Behrami/Saramati* Decision before the European Court of Human Rights, and held that it could "not realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant."[39]

Mr. Al-Jedda then seized the European Court of Human Rights which returned to some extent to the "effective control" criterion. The Court considered that "that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations."[40] This approach seems to create yet another test of attribution, a blend of *Berić* with *Behrami/Saramati*.

On the domestic level, the Dutch Courts were engaged with claims against the Dutch Government for conduct arising out of the actions of the Dutch batallion "Dutchbat" of UNPROFOR in Srebrenica. The District Court in The Hague made only a general reference to the articles on international

[37] *Kyriakoula Stephens against Cyprus, Turkey and the United Nations*, First Section, Decision as to the Admissibility, 11 December 2008, 7.

[38] R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), Decision of 12 December 2007

[39] *Ibid.*, Opinion of Lord Bingham of Cornwall, 17, para. 23. He distinguished the case from Behrami by asserting: "By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in Behrami and Saramati) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself." (*Ibid*). Furthermore, "The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.", *Ibid.*, 17, para. 24. Lord Rodger of Earlsferry equally emphasised the distinction between the two cases, 30, para. 59, he however relied on the criterion developed by the ECHR, 51, para.113. Baroness Hale of Richmond concurred with Lord Bingham, 54-55, para. 124. So did Lord Carswell, 57, para. 131. Lord Brown of Eaton-under-Heywood also distinguished the case from Behrami/Saramati and attributed the conduct to the UK, 61-64, paras. 141-149.

[40] *Case of Al-Jedda v. The United Kingdom*, Judgment, Grand Chamber, Judgment, 7 July 2011.

responsibility of international organisations, and concluded that "these acts and omissions should be attributed strictly, as a matter of principle to the United Nations."[41]

In July 2011, the Court of Appeal in The Hague delivered its judgment in the same affair and reversed the attribution of conduct, judging that the Netherlands would be responsible. The Court based its judgment on the notion of "effective control" as derived from international law literature and the work of the ILC, including Article 6 [now: 7] of the articles on Responsibility of International Organisations.[42] More important however, the Court held that "the possibility that more than one party has 'effective control' is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party."[43] However, the Court did not substantiate this particular finding.[44] The Court also distinguished between two criteria to determine if an entity exercises "effective control", first of all "whether that conduct constituted the execution of a specific instruction" and "if there was no such instruction, the UN or the State had the power to prevent the conduct concerned."[45]

On 6 September 2013, the Supreme Court of the Netherlands rendered its judgment in the two affairs, confirming the judgments of the Court of Appeal. The Supreme Court confirmed not only that conduct can be attributed to both an international organisation and a state if they "exercise effective control"[46], but also that "all factual circumstances and the special context of the case must be taken into account."[47]

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[41] District Court in The Hague, Nuhanović v. The Netherlands, Judgment, LJN: BF0181, Case No. 265615 / HA ZA 06-1671(english translation), 10 September 2008, para. 4.8, see also, paras. 4.11, 4.13, 4.15., District Court in The Hague, Mustafić v. The Netherlands, Judgment, LJN BF0182, Case No. 265618 / HA ZA 06-1672 (English translation), 10 September 2008, para. 4.13, see also paras. 4.10, 4.15., 4.17. . It is evident that this decision was informed by the official United Nations position which makes Article 7 nearly redundant, considering peacekeeping operations to be UN organs according to Article 6, C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after Behrami', in (2012) 45 *Israel Law Review*, 151, 159. According to this "binary model" pursuant to which the criterion of "effective control" is not affected by circumstances such as the break-down of the chain of command or the elements of control retained by troop-contributing countries, it matters alone whether it is a United Nations operation or a United Nations authorised operation, *ibid.* 159.

[42] Court of Appeal in The Hague, Nuhanović v. The State of the Netherlands, Judgment, LJN: BR5388, Case No. 200.20.174/01, 5 July 2011, para. 5.8; Court of Appeal in The Hague, Mustafić v. The State of the Netherlands, Judgment, LJN: BR5386 , Case No. 200.020.173/01, 5 July 2011, para. 5.8 ; See generally T. Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct, (2012) 61 *International and Comparative Law Quarterly*', 713-728.

[43] *Ibid.*, para. 5.9. in both judgments.

[44] *Ibidem.*

[45] *Ibidem*.

[46] Supreme Court of the Netherlands, The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović, Judgment, First Chamber, 12/03324, LZ/TT, 6 September 2013, 22-23, para. 3.11.2; Supreme Court of the Netherlands, The State of the Netherlands (Ministry of Defence and Ministry of Foreign

The Court of First Instance of Brussels was seized in a civil law case for compensation for acts of war crimes in the conduct of operation UNAMIR in Rwanda. The Court attributed the conduct to the Belgian State and not to the United Nations. The Belgian soldiers were withdrawn from UNAMIR and were therefore under the authority of the Belgian state. The Court did not itself pronounce on any rule of attribution applicable under international law.[48]

This overview of jurisprudence shows that there is no discernible rule under international law for the attribution of responsibility of an organ seconded to an international organisation by another state or another international organisation. In other words, there is no consensus regarding the variant of control required to attribute conduct to an international organisation. The European Commission expressed a similar view:

> The question must be asked whether the international practice is presently clear enough and whether there is identifiable opinio juris that would allow for the proposed standard of the International Law Commission (which thus far has not been followed by the European Court of Human Rights) to be codified in the current draft. There is no doubt that this remains a controversial area of international law, in relation to which one can expect a steady stream of case law not only from the European Court of Human Rights, but also from domestic courts, in addition to voluminous academic writings. [49]

Affairs) v. Mehida Mustafić, Damir Mustafić , Alma Mustafić , Judgment, First Chamber, 12/03329, LZ/TT, 6 September 2013, 21-22, para.3.11.2.

[47] *Ibid*. 24, para. 3.11.3; respectively, 22-23, para. 3.11.3. In July 2014, the District Court in The Hague reconfirmed the application of the "effective control" criterion in a civil law suit against the Netherlands, District Court in The Hague, Stichting Mothers of Srebrenica and Others v. The Netherlands, Judgment, Case No. C/09/295247 / HA ZA 07-2973, 16 July 2014, paras. 4.33-4.34. An interesting feature of the judgment is that the Court determined the limits accorded to the attribution of acts of Dutchbat to the Netherlands by using both a temporal and a spatial element. The Netherlands were deemed to have effective control during the transitional period but only with regard to providing humanitarian assistance and the preparation of the evacuation of refugees in the mini safe area, *ibid.*, para. 4.87.

[48] Tribunal civil de Bruxelles, (71e chambre), M. et autres / Etat belge, ministre de la Défense nationale et A. et autres, 8 décembre 2010, paras. 38, 40; Cf. also N. Gal-Or, C. Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN', in (2012) 13 *German Law Journal*, 511, 534-536.

[49] Responsibility of international organizations, Comments and observations received from international organizations 2, *supra* note 25, 22. The EU made this statement in the explicit context of the *Behrami/Saramati* decision and enforced her criticism by pointing out "that the commentaries to the draft article are largely devoted to United Nations practice and to a discussion of the case law of the European Court of Human Rights", *ibid.*22; Cf. also K. M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', in (2008) 19 *European Journal of International Law*, 509, 518. An even more blunt statement by the EU/Council of Europe can be found in the Draft Accession Agreement where it says: "More specifically, as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation there was a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members.", EU/Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the

Further critique came from the United Nations which emphasised that the test of "effective control" has never been used to determine the division of responsibility between the organisation and its troop contributing states[50] but that the test of effective control is used on a horizontal level in joint operations to distinguish between a United Nations operation under UN command and control and a United Nations authorised operation conducted under national or regional command and control.[51]

Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg, 5 April 2013, 19, para.24.

[50] The UN acknowledges this fact equally and frankly: "It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are 'transformed' into a UN subsidiary organ, and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, *regardless of whether the control exercised over all aspects of the operation was, in fact, 'effective'. In the practice of the United Nations, therefore, the test of 'effective control' within the meaning of Article 6 [now Article 7] has never been used to determine the division of responsibilities for damage caused in the course of any given operations between the United Nations and any of its troop-contributing States.*" [Emphasis added], Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 13-14, para. 3, see equally paras. 1-2. As such, the UN sees Article 7 as a mere "guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization, including possibly in connection with activities of the Organization in other contexts.", *ibid.*, 14 para.6. The Secretary-General confirmed this position while reacting to the Behrami/Saramati judgment: "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control.", Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354 (2008), 4 para. 16; A previous statement of the Secretary-General was similar: In authorized chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. *In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised*." [Emphasis added], Report of the Secretary-General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing the United Nations peacekeeping operations, UN Doc. A/51/389 (1996), 6, paras.17-18; International Law Commission, Responsibility of international organizations, Comments and observations received by international organizations, UN Doc. A/CN.4/545 (2004), 18; A summary of UN practice regarding United Nations and UN-authorised operations is contained in, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 10-12, paras. 2-10.

[51] Responsibility of international organizations, Comments and observations received from international organizations, *ibid*., 13, para.2. In contrast, the Secretary-General said "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation", Report of the Secretary-General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, *ibid.*, 6, paras. 17-18, which prompted the ILC to declare "[w]hat has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.", Report of the International Law Commission, Sixty-third session, *supra* note 23, 88, para. 9.

It is even less clear – in the framework of the articles – under which conditions international organisations could be jointly responsible. The Special Rapporteur remarked that there are cases of joint attribution of conduct, but one could also consider "that the infringing acts are attributed to either the State or the United Nations, while omission, if any, of the required preventive measures is attributed to the other subject. Similar conclusions may be reached with regard to infringements by members of peacekeeping forces that affect other areas of the protection of human rights."[52]

Dealing with the particular case of the European Community, he expressed the view that "joint, or joint and several, responsibility does not necessarily depend on dual attribution (…) in case of an infringement (…) that does not distinguish between the respective obligations of the EC and its member States – either directly, or by referring to their respective competencies – responsibility would be joint towards the non-member State party to the agreement."[53] Specifically referring to military operations, he declared that "one may argue that attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution to a State rule out attribution to an international organization. Thus, one possible solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out."[54]

One other author even suggests that the UN has no "real authority or means to control the peacekeepers, absent the TCC's concurrence."[55] It is also questionable whether the distinction between organs made available under Article 6 and organs seconded under Article 7 is not simply artificial and somehow redundant. Article 6 stipulates that the

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However, once again, these examples refer to joint operations between an international organisation and (a) state(s) and the statement by the Secretary-General and the ILC refers to the vertical level of responsibility in contrast to the horizontal level (of distribution) of responsibility.

[52] Gaja, Second Report, *supra* note 15, para. 42.

[53] Gaja, *ibid*., 4-5, para. 8. In his report he referred to C-316/91, *European Parliament v. Council of the European Union*, Judgment of the Court of 2 March 1994, I-664 – I-665, para. 29. It is thus, a legal rule derived from the internal European legal order, but it does not diminish the potential to draw upon the reasoning as a model for attribution in other circumstances; In the same way, Report on the work of its sixty-first session, *supra* note 23, 56, para.4 of the commentary; Report of the International Law Commission, Sixty-third session, *supra* note 23, 81, para. 4 of the commentary; See generally S. Talmon, 'Responsibility of International Organizations: Does The European Community Require Special Treatment', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 405 – 421.

[54] Gaja, Second Report, *supra* note 15, 4, para.7.

[55] C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', (2009) 10 *Melbourne Journal of International Law*, 346, 360. A proposal by Special Rapporteur Gaja taking "these considerations somewhat in account" was not taken up by the ILC, *ibid.*, 361. He proposed that the conduct were to be attributed "to the extent that the organization exercises effective control over the conduct of the organ", Gaja, Second Report, *supra* note 15, 23, para.48. For a general critique of the criterion of "effective control" as formulated in Article 7, see F. Messineo, 'Attribution of Conduct', SHARES Research Paper 32 (2014), available at www.sharesproject.nl, 30-34.

> conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

The ILC relied on the jurisprudence of the ICJ, making reference to the UN, to define the content of agent under this article. In this context, "agent" has to be interpreted "in the most liberal sense" as it was held by the ICJ in the *Reparation* case[56] and the notion "refers not only to officials, but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization."[57] Therefore this disposition is supposed to cover also organs of states which are "absorbed" by the organisation to the extent that the sending State does not retain any form of control.

Nevertheless, any transferring entity, be it a state or an international organisation, will always retain a "substantial degree of authority over any organ" as they would otherwise cease to be organs of the transferring entities. Thus there is a necessity for the transferring entities under their domestic or internal law to keep a certain oversight over their transferred organs.[58] Therefore, the difference between the two articles is "at best one of degree [of retained and transferred control], but not of principle."[59]

The ILA recognises the possibility of joint responsibility and differentiates between joint responsibility *per se* and cases of aid and assistance of an international organisation in the commission of other wrongful acts.[60] The ILC commentary does not state whether cases of joint responsibility could fall under Article 7, but it seems to suggest that Article 7 is a disposition which

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[56] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* (11 April 1949), p. 177; Report of the International Law Commission, Sixty-third session, *supra* note 23, 84-85.

[57] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, 88-89, para.66; Report of the International Law Commission, Sixty-third session, *ibid.*, 85.

[58] Cf. A. Sari, R. A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren, S. Blockmans, J. Wouters (eds.), *The EU's Role in Global Governance: The Legal Dimension* (2013), 126, 132.

[59] *Ibid.*, 132; B. Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping', in (2012) 25 *Leiden Journal of International Law*, 521 , 527. Further critique came by Larsen who considers the complexities of practice not to be fully reflected by the criterion of effective control, Larsen, *supra* note 49, 518.

[60] The ILA distinguishes between joint responsibility per se and aid and assistance by other international organisations: "*The responsibility of an IO does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act*. There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO", International Law Association, Berlin Conference (2004), *supra* note 18, 28.

decides whether conduct has to be attributed to the contributing State or organisation or to the receiving organisation[61] which implicitly excludes joint responsibility under this article.[62]

2. Aid and assistance – compatible with cooperation in peacekeeping operations?

Article 14 of the ARIO states as follows:

> An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:
>
> (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that organization.

This article is based on Article 16 of the Articles on State Responsibility.

The commentary does not provide a single example of a case in which an international organisation has aided or assisted another international organisation and incurred responsibility under international law.[63] However, the Commentary refers to the example of MONUC, the previous peacekeeping operation in the DRC, assisting the security forces of the government, and thereby a state:

> An example of practice of aid or assistance concerning an international organization is provided by an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Forces armées de la République démocratique du Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law. [64]

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[61] Report of the International Law Commission, Sixty-third session, *supra* note 23, 86, para. 5.
[62] One could ask under which article UNAMID would fall.
[63] Report of the International Law Commission, Sixty-third session, *supra* note 23, 104-105. The Commentary only refers to the mentioned example of MONUC.
[64] Report of the International Law Commission, Sixty-third session, *ibid.*, 102, para. 6. As Peter Taksoe-Jensen, in charge of the Office of Legal Affairs wrote to Mr. Le Roy: "MONUC cannot participate in any form of joint operation with FARDC units, or support an operation by those units if there are substantial grounds for believing there to be a real risk of them violating international humanitarian law, human rights law or refugee law in the course of the operation. (…)in the event that elements of the FARDC violate international humanitarian, human rights or refugee law in the course of the operation, MONUC must immediately intercede with the FARDC, both at the command and operational levels, with a view to dissuading the units concerned from continuing in such violations. Should the efforts fail and violations continue, MONUC must reassess its relations with the units concerned and, if the violations are widespread or serious, must cease its participation

MONUC was told to stop all support to the FARDC in the case of violations of IHL, human rights or refugee law, including logistic or service support. The United Nations specified that MONUC was a case where (solely) "the possibility of United Nations aid or assistance being used to facilitate the commission of unlawful acts arose (…) [a]nd [that] it remains a unique example."[65] As stated by the UN, it must be made clear that responsibility for aid and assistance is entailed not for the wrongful act itself, but for the organisation's own conduct, which has been the cause of or contributed to that wrongful act.[66] Nevertheless, as it was also declared by the UN in its comments upon the ARIO: "[T]he Secretariat wishes to underscore the fundamental difference between States and international organizations, whose aid and assistance activities in an ever-growing number and diversity of areas, often constitute their core functions."[67]

Thus, whereas cooperation may be one of the core functions of international organisations, it is highly questionable whether the application of this article properly reflects the reality of cooperation between international organisations in peacekeeping operations which goes beyond cases of mere assistance. Assistance implies that an organisation acts in an auxiliary function to another organisation.[68] Subject to the specific arrangements in each operation,[69] the reality of cooperation

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in the operation as a whole. In an extreme case, MONUC may need to take appropriate action, up to and including the use of armed force, against FARDC units or personnel in order to prevent or put a stop to violations of international humanitarian, human rights or refugee law, if those violations involve the use, or the imminent threat of the use, of physical violence against civilians.", Note to Mr. Le Roy, MONUC – Operation Kimia 2, 1, para.7; 2, para. 10. In addition, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Patricia O'Brien wrote: "if MONUC has reason to believe that FARDC units involved in an operation are violating one or other of those bodies of law [international humanitarian, human rights and refugee law] and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely (…)MONUC may not lawfully provide logistics or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violation any of those bodies of law (…) this follows directly from the Organization's obligations under customary international law and from the Charter to uphold [sic]promote and encourage respect for human rights, international humanitarian law and refugee law", Attachment to Ms. O' Brien's Note of 12 October 2009 to Mr. Le Roy, 3-4, paras. 11-12. All documents were published by the New York Times on 9 December 2009 and are available via: http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1 .; See generally, H.P. Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces', (2014) *Journal of Conflict and Security Law*, Advance Access published 24 June 2014, 1-13; J. Labbé, A. Boutellis, 'Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces', in (2013) 95 *International Review of the Red Cross*, 539-559. See also Shraga, 'ILC Articles on Responsibility of International Organizations', *supra* note 27, 201, 205-206.

[65] Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 17-19, main paras. 1, 5. For more information on MONUC and the UN reaction, *ibid.*, paras. 2-5.

[66] *Ibid*., 17-19, para. 7.

[67] *Ibid*., 19, main para. 7, sub-para. 5.

[68] So the United Nations acknowledges that "aid and assistance activities in an ever-growing number and diversity of areas often constitute (…) core functions" of international organisations", Responsibility of

between international organisations in recent peace-keeping operations is reminiscent of co-perpetration of these internationally wrongful acts rather than of cases in which an international organisation is subordinated to another one. Furthermore, under Article 14, it is necessary that the aiding or assisting organisation has "knowledge of the circumstances of the internationally wrongful act" and that the organisation intended "by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed."[70] These strict requirements regarding the intention of the aiding or assisting organisation also do not reflect the reality of cooperation between international organisations in peacekeeping operations.[71] On the contrary, there are no cases in which international organisations cooperate intentionally in peacekeeping operations to commit violations of international law, but the cooperation agreements and particularly the existing control arrangements, such as the reports to be submitted to the Security Council, seek to prevent or at least minimise the risk of violations of international law. In the majority of academic writings, this intent requirement has also been criticised as "unwarranted".[72]

The comments and observations received by international organisations focused on the practice of International Financial Institutions of lending funds to states,[73] especially in the context of development assistance.[74] In Chapter II an inquiry was made into the financing of AU peacekeeping operations by the EU and the UN. It was stressed that the element of control exercised by both the UN and the EU on the basis of these financial arrangements is substantial. Both organisations could actually block the deployment of an AU peacekeeping operation by refusing to provide funds or at least demand that certain specific requirements are fulfilled so that, on the one hand, they would facilitate the occurrence of an internationally wrongful act, but on the other hand, the amount of the control they have seems to surpass a case of aid or assistance and thereby the application of Article

international organizations, Comments and observations received from international organizations, *supra* note 23, 19, para. 5.

[69] Of course, there may be cases of pure aid and assistance by an international organisation, even in peacekeeping operations, as was pointed out by the representative of Portugal in the Sixth Committee, General Assembly, Fifty-eight session, Official Records, Sixth Committee, Summary Record of the 15th meeting, UN Doc. A/C.6/58/SR.15 (2003), (Mr. Tavares, Portugal), para. 27. In these cases, this article would be applicable and Article 7 would arguably be applicable for the international organisation which commits the internationally wrongful act.

[70] The ILC cites here from the commentary of the Articles on State Responsibility, Report of the International Law Commission, Sixty-third session, *supra* note 23, 104, paras.3-4.

[71] Cf. also V. Lanovoy, 'Complicitiy in an Internationally Wrongful Act', SHARES Research Paper 38 (2014), available at: www.sharesproject.nl, 27, 31.

[72] Aust, 'The UN Human Rights Due Diligence Policy', *supra* note 64, 8, with further references.

[73] Criticism came from the EU: "[s]ince aid or assistance is often used in a financial context, it would seem desirable that this draft article and its interpretation be kept as narrow as possible", Responsibility of international organizations, Comments and observations received from international organizations 2, *supra* note 25, 27.

[74] International Law Association, Sofia Conference (2012), *supra* note 24, 29.

14 – in fact, one can say, that they actually are dominating the relationship with the AU if they decide to provide funds. Consequently, as international organisations cooperate in various areas in peacekeeping operations and if financial assistance provided in the peacekeeping context could already surpass the application of Article 14, it results, *a fortiori*, from their cooperation on various other levels that their interaction does not correspond to "aid and assistance" and cannot legally be regulated by the application of Article 14.[75]

3. Article 15: Direction and control

Another article which has to be mentioned is Article 15, which deals with the direction and control of an international organisation over the commission of an internationally wrongful act by another international organisation. The only example the ILC refers to is KFOR based on the submission by the French government. Assuming that KFOR is an international organisation, it is "an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act"[76], whereas "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[77] The ILC remarked that "[a] joint exercise of direction and control was probably envisaged."[78] The UN Secretariat itself states that it "knows of no practice supporting the rule on "direction and control" (…) and doubts the propriety of applying it by analogy from the articles on the responsibility of States for internationally wrongful acts" as also "[m]any aspects of this rule, the threshold (…), its nature (…) remain unclear."[79]

It is also questionable if this article can be applicable to international organisations cooperating in peacekeeping operations besides the alleged example of KFOR. This article presupposes a very one-sided relationship between two international organisations, "'cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or

[75] Cf. also again, Gaja, Second Report, *supra* note 15, 4, para.7, regarding joint military planning.
[76] Report of the International Law Commission, Sixty-third session, *supra* note 23, 103, para. 3. The Secretariat indicated furthermore its preference that the example of KFOR should be not included as an example as it is "controversial, as it has never been judicially determined, but in using it the Commission may be seen as endorsing the argument that in Kosovo the United Nations had exercised control over KFOR, which was not the case.", *ibid.*, para.4.
[77] *Case concerning Legality of Use of Force (Yugoslavia v. France),* Preliminary Objections of the French Republic, 5 July 2000, 33, para. 46.
[78] Report of the International Law Commission, Sixty-third session, *supra* note 23, 103, para. 3; A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', in (2010) 7 *International Organizations Law Review*, 63, 75.
[79] Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 19-20, para.3. Shraga also states that it is not likely that any practice in support of this rule will emerge (at the UN), Shraga, 'ILC Articles on Responsibility of International Organizations', *supra* note 27, 201, 208.

concern.'"[80] In that context, "'the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."'[81] The directed or controlled organisation has to be seen as being given no discretion to conduct itself in a specific manner.[82]

4. Assessing the ARIO

Thus, an analysis of the relevant Articles from the ILC leads to the conclusion that the concept of joint responsibility is only covered in the form of auxiliary functions by one organisation, aid and assistance, or for situations in which one organisation is clearly dominating the conduct of another through direction and control. For any other potential cases, the concept of joint responsibility does not fit under the articles of the ILC.[83] The articles therefore contain a lacuna with respect to cases of joint responsibility. Indeed, although Article 48 of the Articles holds that one or several international organisations may be responsible for the same wrongful act, it "fails to define when and how this would operate."[84] The ILC has even specifically mentioned – early in the process of elaborating the articles – the possibility that two international organisations will be simultaneously responsible as equals, but once again without providing any indication of the applicable criterion of attribution.[85] The reason may be that the current view in legal doctrine, and in at least some parts of judicial practice is still, that cases of dual or multiple attribution are rare, so that "the system of international

[80] The ILC relies on the commentary to the articles on state responsibility, Report of the International Law Commission, Sixty-third session, *supra* note 23, 103-04, para. 4.
[81] *Ibid.*
[82] *Ibid.* According to the ILA, referring to the ILC, "for direction and control (which includes also political and financial aspects) general domination suffices, there is no requirement for detailed instructions or authorisation of a particular act", International Law Association, Berlin Conference (2004), *supra* note 18, 29. As stated in the report of the ILC, "varying degrees of sufficient control [are] required in different specific legal contexts", Report of the International Law Commission on the work of its fiftieth session, 20 April-12 June 1998, 27 July-14 August 1998, General Assembly Official Records, Fifty-third Session, Supplement No.10, UN Doc. A/53/10 (1998), 160, para. 395, cf, also 164, para. 422.
[83] Other relevant articles for the analysis of responsibility for a specific case will be examined in the case-studies, e.g. self-defence.
[84] J. D'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', in (2012) 9 *International Organizations Law Review,* 15, 24.
[85] International Law Commission, Report on the work of its fifty-sixth session (3 May to 4 June and 5 July to 6 August (2004), General Assembly Official Records, Fifty-ninth Session, Supplement No.10 (A/59/10) (2004), 101 para.4. Also acknowledging the possibility of joint responsibility are, e.g. J. Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations', in (2007) 58 *Hastings Law Journal*, 479, 521; although more critical, D. Stephens, 'The lawful use of force by peacekeeping forces: the tactical imperative', in (2005) 12 *International Peacekeeping*, 157, esp. 161-62; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', (2008) 8 *Human Rights Law Review*, 151, especially 150-60; Larsen, *supra* note 49, 509, 517, 524. For dual attribution to an international organisation and a state, A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', in (2011) 9 *Journal of International Criminal Justice*, 1143-57.

responsibility would be fundamentally ill-equipped to deal with issues of shared responsibility."[86] Furthermore, as the system of international responsibility was originally conceptualised with bilateral relations and obligations in mind, it would be therefore also "ill-equipped to deal with the multiple attribution of conduct to more than one actor at once."[87] It is true that the idea of a breach of an obligation owed to the whole community (*erga omnes*) was not foreseen, but developed in practice in the progress of the rise of international human rights law and the increased recognition of the individual in international law,[88] but it nevertheless does not pose a problem as the invocation of responsibility towards each party to which the alleged conduct is attributed, remains possible.[89] It is therefore necessary to look beyond the law of responsibility for inspiration.[90]

3. The quest for a new criterion of attribution

Instances of joint responsibility of international organisations may have been rare thus far in practice; nevertheless this does not mean that they do not arise or that they will not arise more often in future. The articles of the ILC hold on to the traditional understanding of the law of international responsibility as being derived from bilateral relations existing between entities possessing international legal personality.[91] However, this study has shown that in the specific area of

[86] F. Messineo, 'Multiple Attribution of Conduct', SHARES Research Paper No. 2012-11, available at: www.sharesproject.nl, 3. According to Nollkaemper and Jacobs, the dominant approach in international law is, indeed, based on the idea of individual or independent responsibility of states and international organisations, A. Nollkaemper, D. Jacobs, 'Shared Responsibility in International Law: A Concept Paper', ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl), 10. One can possibly trace this conception of the law of responsibility to the principle of sovereignty, states being thereby independent and *pares inter pares,* cf. Nollkaemper, Jacobs, *ibid.*, 14. See also Ö.F. Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the 'Effective Control' Standard', in (2014) 61 *Netherlands International Law Review*, 1, 9.

[87] *Messineo, ibid.*, 23-24. See also the statement of Mr. Riphagen in the ILC, Yearbook of the International Law Commission (1978) Volume I, Summary records of the thirtieth session, 233, para.7.
There is also a clash between the concept and peacekeeping operations as one could see in Behrami/Saramati; while the decentralisation of military force is undisputed, the regime of responsibility remains – according to the ECtHR in this case – centralised, cf. L. Boisson de Chazournes, V. Pergantis, 'À propos de l'arrêt Behrami et Saramati: Un jeu d'ombre et de lumière dans les relations entre l'ONU et les organisations régionales ', in M. Kohen, R. Kolb, D. L. Tehindrazanarivelo (eds.), Perspectives of International Law in the 21st century/Perspectives du droit international au 21e siècle (2011), 191, 222. Cf. also L. Boisson de Chazournes, 'United in Joy and Sorrow : Some Considerations on Responsibility Issues under Partnership among International Financial Institutions', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 213, 214.

[88] See e.g. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain*) (New Application: 1962), Judgment of 5 February 1970, Second Phase.

[89] Cf., *Messineo, supra* note 86, 24.

[90] This includes the danger that the Articles will be demoted "to a cosmetic instrument", D'Aspremont, *supra* note 84, 15, 24.

[91] Crawford also came to the conclusion that "[n]one of this shows that the doctrine of joint and several responsibility is already established under that name at the international level, and the reticence of other judges suggests that a cautious approach is appropriate", Crawford, *supra* note 29, 331.

peacekeeping operations, international organisations engage in cooperation arrangements which derogate from the general rules that the ARIO seek to codify as they are outside the scope of the scenarios of joint responsibility regulated in the articles. In short, legal regulation of peacekeeping operations from the point of view of international responsibility requires a new criterion of attribution to allocate responsibility to two or more international organisations.

Article 64 of the ARIOs contains the possibility to derogate from the articles in the case of an existing rule of *lex specialis*. Such special rules "may be contained in the rules of the organization applicable to the relations between an international organization and its members." As the wording shows, these special rules[92] are not limited "to rules contained in the internal law of the organisations and applicable to the relations of the organisations and its members."[93] Furthermore, Article 65 provides that "the applicable rules of international law continue to govern questions concerning the responsibility of an international organization (…) for an internationally wrongful act to the extent that they are not regulated by these draft articles." The rules of an organisation include its practice.[94] The practice of cooperation in peacekeeping operations can therefore constitute a rule of *lex specialis* according to Article 64 ARIO, drawing inspiration from and being based on other existing rules of international law. It is therefore in line with both articles 64 and 65.[95] Moreover, as it was pointed out in the General Commentary to the ARIO:

[92] Generally on the identification of a rule of *lex specialis* in this particular context, K.E. Boon, 'The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 135, 141.

[93] The wording of the article is problematic as it allows internal rules of the organisation to be raised to international legal rules on international responsibility, J. d'Aspremont, 'A European Law of International Responsibility: The Articles on Responsibility of International Organizations and the European Union', SHARES Research Paper 22 (2013), ACIL, 2013-04, available at www.sharesproject.nl and SSRN, 10.

[94] Article 2b of the articles; cf. also S.P. Sheeran, 'A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo', in (2011) 8 *International Organizations Law Review*, 55, 66.

[95] An application of Article 64 in the peacekeeping context is also advocated by several experts, B. Boutin, 'SHARES Expert Seminar Report 'Responsibility in Multinational Military Operations: a Review of Recent Practice'', (16 December 2010, Amsterdam), published in December 2011, available at www.sharesproject.nl, 17. Article 2 (2) of the ARIOs is however not exhaustive as it allows for other issues to qualify as rules of the organisation. So it is argued that the articles contain a "rule implicitly provided" for *de facto* organs similar to article 8 on state responsibility, as "in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization", Report of the International Law Commission, Sixty-third session, *supra* note 23, 86, para.9. One author therefore invokes the possibility of such an implicit rule which would be tantamount to codifying the rule of attribution developed in the Nicaragua Case within the ARIOs, cf. F. Salerno, 'International Responsibility for the Conduct of 'Blue Helmets': Exploring the Organic Link', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 415, 418-419. If one were to follow this argumentation one could imagine that the conduct of peacekeeping forces which are not an organ of an organisation could nevertheless be attributed to this particular organisation on the basis of considering these peacekeeping forces also to be a *de facto* organ of this organisation, e.g. attributing conduct of AFISMA to the UN.

> The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.[96]

In the end, the attribution of acts of peacekeepers to the international organisation they are seconded to as enshrined in Article 7 ARIO is also based on considerations of practice. Due to their institutional status as a subsidiary organ of the respective organisation, their conduct is generally deemed to be attributable to the latter. The transfer of operational command over the troops, however, leads to the formulation of another presumption which is that the international organisation is exclusively responsible for their conduct.[97] Thus, nothing in the articles contravenes an articulation of a specific criterion of attribution in the context of cooperation of international organisations in peacekeeping operations.

1. The need for a special rule on attribution for peacekeeping operations and discussions to this effect

Due to the specific context of peacekeeping operations, it is suggested that the new criterion of attribution will be used exclusively for the purposes of this present study. In contrast, it is not submitted that the articles of the ILC are inappropriate to the regulation of any conduct of international organisations outside of the specific context of peacekeeping operations and particularly cooperation between international organisations during peacekeeping operations. Indeed, as the ICJ stated in the *Genocide* case "logic does not require the same test [on attribution] to be adopted in resolving (…) issues which are very different in nature."[98] It is also not even argued that any future peacekeeping operation which is conducted under the auspices of one international organisation without any external participation by other organisations will not fall under the Articles of the ILC.[99]

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[96] Report of the International Law Commission, Sixty-third session, *supra* note 23, 67-68, para. 5.
[97] Sari, Wessel, *supra* note 58, 133-134.
[98] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26 February 2007, para. 405. Tsagourias and White argue that UN practice and doctrine with regard to international responsibility for UN and UN authorised operations "constitutes a special regime and that, as a consequences, the rules developed by the ILC on the responsibility of international organisations do not apply in that case", N. Tsagourias, N. D. White, *Collective Security. Theory, Law and Practice* (2013), 373.
[99] The development of practice does, however, not suggest that any such scenario will still occur.

Regarding the present subject matter, the suggestion that a specific rule or even a regime *sui generis* is necessary is not new. Article 7 of the articles of the ILC was drafted in recognition of the need to create a separate article, and thus a specific rule of attribution, applicable to situations such as peacekeeping operations.[100] The ILA remarked that "In some areas, *such an attempt* [of attribution of conduct to an international organisation] *can only be undertaken on a case-by-case basis, e.g. incidents occurring during operations of peacekeeping and peace enforcement. Traditional peacekeeping operations are organs of the UN* and *normal principles of attribution apply*"[101] [Emphasis added]. Moreover, several members of the International Law Commission raised the question of whether, given the difficulties encountered in the area of peacekeeping operations, it would not be preferable to either study further the practice of the United Nations or, preferably, a separate rule applicable to peacekeeping operations.[102] Other authors suggest an application of

[100] International Law Commission, Report on the work of its fifty-sixth session, *supra* note 85, 99, 110, para. 1; Leck, *supra* note 55, 346, 349.

[101] International Law Association, New Delhi Conference (2002), *supra* note 18, 16. Generally, the ILA agrees with the application of the "effective control" test to international organisations, but it highlights again that the "test of effective control should be further specified based on the available practice, and in relation to the test of effective control as applied in the law of State responsibility", International Law Association, Sofia Conference (2012), *supra* note 24, 25.

[102] International Law Commission, Summary record of the 2800th meeting, UN Doc. A/CN.4/SR.2800 (2004) (Mr. Momtaz), para. 16. See also the statement of Mr. Matheson who declared "As to article 5, it was not entirely clear how the criterion of "effective control" would be applied in practice. For example, in the context of United Nations peacekeeping operations, it appeared that the Organization accepted responsibility for acts of all national military personnel under United Nations command, subject to any separate arrangements which might exist between the United Nations and the State in question in respect of reimbursement to the United Nations. To apply that criterion, would it depend on whether the United Nations or the State had actually given the order to commit the act in question, or on the degree to which the United Nations or the State had influenced the conduct of the forces concerned? Was there a presumption that the United Nations had effective control over forces under its command, unless demonstrated otherwise? Before producing specific wording, the Commission would do well to have a more complete compilation of the practice of the United Nations and regional organizations in the area of peacekeeping operations, drawing in particular on such organizations as the NATO, OAS and ECOWAS." (*ibid*., para. 19); See equally the remarks of Mr. Chee, International Law Commission, Summary record of the 2801st meeting, UN Doc. A/CN.4/SR.2801 (2004), para. 70 who argued in favour of the establishment of *sui generis* legal regimes for peacekeeping operations; Mr. Niehaus, International Law Commission, Summary record of the 2802nd meeting, UN Doc. A/CN.4/SR.2802 (2004), para. 12-3 who said that "the criterion of effective control (…) raise[s] certain problems. Firstly, on account of the wide range of situations encountered in peacekeeping operations under United Nations command, it was difficult to establish a general rule for determining in which cases the Organization exercised effective control over its forces. It would nonetheless be useful for the Commission to analyse specific cases. Secondly, effective control was not necessarily exclusive control. It was possible for a State which supplied contingents to exercise some form of de facto control over them. According to some doctrine in such cases, the State should be held responsible for wrongful acts committed by its armed forces. Some authors even affirmed that, insofar as national contingents were, in the final analysis, always subordinate to their superiors at the national level, the State would be jointly responsible for wrongful acts. At any rate, the United Nations would not be responsible if the contributing State took action and made decisions that were not in line with the instructions issued by the United Nations."; confer also the remarks by Mr. Yamada, Summary record of the 2802nd meeting, *ibid*., para. 19; Mr. Comissário Afonso, International Law Commission, Summary record of the 2803rd meeting, UN Doc. A/CN.4/SR.2803 (2004), para. 34. Criticism was also raised within the General Assembly: "As regards draft article 7, Conduct of organs of a State or organs or agents of an international

Articles 64 or 44 ASR generally for the conduct of armed forces based on considerations arising under international humanitarian law. [103]

The recommendation of a special rule for peacekeeping operations was to a certain extent examined as the ILC considered the inclusion of a specific disposition specifying that a contributing state or organisation could derogate from the general rule of attribution in its relations with the host organisations under the form of an agreement.[104] However, in the end, the Commission decided against it, following the opinion of the Special Rapporteur Giorgio Gaja, who was opposed to a specific rule for peacekeeping operations for two reasons, the first one being purely methodological - namely that such a specific rule would have been "at odds with the pattern of the articles on State responsibility."[105] Secondly, any such rule would be difficult to establish due to the lack of an agreed definition of "peacekeeping operation".[106]

In doctrine it is, *inter alia*, argued that it is impossible to construe a general rule for attribution of conduct in UN peacekeeping operations.[107] The difficulty with which the ILC was faced in developing the articles was that the rules needed to be wide enough to take into account the diversity of international organisations, while simultaneously being universally applicable.[108]

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organization placed at the disposal of another international organization, the point was made that the criterion of "effective control" was logical but that caution was required in assessing such control. According to another remark, there was reluctance to endorse the criterion of "effective control", believing instead that the responsibility of an international organization for acts or omissions by organs or agents placed at its disposal arose from the mere fact of their transfer.", General Assembly, International Law Commission, Sixty-fourth session, Report of the International Law Commission on the work its sixty-third session (2011), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat, Addendum, UN Doc. UN Doc. A/CN.4/650/Add.1 (2012), 6, para. 14.

[103] B. Stern, 'The Elements of an internationally Wrongful Act', in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 193, 203; B. Kondoch, 'The Responsibility of Peacekeepers, their Sending States, and International Organizations', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 515, 529. Kondoch argues that it is in accordance with Article 3 Hague Convention IV as well as with Article 91 of Additional Protocol 1 to the Geneva Conventions; See also R. Burke, 'Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets', in (2012) 16 *Journal of International Peacekeeping*, 1, 42.

[104] "'Notwithstanding the provisions of paragraph 1, an agreement between a contributing State or an international organization and the host international organization may contain a different rule on the attribution of conduct. Such a rule may be applicable to a third party only if the latter knew, or should have known, the rule at the time of the conduct.'" Such an arrangement would however only been valid between the parties and it was thus discarded, International law Commission, Summary record of the 2810th meeting, UN Doc. A/CN.4/SR.2810 (2004), para. 17.

[105] Gaja, Second Report, *supra* note 15, 16, para.34.

[106] Gaja, *ibid*., 16, para.34.

[107] G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 201.

[108] J. Wouters, J. Odermatt, 'Are All International Organizations Created Equal?', in (2012) 9 *International Organizations Law Review*, 7, 12.

2. *Defining the new rule of attribution*

Two main points have to be addressed for the establishment of a new criterion of attribution. First of all, it would be preferable if the new criterion were to have an ascertainable legal basis. Secondly, the threshold of control over the conduct has to be determined.[109] In this regard, one has to distinguish between the levels in the chain of command for the attribution of conduct to two or more international organisations. As the present study examines the possibility of joint responsibility of international organisations, it is concerned with the highest level in the chain of command within the organisations, the organisations to which responsibility is ultimately attributed. Thus, force commanders of a peacekeeping operation might exercise "effective control" over a given specific act, whilst the Security Council as the organ on top of the chain exercises a different kind of control, which also has political connotations. This argument is even more relevant in the context of two or more international organisations.[110] The criterion needs to be construed in such a way as to reflect the "equal standing" of two or more international organisations.

A new criterion of attribution has to take into account particularly the "organisational element". International organisations are complex entities with different organs, chains of command and control mechanisms, and this also affects peacekeeping operations carried out by international organisations, especially modern, integrated operations. If two or more organisations then decide to cooperate in this complex matter, it is evident that these internal organisational arrangements, as well as the inter-organisational arrangements, do not only have to be taken into account, but they also have to be part of the basis of the criterion of attribution. An excellent remark was made by

[109] N. Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 245

[110] E.g., in United Nations peace-keeping operations, one distinguishes between three levels of command: "(1) overall political direction, the purview of the Security Council; (2) executive direction and control, provided by the Secretary-General; and (3) command in the field, residing in the chief of mission, i.e., the Special Representative of the Secretary-General or, in cases where no Special Representative is approved, the Force Commander or Chief Military Observer", Comprehensive review of the whole Question of Peace-keeping Operations in all their Aspects: Command and Control of United Nations peace-keeping operations, Report of the Secretary-General, UN Doc. A/49/681 (1994), 2, para. 4. Indeed, although "[t]he three levels constitute a conceptual whole in that each can only be understood in relation to the others, and [although]they comprise a practical continuum in that none can be fully effective in isolation (…) the distinctions among levels are real and are important to maintain conceptually as well as operationally, avoiding a blurring of functions and responsibilities. Just as overall political objectives reflecting the will of the international community could not be readily formulated in the field, so it would not be wise to decide matters at United Nations Headquarters in New York that require an understanding of operational conditions which can only be acquired in the field.", *ibid.*, 2, para. 5. See also Department of Peacekeeping Operations and Department of Field Support, Policy, February 2008, Authority, Command and Control in United Nations Peacekeeping Operations, 3-4, paras.7-11. For the EU, see Council of the European Union, EU Concept for Military Command and Control, Brussels, 24 September 2012.

Bodeau-Livinec in this context. Commenting on the position of the ILC regarding the notion of "control", he stated:

> La position de la CDI paraît plus conforme aux prescrits classiques du droit international en la matière, qui se fondent sur l'emprise exercée sur un comportement plutôt que sur l'autorité exercée sur une personne ou une entité : la responsabilité est déterminée à raison de faits, et non de liens entre sujets.[111]

This is exactly the crux of the problem with the current notion of "control", that it still adheres to this very limited view of control over the specific conduct in a specific moment, while completely ignoring the fact that such a notion cannot be operational in a system which becomes gradually more institutionalised and complex.[112] Although the notion is well established in international law, it has not been fully explored yet in a theoretical manner.[113] Control is also a requirement of the internal law of an international organisation, e.g. the UN, "and must not be confused with control as a distinct basis of attribution of conduct."[114] But it is exactly through these institutionalised mechanisms and channels that international organisations also contribute to, and exercise control over, conduct amounting to a violation of a rule under international law.[115]

Furthermore, the importance of the element of control has to be questioned particularly in the context of the responsibility of international organisations, which operate as international legal entities without being sovereigns of any territory. As explained, e.g. by Eagleton: "[R]esponsibility derives from control. The responsibility of a state rests largely upon a territorial basis, but behind this

[111] P. Bodeau-Livinec, 'Le cadre juridique général de la détermination de la responsabilité pour faits illicities commis au cours d'opérations de maintien de la paix : les principles d'attribution et leurs implications', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 83, 93. Eagleton, for example, wrote in 1950: "Responsibility derives from control" C. Eagleton, *International Organization and the Law of Responsibility*, Collected Courses of the Hague Academy of International Law, Vol. 076 (1950), 320, 385.

[112] Cf. Sari, Wessel, 'International Responsibility for EU Military Operations', *supra* note 58, 126, 132. Major sees a trend towards more "hybrid operations", involving different institutional actors requiring "increased cooperation and coordination.", C. Major, 'EU-UN cooperation in military crisis management: the experience of EUFOR RD Congo in 2006', Occasional Paper, n°72, September 2008, EUISS, 7. Cf. also Direk, *supra* note 86, 1, 19.

[113] Gal-Or, Ryngaert, *supra* note 48, 511, 529.

[114] Sari, Wessel, 'International Responsibility for EU Military Operations', *supra* note 58, 126, 133.

[115] Therefore, one can quite argue that the decision of the ECtHR in Behrami was "a realistic reflection on the factual and legal situation in military actions conducted under the auspices of the UN by multinational forces" despite all the critique of the decision, Meeting Summary, Legal Responsibility of International Organisations in International Law, Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011, 7. The same can, of course, be also true for states as mentioned briefly by the District Court in The Hague in its judgment in July 2014, Stichting Mothers of Srebrenica and Others v. The Netherlands, *supra* note 47, para. 4117.

territorial basis lies the broader concept of control."[116] The attribution of extra-territorial conduct to a state developed later, particularly also in the practice of the European Court of Human Rights, and is limited to specific circumstances. International organisations, however, neither act territorially nor extraterritorially, but "unterritorially" from their point of view and "territorially" from the point of view of the state in whose territory they are engaged. Therefore it is also important that the criterion of control in its traditional understanding has to be less decisive in determining the responsibility of an international organisation.[117]

Indeed, even in the early writings of modern international law, one can find arguments for taking into account other factors for the attribution of conduct and responsibility. Grotius not only acknowledged the possibility of the attribution of conduct to several actors,[118] but he also emphasised as a determinative factor that their action gave a determinative cause to the whole violation and the resulting damage or parts of both.[119] Emphasising the element of contribution to injury instead of the very same wrongful act, would allow one to articulate responsibility based on the idea of a single, undivided injury, an avenue which was closed in the articles of the ILC.[120]

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[116] Eagleton, *supra* note 111, 320, 386. The idea of a state exercising control over a given territory and generally the definition of a state under international law, derives originally from the writings of Jellinek and his *allgemeine Staatslehre*, G. Jellinek, *Allgemeine Staatslehre* (1900), 396. He defined the state as "die mit ursprünglicher Herrschaftrsmacht ausgerüstete Körperschaft eines sesshaften Volkes (Gebietskörperschaft), *ibid.*; K. Holzinger, *EMRK und international Organisationen. Die Zulässigkeit der Übertragung von Hoheitsrechten aus Sicht der EMRK und ihre Folgen für die konventionsrechtliche Verantwortlichkeit der Mitgliedsstaaten* (2010), 33.

[117] Eagleton came to a similar conclusion, stating that "[s]ince the extent of control possessed by the United Nations is much smaller than that of the average state, its range of possible responsibility would be smaller than that of a state.", It is, thus, "since the United Nations has no territory (or little if any) and no population, and indeed is not a government, that therefore it should not be held responsible in the usual way for the protection of persons injured by it.", *ibid., 386,* 403. The ILC to some extent acknowledged these differences, but once again remained also in a state-focused context and did not further elaborate the exact notion of "effective control". Report of the International Law Commission, Sixty-third session, *supra* note 23, 88, para. 5. One can therefore argue, that Article 7 was not supposed to be reflecting the ICJ's Nicaragua decision, Dannenbaum, *supra* note 42 713, 724.

[118] "Neben dem, der selbst und unmittelbar den Schaden verursacht hat, sind auch andere durch ihre Handlungen oder Unterlassungen haftbar, und zwar bei Handlungen an erster und an zweiter Stelle. An erster Stelle, wenn jemand die Tat befohlen hat; wenn er die erbetene Einwilligung erteilt hat, wenn er Hilfe geleistet hat, wenn er Sachen verhehlt oder sonst am Vergehen sich beteiligt hat.
An zweiter Stelle haftet er, wenn er Rat erteilt, die Tat gelobt oder ihr zu-gestimmt hat. ‚Denn welcher Unterschied bestände zwischen dem, der zu Handlung überredet, und dem, der sie billigt?', sagt Cicero",
H. Grotius, *De jure belli ac pacis*, *Libri tres* (1625), in the German version by Dr. W. Schätzel (1950), published in the e-book edition by Textor Verlag, Frankfurt am Main (2008), 304, paras. VI.-VII.

[119] "Übrigens haften alle obgenannten Personen nur, wenn sie den Schaden wirklich verursacht haben, dh. Einen entscheidenen Anlaß zum ganzen Schaden oder zu einem Teil desselben gegeben haben.", *ibid.*, 305, para. X.

[120] N. Nedeski, A. Nollkaemper, 'Responsibility of International Organizations 'in connection with acts of States'', in (2012) 9 *International Organizations Law Review*, 33, 50.

The following example may helpfully illustrate the issues at stake:[121]

An ECOWAS peacekeeper, in an operation XY with the authorisation to use all necessary means to defend the mandate, due to misinterpreting the ROEs and unclear circumstances on the ground and faulty communication equipment, shoots and kills a civilian on the ground. The operation was paid for by the EU through the African Peace Facility Fund. The Soldier was trained as part of the ASF in a joint training exercise of the AU in cooperation with ECOWAS and in coordination with the EU and NATO. Logistical support to the operation was provided by the United Nations in the form of a Support package based on "assessed contributions." The mission plans were developed in cooperation between the AU, ECOWAS and the United Nations. The mandate of this operation is based first of all on the implementation of the ECOWAS Mechanism, which was authorised by the AU, which itself was authorised by the United Nations Security Council.

So, why would one break down this whole structure and simply look at which entity was exercising "effective control" over a specific act if the whole mission is based on cooperation and interaction between several actors? Even the ICJ in its Nicaragua decision spoke of "effective control of the (…) operations in the course of which the alleged violations were committed.[122] The more complex the situation in which responsibility for an internationally wrongful act arises, the more artificial it becomes to ignore all pertinent circumstances for the establishment and execution of the peacekeeping operation, and it would become even more important to respond to and to develop a norm which takes into account these complex circumstances, also from the perspective of justice and equity.[123] The very same argument is made for the responsibility of troop-contributing countries (TCC) and international organisations for peacekeeping operations. Leck states that "TCCs can

[121] Based roughly on AFISMA in Mali.

[122] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment (27 June 1986), 14, para.115.

[123] See, for example, R. G. Teifel, *Humanity's Law* (2011), see especially 141-64. D'aspremont who is highly critical of both the articles on state responsibility as well as the articles on the Responsibility of International Organisations supports this view. He states "Indeed, in the view of the author of the present contribution, it is when causation, either in attribution or in reparation, has not been able to apportion responsibility between the multiple participants in the wrongdoing that a situation of shared responsibility stricto sensu arises. More specifically, situations of shared responsibility stricto sensu originate in the cumulative presence of the indivisibility of the wrong and the indivisibility of the damage. *In other words, a situation of shared responsibility, stricto sensu arises when attribution of conduct and attribution of responsibility do not allow apportionment among responsible actors while causal analysis does not allow to share the burden of reparation among those involved in the commission of the wrong*" [Emphasis added], d'Aspremont, *supra* note 84, 15, 22-23.It is therefore that the articles are of limited use "to ascertain, unravel and address situations involving a plurality of wrongdoers.", *ibid.*, 23; Tomuschat, although referring UN operations in the context of distinction between responsibility of troop contributing states and the organisation is equally opposed to a reliance on the criterion of "effective control" and he acknowledges the "cooperative organisational structures" within peacekeeping operations, Tomuschat, 'The European Court of Human Rights and the United Nations', *supra* note 13, 334, 357-358. Direk also acknowledges that "the contribution of all the relevant actors froms a coherent whole in the commissions of the disputed conduct", Direk, *supra* note 86, 1, 15.

scrutinise and consent to the minutiae of the employment of their peacekeepers prior to deployment, provide input to the development of concept of operations and [rules of engagement]; and, through the NCCs, can disagree with (or have to agree to) any changes in employment of their peacekeepers in-mission. This suggests that peacekeepers are not under the effective control of the UN, but are perhaps under the dual or joint control of both the UN and the TCC."[124] Tomuschat argues similarly on the organisational level, and contends that the UN may also entail responsibility for an authorised operation (of several states) if "the Security Council may be so tightly involved in the activities endorsed by it that the operation concerned may become legally attributable to the UN."[125]

Consequently, in order to further define the new criterion of attribution it appears necessary to look to other areas of law for inspiration. In this context, Judge Simma described in his separate opinion in the *Oil Platforms* case the difficulty of establishing the responsibility of multiple tortfeasors as a "textbook situation calling for (…) an exercise in legal analogy."[126] In particular, criminal law and international criminal law may provide useful guidance for the present purposes.[127]

3. *Drawing inspiration from other international legal rules: (international) criminal law*

As with international criminal law, the law of international responsibility can also only promote compliance and exude a deterrent effect if responsibility is attributed to those entities which are truly responsible, thereby preventing an actor from taking a free ride on account of another entity being held responsible unjustly on its own.[128] Taking a wider perspective, there are other undertakings on the international level that have the aim of limiting the exercise of powers on an international level and by international organisations, for example, the emergence of global administrative law.[129] There are also arguments put forward for a constitutionalisation of international law, according to which acts need to be in conformity with the constitutional values of

[124] Leck, *supra* note 55, 346, 359.
[125] C. Tomuschat, 'Case Note. R (on the Application of Al-Jedda) v. Secretary of State for Defence. Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists', in (2008) 9 *Melbourne Journal of International Law*, 391, 394; Also J.-P. Schütze, *Die Zurechenbarkeit von Völkerrechtsverstößen im Rahmen mandatierter Friedensmissionen der Vereinten Nationen* (2010), 137.
[126] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003 (Judge Simma, Separate Opinion), 354, para.66.
[127] The view that private law analogies are particularly helpful in discussing responsibility and joint conduct is also further supported in academia, see Crawford, *supra* note 29, 328-329, with further references.
[128] Cf. Ryngaert, *supra* note 41, 151, 154.
[129] Cf. for example, S. Cassese, B. Carotti, L. Casini et al (eds.), *Global Administrative Law: The Casebook* (2012) and especially J. Arato, 'Material Limits to the Power of the United Nations Security Council: Between Law and Politics', *ibid.*, 59, 65-67.

the international legal order which includes, for example, human rights, and are therefore also binding international organisations in their actions.[130]

In its *Tadić* decision, the ICTY stated:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.[131]

The clear chain of command in peacekeeping operation, as in any military operation, appears in that context as beneficial for the exercise of command and control in the complex circumstances of peacekeeping operations. Consequently, it seems to be justified, as it was ultimately held by the ICTY to inquire whether the nature and degree of organisation of an organ, over which control is exercised, is relevant for the purposes of attributing control and justifies adapting the required degree of control.[132]

But *Tadić* is also a good example of cognisance of the interweaving (*Verpflechtung*) of international actors for the purposes of the attribution of conduct.[133] This case is even more relevant as it also

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[130] J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', in (2011) 8 *International Organizations Law Review*, 285, 286-287; A. von Bogdandy, M. Steinbrück Platise, 'ARIO and Human Rights Protection: Leaving the Individual in the Cold', in (2012) 9 *International Organizations Law Review*, 67, 68, 70. Shared responsibility (of an international organisation and its member states) is also relevant because of international organisations exercising "public authority" over an individual despite the conduct breaching a human rights norm being attributed to a state, *ibid.*, 70. The same logic can apply in an inter-organisational setting when the UN, i.e. leaves another international organisation no discretion in the implementation of a Security Council, similar to the *Bosporus Case*.

[131] *Prosecutor v. Duško Tadić a/k/a "Dule",* Judgment, Case No. IT-94-1, Ap. Chamber, 15 July 1999, 56, para. 131; 58-59, para. 147. See also J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations', in (2006) 39 *Vanderbilt Journal of Transnational Law*, 1447, 1460.

[132] Crawford is correct in pointing out that in some circumstances, for example, the exercise of control over a single terrorist such an adapted lower standard of control would not lead to a different conclusion, but once again, it always depends on the specific circumstances. See, Crawford, *supra* note 29, 153-154. But there are also other instances in which other thresholds than "effective control" over a specific act for the attribution of conduct were used, for example, Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am Ct. H.R., para. 172. Other authors, although against lowering the threshold of control along the standard used in Tadić argue that the standard should nevertheless be adapted to the type of control required as the notion of (de facto) organ combines both factual and institutional considerations, Sari, Wessel, 'International Responsibility for EU Military Operations', *supra* note 58, 126, 138-139. Following the 9/11 attacks the debate upon the necessary degree of control was reignited. Slaughter and White considered the "effective control" test to be insufficient, A.-M. Slaughter, W. Burke-White, 'An International Constitutional Moment', in (2002) 43 *Harvard International Law Journal*, 1, 19-20. See also K.N. Trapp, *State Responsibility for International Terrorism* (2011), 44-45.

[133] This is without prejudice to the decisions of the ICJ in the *Nicaragua* Case and in *Congo v. Uganda*. But it has nevertheless to be pointed out that a main reason for the ICJ to refuse the validity of Tadić, the broadening of the Scope of State responsibility can be disregarded in the specific peacekeeping context. The Court explained in the Genocide case that the test developed in Tadić "broaden[s] the scope of State responsibility well beyond

established the notion of "joint criminal enterprise" under international law.[134] According to this concept:

> [T]o hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrators physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[135]

The aim of this concept of liability in criminal law is to prevent crimes from going unpunished which have been committed in very complex organisational settings. As explained in the *Amicus Curiae* Brief in the *Duch* Case:

> When such crimes are committed, it is extremely difficult to point out the specific contribution made by each individual participant in the collective criminal enterprise because (i) not all participants acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing, or otherwise contributing to the criminal conduct, and (ii) the evidence related to each individual's conduct may prove difficult if not impossible to find (…) To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law.[136]

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the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf", *Application of the Convention, supra* note 98, para.406. However, as pointed out by Dannenbaum, "this fundamental concern is significantly reduced in the U.N. peacekeeping context, because (…) of the unique features of peacekeepers (…) [which] act on behalf of both their governments and the United Nations itself", T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', (2010) 51 *Harvard International Law Journal*, 113, 155. Buchan argues in favour of applying the test of "overall control" for purposes of attributing conduct to an international organisation, R. Buchan, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?', in (2012) 32 *Legal Studies*, 282, 298, 301. In his view it does not make any "material difference" that the ICJ was seized in Nicaragua with issues of state responsibility, instead of responsibility of international organisations, but that nevertheless due to factual differences a different test might be appropriate, *ibid*., 288.

[134] In Tadić it was still called "common purpose" and it is derived especially from post WWII military tribunal decisions. The very same argument was also made by Nollkaemper and Jacobs which equally suggest that international law might be better equipped to deal with questions of shared responsibility on such a different criterion, Nollkaemper, Jacobs, *supra* note 86, 15.

[135] *Prosecutor v. Duško Tadić a/k/a "Dule", supra* note 131, 82-83, para. 192.

[136] A. Cassese and Members of the Journal of International Criminal Justice, 'Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine', in (2009) 20 *Criminal Law Forum,* 289, 301 ; H. Olasolo, 'Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?', in (2009) 20 *Criminal Law Forum*, 263, 265.

Particularly in domestic law, one can compare it with the notion of "co-perpetration"[137], although the concept of co-perpetration is also another method of criminal responsibility under international criminal law.[138] In international criminal law, another concept is derived particularly from German criminal law, according to which an individual can be held legally responsible for inducing others to commit crimes through a hierarchically structured organisation under his or her control, thereby acting as *"der Täter hinter dem Täter"*, the perpetrator behind the perpetrator,[139] has been applied by the ICC.[140] Especially relevant for the present purposes are the instances in which the individual acts by means of "control over an organisation" (*Organisationsherrschaft),* often also in a military context.[141] As pointed out by the ICC, this approach can be distinguished from the notion of joint criminal enterprise.[142] Moreover, it covers cases of "political and military leaders, who are each of them in control of a different hierarchical organisation (…) [and who] direct their different organisations to implement in a coordinated manner a common criminal plan."[143] Interestingly, it

[137] For example, under § 25 of the German Criminal Code, "If more than one person commit the offence jointly, each shall be liable as a principal (joint principals)."

[138] For instance, Article 25 (3)(a) second alternative of the Rome State of the ICC.

[139] Decision on the Confirmation of Charges, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, 167, para. 496. See also generally and for a critique, T. Weigend, 'Perpetration through an Organization. The Unexpected Career of a German Legal Concept', in (2011) 9 *Journal of International Criminal Justice*, 91, 94 – 111; This concept was developed by the influential German legal scholar Claus Roxin in 1963, for a recent contribution by him on this issue, see C. Roxin, 'Organisationsherrschaft und Tatentschlossenheit', in (2006) 1 *Zeitschrift für internationale Strafrechtsdogmatik*, 293-300. In Germany, this concept was relied on in context of shootings and other (mostly) lethal human rights violations at the previous inner-German border between the FRG and the GDR, Weigend, *ibid.*94 with references to case-law. For its role in International Criminal Law, cf. also S. Manacorda, C. Meloni, 'Indirect Perpetration *versus* Joint Criminal Enterprise. Concurrent Approaches in the Practice of International Criminal Law?', in (2011) 9 *Journal of International Criminal Justice*, 159 – 178 ; S. Eldar, 'Exploring International Criminal Law's Reluctance to Resort to Modalities of Group Responsibility', in (2013) 11 *Journal of International Criminal Justice*, 331 – 349.

[140] Decision on the Confirmation of Charges*, Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, paras. 322-367. See especially Decision on the Confirmation of Charges, *ibid.*, paras. 487-518. The rendered judgment by Trial Chamber I against Thomas Lubanga Dyilo is limited to an analysis of Lubanga's responsibililty as a direct co-perpetrator, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, 423, para.978. Nevertheless, the Court confirmed its previous jurisprudence that criminal liability also includes indiviuals who "in spite of being removed from the scene of the crime, control or mastermind its commission", *ibid.*, 433 para.1003. This corresponds nearly literally to decisions of the Pre-Trial Chamber against Lubanga and against Katanga and Chui, Decision on the Confirmation of Charges*, Prosecutor v. Thomas Lubanga Dyilo, ibid.*, para. 330; Decision on the Confirmation of Charges, *ibid.*, para. 488.

[141] Decision on the Confirmation of Charges, *ibid.,* 167-168, para. 498; Olasolo, *supra* note 136, 263, 269. Generally, K. Ambos, 'Command Responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the 'most responsible'', in A. Nollkaemper, H. van der Wilt (eds.), *System Criminality in International Law* (2009), 127 – 157.

[142] Decision on the Confirmation of Charges*, Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), *ibid.*, para. 338-341. Cf. Manacorda, Meloni, *supra* note 139, 159 – 178 .

[143] Olasolo, *supra* note 136, 263, 269; Decision on the Confirmation of Charges, *supra* note 139, paras. 540-582; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Combo (ICC-01/05-01/08), Pre-Trail Chamber III, 10 June 2008, paras. 69-84; *Prosecutor v. Milomir Stakić,* Judgment, Case No. IT-97-24-T, T. Ch. II, 31 July 2003, paras. 738-744, 774, 818, 822 and 826.

was even held in the *Eichmann* trial that the blameworthiness and responsibility of an individual increases with depending on their position within the organisation and thus, the complexity of the structure of the latter.[144]

4. *A new notion of control*: normative control

It is not to suggest that the new notion of control for the purposes of attribution will be based on something similar to the idea of a "crime of states." [145] However, the new notion of attribution will be based on the idea that international organisations are jointly responsible in peacekeeping operations because they cooperate in various areas and that this "cooperative effort" is also causal for violations of international law in a given case.[146] This is precisely why the notion of control has to be broader than "factual control".[147] As explained, factual control alone is also not sufficient due to the territorial differences between states and international organisations. Also important is "normative control"

[144] In *Eichmann*, the Court held that "[i]n the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hand and reach the higher ranks of command.", Jerusalem District Court, *The Attorney General v. Eichmann*, Case No. 40/61, Judgment, 36 I.L.R. 5-14, 18-276, 12 December 1961, para.197.

[145] The draft articles of the ILC distinguished between international delicts and international crimes, whereas the latter was a qualification for serious breaches of the most fundamental norms, including rules being nowadays recognised as *jus cogens*, for example, for example, slavery, genocide and apartheid, Yearbook of the International Law Commission (1976) Volume II Part Two, Report of the Commission to the General Assembly on the work of its twenty-eighth session, 95-112. The Commission responded to a suggestion by the Special Rapporteur Roberto Ago who had suggested such a distinction in his Hague Academy Course from 1939, R. Ago, Le délit international, Recueil des cours de l'Académie de La Haye, Volume 068 (1939), 415, 499-531. The whole field of the law of responsibility of states developed around the notions of states being sovereign equals, a rather positivist approach, first formulated by Anzilotti and an approach taking into account also the interest of the wieder community. Among the latter's supporters were Ago and also Hersch Laupterpacht. From the current perspective, one could call it a human rights induced view on state responsibility, cf. G. Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations', in (2002) 13 *European Journal of International Law*, 1083 – 1098. Such a distinction between different categories of acts of states entailing international responsibility is still supported in doctrine, see e.g. A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', in (1999) 10 *European Journal of International Law*, 425, 426. The International Law Commission replaced the distinctive categories of delict and crimes of states with breaches of obligations under international law and serious breaches of obligations under peremptory norms of general international law (Articles 40, 41 of the articles).

[146] Note that the ICJ held that "it is not necessary for the Court to make findings of fact with regard to each individual incident alleged [regarding human rights violations] (…) the coincidence of reports from credible sources is sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed", *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005, para. 206.

[147] It is therefore not surprising that the UN Secretariat expressed doubts whether a binding decision could constitute "direction and control" under Article 14 as has been pointed out by Boisson de Chazournes, *supra* note 87, 213, 220-221; Responsibility of international organizations, Comments and observations received from international organizations 2, *supra* note 23, 20, para. 3 under draft article 8. Other financial institutions were likewise very critical, see Boisson de Chazournes, *ibid.*

based on institutionalised relations between the international organisations.[148] In the WTO *Geographical Indications Dispute*, the Panel accepted the view of the EC that Member States were to act as *de facto* organs of the Community for the implementation of its law. The dependence of the states on the EU and the control of the latter are based on a transfer of competences to the EC and thus on control derived from legal instruments, which amounts to normative control.[149] This case is particularly relevant as it involves normative control based on the transfer of competences over other entities possessing independent legal personality in contrast to the transfer of competences by the Security Council to a UN Peacekeeping operation.

The ICJ, in the *Genocide case* took into account these alternative bases for establishing control, declaring that "the physical acts constitutive of genocide (…) have been committed by organs (…) [and] were carried out, *wholly or in part*, on the instructions or directions of the State, *or* under its effective control"[150] [Emphasis added]. Effective control pervades as an alternative through the whole judgment[151] and the "wholly or in part" also suggests that other criterion are determinative for the attribution of conduct.

The new proposed criterion does not touch upon the question of whether member states could, in individual cases, also be (jointly) responsible, which is outside of the focus of the present study.[152] As

[148] For the purposes of the present study, "normative control" is meant to encompass not only control based on legal instruments, but also control based on the institutional relations existing between two organisations, including any form of "political" influence over the decision-making of the other organisation. Certain elements such as the "responsibility relation" between the authorising and the authorised entities are both "factual and normative. This means that the complicating effect of authorization is both a fact of life as well as a fact created by the legal system", J. d'Aspremont, 'The Law of International Responsibility and Multi-layered Institutional Veils: the Case of Authorized Regional Peace-Enforcement Operations', SHARES Research Paper 24 (2013), ACIL 2013-10, available at www.sharesproject.nl and SSRN, 4. Interestingly, Galicki had already suggested in 2004 while being a member of the ILC to replace "effective control" with "within their apparent authority or general scope of authority". Brownlie said later during the same meeting that the test should be or "authority, or apparent authority" which also reflects more accurately the wider character of "normative control", International Law Commission, Summary record of the 2803rd meeting, UN Doc. A/CN.4/SR.2803 (2004), 86-87, para. 8; 90, para. 36. See also more generally, A. Nollkaemper, 'Power and Responsibility', SHARES Research Paper 42 (2014), ACIL 2014-22, available at www.sharesproject.nl and SSRN, in particular p. 12.

[149] WTO Panel Report, European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, DS174, 15 March 2005, paras 7.98 and 7.269; Cf. Sari, Wessel, 'International Responsibility for EU Military Operations', *supra* note 58, 126, 139.

[150] *Application of the Convention, supra* note 98, para. 401.

[151] Ibid., e.g. ,paras. 400, 406, 412-13; Cf. also Dannenbaum, *supra* note 133, 113, 154.

[152] Cf. Ryngaert, *supra* note 41, 151, esp. 155-57, 165-66. Particularly relevant is when military operations of individual or several member states grant support to a UN operation and these arrangements provide for an element of oversight and control over these military forces. An example would be the cooperation agreement between the French mission "Force Licorne" and the UN Operation in Côte d'Ivoire (UNOCI). The cooperation agreement itself is not available to the public, but Security Council Resolution 1528 provides (para. 16), for instance, that the French troops shall use all necessary means to support UNOCI and "intervene at the request of UNOCI in support of its elements whose security may be threatened, *ibid.*, 157-58; Security Council

states equally increase coordination on a bi- and multi-national level outside of an international organisation, the complexity of an examination of attribution of conduct to states will increase, as well as the amount of cases of joint responsibility of states.[153] In contrast to these cases, however, it should not be apprehended that the attribution of responsibility to two or more international organisations instead of one will diminish the willingness of member states to contribute troops to military operations of international organisations as it is argued pursuant to a "utilitarian approach" which "emphasises the end-goal (…) rather than the intrinsic fairness of the regime."[154] In contrast, the benefits of a regime of shared responsibility are that it prevents "behavioural externalities and other undesirable consequences."[155]

Responsibility under criminal law necessitates an element of intent (*mens rea*) which can also be found in the articles of the ILC which presuppose "knowledge" by the organisation in aiding or abetting another international organisation. But one cannot completely reconcile the law of

Resolution 1528, UN Doc. S/RES/1528 (2004), para. 16. To complete the picture, one has also to mention the employment of private military and security contractors by peacekeeping organisations; ECOWAS relies on PMSCs to rectify the lack of capabilities of its members in certain given areas, UNAMSIL and MONUC used PMSCs for logistical support and demining is nearly completely outsourced by the UN, R. Buchan, H. Jones, N.D. White, 'The Externalization of Peacekeeping: Policy, Responsibility and Accountability', (2011) 15 *Journal of International Peacekeeping*, 281, 286. Although the treaties concluded by the UN specify that the employees of these companies will not in any form be considered as agents of the UN and it also appears highly unlikely that the UN will exercise "effective control" over them, the issue *per se* is problematic *ibid.*, 293-296). For an excellent overview of how private companies are also influencing training and planning of UN peacekeeping operations, see, A.G. Østensen, 'In the Business of Peace: The Political Influence of Private Military and Security Companies on UN Peacekeeping', in (2013) 20 *International peacekeeping*, 33-47. Kofi Annan had already proposed to hire a private security company to control the camps in Rwanda in 1994, S. Brayton, 'Outsourcing War: Mercenaries and the Privatization of Peacekeeping', in (2002) 55 *Journal of International Affairs*, 303, 317. In 2013, MONUSCO decided to run a selection process for a contractor to run the deployment of unmanned aerial vehicles (UAVs) for the whole operation. So far there are no plans to arm the drones, but there are requests for further high technology weaponry and other equipment, Briefing by Lieutenant General dos Santos Cruz, Force Commander MONUSCO to the UN Security Council, Security Council 6987th meeting, UN Doc. S/PV.6987 (2013), 2-3.

[153] Germany and the Netherlands signed a declaration of intent on 28 May 2013 covering 38 specific points under which the cooperation between the two countries in the field of defence will be increased; e.g., their Mobile Brigade will be put under the control of the German Division of Rapid Forces (Division Schnelle Kräfte). The German Minister of Defence spoke of a unprecedented level of cooperation, German Ministry of Defence, 'Smarte Militärkooperation mit den Niederlanden', 29 May 2013, available at: https://www.bmvg.de/portal/a/bmvg/!ut/p/c4/NYvBCsIwEET_aDcRBPXW0ovXImi9pW0IK022rJv20o83OTgD7zCPwTeWJrdRcEqc3IIvHCa6jTuMcQvw4SxlhUiJvuqFcsRn_cweJk5eK9UnpcIgTllgZdGlmixSDNCMg7Fda6z5xx7Xy7l59Maeunvb4xpj8wNupiMx/, H. Kiesel, 'Deutschland will für Europas Sicherheits-Rahmen sorgen', 28 May 2013, available at: http://www.dw.de/deutschland-will-f%C3%BCr-europas-sicherheits-rahmen-sorgen/a-16842457 .

[154] Ryngaert, *supra* note 41, 151, 164. Nevertheless, States also have a legitimate interest in accepting responsibility, the refusal of which would be tantamount to admitting that the State in question has no control whatsoever about its troops placed at the disposal of an international organisation, *ibid.*, 165.

[155] Leck, *supra* note 55, 346, 364.

responsibility and international criminal law as regards their inherent systemic functions.[156] Both bodies of law contain an inherent aspect of deterrence to prevent further violations of norms, but whereas criminal law sanctions individuals to serve a sentence in prison, the law of responsibility allows for different forms of reparation as one finds in domestic civil law.[157] It is actually, the requirement or non-requirement of "intent" which circumscribes the two fields of law. Whereas willful damage of property falls under criminal law and is appropriate for claims of compensation under civil law, as regards unintentional damage of property, compensation is only possible under civil law.[158] Moreover, one can distinguish between "intent" and "wrongful intent" and the law of responsibility is simply neutral regarding the requirement of the latter. [159] It so appears that despite the possibility of drawing inspiration from criminal law in the form of a criterion of attribution, one has nevertheless to differentiate between the two bodies of law in respect of the element of "intent".[160] However it also remains possible to argue that such an element of *mens rea* could be found in the conduct of international organisations. It can be argued that the United Nations and regional organisations have voluntarily entered into various agreements of cooperation for the purposes of the conduct of peacekeeping operations, in the knowledge that despite all efforts, violations of human rights, humanitarian law and other potentially applicable norms by peacekeepers may occur and, as a result, they therefore possess the necessary degree of *mens rea*.[161]

The advantage of this proposed criterion is equally that it disposes of the distinction between UN authorised and United Nations operations,[162] as cooperation between the organisations is

[156] Only about 70 years ago, Ago, in his Hague Academy Lecture, actually denied the possibility of a participation in any internationally wrongful act which would be characteristic results of the elaboration and nature of domestic criminal law, Ago, *supra* note 145 415, 523.
[157] See Articles 34-38 ARIO.
[158] See e.g under German law, §§ 303 and 15 StGB and § 823 BGB.
[159] As pointed out by Sheeran the articles on State responsibility are neutral regarding the requirement or not of a "wrongful intent", Sheeran, *supra* note 94, 55, 76.
[160] In other instances, the law of responsibility is, of course, synonymous with ideas and concepts of (international) criminal law. The institution of "aid and assistance" can be found in most criminal legal systems.
[161] Cf. Tomuschat who hold similarly for member states that by "join[ing] a UN operation or a UN-mandated operation [they] may thereby manifest their will to contribute to attaining a common goal." In contrast, to member-states, however, it is not submitted that the present study deals with "vicarious liability" by international organisations, but rather with responsibility for acts of the international organisations themselves, Tomuschat, 'The European Court of Human Rights and the United Nations', *supra* note 13, 334, 357.
[162] The UN accordingly criticised the Behrami/Saramati decision, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 10-12, paras. 9-10; P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford, A. Pellet, S. Olleson (eds.), The Law of International Responsibility (2010), 297, 299-300.

independent of the question whether it is an authorised or a United Nations operation.[163] Article 17 of the Articles equally allows for an international organisation to be responsible for any binding decisions it has adopted which were implemented by its member states or international organisations (para. 1), as well as for authorisations acted upon accordingly (para.2).

5. The challenges regarding the interpretation of Security Council Resolutions

In this context it was also argued that authorisations for the use of force by the Security Council are exceptional. They might therefore not be suitable for the establishment of a general rule of attribution for several reasons, including the question of how to interpret a Security Council resolution as well as their legal nature.[164] As the ICJ stated in its *Kosovo* advisory opinion, "the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance", but "differences between Security Council Resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account."[165] These differences result from the different drafting process of Security Council

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[163] Under the articles of the ILC, authorised or recommended conduct can also entail the responsibility of the organisation: "This is not to say that the authorized or recommended conduct would always entail the organization's responsibility. This would depend on the character of the recommended or authorized conduct. Responsibility would be justified only if the recommended or authorized act was actually taken and would have been in breach of an obligation for the organization had the organization taken it directly", G. Gaja, Third report on responsibility of international organisations, UN Doc. A/CN.4/553 (2005), para. 41. In context of a case-study, Gaja continues: "The foregoing conclusion would lead to the addition of a slight qualification to the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda:

> 'insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'.'

What is assumed here is that the authorized conduct does not involve any breach of an international obligation on the part of the organization", *ibid.*, para.42. One member of the ILC supported even joint responsibility in cases of authorisations, International Law Commission, Summary record of the 2802nd meeting, *supra* note 102, (Mr. Economides), para. 21-22.

[164] N. Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations', in (2010) 7 *International Organizations Law Review*, 35, 46-47. Furthermore, the authorisations handed out by the Security Council are also not uniform but reflect its varied practice as a response to each and every individual situation. As also Blokker correctly asserts it may be, indeed, questioned whether the practice of the United Nations to refuse *a priori* and not even *a posteriori* all responsibility arising from the conduct of multinational forces authorised by the Security Council is reasonable, *ibid.*, 47.

[165] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 94. The Court had previously given some hints regarding the criteria for the interpretation of a resolution by the Council in its *Namibia* advisory opinion, although not referring to the VCLT, the Court indicated that determinative in the interpretation are "the terms of the Resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

resolutions, as well as from their different legal effect, as they can be binding on all members of the United Nations notwithstanding their possible non-participation in the formulation of the resolution.[166] Consequently, it may be necessary to examine the *travaux préparatoires* of the resolutions; statements made by members of the Council at the time of the adoption of the resolution, other resolutions on the same issue, but also "subsequent practice of relevant United Nations organs and of States affected by those given resolutions."[167] The differences result from the different legal framework of constituent instruments of international organisations. On the one hand, they are international treaties concluded between sovereign states; on the other hand they form the "constitutions"[168] of different, independent legal entities with their own legal orders.[169]

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notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971), p. 53. The predecessor Court, the PCIJ was seized in the case of *Access to German Minority Schools in Upper Silesia* concerning the interpretation of an arrangement contained in its Resolution of March 12th, 1927. The Court started by identifying the intention of the Parties on the basis of Resolution in question as well as in subsequent practice; these two elements were prioritised for the interpretation of a Resolution of the Council of the League of Nations, Permanent Court of International Justice, Series A./B., Fascicule No. 40, Access to German Minority Schools in Upper Silesia, Advisory Opinion of May 15th, 1931, 16. The ICTY in *Tadić*, used a teleological approach to interpret unclear provisions of its Statute to ascertain whether these apply only to offences in international armed conflicts or also equally to offences committed in internal armed conflicts. The Tribunal thereby also analysed statements and Resolutions leading to the establishment of the Tribunal as well as the report of the Secretary-General concerning the statement and statements by members of the Council regarding the interpretation of the Statute, *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, App. Ch., 2 October 1995, paras. 71-93.

[166] *Ibid.* See also E. Papastavridis, 'Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis', in (2007) 56 *International & Comparative Law Quarterly*, 83, 86-88; J. A. Frowein, 'Unilateral Interpretation of Security Council Resolutions – a Threat to Collective Security ?', in V. Götz, P. Selmer, R. Wofrum (eds.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (1998), 97, 98-99; M. C. Wood, 'The Interpretation of Security Council Resolutions', in (1998) 2 *Max Planck Yearbook of United Nations Law*, 73, 81; H. Nasu, *International Law on Peacekeeping. A Study of Article 40 of the UN Charter* (2009), 111-120; Larsen, *supra* note 20, 27-32. The Arbitral Tribunal in the case of *Laguna del Desierto* between Chile and Argentina held that "International law has rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral instrument, an arbitral award or a resolution of an international organization.For example, the rule of the natural and ordinary meaning of the terms, the rule of reference to the context and the rule of the practical effect are all general rules of interpretation", United Nations, Reports of International Arbitral Awards, Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy, 21 October 1994, Volume XXII pp. 3- 149 , 25, para. 72.

[167] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 94. A different approach is developed by Papastavridis, although with a similar result, cf. Papastavridis, *ibid*., 83, esp. 89-111. He correctly points out that Security Council Resolutions authorising the use of military force have to be interpreted *in strictu sensu* in respect of the maxim *exceptiones sunt strictissimae interpretationes* as well as the hierarchy of the prohibition of the use of force as a norm of *ius cogens* within the international legal order, *ibid.* 107-108. For Frowein, particularly important is the "objective view of the neutral observer as addressee" who has not contributed to the formulation of the resolution, Frowein, 'Unilateral Interpretation of Security Council Resolutions', *ibid.*, 97, 99. According to Wood, Security Council Resolutions also need to be interpreted *bona fide* which applies equally to treaties and resolutions and its relevance is emphasised by Article 2 (2) of the United Nations Charter which obliges states to fulfil in good faith their obligations under the Charter, Wood, *ibid*., 73, 87, 89. Generally, Wood also subscribes to an application of the rules in the Vienna Convention, *mutatis mutandis*, as far as possible, depending also on the nature of the specific resolution, *ibid.*, 95.

[168] The word constitution itself has no particular meaning in international law, M. Wood, 'The UN Security Council and International Law', *Hersch Lauterpacht Memorial Lectures*, 1st Lecture, 7th November 2006, 6,

Drawing from national constitutional law, it is therefore that constituent instruments of international organisations disallow contracting parties to act as *Herren der Verträge* (masters of the treaties).[170] On the contrary, these instruments acquire a life of their own,[171] the primacy of interpreting any such treaty lies with the institution and its organs and they are therefore "living instruments". Consequently, any such interpretation cannot be "intended to respect residual national sovereignty" of member states.[172] Both the interpretation of resolutions of an international organisation as well as the interpretation of founding documents may cause problems in practice.[173]

6. *Distinguishing the new criterion of attribution from cases of other forms of responsibility (e.g. aid and assistance)*

A clear line of distinction between cases falling under the new criterion of attribution for cases of joint responsibility and cases of auxiliary responsibility is necessary. It is suggested that the distinction between these two notions can be best achieved by the form of a causal, cumulative criterion; if the cooperative involvement of one organisation in the peacekeeping operation of another organisation penetrates the operation on all structural levels and over the whole period, thereby including planning, pre-deployment and deployment, the two organisations should be held jointly responsible on the basis of this new specific criterion of attribution which includes elements used in *Nicaragua* and *Tadić*. Causality is included insofar as this involvement of the contributing organisation allows a piercing of the institutional veil of the control of the other organisation under whose *aegis* the operation is conducted. The contributing organisation would be responsible by

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para.18. See generally E. Klein, S. Schmahl, 'Die Internationalen und die Supranationalen Organisationen', in W. Graf Vitzthum (ed.), *Völkerrecht* (2010), 263, 283-284, mn. 37-38 with further references.

[169] There are different reasons given to justify the special status of treaties of international organisations, cf. C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (2012), 316, with references.

[170] Janik, *ibid.*, 316; N. D. White, *The law of international organisations* (2005), 18, 20; H. Abromeit, T. Hitzel-Cassagnes, 'Constitutional Change and Contractual Revision: Principles and Procedures', in (1999) 5 *European Law Journal*, 23, 30. The UN Charter has since the early days of the UN already also be seen as a Constitution, cf. O. Schachter, 'Review', (1951) 60 *Yale Law Journal*, 189, 193.

[171] B. Fassbender, 'The United Nations Charter as a Constitution of The International Community', in (1998) 36 *Columbia Journal of Transnational Law*, 529, 597.

[172] J. E. Alvarez, 'Legal Perspectives, in T. Weiss, S. Daws (eds.), *The Oxford Handbook on the United Nations* (2007), 58, 62.

[173] The ICJ acknowledged this difficulty of interpretation for the United Nations Charter: "But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties", *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion* (8 July 1996), 75.

virtue of its position or functions - on the basis of the new criterion of attribution and similar to the principle of joint criminal enterprise and co-perpetration as developed in international criminal law.

The cumulative criterion shall include, for example, contributions of a normative and factual nature: normative and legal control also through the exercise of political "soft power" which cannot be truly legally ascertained, factual elements such as support in the training of troops, financing, logistical and other operational support, mission planning and the operation plan, and general involvement in the oversight and implementation of the operation. Bearing in mind the complexity of the topic and the fact that each organisation and each peacekeeping operation is unique, a clear-cut distinction will not be legally feasible, and the particularly strong involvement of one organisation through one specific element such as financing may remedy weaker involvement in another area.

Two authors suggest that the impact of the theory of the delegation of powers on the law of responsibility merits further exploration.[174] Indeed, it is also possible to partially conceptualise this new notion of attribution from the perspective of other international organisations as a contribution to implementing the powers of the Security Council. Implementation through the various cooperation mechanisms in peacekeeping operations would constitute a method of delegation.

The case-studies will therefore not only serve to verify the need and the relevance of such a new criterion of attribution, but they will also help to further delimit it from other cases of attribution of conduct and/or responsibility.

The difficulty resides in conceptualising a rule which is both defined and confined enough to qualify as a "rule" in a legal understanding, but simultaneously flexible enough to accommodate the different and unique cooperation arrangements and mechanisms in peacekeeping operations. As with any other legal rule, the only possibility to correspond to these requirements is in the form of a general and abstract rule.[175]

Moreover, any wide interpretation might lead to more international organisations becoming implicated in internationally wrongful acts. Participation in internationally wrongful acts might appear as the norm rather than the exception which reduces the respect for international law and the willingness of international organisations to obey international rules.[176]

[174] Boisson de Chazournes, Pergantis, 'À propos de l'arrêt Behrami et Saramati', *supra* note 87, 191, 220.
[175] Cf. M. Koskenniemi, 'International law in the world of ideas', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 47, 60-61.
[176] Cf. H.P. Aust, *Complicitiy and the Law of State Responsibility* (2011), 89-90. However, as the proposed new criterion amounts to the most "severe" form of responsibility as international organisations are treated as

The conceptual nature of the new criterion of attribution adds another layer of difficulty. Similarly to the rules of complicity such as aid and assistance under Article 14,[177] it has some features of primary rules; it does not only address the consequences of an internationally wrongful act, but it extends their application to international organisations which would – in other circumstances – not incur responsibility.[178]

It could be helpful to resort to the criterion of "intent" to distinguish between acts falling under the new joint criterion of attribution and cases of complicity. Another possibility would be to rely on a negative definition similar to the definition of "civilian" in IHL; any cooperative interaction between two or more international organisations which exceeds an act of complicity would be falling under the new criterion of attribution.[179] In other words, a contribution of such substantial character that it oversteps the threshold for joint commission would be necessary.[180] This matter was actually debated within the ILC during its 1978 session in the context of the definition of "aid and assistance". Ushakov, the member from the USSR, described the problem of definition in the following terms:

> [P]articipation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity.[181]

However, the exact contours of complicity in international law remain equally unclear.[182] In his extensive treatise, Aust concludes that "aid and assistance" is a normative and case-specific concept, meaning that its content will have to be determined in the specific situation."[183]

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equal partners, their conduct would – possibly or even most likely – fall under one of the other forms of responsibility under the ARIO.

[177] The ICJ held in the *Genocide* case, that "although 'complicity', as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State", *Application of the Convention, supra* note 98, para. 419.

[178] Aust, *supra* note 176, 188.

[179] In this context, "complicity" is just another term for the neutral concept of "aid and assistance", cf. Crawford, *supra* note 29, 329.

[180] Aust, *supra* note 176, 216-217.

[181] Yearbook of the International Law Commission (1978) Volume I, Summary records of the thiertieth session, 239, para.11.

[182] Aust, *supra* note 176, 193-194. There are, indeed, various forms of complicity which can be found in different areas of international, for an overview, see e.g. A. Clapham, S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', in (2001) 24 *Hastings International and Comparative Law Review*, 339, 342-349.

[183] Given that the practice is even scarcer for international organisations than for states, there are no reasons why his conclusions cannot be applied in the context of international organisations, Aust, *ibid.,* 230. Crawford subscribed to the view of Aust, see Crawford, *supra* note 29, 405.

Another helpful way of narrowing the distinction between "aid and assistance" and "joint responsibility" could be to analyse which "entity (…) is best positioned to act effectively and within the law to prevent the abuse in question."[184]

7. *Application of the new criterion of „normative control" in practice: Problems and Obstacles*

Chapter I of the ARIOs contains the provisions pertaining to the invocation of responsibility. Article 48, which is not a substantive rule of responsibility,[185] stipulates the principle of separate or individual responsibility: "Where an international organization and one or more (…) other international organizations are responsible for the same internationally wrongful act, the responsibility of each (…) organization may be invoked in relation to that act." Thus, this article accommodates the primarily bilateral nature of international dispute settlement; the "plurality [of responsible actors] is reduced to bilateral relationships where issues of invocation of responsibility are concerned."[186]

Paragraph 2 further stipulates that "[s]ubsidiary responsibility [of another international organisation] may be invoked insofar as the invocation of the primary responsibility has not led to reparation." The Commentary fails to define precisely which categories of states and international organisations would fall under the notion of subsidiary responsibility, but it states that the responsibility of a state member of an international organisation according to Article 62 ARIO belongs in this category.[187] It is rather likely that cases of aid and assistance and of direction and control would also fall into this category as they presuppose the breach of an international obligation by another organisation. Thus, their responsibility cannot be invoked without a previous determination as to the breach of an international obligation by the other international organisation(s). The vague framework providing for the invocation of international responsibility in the ARIOs therefore allows an accounting for the different arrangements of international dispute settlement in cases involving a plurality of actors.

[184] This argument was developed by Dannenbaum to interpret to which entity the conduct should be attributed to a state or an international organisation but it could also help to determine which organisations are to be held jointly responsible as they would be ones "best positioned to act effectively and within the law to prevent the abuse" in contrast to those organisations in a supporting role. See, Dannenbaum, *supra* note 133, 113, 157. Crawford generally considers such an interpretation, on which it was also relied by the Court of Appeal regarding the conduct of Dutchbat, as a "step forward in ensuring an effective regime of responsibility", Crawford, *ibid.*, 209, see also pp. 206-208.

[185] Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', SHARES Research Paper 34 (2014), available at www.sharesproject.nl, 29.

[186] Messineo, 'Attribution of Conduct', *supra* note 55, 19-20.

[187] Report of the International Law Commission, Sixty-third session, *supra* note 23, 142, para. 2 of the commentary.

Finally, Article 48 (3) contains a without prejudice rule permitting the organisation paying reparation to have a right of recourse against the other responsible international organisations.

In the literature, this article has been criticised as failing to provide for "inherent differences that exist between situations with one responsible (…) international organisation and situations involving a plurality of responsible (…) organisations."[188] Indeed, "[r]equiring the individualisation of responsibility leads to particular complexities in cases involving aid and assistance, coercion, the creation of joint organs, direction and control."[189] Nevertheless, these are problems which are intrinsic to and inherent in the different systems for the settlement of international disputes, for whose application the ARIOs only provide a general and vague framework.

Article 49 ARIO increases the circle of international organisations and states which may invoke international responsibility beyond injured states or international organisations. In the case of *erga omnes* violations, all states are entitled to invoke international responsibility, whereas only the international organisations can invoke responsibility in the case of a breach of an *erga omnes* violation if "safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organisations invoking responsibility" (Article 49 (3)). Such a limitation upon international organisations is in conformity with the principle of speciality (*infra* 3.1.), but it could be questioned whether it is appropriate within the context of the present study. Unless one were to argue that the maintenance of international peace and security by regional organisations, such as those examined in this study, is also in the interests of the international community, regional organisations such as the AU or the EU would be precluded from invoking the international responsibility of the UN, whereas the latter could invoke the responsibility of the regional organisations.

In practice, several problems arise if one were to attempt the invocation of international responsibility in respect of of a plurality of actors. These problems relate to the procedural and the substantive law applicable in international dispute settlement, and in particular to the admissibility of claims, issues of jurisdiction and standing, as well as the applicable substantive law.

Taking up the sketch of a breach of an international obligation arising during the deployment of a peacekeeping operation, as it was presented (*infra* pages 266-267), the following analysis will briefly address the main obstacles encountered, as well as suggest potential solutions and remedies with

[188] A. Vermeer-Künzli, 'Invocation of Responsibility', SHARES Research Paper 36 (2014), available at www.sharesporject.nl, 4.
[189] *Ibid*., 10.

regard in particular to the application of the criterion of normative control. Any further analysis would go beyond the scope of the present study.

In the fictitious, but not unrealistic sketch of a case-scenario, a civilian was killed, which would amount to an alleged violation of the right to life. It was established earlier in Chapter III (*infra*, 3.2.2. and 3.2.2.6.2.2.) that the EU will in the near future accede to the ECHR, whereas no other international legal bodies with jurisdiction to hear cases of violations of human rights or international humanitarian law thus permit claims against international organisations. Thus, assuming that the EU had already acceded to the European Convention of Human Rights, the European Court of Human Rights could be seized of the dispute by the family of the victim.[190]

The main problem which would arise is in which circumstances the ECtHR could assess the alleged breach of an international obligation by the EU under the Convention bearing in mind that the peacekeeping operation XY was deployed in a cooperative setting, involving various contributions by the UN, the AU, ECOWAS, as well as NATO. Generally speaking, any international organisation that is part of a group of responsible actors, but not part of the judicial proceedings invoking international responsibility, finds itself simultaneously both at an advantage and a disadvantage:

> The advantage is that its responsibility and its contribution to the injury will not be identified. The disadvantage, though, is that it will be unable to argue its position, or bring additional evidence, and so on, to clear its name without compromising its position as a non-participant in the procedures.[191]

As mentioned earlier, the system of international dispute settlement is essentially bilateral in character, involving a claimant and a respondent. It is also derived from a conceptualisation of international law as a system of independent, sovereign actors whose consent is a requirement for the exercise of jurisdiction over them. To this end, the ICJ formulated the famous *Monetary Gold* principle, according to which the Court is barred from adjudicating the case "if the vital issue to be settled concerns the international responsibility of a third State [as] the Court cannot, without the consent of that third State, give a decision on that issue" if the third state's "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[192] In

[190] The question of the exhaustion of domestic remedies will not be examined. According to Article 45 (2) ARIO, the exhaustion of domestic remedies is only necessary insofar as it applies to a claim.
[191] Vermeer-Künzli, *supra* note 188, 27.
[192] *Case of the Monetary Gold Removed from Rome in 1943, Preliminary Question (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America),* Judgment of June 15th, 1954, 32-33. Although this case did not involve questions of shared responsibility, it is particularly relevant for that specific context, A. Nollkaemper, 'Concerted Adjudication in Cases of Shared Responsibility', SHARES Research Paper 40 (2014), ACIL 2014-17, available at www.sharesproject.nl and SSRN, 9. In its East Timor judgment, the Court specified that it cannot rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case, even if the

contrast, the Court held in the *Nauru* case that it is not banned from exercising its jurisdiction if "the determination of [third states'] responsibility [is] not a prerequisite for a decision to be taken" and their "interests (…) do not constitute the very subject matter of the judgment to be rendered."[193] It is however doubtful whether the *Monetary Gold* principle is also applicable to international organisations. Indeed, the explicit reference to a third state suggests an application of that principle solely to states.[194] Nevertheless, such an application of the principle was acknowledged by Judge Schwebel in his dissenting opinion in the *Lockerbie case.*[195] In the case relating to the *Application of the Interim Accord*, the ICJ did not immediately reject the application of the principle to NATO, but distinguished the facts from those in the *Monetary Gold* case, thereby leaving the door open to its application to international organisations.[196] Nollkaemper nevertheless argues against an application of the principle to international organisations; he perceives the principle as deriving from consent. Consequently, in his view, it can only apply to these entities that have consented to the ICJ's jurisdiction. If the Court does not exercise jurisdiction over an entity, it can also not pronounce itself – from a technical point of view – upon the rights and obligations of that given entity. Moreover, he sees the risk that an application to international organisations could be the first step to a wider application of the principle beyond states and international organisations.[197]

In the ECtHR Statute and rules of procedure, there is no inherent prohibition on claims against more than one state. The ECtHR has decided cases against more than one state and even held one or both states responsible.[198] But the ECtHR always follows the law of international responsibility approach by isolating the conduct of each state and trying to establish its individual responsibility. The analysis in the previous chapters demonstrated that such a breakdown of responsibility is precisely not possible in the circumstances of cooperation between international organisations in peacekeeping operations. Moreover, on the basis of the principle of the relativity of treaties, the ECtHR can in any

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right in question is a right *erga omnes*, *Case concerning East Timor (Portugal v. France)*, Judgment of 30 June 1995, 102, paras. 28-29.

[193] *Case concerning certain phosphate lands in Nauru (Nauru v. Australia),* Preliminary Objections, Judgment of 26 June 1992, 261, para. 55. The Court confirmed this view in the Case of the *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, 659-660, para. 43.

[194] *Monetary Gold, supra* note 192, 32-33. Nollkaemper, 'Concerted Adjudication', *supra* note 192, 10.

[195] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998 (Dissenting Opinion of President Schwebel), 172.

[196] *Application of the Interim Accord, supra* note 193, paras. 43-44.

[197] Nollkaemper, 'Concerted Adjudication', *supra* note 192, 10-11.

[198] See, for example, *Bankovic and others v. Belgium and others*, Admissibility, Decision of 12 December 2001; Behrami, *supra* note 29; *Case of Ilaşcu and Others v. Moldova and Russia*, Judgment of the Grand Chamber, 8 July 2004; *Case of Rantsev v. Cyprus and Russia*, Judgment, 7 January 2010. For further references, see M. den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights', in (2013) 4 *Journal of International Dispute Settlement*, 361, 381.

case not exercise jurisdiction over states or international organisations which are not parties to the Convention.[199] The *Monetary Gold* principle is generally not applied by the ECtHR,[200] but an application of the principle would also, arguably, preclude the European Court of Human Rights from rendering a judgment with regard to the sketch of a fictitious case scenario, unless the other, involved international organisations were also part to the proceedings.

There is only one feasible and legal option that allows not only to accommodate the (legal) interests of the other international organisations involved, but also to consider their contributions to the internationally wrongful act in question – a third party intervention by these organisations under Article 36 (2) of the Convention. Intervenors can thereby present evidence and defend their legal interests. In the *Behrami/Saramati* case, the UN intervened as a third party[201] and the Draft Accession agreement of the EU likewise foresees such as possibility for other international actors. [202] Nevertheless, the ECtHR could only pronounce, even in the case of a third party intervention, upon the individual responsibility of the EU, unless the intervening involved international organisations were also to become members to the ECHR; a situation which would be not possible without further major changes to the Convention, in particular with regard to the *espace juridique* of the Convention, at least for the AU and ECOWAS.

Quite surprisingly, a departure from the principle of individual responsibility is contained is also contained in the Draft Accession Agreement with regard to the new co-respondent mechanism. Article 3(7) of the Protocol on the EU accession to the ECHR stipulates that the joint responsibility of the EU and member states is envisaged under the new co-respondent mechanism as the normal rule:

> If the violation in respect of which a High Contracting Party has become a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless they have jointly requested the Court that only one of them be held responsible and the Court decides that only one of them be held responsible.

Although that disposition was included in order to prevent "a risk that the Court would assess the distribution of competences between the EU and its member States"[203] it could also be seen as an

[199] Cf. also Nollkaemper, 'Concerted Adjudication', *supra* note 192, 4.
[200] *Ibid.*, 11. It is, as, indeed, the parties to the Convention have given their prior consent to the exercise of jurisdiction by the Court by becoming parties to the ECHR:
[201] Behrami, *supra* note 29, paras. 118-120.; den Heijer, *supra* note 198, 361, 377.
[202] Fifth Negotiation Meeting, *supra* note 49, 23, para. 45.
[203] 8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16, 19, para. 54; EU/Council of Europe, Fourth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human

acknowledgement of the fact that "the traditional attribution rules and the principle of independent responsibility are ill-suited"[204] for cases of joint responsibility, particularly when the actions of international organisations are very intertwined. The fact that the criterion of normative control is construed precisely for those cases in which the attribution of individual organisations to a single injury cannot be distinguished adds an additional lawyer of difficulty to the exercise of jurisdiction by the ECtHR, which establishes the individual responsibility of each respondent in a given case. This problem is, however intrinsic to the general conceptualisation of the system of international dispute settlement.

However, the EU and the other involved organisations could contribute to reach a halfway satisfactory solution –in terms of transparency in global governance, the rule of law, and the sanctity of international obligations. The EU could accept the responsibility before the ECtHR; the other international organisations involved in the peacekeeping operation would intervene as third parties; and the EU and the other organisations would agree that the EU could recover an equal share of any reparation paid on the basis of a separate agreement concluded between all organisations or on the basis of a specific disposition in the SOMA in conformity with Article 48 (3) ARIO.[205]

This assumption of responsibility by the EU would operate similar to the practice of the United Nations, which generaly assumes international responsibility for the conduct of UN peacekeeping operations with regard to the troop-contributing countries. Thus, if the degree of cooperation between international organisations during a peacekeeping operation is of such a degree as to fall under the criterion of normative control, it would be automatically assumed that one international organisation should assume the responsibility, on behalf of the involved organisations, in any case pending before a competent international body.

Generally speaking, the UN should assume a leading role. The analysed practice of the regional organisations has demonstrated that they increasingly seek authorisation for the deployment of a peacekeeping operation from the Security Council which is the ultimate guardian for the maintenance of international peace and security, thus it is highly unlikely that a peacekeeping operation which contains elements of cooperation with other international organisations will be deployed without any contribution by the United Nations. Returning to the sketch of a fictitious case

Rights, Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 8 January 2013, 12, para. 54.

[204] den Heijer, *supra* note 198, 361, 383.

[205] The EU and the UN are currently negotiating a Framework agreement for future peacekeeping operations which will most likely also contain a clause with regard to respective claims by the organisations against each other, Presentation by Katarina Grenfell of the Office of Legal Affairs at the United Nations at the SHARES Seminar in Amsterdam on 03 October 2014.

scenario, the EU would assume responsibility and it would arrange internally with the other involved organisations for compensation of the reparation paid. Another theoretical option would be to use cross-judging in situations of shared responsibility.[206] This technique also presupposes that other courts and tribunals could exercise jurisdiction over the other international organisations involved in the fictitious case scenario. But despite the benefits that this option presents – such as the prevention of double-dipping, access to evidence, and the prevention or mitigation of jurisdictional disputes[207] – it creates problems of its own.[208]

Nevertheless, there is one advantage of an application of the criterion of normative control before an international court over an application of other rules for a plurality of responsible actors, such as aid and assistance. If the application of the criterion of normative control has been triggered, the application of jurisdiction under human rights treaties will be comparatively easy in comparison to a situation in which international organisations cooperate in a peacekeeping operation, but at least one organisation would be only aiding and assisting. In the former case, the fact that the criterion of normative control is applicable signifies that all involved organisations generally also exercise jurisdiction under human rights law jointly,[209] whether it is under the personal, the spatial or a combined personal-spatial model of jurisdiction. In the case of at least one international organisation aiding and assisting one or more international organisations, the exercise of jurisdiction under human rights law would not only have to be established individually, but their human rights obligations might also be different. The aiding and assisting organisation might only exercise jurisdiction under the personal model, whereas the other organisation(s) could be exercising jurisdiction under the spatial model; the aiding and assisting organisation could then only be bound by negative obligations under human rights law, whereas the other organisation(s) could be bound by positive human rights obligations.

In summary, the invocation of international responsibility in the context of cooperation of international organisations in peacekeeping operations raises several problems, which do, however, not only derive from the specific context of the present study, but primarily from the inherent inaptitude of the system for the settlement of international disputes to accommodate sufficiently for the intrinsic specific features of cases involving a plurality of actors.

[206] See generally Nollkaemper, 'Concerted Adjudication', *supra* note 192.
[207] *Ibid.*, 35.
[208] *Ibid.*, 19-24.
[209] See also, *infra* 3.3.

4.2. Outlook for the case studies

The case studies in the next part will explore and define this new notion of "normative control", on the firm general foundation of the Articles of the International Law Commission. The focus of the case studies is on recent and on-going peacekeeping operations for two reasons. First of all, they display a higher degree of cooperation between international organisations, and they continue to evolve. Secondly, on-going peacekeeping operations allow the application of the law as it is and stands nowadays. Bearing in mind the findings in particular of Chapter II, as well as taking into account the nature of the specific peacekeeping operations whose geographical focus is the African continent, the following propositions can be made:

NATO, with the exception of KFOR, might find itself in an auxiliary role regarding the attribution of conduct and/or responsibility. The EU entertains strong institutional ties with both the AU and the UN, but its engagement on the African continent is more limited. Nevertheless, these three organisations might be jointly responsible. ECOWAS is probably situated somewhere in between the EU and the UN and the AU on the basis of the fact that it is also part of the African Peace and Security Architecture.

In peacekeeping operations in other geographical and political settings, the involved organisations might display a different kind of cooperation and they would then potentially, also be held responsible in a different way.

Chapter V: The case-studies

This Chapter introduces the four different case-studies which are part of this study. They analyse the attribution of conduct to international organisations for internationally wrongful conduct committed by peacekeepers in Kosovo (KFOR), Darfur (UNAMID), South Sudan (UNMISS and UNISFA), and finally in Mali (AFISMA and MINUSMA). The chronological order of their examination was chosen as it allows us to highlight once again the continuously developing character of the relations among these organisations which are becoming increasingly institutionalised. In addition, this approach might also be beneficial for the purpose of further defining the criterion of attribution as the development towards more cooperation simultaneously takes place on the intra-mission level. Therefore, whereas the framework for coordination is rather limited in the case of KFOR and UNMIK, the case-study of Mali demonstrates the full integration of the whole mission within a cooperative framework. On the one hand the case-studies serve as representative examples of peacekeeping operations; on the other they provide a basis for a circumscription of the criterion of normative control. Furthermore they might allow a certain generalisation of the criterion for future peacekeeping operations.

On the basis of the chronological approach, it is possible not only to trace the development of intra-mission cooperation, but also to identify these particular features which constitute the required nexus justifying the attribution of conduct to two or several international organisations. Nevertheless, the analysis will also demonstrate that intra-mission cooperation is unique in each case and that there is no tangible blueprint for categorising it. Any application of law requires an analysis of the specific circumstances of a given case. The fact that there is a vast diversity of intra-mission cooperation arrangements underlines the necessity to thoroughly analyse the individual circumstances in each and very case-study with the aim to further circumscribe the suggested special criterion of attribution.

5.1. The Attribution of Conduct and the difficulty to classify intra-mission cooperation

1. Attribution of Conduct of KFOR

> Throughout Kosovo, and bearing in mind its operational Mandate, KFOR is cooperating with and assisting the UN, the EU and other international actors, as appropriate, to support the development of a stable, democractic, multi-ethnic and peaceful Kosovo
>
> - KFOR official homepage[1]

KFOR constitutes the first of four case-studies of this chapter. The decision of the European Court of Human Rights in *Behrami/Saramati* to attribute the conduct of KFOR troops to the UN, despite being a NATO-led operation raises implicitly the question whether the conduct of KFOR troops could not have been attributed both to the United Nations as well as to NATO.[2] Indeed, some authors suggest that the conduct of KFOR can be generally attributed to the UN and NATO: "'Nato [sic] is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[3] Another author suggests "[t]he

[1] NATO's Role in Kosovo, http://www.aco.nato.int/kfor/about-us/natos-role-in-kosovo.aspx

[2] The ECtHR, however, reiterated its view in the follow-up decisions of Kasumaj v. Greece and Gajić v. Germany, attributing the conduct of national contingents of KFOR to the UN as well as attributing the conduct of the High Representative in Bosnia and Herzegovina to the UN, International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), General Assembly, Official Records, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10 (2009), 68, para. 10 of the commentary; International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011), 89, para. 11 of the Commentary.

[3] G. Gaja, Third report on responsibility of international organisations, UN Doc. A/CN.4/553 (2005), 12, para. 28. See also *Case concerning Legality of Use of Force (Yugoslavia v. France),* Preliminary Objections of the French Republic, 5 July 2000, 29, para. 25; 33, para. 46; A. Pellet, 'L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres' in C. Tomuschat (ed.), *Kosovo and the International Community : A Legal Assessment* (2002), 193, 199; N. von Woedtke, *Die Verantwortlichkeit Deutschlands für seine Streitkräfte im Auslandseinsatz und die sich daraus ergebenden Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen* (2010), 140 ; G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 117; General Assembly, Sixtieth session, Official Records, Sixth Committee, Summary Record of the 13th meeting, UN Doc. A/C.6/60/SR.13 (2005) (Mr. Hmoud, Jordan), 3, para. 12. In contrast Blokker suggests that whereas the UN was clearly responsible for UNMIK, KFOR or NATO could have been responsible for KFOR's conduct, H.G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 1016, para. 1590; For a critical view of the joint responsibility of UN and UNMIK see also Häußler, U. Häußler, 'Human Rights Accountability of International Organisations in the Lead of International Peace Missions', in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 215, 240; P.M. Dupont, 'Detention of Individuals during Peacekeeping Operations: Lessons Learned from Kosovo', in R. Arnold, G.-J. A. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International* Law (2006), 249, 252; European Commission for Democracy through Law (Venice

Court could have examined in the first place KFOR's legal status and, had it satisfied itself that KFOR was a subsidiary organ of NATO, perhaps attributed its conduct to NATO."[4] Tomuschat asserts that

> [t]here could be no doubt that the political direction of the operation in Kosovo remained in the hands of the UN. KFOR was meant to ensure public safety and order until UNMIK could take responsibility for that task. It was enjoined to support UNMIK and cooperate with it; thus, it was part of a concerted action by the UN.[5]

This quick overview shows that several arguments are made to determine the legal status of KFOR, as well as which entity is responsible for the conduct of KFOR: political control vs. operational control, direction vs. control, and also the legal status of KFOR. As the present study argues that acts committed in a peacekeeping operation under the operational command and control can be also attributed to another organisation which is outside of the military chain of command of the latter, the element of "political control" or "normative control", based on the exercise of influence through institutional relations, is particularly important. Moreover, it is important as the conduct is ultimately attributed to the organisations through their respective organic structure and their political organs are at the top of the echelons. In this regard, it is preferable to focus primarily on the first phase of the provision of security in Kosovo. According to the UNMIK Report submitted to the Human Rights Committee in 2006,

> [t]he provision of security on Kosovo was designed to undergo three phases:
>
> • In the first phase, KFOR was responsible for ensuring public safety and order until the international civil presence could take responsibility for this task. Until the transfer of that responsibility, UNMIK's civilian police advised KFOR on policing matters and established liaison with local and international counterparts;
>
> • In the second phase, UNMIK took over responsibility for law and order from KFOR and UNMIK civilian police carried out normal police duties and had executive law enforcement authority;

Commission), Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, CDL-AD (2004)033 (2004), 18, para. 79; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 518.

[4] N. Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello, R. Piotrowicz (eds.), International Military Missions and International Law (2011), 245, 252. The Venice Commission likewise considered KFOR as an organ of NATO, European Commission for Democracy through Law, *ibid*., para. 63.

[5] C. Tomuschat, 'The European Court of Human Rights and the United Nations', in A. Føllesdal, B. Peters, G. Ulfstein (eds.), *The European Court of Human Rights in a National, European and Global Context* (2013), 334, 353.

> • In the third phase, which is being implemented currently, UNMIK is in the process of transferring responsibilities for law and order and border policing functions to the Kosovo Police Service. UNMIK civilian and border police are reverting to training, advising and monitoring functions."[6]

Consequently, the incentives for cooperation between KFOR and UNMIK were the greatest in this first phase of deployment and it is thereby most interesting for the purpose of analysing the distribution of international responsibility.

The European Court of Human Rights' judgment in *Behrami* seems to have been inspired by the writings of Sarooshi.[7] In his book, Sarooshi argued that the adoption of resolution by the Security Council authorising the use of military force by an international organisation amounts to a delegation of powers of the Security Council to this particular organisation. Thus, in his view, the Council would have temporarily given away some of its own powers, instead of having simply authorised the use of force, a view which is taken by other scholars.[8]

The distinction between the two concepts has been highly debated in legal scholarship,[9] but it appears in any case correct that the Court failed to distinguish between the act conferring authority to act, Security Council Resolution 1244, and the actual exercise of authority by KFOR and UNMIK.[10] If the Security Council decides to authorise a peacekeeping operation under the authority of another international organisation and then "retreats into its shell" and abstains from exercising from any form of supervisory control or influence over the execution of the mandate by the peacekeeping operation, there would be no nexus at all to attribute conduct and/or responsibility to the UN.

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[6] Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999, Kosovo (Serbia and Montenegro), UN Doc. CCPR/C/UNK/1 (2006), 8, para.30.

[7] D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of Its Chapter VII Powers* (2000), 163. Cf. *Agim Behrami and Bekir Behrami against France, Ruzdhi Saramati against France, Germany and Norway,* Decision on Admissibility, 2 May 2007, paras. 129, 135.

[8] Cf., for example, L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 322, 324-335; M. Milanović, T. Papić, 'As Bad As It Gets: The European Court of Human Rights' *Behrami And Seramati* Decision And General International Law', (2009) 58 *International and Comparative Law Quarterly*, 267, 279. So one can also ask, whether the Security Council really has "'civil administration powers' over Kosovo, which it delegated to UNMIK, or did it have the power to create such an administration under Chapter VII? Moreover, can it truly be said, as the Court in fact implicitly held, that the Security Council somehow has the direct power to detain persons indefinitely, which it then supposedly delegated to KFOR?", *ibid.* 278. Häußler asserts that the ECtHR fails to distinguish between the act conferring power and the actual exercise of the (given authority): "it is on this basis that it proposes that 'the acts of the delegate entity' (…) ought to 'be attributable to the UN' where this requirements only covers [sic] the act of delegation", Häußler, 'Human Rights Accountability of International Organisations', *supra* note 3, 215, 241.

[9] See, for instance, E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004).

[10] Häußler, 'Human Rights Accountability of International Organisations', *supra* note 3, 215, 241.

Apart from the scenario, in which the Security Council does not exercise any supervision over a peacekeeping operation deployed by a regional organisation, circumstances may even arise under which there would be *de facto* no delegation of powers by the Security Council. If one bears in mind that regional organisations are allowed under Article 53 of the UN Charter (*infra* 1.3) to deploy peacekeeping operations without an authorisation of the Security Council, provided that the use of force is limited to cases of self-defence, in such circumstances any authorisation of the Security Council would not add or transfer any additional powers to the regional organisation, at least from the perspectives of the internal law of the regional organisation and from the perspective of international law.[11] However, under internal UN law, one could arguably consider the Security Council authorisation as effectively delegating some of the powers of the Council to these member states of the UN who are simultaneously members of the authorised regional organisation.[12]

The degree of force authorised by the Security Council would then actually be decisive to determine if powers of the Security Council have been delegated to the regional organisation or not. In this context, one also has to recall that in practice there have been cases in which the distinction between peacekeeping and peace enforcement has been effectively blurred (*infra* 1.2.3.). Thus, any attempt to determine as to whether powers of the Security Council have been effectively delegated to a regional organisation on the basis of the use of force authorised appears at least to be questionable.

The law of international responsibility has also adopted a different approach to determine if an authorisation by an international organisation will give rise to international responsibility of the organisation.[13] It is very unlikely that the Security Council will adopt a resolution authorising conduct which would be internationally wrongful if committed by it.

On the contrary, as the previous Chapters of this thesis illustrated and as the other case-studies will further demonstrate, the recent practice of the UN and regional organisations illustrates that the UN is not limiting its role to solely handing out authorisations without any element of cooperation in the planning or deployment of the operation. This enhanced input of the UN, in the form of cooperation arrangements and mechanisms, in peacekeeping operations operated by regional organisations is also possibly precisely a reaction to judicial decisions with regard to peacekeeping forces, including the judgments from Dutch courts and the Behrami/Saramati decision of the ECtHR. In fact, it is rather

[11] This argument could also be used to distinguish further between authorisation and delegation of powers as it is debated in academic writings.
[12] Cf. for instance de Wet, *supra* note 9, 260.
[13] Article 17 ARIO requires in order that an authorising entity may be held responsible that the authorising organisation circumvents one of its own obligations by authorising an act which would be internationally wrongful if committed by itself and that the act in question is committed because of that authorisation.

ironic that the criticised decision in particular of the ECtHR in Behrami/Saramati which arguably might not have involved any delegation of powers by the Security Council, has boosted an increase in cooperation between the UN and regional organisations which might justify holding the organisations jointly responsible on the basis of their framework of cooperation.

Nevertheless, as pointed out in the previous Chapter, there may of course be cases in which the amount of cooperation by the UN in the deployment of a peacekeeping operation by a regional organisation would not justify to consider it jointly responsible under the criterion of normative control. The basis to determine whether the normative control criterion is applicable, is if the involvement of the respective "external organisations", the organisations cooperating with the organisation which was entrusted with the mandate by the Security Council is of such an intensity as to justify the application of the normative control criterion. If the analysis leads to the conclusion that the normative control criterion is not applicable, there is, indeed, a lacuna in the ARIO, as acts of aid and assistance require the element of intent, which under normal circumstances could not be established on behalf of the UN (*infra* 4.1.2.2.).

Should the ECtHR, however, continue to rely on its approach as developed in *Behrami/Saramati* and further developed in *Al-Jedda* (*infra* 4.1.2.1.), the UN would possibly even then not be able to escape responsibility.[14]

Generally with regard to the distinction between UN and UN authorised operations, it has been argued in Chapter IV, that this distinction is not truly relevant as cooperation between the UN and regional organisations has generally emerged as part of the division of labour between these organisations. Therefore, the case-study analyses whether the conduct of KFOR troops can be attributed to both the UN and NATO on the basis of the newly proposed criterion of attribution. The following section introduces to the application of the law of international responsibility.

1. The attribution of conduct of acts and omissions of KFOR under the law of international responsibility of international organisations

1. The application of the law of international responsibility

The analysis of the law of international responsibility is conducted following a two-step procedure. According to Article 4 of the ARIO, there is an internationally wrongful act of an international organisation when conduct consisting of an action or omission:

[14] At least indirectly, as the UN is not a contracting party of the ECHR.

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

The analysis will therefore start with the question as to which international organisation(s) the conduct of KFOR is attributable. As a principle, "the command and control framework of all peacekeeping operations is similar, no matter whether under OPCON of the United Nations, NATO, the European Union, (…) accordingly, equivalent legal considerations apply."[15]

Also relevant for the analysis are resolutions of the Security Council and other documents pertaining to the mandate, structure and functioning of the operation e.g. the rules of engagement,[16] as well as documents being part of the internal law of the respective organisations.

2. Attribution of Conduct of KFOR – the institutional and normative framework

1. KFOR Mandate

KFOR's mandate is derived from Security Council Resolution 1244. NATO was not directly authorised to establish "the international security presence" which would become KFOR, but the Council authorised "Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below."[17] One day prior to the adoption of Security Council Resolution 1244, the North Atlantic Council (NAC) had decided to implement the "Joint Guardian" operation order concerning the deployment of KFOR; the deployment was authorised on 11 June 1999, the day following the adoption of the resolution by the Security Council.[18] Paragraph 9 stipulates that the responsibility of the international security presence (KFOR) include:

(a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2; (…)

[15] Häußler, 'Human Rights Accountability of International Organisations', *supra* note 3, 215, 236 fn. 70.

[16] Regarding the rules of engagement, it can be problematic to interpret and apply these rules during the deployment on the ground, cf. B. Klappe, 'Rules of Engagement', in M. Odello, R. Piotrowicz, *International Military Missions and International Law* (2011), 145, see especially the examples of Rwanda, 150-52 and the DRC, 154 – 56.

[17] Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), 2, para.7.

[18] *Case concerning Legality,* supra note 3, 32, para.42. For the process of deploying a NATO operation, cf. also comments by NATO, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 12-13, para.5.

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;

(d) Ensuring public safety and order until the international civil presence can take responsibility for this task; (…)

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;[19]

According to Point 4 of Annex 2 to the Resolution, "[t]he international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to *establish a safe environment for all people in Kosovo* and to facilitate the safe return to their homes of all displaced persons and refugees."[20] In addition, NATO concluded a military-technical agreement (MTA) with the Federal Republic of Yugoslavia which further defines the powers and competences of Yugoslavia.[21] So it contains an authorisation also by the governments of the Federal Republic of Yugoslavia and of the Republic of Serbia to use all necessary action to establish and maintain a secure environment for all citizens of Kosovo.[22] Both countries authorised KFOR:

(a) To monitor and ensure compliance with this agreement and to respond promptly to any violations and restore compliance, using military force if required. This includes necessary actions to:

(i) Enforce withdrawals of Federal Republic of Yugoslavia forces;

(ii) Enforce compliance following the return of selected Federal Republic of Yugoslavia personnel to Kosovo;

(iii) Provide assistance to other international entities involved in the implementation or otherwise authorized by the Security Council;[23]

Military command of KFOR was initially conferred on the Supreme Allied Commander Europe (SACEUR) who delegated it to the Commander in Chief Allied Forces, Southern Europe (CINCSOUTH), the former was responsible to the NAC. The KFOR commander was appointed by NATO and he is responsible to CINCSOUTH.[24] The operation *per se* is not part of the NATO military command structure but rather resembles an *ad hoc* force, comprising 35 states, including 12 non-NATO

[19] *Ibid.*, 3, para.9.
[20] *Ibid.*, 6, para.4.
[21] Enclosure, Military-technical agreement between the international security force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Letter dated 15 June 1999 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1999/682 (1999), 3-10.
[22] *Ibid.*, 3, para.2; 9, paras.1-2.
[23] *Ibid*, 9, para. 4.
[24] M. Zwanenburg, *Accountability of Peace Support Operations* (2005), 47.

members whereas the majority of positions at KFOR headquarters are held by personnel from NATO member states. As mentioned, KFOR is NATO-led and a *de facto* NATO-commanded operation.[25]

2. Cooperation between UNMIK (UN) and KFOR (NATO)

The following parts analyse the cooperation between UNMIK (UN) and KFOR (NATO) on various levels to ascertain whether the cooperation arrangements on a practical and an operational level justify a joint attribution of conduct to both organisations or whether the UN might rather be held responsible as an accessory.

1. Political Level

KFOR and UNMIK established various consultation mechanisms on the political level to ensure the coordination and cooperation of the international civil and the international military presence.

On the echelon of the Special Representative of the Secretary-General,[26] the Joint Planning Group of the Executive Committee of the Special Representative of the Secretary-General works with a Senior Representative of KFOR on military-civilian issues.[27] The Special Representative himself also oversees coordination with KFOR directly through the Executive Committee.[28] The Joint Planning Group Secretariat serves to provide political guidance to KFOR and the four components; whereas working-level staff from KFOR and the four components "provide operational requirements for planning and policy implementation (…), the political officers from the Office of the Special Representative

[25] R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo*. Operational and Legal Issues in Practice (2007), 146-147. See also the Statement of Russia in the Security Council, Security Council, 4288th meeting, UN Doc. S/PV.4288 (Resumption 1) (2001), 13. Kolb, Porretto and Vité see NATO rather as a coordinating organ for KFOR, as an organisational chaperon, R. Kolb, G. Porretto, S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoires* (2005), 287. In contrast to their view, it has to be noted that NATO military operations are based on the "need to know principle" according to which each participating member state only receives the information necessary for the implementation of his specific tasks which led the German Supreme Court to conclude in a case concerning the destruction of the bridge in Varvarin, killing 10 civilians and injuring 30, that this act could not be attributed to Germany as the latter was not aware of the mission target, German Supreme Court, III ZR 190/05, Urteil, 2. November 2006, 15, para.23.

[26] Generally on the role, responsibility and authority of the Special Representative of the Secretary-General see Note of Guidance on Integrated Missions; clarifying the Role, Responsibility and Authority of the Special Representative of the Secretary-General and the Deputy Special Representative of the Secretary-General/Resident Coordinator/Humanitarian Coordinator, 17 January 2006, 2, paras. 5, 7, 8.

[27] Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/54/494 (1999), 5, para. 10; Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/54/622 (1999), 2, para. 9.

[28] Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/54/807 (2000), 5, para. 7.

contribute political guidance."[29] Meetings cover a wide range of issues, promoting and enhancing cross-competent coordination, including "information management, border control (…) and joint UNMIK/KFOR security issues."[30] The Secretariat is the main mechanism responsible for the formation of task forces and workings groups "which develop strategy and policy recommendations and plans for the implementation of mission priorities."[31]

On 5 December 1999, the Special Representative of the Secretary-General issued the first version of the UNMIK Strategic Planning Document which provided "a basis for periodic joint UNMIK-KFOR Strategic Planning Conferences, where the Special Representative, the Commander of KFOR and their respective Deputies synchronize aims, capabilities and support."[32] The Advisory Unit on Security, established in March 2001 is, *inter alia*, "directly involved in the coordination of policy issues in respect of KFOR and UNMIK Police."[33] Liaison and exchange of information on security-related measures between the UN and KFOR occurs on a daily basis.[34]

On the lower regional level, the Regional Security Supervisor who acts as the principal security advisor to the Regional and Municipal Administrators is responsible for laising with the KFOR multinational brigade with responsibility for the Region Centre.[35]

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[29] *Ibid*., 5, para. 8; Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2001 to 30 June 2002, Report of the Secretary-General, UN Doc. A/55/833 (2001), 6, para .9.

[30] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/1250 (1999), 5, para. 20.

[31] Budget for the United Nations Interim Administration Mission in Kosovo, *ibid.*, 6, para. 9. According to the first report of the Secretary-General on UNMIK, there were put in place close working relations with KFOR and various other international organisations. UNMIK and KFOR have established a comprehensive structure of coordination mechanism, which includes daily meetings of the Special Representative and the KFOR Commander, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779 (1999), 5, para. 17; 6, para. 24.

[32] Financing of the United Nations Interim Administration Mission in Kosovo (2000), *supra* note 28, 5, para. 8; Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/55/477 (2000), 5, para.8. See also the remarks of the President of the Security Council at the end of the 4309th meeting, Security Council, 4309th meeting, UN Doc. S/PV.4309 (2001), 24.

[33] Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2002 to 30 June 2003, Report of the Secretary-General, UN Doc. A/56/802 (2002), 6-7, para. 9. The Unit represents "the Office of the Special Representative, along with the Principal Deputy Special Representative, the Police Commissioner and the Deputy Police Commissioner, on the UNMIK/KFOR Joint Security Executive Committee and the UNMIK/KFOR Joint Security Implementation Group.", *ibid.*, 15, para. 49.

[34] Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2011 to 30 June 2012, Report of the Secretary-General, UN Doc. A/65/711 (2011), 10. The monthly report from August 1999 from KFOR to the Security Council lists that "KFOR is represented at all levels of civil administration and works closely with UNMIK civil administrators. Daily coordination meetings have been established", Annex, Monthly report to the Security Council on the operations of KFOR, Letter dated 10 August 1999 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1999/868 (1999), 4, para. 17.

[35] Financing of the United Nations Interim Administration Mission in Kosovo (2000) 2, *supra* note 32, 50, para. 236.

On a local level, UNMIK municipal administrative teams coordinated the activities of UNMIK components and "maintain[ed] close liaison with KFOR with respect to security and law and other matters, at the municipal level"[36] during the first phase of the mission.[37]

The Security Council itself is the recipient of monthly reports of the activities of KFOR on the basis of Resolution 1244; however, the reports with an average length of 3-4 pages provide only a summary of the activities of KFOR within the past month, so they are solely provided for the Security Council's information. However, it should be noted that there were at least instances in which the Security Council was kept very well-informed of KFOR's activities; the Russian delegate mentioned in a statement on 6 April 2001 the arrest of Major Saramati, "the commander of a KPC brigade accused of undertaking activities threatening the international presences in Kosovo."[38] Nevertheless, it is not evident from his statement how he had become aware of that arrest.[39]

UNMIK Regulation No. 2000/47 orders KFOR personnel to respect "the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General insofar as they do not conflict with the fulfillment of the mandate given to KFOR under Security Council resolution 1244 (1999)"[40] which suggests, on the one hand, a more profound subordination of KFOR under the authority of the UN. On the other hand, this regulation also indicates that KFOR enjoyed some form of autonomy from the UN as the Special Representative was only authorised to issue directives to KFOR as long as they do not contravene KFOR's mandate.[41] Stahn consequently concludes that the role of the Special Representative of the Secretary-General towards KFOR was limited to mere tasks of coordination.[42] Indeed, an analysis of the available documents on KFOR and UNMIK does not suggest that the cooperation on the political level surpassed the level of coordination and included essential elements of control by UNMIK and thereby the UN over KFOR.[43]

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[36] Financing of the United Nations Interim Administration Mission in Kosovo, *supra* note 27, 17, para. 63; Financing of the United Nations Interim Administration Mission in Kosovo (2000), *supra* note 28, 16, para. 60.
[37] Budget for the United Nations Interim Administration Mission in Kosovo, *supra* note 33, 29, para. 125.
[38] Security Council, 4350th meeting, UN Doc. S/PV.4350 (2001), 6. See also Schermers, Blokker, *supra* note 3, 1016, para. 1590.
[39] The short summary reports of KFOR do not contain any information about this incident.
[40] UNMIK Regulation No.2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, UN Doc. UNMIK/REG/2000/47 (2000), para. 2.2.
[41] KFOR nevertheless enjoys the same privileges and immunities as UNMIK under the mentioned regulation.
[42] C. Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (2008), 330.
[43] For a contrary opinion, see C. Tomuschat, 'Attribution of International Responsibility: Direction and Control', in M. Evans, P. Koutrakos (eds.), *The International Responsibility of the European Union* (2013), 7, 28-29, 31. He argues that "SC Resolution 1244 (1999) brought into being an operation providing for institutional machinery that ensured a strong influence of the UN. In such instances, the situation is not essentially different from patterns where the UN puts into operation its own machinery. It would be awkward, therefore, to focus on effective control of each and every individual action.", *ibid.*, 31.

2. *Strategic Level*

On a strategic level, an UNMIK liaison officer is deployed as the strategic and operational planner and liaison officer with the KFOR planners.[44] Furthermore, UNMIK had deployed military liaison officers to the headquarters of KFOR, at regional and at the five KFOR multinational brigades level.[45] As KFOR representatives took part, "as necessary, in the work of UNMIK", and UNMIK, in turn, participated "in KFOR's Joint Implementation Commission (JIC), which liaised with both the Federal Republic of Yugoslavia's armed forces and the Kosovo Liberation Army (KLA).[46] As there are no further documents publicly available, it is difficult to assess whether these liaison officers transmit any form of control on the strategic level over the conduct of KFOR troops.

3. *Operational/Mission Level*

Operational cooperation between UNMIK and KFOR is centered on the conducting of joint patrols between UNMIK (police) and KFOR troops. In period up to 30 June 2002 alone UN Civilian Police had conducted 11,161 joint patrols with KFOR.[47] In 2000, KFOR decided to establish joint operations centres with UNMIK police at brigade and battalion levels, with "the aim of fostering closer cooperation between both organizations."[48] In this context, a Political Violence Task Force staffed by senior staff of UNMIK police and KFOR was established to coordinate activities at the local, regional and central levels. On 2 July 2002, UNMIK police and officials of KFOR signed a memorandum of understanding which established a process to transfer the responsibility of KFOR over general public security, management of demonstrations and other related tasks in the Mitrovica region to UNMIK.[49]

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[44] Financing of the United Nations Interim Administration Mission in Kosovo (2000) 2, *supra* note 32, 66, para.3.
[45] Report of the Secretary-General on the United Nations Interim Administration Mission, *supra* note 31, 11, para.50.
[46] *Ibid*., 6, para.25.
[47] Performance report on the budget of the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2001 to 30 June 2002, Report of the Secretary-General, UN Doc. A/57/678 (2002), 9; Annex, Monthly report to the United Nations on the operations of the Kosovo Force, Letter Dated 18 November 1999 From the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/1185 (1999), 3, para.9.
[48] Annex, Monthly report to the United Nations on the operations of the Kosovo Force, Letter dated 28 June 2000 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2000/634 (2000), 3 para. 14.
[49] Annex, Monthly report to the United Nations on the operations of the Kosovo Force, Letter dated 9 September 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/984 (2002), 4, para. 19; Statement by Hédi Annabi, Assistant Secretary-General for Peacekeeping Operations, Security Council, 4249th meeting, UN Doc. S/PV.4249 (2000), 3.

Therefore an analysis of the cooperation on the operational level on the basis of the available documents does not allude to any exercise of control by UNMIK over the operation of KFOR on the ground. However, it cannot be excluded that the UN and NATO could be jointly responsible, under specific circumstances, for the conduct of UNMIK (police) and KFOR troops during their joint patrols. One specific joint patrol which gave reason to serious criticism by Serbia underlines this assessment. A monthly report of KFOR to the UN Security Council notes the following:

> On 17 March, after a formal request for support from UNMIK to KFOR, an operation to retake the courthouse was launched by UNMIK police supported by KFOR. Seven platoons of the UNMIK formed police unit took part. UNMIK police arrested 35 Kosovo Serb protesters, while KFOR blocked off nearby roads. With KFOR assistance to clear the route, UNMIK police delivered the detainees to the detention facility in Pristina. However, as UNMIK attempted to transport the detainees to Pristina for processing, a large crowd gathered and started to throw stones, Molotov cocktails, grenades and other objects at the security forces; AK-47 rifles and pistols were also fired. UNMIK police and KFOR responded to the violence using tear gas, baton rounds and warning shots using live rounds in accordance with the agreed rules of engagement. In the end, 48 KFOR soldiers, 7 officers of the Kosovo Police Service and 35 UNMIK police officers were wounded, including a Ukrainian police officer who later died of his wounds.[50]

As noted by the Secretary-General in his report from 18 September 2000, "the level and sophistication of the joint security operations conducted by UNMIK police and KFOR continued to develop in many regions."[51] The Security Council Mission to Kosovo reported likewise that "[t]he level of cooperation and coordination between UNMIK Police and KFOR is extremely high."[52] UNMIK police also arrested Mr. Saramati on KFOR orders, and, as a result, it is worthwhile to inquire whether UNMIK could not have aided and assisted KFOR for the purposes of the law of international responsibility.

[50] Annex, Monthly Report to the United Nations on the operations of the Kosovo Force, Letter dated 3 June 2008 from the Secretary-General to the President of the Security Council, UN Doc. S/2008/362 (2008), 2-3, para.14. Serbia recalls the events differently in its letter to the President of the Security Council, it is stated that UNMIK and KFOR forces opened fire and that a sniper was also shooting from the Court building, resulting in 150 wounded, Comments on the report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/211), Annex to the Letter dated 17 April 2008 from the Permanent Representative of Serbia of the United Nations addressed to the President of the Security Council, UN Doc. S/2008/260 (2008), 10-11, para.14. Cf. in this matter also the report of the Secretary-General, 3-4, para. 7.

[51] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2000/878 (2000), 5, para. 26.

[52] Report of the Security Council Mission on the implementation of Security Council resolution 1244 (1999), 27 to 29 April 2000, UN Doc. S/2000/363 (2000), 5, para. 18. KFOR provided, for example, also medical services to UNMIK personnel, Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/55/624 (2000), 9, para. 45.

2. *Assessment of the cooperation arrangements and implications for the attribution of conduct*

It has been stressed previously that the element of "normative control" based on institutional relations between the involved organisations is particularly important in the determination of the attribution of conduct and responsibility.[53] The analysis showed that the degree of cooperation on a political level between KFOR and UNMIK is certainly high and that arguably UNMIK is exercising some form of control on a political level via "political guidance", but that element of control has not penetrated the strategic or operational level of cooperation.

Bearing in mind, that joint responsibility as envisaged in this present study presupposes that one organisation makes more than a "substantial contribution" to surpass "aid and assistance" under Article 14 ARIO, any attribution of conduct of KFOR to the UN would require that there is a strong nexus between the control exercised on a political level, outside the military chain of command, and the control exercised on strategic and operational levels.

There must be an *intimate link* between the control exercised on a political level and on the other levels to justify holding both organisations jointly responsible, precisely because the UN is not part of the chain of command of NATO. Otherwise, one cannot hold both organisations jointly responsible, at least on the basis of the suggest criterion of normative control. The disjuncture between these elements in the present case of KFOR is underlined by the hybrid base of authority of KFOR; on the one hand, its authority is derived from Security Council Resolution 1244, and on the other hand, it stems from the MTA.

One therefore has to conclude that the responsibility for the conduct of KFOR lies at least primarily with NATO and to a lesser extent with the UN.[54] There are, indeed, instances, in which KFOR and, consequently, NATO act independently from any UN involvement by virtue of its powers granted under the MTA. For example, the Security Council welcomed "the decision taken by the North Atlantic Treaty Organization (NATO) to authorize the commander of KFOR to allow the controlled

[53] One could also use the term "normative power" as it is used by Boisson de Chazournes regarding partnerships among International Financial Institutions, L. Boisson de Chazournes, 'United in Joy and Sorrow : Some Considerations on Responsibility Issues under Partnership among International Financial Institutions', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 213, 215.
[54] Cf. *Case concerning Legality,* supra note 3, 33, para. 45.

return of forces of the Federal Republic of Yugoslavia to the Ground Safety Zone as defined in the military-technical agreement."[55]

In conclusion, the conduct of KFOR troops can generally not be attributed jointly both to the UN and NATO on the basis of an analysis of the cooperation arrangements. As the Articles of the ILC articulate the requirement of intent for one organisation to be aiding and assisting another, UNMIK would also not be responsible for having aided or assisted KFOR. Nevertheless, there may be specific circumstances which warrant the attribution of conduct to both the UN and NATO. The question one could ask now is whether there is another lacuna in the Articles of the ILC regarding such cases. As cooperation generally becomes more institutionalised between international organisations, it is at least questionable whether the focus on individual acts and intent and knowledge is always appropriate. The next case-study, UNAMID illustrates that particular point as well. The wider political process to resolve the conflict in Darfur is intrinsically linked to the deployment of the peacekeeping operation and so is the control of the political actors over the operation.

2. Attribution of Conduct of UNAMID

The Hybrid Operation is not a joint force. Let there be no confusion about it.
We are not talking about any joint force by the United Nations and the African Union

- Ambassador Abdalmahmood Abdalhaleem of Sudan[56]

In fact, the hybrid nature of the Mission has optimized the level of complementarity between the UN and AU.

- Report of the Chairperson of the Commission of the AU, 23 September 2013[57]

1. Introduction

The deployment of AMIS and later on UNAMID came as the reaction of the international community to military clashes between the Sudanese government and the Arab *Janjaweed* militia against the Sudanese Liberation Movement/Army (SLM/A) and the Justice Equality Movement (JEM) who claim

[55] Statement by the President of the Security Council, UN Doc. S/PRST/2001/8 (2001), 2.
[56] Cited in A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', (2007) 54 *Netherlands International Law Review*, 415, 416, fn. 2. as well as at http://www.militaryconnections.com/news_story.cfm?textnewsid=2229
[57] Report of the Chairperson of the Commission on the African-Union-United Nations Partnership: The Need For Greater Coherence, PSC/AHG/3.(CCCXCVII) (2013), 4, para. 10.

to represent the black Darfurians.[58] It is undisputed that the situation in Darfur amounts to an armed conflict for the purposes of international law. Indeed, there was no operative peace agreement in Darfur when AMIS formally handed over to UNAMID, meaning the operation was deployed in an "as-yet-unresolved war."[59]

The Peace and Security Council of the African Union decided "to endorse the conclusions of the Addis Ababa High Level Consultation on the Situation in Darfur (…) which provided for a three-phased support to the African Union Mission in Sudan"[60] at its meeting in November 2006. The foreseen three-phased support included in addition to a light and a heavy support package a hybrid operation with the United Nations.[61] As the AU operation evolved into a complex peacekeeping operation and owing to "uncertainty regarding its financial sustainability", the AU supported the transition to a UN operation.[62] The envisaged three-phased plan was preceded by the vigorous opposition of the Sudanese government to an autonomous UN peacekeeping operation in Darfur as envisaged in Security Council Resolution 1706.[63] The compromise was a UN-AU hybrid operation the establishment of which was supported by the Sudanese government.[64] UNAMID is a particularly important case-study as it is not only the first hybrid peacekeeping operation deployed by international organisations, but the findings regarding UNAMID could also help in the analysis of potentially envisaged hybrid AU-UN operation for Somalia.[65] Furthermore, as a hybrid operation, on

[58] Z. Yihdego, 'Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects', in (2009) 14 *Journal of Conflict & Security Law*, 37, 37-38.
[59] A. de Waal, 'Sudan: Darfur', J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 283, 293.
[60] Communiqué of the 66th meeting of the Peace and Security Council, PSC/AHG/Comm(LXVI) (2006), para. 2 chapeau.
[61] Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur, Annex to Letter dated 5 June 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/307/Rev.1 (2007),3, para. 8; 10-17, paras. 40-63.
[62] *Ibid*., 2, para. 4; Report of the Chairperson of the Commission on the Situation in Darfur (The Sudan), PSC/AHG/3(LXVI) (2006), 7, para. 29.
[63] al-Jazeera, Sudan 'Accepts' UN Darfur Package, 27 December 2006, available at: http://www.globalpolicy.org/component/content/article/206/39736.html, Security Council Resolution 1706 (2006), UN Doc. S/RES/1706, especially para. 5; Report of the Chairperson of the Commission on the Situation in Darfur, *ibid.*, 15-20 paras. 63-79.
[64] Abass, *supra* note 56, 415, 434. The solution was not a preferred one to either organisations, who allegedly "favoured an approach which would have given the primary responsibility for the operation to the UN", C. Walter, 'Hybrid Peacekeeping: Is UNAMID a new Model for Cooperation between the United Nations and Regional Organizations?', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1327, 1337. See furthermore the comments by the United States in the Security Council, Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 16.
[65] Results of the Secretary-General's technical assessment mission to Somalia, pursuant to Security Council resolution 2093 (2013), Annex to Letter dated 19 April 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/239 (2013), 13, para. 46.

a first glance, at least, one would presume that its acts are attributed jointly to the UN and the AU.[66] Besides, UNAMID is an interesting experiment of marrying universalism and regionalism"[67] and can therefore also serve to elaborate further upon the wider debate addressed in the present study upon the relationship between universalism and regionalism under the framework of the United Nations Charter.

This intervention by invitation also leads to questions concerning the existing or non-existing enforcement character of Security Council Resolution 1769 which constitutes the legal basis for UNAMID. The resolution was adopted under Chapter VII, but the records of the meeting leading to the resolution suggest that there was a clear majority for the position that the mandate of the force would not be of an enforcement nature which corresponds to the Chinese statement that "the purpose of the resolution is to authorize the launch of the hybrid operation, rather than to exert pressure or impose sanctions".[68] In the rare cases of intervention by invitation with the right to enforcement action by the intervening party this right was formally granted through treaty ratifications as in the cases of the ECOWAS intervention in Sierra Leone (2000) and Togo (2005-2006).[69]

2. Attribution of Conduct

1. Mandate of UNAMID

According to Security Council Resolution 1769, the mandate of UNAMID is as set out in paragraphs 54 and 55 of the report of the Secretary-General and the Chairperson of the African Union Commission on UNAMID.[70] Under the report, UNAMID has the general aim to contribute to the restoration of security conditions in Darfur allowing the deliverance of humanitarian assistance as well as the protection of civilian populations under imminent threat of physical violence while

[66] Tsagourias also held that "it follows (…) that joint responsibility can arise in the case of UNAMID, the joint UN/AU peacekeeping operation in Darfur", Tsagourias, 'The Responsibility of International Organisations for Military Missions', *supra* note 4, 245, 254.
[67] Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security. Towards Greater Strategic and Political Coherence, PSC/PR/2.(CCCVII) (2012), 16, para. 61.
[68] Security Council 5727th meeting, UN Doc. S/PV.5727 (2007), p. 10. The United States were taking the position that "UNAMID has the authority under Chapter VII to use force to prevent armed attacks, to protect civilians and to prevent any disruption of the implementation of the Darfur Peace Agreement, *ibid*., p. 7.
[69] Abass, *supra* note 56, 415, 434. Another potential problem is whether UNAMID can be considered under UN law as a UN operation regarding the expenses for the operation, *ibid.*, 438.
[70] Security Council Resolution 1769, UN Doc. S/RES/1769 (2007), 3, para. 1.

supporting the political process and the AU-UN joint meditation. Paragraph 54 of the Report sets out the broad goals which include, *inter alia*:

(b) to contribute to the protection of civilian populations under imminent threat of physical violence and prevent attacks against civilians, within its capability and areas of deployment (…)

(d) To assist the political process in order to ensure that it is inclusive, and to support the African Union-United Nations joint mediation in its efforts to broaden and deepen commitment to the peace process; (…)

In order to achieve these goals, the operation's talks include:

(a) Support for the peace process and good offices:

> (i) To support the good offices of the African Union-United Nations Joint Special Representative for Darfur and the mediation efforts of the Special Envoys of the African Union and the United Nations;

(b) Security:

> (i) To promote the re-establishment of confidence, deter violence and assist in monitoring and verifying the implementation of the redeployment and disengagement provisions of the Darfur Peace Agreement, (…)
>
> (vii) In the areas of deployment of its forces and within its capabilities, to protect the hybrid operation's personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations-African Union personnel (…);[71]

Acting under Chapter VII of the Charter,[72] the Security Council also adopted a mandate to protect civilians within paragraph 15 of Resolution 1769.[73] The Security Council further elaborated upon the "protection of civilians" mandate in Resolution 2003, declaring that UNAMID shall make full use of its mandate for the protection of civilians across Darfur, "including through proactive deployment and patrols in areas at high risk of conflict, securing IDP camps and adjacent areas, and implementation of a mission-wide early warning strategy and capacity."[74] In Resolution 2113, the Council added

[71] Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 13, para. 54 (b), (d), (f); 13-15, para. 55 (a) (i), (b) (i), (vii).
[72] The Security Council emphasized UNAMID's Chapter VII mandate in Resolution 2003, Security Council Resolution 2003, UN Doc. S/RES/2003 (2011), 3, para. 5.
[73] Security Council Resolution 1769, supra note 70, 5, para.15. In the follow-up resolution 1828, the Security Council underlined "the need for UNAMID to make full use of its current mandate and capabilities with regard to the protection of civilians", Security Council Resolution 1809, UN Doc. S/RES/1809 (2008), 3, para. 7. See also p.3, para. 11 of this resolution. The plea was repeated in Resolutions 1881, 1935, 2063 and 2113, Security Council Resolution 1891, UN Doc. S/RES/1881 (2009), 2, para. 2; Security Council Resolution 1935, UN Doc. S/RES/1935 (2010), 2, para. 2; 3, para. 4; Security Council Resolution 2063, UN Doc. S/RES/2063 (2012), 3-4, para. 3; Security Council Resolution 2113, UN Doc. S/RES/2113 (2013), 4-5, para. 4.
[74] Security Council Resolution 2003, supra note 72, 3, para. 3 (a).

another qualification according to which UNAMID shall make "enhanced efforts to respond promptly and effectively to threats of violence against civilians."[75] Furthermore, the Council *urged* UNAMID to deter any threats against itself and its mandate.[76] Reviews of UNAMID's mandate are conducted by the Secretary-General, in close consultation with the AU.[77] Accordingly, UNAMID military and police units are operating on the basis of a very robust mandate regarding the use of military force. Both components of the operation were instructed that attacks upon UNAMID patrols "are to be responded to robustly and in accordance with the rules of engagement, proactive measures are to be taken to protect civilians."[78] The updated strategy for the protection of civilians outlines among the four main objectives the protection of civilians from physical acts of violence.[79]

2. The political process to resolve the conflict in Darfur and political oversight of UNAMID

The deployment of UNAMID is directly linked to the political process to resolve the conflict in Darfur under the leadership of both the AU and the UN. The Political Process is managed by Joint AU and UN Mediation Activities in respect of talks between the Government of Sudan and non-signatory movements[80] on the basis of the AU-UN Roadmap[81] which was later replaced by the Framework for African Union and United Nations facilitation of the Darfur peace process.[82] In 2011, the Government and the Liberation and Justice Movement (LJM) signed the Agreement for the Adoption of the Doha Document for Peace in Darfur.[83]

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[75] Security Council Resolution 2113, supra note 73, 4, para. 4.
[76] *Ibid.*, 5, para.5. In this regard, the Council also urged UNAMID to take all necessary measures within its rules of engagement to protect United Nations personnel and equipment, *ibid.*, 6, para. 11.
[77] See e.g., Security Council Resolution 2113, supra note 72, 4, para. 3.
[78] Report of the Chairperson of the Commission on the African Union-United Nations Hybrid Operation in Darfur (UNAMID) and the Situation in Darfur, PSC/PR/2(CCLVIII) (2011), 1, para. 3.
[79] *Ibid.*, 3, para.13. The Under-Secretary-General for Peacekeeping Operations Le Roy stated likewise before the Security Council that "UNAMID is basically a protection operation", Security Council 6170th meeting, UN Doc. S/PV.6170 (2009), 3.
[80] Report of the Chairperson of the Commission on the African Union-United Nations Hybrid Operation in Darfur, PSC/PR/2.(CCCXLVIII) (2012), 3, para.11. The Security Council repeatedly emphasised the importance of promoting the AU-UN led peace and welcomed the efforts of the AU High Level Panel for Sudan in this regard, see, for example, Security Council Resolution 2003, *supra* note 72, 3, para. 4; 4, para. 7.
[81] Joint AU-UN Road-map for Darfur Political Process, 8 June 2007.
[82] Annex, Framework for African Union and United Nations facilitation of the Darfur peace process, Letter dated 19 March 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/166 (2012), 2-10. See e.g. also Annex to the letter dated 19 February 2009 from the Permanent Reprsentative of the Sudan to the United Nations addressed to the President of the Security Council, Government of Sudan, African Union and United Nations Tripartite Committee on UNAMID, UN Doc. S/2009/173 (2009), 2, para. 2; 4, para. 6.
[83] Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2011/814 (2011), 1-4, paras. 2-17; 14, para. 75. Following this adoption, the Joint Special Representative and Joint Chief Mediator ad interim of the AU and the UN promoted further talks between non-signatory movements and the Government of Sudan with the aim of reaching an inclusive peace agreement through

The Joint Chief Mediator reports to both the UN Secretary-General and the Chairperson of the AU Commission through the Under-Secretary-General of the DPKO and the Commissioner for Peace and Security. According to his mandate he is entrusted with the AU/UN-led political process and mediation efforts between the parties to the Darfur Conflict, in the exercise of which he maintains "close liaison" with the Joint Special Representative.[84]

The most interesting feature is, however, that the implementation of the political process is generally managed directly by UNAMID. The Darfur political process secretariat, which was established at UNAMID headquarters, is responsible for "strategic planning and management of the Darfur political process, overseeing its implementation (…) and monitoring and maintaining an overview of substantive discussion during the process."[85] For that purpose, Darfur political process sub-units were established at each sector office. In the exercise of its duties, the secretariat directly reports to the Joint Special Representative and the chair of the AU High-level Implementation Panel. [86]

As to the political oversight by the respective organs of the AU and the UN, the AU Peace and Security Council requested the AU Commission to ensure that there is regular interaction with UNAMID, including briefings to the Peace and Security Council every 90 days.[87] A review exercise of UNAMID uniformed personnel by the AU Commission and the UN Secretariat was conducted in February 2012, in accordance with Security Council Resolution 2003.[88] The Mandate of UNAMID is extended by both organisations through decisions of the AU PSC and the UN Security Council.[89]

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their participation, Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2012/231 (2012), 2, para. 11.

[84] Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/64/685 (2010), 5-6, para. 7.

[85] Report of the Secretary-General on the implementation of the Darfur political process, UN Doc. S/2011/252 (2011), 5, para. 18. The secretariat comprises representatives of several UNAMID sections, including political affairs, civil affairs, human rights, humanitarian liaison, legal affairs, rule of law, the joint mission analysis centre, security, the joint logistics operation centre, mission support, as well as staff of the AU High-level Implementation Panel, *ibid.*

[86] The Security Council praised UNAMID for its continuing efforts "in support of and as a complement to the work of the Joint Chief Mediator and the African Union/United Nations-led political process for Darfur", Report of the Secretary-General on the implementation of the Darfur political process, *ibid*., 2, para. 6. See also, Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur (UNAMID), UN Doc. S/2010/543 (2010), 2, para. 7; 4-5, paras. 15-19; Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2011/244 (2011), 3, paras. 9-11.

[87] Peace and Security Council, 371st Meeting, Addis Ababa, Ethiopia, 25 April 2013, PSC/PR/COMM.3(CCCLXXI), Communiqué, 2, para. 13.

[88] Peace and Security Council, 328th Meeting, Addis Ababa, Ethiopia 24 July 2012, Communiqué, PSC/PRC/COMM.(CCCXXVIII), 2, para. 11.

[89] Peace and Security Council, 328th Meeting, *ibid*., 3, para. 14; Annex, Letter dated 20 July 2011 from the Chairperson of the African Union Commission addressed to the Secretary-General, Letter dated 27 July 2011 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2011/466 (2011), 2, 2nd para; 5-6, para. 12.

The Tripartite Coordination Mechanism on UNAMID which includes representatives of both the AU and the UN as well as of the Government of Sudan serves as another instrument to resolve issues and challenges related to UNAMID deployment and operations.[90]

3. Strategic Control

Strategic guidance of UNAMID is provided from New York from both the UN and the AU.[91] The military concept of operations was developed jointly by the AU and the UN focusing on three core complementation functions: protection, liaison, and monitoring and verification.[92] The same procedure was used for the elaboration of various other strategic and legal documents, including the military command directive for the Force Commander of UNAMID and the UNAMID rules of engagement.[93]

4. The Chain of Command and Operational Control

The distribution of tasks between the two organisations foresees that whereas "the [m]ission shall benefit from United Nations backstopping and *command and control structures and systems*"[94], the African Union shall merely decide upon the size of the force and should also appoint the force commander.[95]

As support, command and control structures for UNAMID are provided by the UN alone, the overall management of the operation is likewise based on UN standards, principles and established practices. To compensate the AU for the United Nations' dominance in that area, it was agreed between both that "all efforts will be made to ensure that the peacekeeping force will have a predominantly African character" regarding the force and personnel generation.[96] In order "to

[90] See e.g., Press Release, 16 Apr 13 – Tripartite Meeting on UNAMID focuses on Darfur security, access, available at: http://unamid.unmissions.org/Default.aspx?ctl=Details&tabid=11027&mid=14214&ItemID=22335.
[91] Opening Remarks by Ambassador Ramtane Lamamra, African Union Commissioner for Peace and Security, on the occasion of the 15th Session of the UNAMID Tripartite Coordinating Mechanism meeting, 15th April 2013, Addis Ababa, 3.
[92] Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 18, para. 73; Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2007/517 (2007), 2, para. 7; 4, para. 13.
[93] Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2007/596 (2007), 3-4, para. 13.
[94] Communiqué of the 66th meeting, *supra* note 60, para. 2 c)
[95] *Ibid*., para. 2 b), d).
[96] Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 27, para. 113; Security Council Resolution 1769, *supra* note 70, 4, para.8. Interestingly, though, the Convention on the Privileges and Immunities of the United Nations applies to the whole operation, see Agreement between

maintain the joint nature of the mission, and to ensure joint decision-making and input into operational decisions and procedures for UNAMID, it was agreed that the Secretary-General and the Chairperson of the African Union would appoint a joint special representative and that strategic guidance would be jointly provided by the United Nations and the African Union."[97] This decision was also taken as a reaction to the fact that the daily operational command and control of the mission, however, resides with the United Nations.

The Joint Special Representative of the Chairperson of the AU Commission and the Secretary-General of the UN has overall authority over UNAMID, overseeing the implementation of its mandate and being responsible for the operation's functioning and management.[98] He is in charge of analysing and implementing the strategic directives issued by the Under-Secretary-General of the DPKO of the UN and the AU Commissioner for Peace and Security, and he reports, through them, to the UN Secretary-General as well as to the Chairperson of the AU Commission.

The Force Commander and the Police Commander were both appointed by the AU in consultation with the UN and report to the Joint Special Representative while exercising command and control over the military and police activities, respectively.[99]

The important feature of the command and control arrangements on an operational level is that the deployment of UNAMID is coordinated through the Joint Support and Coordination Mechanism (JSCM) established in Addis Ababa and "tasked with empowered liaison" between the DPKO and the AU Peace and Security Department.[100] Another part of the mandate of the JSCM is the coordination

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The United Nations and the African Union and the Government of Sudan Concerning the Status of the African Union/United Nations Hybrid Operation in Darfur (2008), 1, para. 1(f); 2, para. 2.

[97] Report of the Secretary-General on United Nations-African Union cooperation in peace and security, UN Doc. S/2011/805 (2011), 11-12, para. 39.

[98] Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *supra* note 84, 5, para. 5.; Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/65/740 (2011), 5, para. 4.His Office" comprises the Office of the Chief of Staff, inclusive of the Planning Unit; the Office of Legal Affairs; and the Joint Mission Analysis Centre" as well as the Office of the Deputy Joint Special Representative, Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2008 to 30 June 2009, Report of the Secretary-General, UN Doc. A/62/791 (2008), 5-6, para. 10.

[99] Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *supra* note 84, 5, para.6; Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, *ibid*., 5-6, para. 7.

[100] Security Council Resolution 1769, *supra* note 70, 4, para. 7; Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *ibid.,* 6, para. 8. The review of UNAMID by the UN found that the JSCM "performs important coordination, support and liaison functions effectively", despite the challenges the UN and the AU are faced with to coordinate with one another on joint strategic guidance to UNAMID, Special report of the Secretary-General on the review of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2014/138 (2014), 10, para. 38. The Joint Special Representative also maintains communications with the heads of the other UN operations in the region to ensure complementarity, Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *supra* note 84, 12, para. 39. Further coordination is

and support of the implementation of the mandate of UNAMID in the form of operational directives as well as deepening "the current collaboration between the two institutions."[101]

3. *Assessment of the Control Arrangements*

The analysis of the command and control structures of UNAMID on the basis of the available documents showed that in contrast to the first case-study, the deployment of UNAMID as a peacekeeping operation is directly included in and part of the wider political framework for a peaceful resolution of the Darfur crisis. In fact, the political process is not only intrinsically connected to the deployment of UNAMID, but the latter is actually steering the implementation and management of the process. The cited report of the Secretary-General indicates that the strategic planning of the peace process is also part of the therefore established secretariat at UNAMID headquarters. Then again, the overall authority over UNAMID is exercised by the Joint Special Representative whose functions include the supervision of UNAMID's mandate and the implementation of strategic directives issued by the AU and the UN.

It was stressed in the previous case-study that in order to justify that two international organisations are held jointly responsible on the basis of the proposed criterion of attribution, there has to be a strong nexus between the control exercised on the political level by the organisations and the control performed by the responsible organs in the peacekeeping operation. In the present context of UNAMID, it appears that the set-up of the operation actually transcends the required intimate link; part of the wider political control has been allocated to the peacekeeping operation itself, although ultimately under the authority of both organisations. UNAMID can, to a certain extent, navigate the political process autonomously. This fact also raises the question as to whether there is a heightened responsibility of the UN and the AU. The attribution of responsibility to international organisations

performed through the DPKO in New York and the AU Observer Office to the UN including information sharing regarding the deployment of UNAMID and the political process, *ibid.*, 13, para. 44; Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2013 to 30 June 2014, Report of the Secretary-General, UN Doc. A/67/806 (2013), 7, para. 8. For an overview of the quite extensive cooperation with UNMIS, see Budget performance of the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/66/596 (2011), 9, para. 34.

[101] Budget for the African Union-United Nations Hybrid Operation in Darfur 2010), *ibid.*, 7, para. 13. In order to enhance collaboration between the UN and the AU on UNAMID, the Secretary-General and the Under-Secretary-Generals for the DPKO, the Department of Political Affairs and the DFS as well as the Joint Special Representative participated in the AU summit in 2011, Budget performance of the African Union-United Nations Hybrid Operation, *ibid.*, 10, para. 37. See also Communiqué of the 198th Meeting of the Peace and Security Council, Annex to the letter dated 24 July 2009 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, UN Doc. S/2009/388 (2009), 5, para. 18; Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 16, para. 57.

cannot only be seen as a sliding scale upon which the amount of control exercised by international organisations reflects the likelihood of the attribution of conduct to that organisation. In contrast, another factor is the autonomy of the respective organ (the peacekeeping operation); not autonomy in the sense of a lack of control by the organisation, but autonomy due to a transfer of certain tasks to the organ whose implementation by the organ binds the organisation. This corresponds to a more "mature" relationship between the organ and the organisation, as the latter has actually done more by entrusting certain specific functions to that organ. One author speaks in this context of the "hierarchy of influence" which is more about *auctoritas* than *potestas*, a very fitting description for this particular cooperation arrangement in UNAMID.[102]

One can draw two conclusions here. Firstly, UNAMID reconfirmed the particular relevance of political control, as well as of the translation of that control over the mission. Secondly, it became evident that a comprehensive approach towards the political peace process and the deployment of a peacekeeping operation, involving the same institutional actors, reinforces the control and oversight executed over the operation.

Regarding the distribution of responsibility between the UN and the AU, the analysis highlighted that, notwithstanding the provision of backstop and command and control structures solely by the UN, all decisions regarding the deployment, the operations on the ground, the appointment of personnel, the revision of operational directives and other issues are taken jointly by both organisations. Therefore, even if the UN enjoys greater control and influence over UNAMID than the AU due to an advantage in resources and experience,[103] it does not compromise the fact that all decisive stratic and operational decisions are taken jointly by both operations.[104] Thus, the daily operational command and control of the mission by the UN does not impair the essential and predominant hybrid character of the operation.

The available documents do not give any indication that the UN exercises any more supplementary control by paying for the budget of the operation; neither does the financing of the operation by the UN affect the decision-making processes within the operation.

[102] J.J. Piernas López, 'Regionalism in the Field: The Case of South Sudan', *European Society of International Law, Conference Paper Series*, Conference Paper No. 7/2012 , 14.
[103] A. Bashua, 'Challenges and Prospects of AU-Un Hybrid Operations', in (2014) 18 *Journal of International Peacekeeping*, 92, 99-100.
[104] The SOFA of UNAMID also stipulates that the AU and the UN shall ensure that UNAMID conducts its operations in full conformity with international humanitarian law, Agreement between The United Nations and the African Union and the Government of Sudan, *supra* note 96, 3, para. 6 a).

Furthermore, the UN and the AU are not only acting together in the operation of UNAMID, but all political activities are equally led jointly by the two institutions, through their joint Chief Mediator and in coordination – when necessary – with the Government of Sudan.

Naturally, the United Nations is in a slightly stronger moral position than the AU due to the Security Council being at the forefront of the international system of collective security. Another factor is the extensive experience of the organisation in the deployment of peacekeeping operations. In the end, the UN and the AU cooperate on the political, strategic and operational levels as equals so that any conduct of UNAMID personnel, in violation of international law is to be attributed jointly to the AU and to the UN.

The next section, on South Sudan, will highlight in particular the relevance of not only the political process but also of inter-mission cooperation as another contributing factor to the analysis of the responsibility of international organisations in the context of peacekeeping operations.

3. Attribution of Conduct of UNISFA and UNMISS

1. Introduction

Since the beginning of the Sudan and Darfur crisis, the African Union has led the international community in dealing with the situation.[105] That leadership of the AU on the political level is undisputed by all other international actors; the AU Roadmap for the settlement of the unresolved issues between Sudan and South Sudan of April 2012, following hostilities between the two states along the border, and as adopted by the AU Peace and Security Council was not only accepted by the Parties, but endorsed by the Security Council just one week later in Resolution 2046.[106] In that Resolution the Council, while determining that the prevailing situation along the border between Sudan and South Sudan constitutes a serious threat to international peace and security, decided that both states shall, *inter alia*, immediately cease all hostilities, including aerial bombardments and

[105] *Ibid*., 7.

[106] Report of the Secretary-General on South Sudan, UN Doc. S/2012/486 (2012), 4, para. 17; Report of the African Union High-Level Implementation Panel for Sudan and South Sudan, PSC/PR/COMM.1 (CCCLIII) (2013), 1, para.2; Peace and Security Council, 319th Ministerial Meeting, Addis Ababa, Ethiopia, 24 April 2012, PSC/MIN/COMM/3.(CCCXIX) (2012), 3-4, para. 12; 5, para. 18; Report of the Chairperson of the Commission, *supra* note 57, 3, para. 8. The EU is fully supportive of the roadmap, see Council of the European Union, Council conclusions on the Roadmap for Sudan and South Sudan, 3183rd Foreign Affairs Council meeting, Brussels, 23 July 2012, 1, paras. 1-3; 2, para. 6; Statement by the High Representative Catherine Aston on the agreements concluded between Sudan and South Sudan in Addis Ababa, Brussels, 27 September 2012, A 425/12, 1; Council conclusions on Sudan and South Sudan, Foreign Affairs Council meeting, Brussels, 22 July 2013, 1, paras. 1-2; 2, para. 4.

withdraw all of their armed forces to their side of the border.[107] The Council also legally obliged both governments to resume negotiations under the African Union High-Level Implementation Panel on Sudan (henceforth: AUHIP).[108]

The Agreements signed between the Governments of Sudan and South Sudan on 27 September support the primacy of the political role of the AU in dealing with the crisis involving the two states.[109] The Security Council in a press release, following the conclusion of the agreements, stated that it "look[s] forward to President Mbeki's recommendations on these matters after he reports to the African Union Peace and Security Council and to the report of the Secretary-General."[110]

A division of labour between the AU and the UN has been established, whereas the former focuses on direct interaction with the two governments and the facilitation of new agreements between them, the UN concentrates on the correct implementation of the Comprehensive Peace Agreement.[111]

The United Nations is engaged with two operations in South Sudan, UNISFA and AFISMA which have different tasks and responsibilities under their mandate. As the available documents demonstrate, there is a rather close linkage between the deployment and execution of their mandates between the two operations as well as other peacekeeping operations in the area.

2. UNISFA

1. Mandate

UNISFA was established on the basis of Security Council Resolution 1990 in 2011 in order to support the implementation of the Agreement between the Government of Sudan and the Sudan's People Liberation Movement on temporary arrangements for the disputed Abyei area, including the

[107] Security Council Resolution 2046, UN Doc. S/RES/2046 (2012), 3, para.1(i), (ii).
[108] *Ibid.*, 4, paras. 2-3. The Security Council likewise requested the Secretary-General to consult with the AU regarding the implementation of the resolution and the decisions of the AU PSC as well as to work closely with the AUHIP, *ibid.*, 4, para.6.
[109] The Cooperation Agreement between the Republic of the Sudan and The Republic of South Sudan, 27 September 2012, p. 2, Preamble; 3, Preamble; 4, para. 1; 6, para. 4; Agreement on Security Arrangements between The Republic of the Sudan and The Republic of South Sudan, 27 September 2012, 2-3, para. 3.
[110] Security Council Press Statement on Sudan/South Sudan, SC/10779 (2012), 2nd paragraph.
[111] Piernas López, *supra* note 102, 9. The UN also coordinates with other international actors, including the EU, IGAD and important states such as the USA; China or the UK in the development and implementation of the CPA, *ibid.*

protection of civilians and the peaceful administration of that area.[112] The Security Council acted in that instance under Chapter VII of the UN Charter.[113] Referring explicitly to Chapter VII later in the Resolution, UNISFA is authorised, "within its capabilities and its area of deployment to take the necessary actions to" protect UNISFA and United Nations personnel, installations, and equipment as well as to protect civilians and to ensure security in the Abyei area.[114] UNISFA's protection of civilians mandate "includes taking the necessary actions to protect civilians under imminent threat of physical violence, irrespective of the source of such violence."[115]

2. Political Control/Chain of Command

The Temporary Arrangements Agreement for the Administration and Security of the Abyei Area signed in June 2011 established various mechanisms "which hinge on the effective and efficient cooperation between the AU and the UN."[116] It is particularly important to mention the Abyei Joint Oversight Committee (AJOC) consisting of an AU official, the UNISFA Force Commander and representatives of the two countries.[117] In this regard, the AU commended the UN and in particular its Special Envoy and as well as UNISFA for their continued support to AU-led efforts.[118]

UNISFA was deployed consisting of Ethiopian soldiers under its own command structure on the insistence of Ethiopia which was represented the only third party that both sides would accept as an intervening agent.[119]

3. Inter-mission cooperation

Following the adoption of the Joint Border Verification and Monitoring Mechanism implementation plan by the Joint Political and Security Mechanism, UNISFA, UNMISS and UNAMID held a joint

[112] Budget for the United Nations Interim Security Force for Abyei for the period from 1 July 2011 to 30 June 2012, Report of the Secretary-General, UN Doc. A/66/526 (2011), 4, para.2; Security Council Resolution 1990, UN Doc. S/RES/1990 (2011), 2, para. 1.
[113] The Council abstained from referring explicitly to Chapter VII but recognised in the last paragraph of the preamble of Resolution 1990 that the situation in Abyei constitutes a threat to international peace and security, *ibid.*, 2.
[114] Security Council Resolution 1990, UN Doc. S/RES/1990 (2011), 3, para. 3. As emphasised in Resolution 2126, "UNISFA's protection of civilians' mandate (…) includes taking the necessary actions to protect civilians under imminent threat of physical violence, irrespective of the source of such violence, Security Council Resolution 2126, UN Doc. S/RES/2126 (2013), 4, para. 5.
[115] Security Council Resolution 2104, UN Doc. S/RES/2104 (2013), 4, para. 4.
[116] Report of the Chairperson of the Commission, *supra* note 57, 4, para. 9.
[117] *Ibid.*
[118] Peace and Security Council, 387th Meeting at Ministerial Level, 29 July 2013, Addis Ababa, Ethiopia, Communiqué, PSC/MIN/COMM.1/CCCLXXXVII), 1, para. 4.
[119] A. M. Fitz-Gerald, 'South Sudan', in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 307, 318.

meeting in Juba on 30 November 2012 "[f]or the purpose of establishing necessary operational and strategic mechanisms."[120] In this context, UNISFA also conducted a series of reconnaissance missions with UNMISS support.[121] UNISFA draws "significantly on existing logistical arrangements and support structures in UNMISS."[122]

Bearing in mind that the deployment of UNISFA is coordinated with the deployment of UNMISS, it seems preferable to analyse the question of attribution of conduct following the analysis of UNMISS.

3. UNMISS

1. Mandate

The United Nations Mission in the Republic of South Sudan (UNMISS) was established as the follow-up operation to UNMIS. As its name mission instead of operation suggests, it is an integrated operation whose head the Special Representative for the Republic of South Sudan coordinates all activities of the whole United Nations System in the Republic of South Sudan.[123]The overall mandate is to consolidate peace and security and to help establish the conditions for development in South Sudan.[124]

The government of South Sudan protested in a letter to the Security Council that the adoption of the mandate for UNMISS in 2011 under Chapter VII was not appropriate,[125] but as it was established in Chapter I, the recent practice of the Security Council has been to resort to Chapter VII for mandating peacekeeping operations. The mandate includes a strong "protection of civilians" component, which

[120] Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/59 (2013), 5, paras. 20-22.
[121] Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/59 (2013), 5, para. 22.
[122] Budget for the United Nations Interim Security Force for Abyei, supra note 112, 8, para. 27. UNMISS Provided UNISFA "with aviation support, spare parts, accommodations for personnel in transit, cargo movement services and full communications and information technology support while the African Union-United Nations Hybrid Operation in Darfur has provided UNISFA with staff on temporary assignment, surplus vehicles in Entebbe, Uganda, and customs clearance services in Port Sudan, and has facilitated inter-mission transfer and transportation of critical stores", Budget for the United Nations Interim Security Force for Abyei for the period from 1 July 2011 to 30 June 2012, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/66/576 (2011), 3-4, para. 12.
[123] Security Council Resolution 1996, UN Doc. S/RES/1996 (2011), 3, paras. 1-3.
[124] Budget for the United Nations Mission in South Sudan for the period from 1 July 2013 to 30 June 2014, Report of the Secretary-General, UN Doc. A/67/716 (2013), 4, para. 2.
[125] The Government alleges that the safety conditions do not warrant any further qualification of the situation in the South Sudan as falling under Chapter VII of the Charter, Letter dated 13 June 2012 from the Chargé d'affaires a.i. of the Permanent Mission of South Sudan to the United Nations addressed to the President of the Security Council, UN Doc. S/2012/429 (2012), 2. The Secretary-General had proposed that the mandate of the operation should be adopted under Chapter VI of the Charter, Special report of the Secretary-General on the Sudan, UN Doc. S/2011/314 (2011), 8, para. 41.

might also explain and justify the adoption under Chapter VII by the Council despite the criticism of the South Sudanese government.

According to Paragraph 3, UNMISS shall support the South Sudanese government in a twofold manner to protect civilians. First of all, UNMISS is charged with the responsibility to advise and assist the Government, including the military and police at national and local levels, in order to protect civilians in compliance with international humanitarian, human rights, and refugee law. As such, the language used in the resolution resembles strongly "the responsibility to protect" concept.[126] Moreover, UNMISS is authorised to deter the conduct of violence including through proactive deployment and patrols "in areas at high risk of conflict, within its capabilities and in its areas of deployment, protecting civilians under imminent threat of physical violence."[127] Paragraph 4 authorises UNMISS to "use all necessary means, within the limits of its capacity and in the areas where its units are deployed to carry out its protection mandate as set out in paragraphs 3(b) (iv), 3 (b) (v), and 3 (b) (vi)."[128] In the follow-up resolution 2057, the Security Council emphasised the importance of UNMISS' mandated tasks for the protection of civilians.[129]

2. The political level and the political process

The political process between South Sudan and Sudan is led by the African Union.[130] Under the auspices of the AUHIP, both governments signed a memorandum of understanding on non-aggression and cooperation.[131] The AU cooperates in its political mediation activities regarding these two countries with the UN.[132] According to the Report of the Chairperson of the AU Commission of 23 September 2013, a close working relationship has therefore been forged with then UN through

[126] Security Council Resolution 2057 supports such a view, Security Council Resolution 2057, UN Doc. S/RES/2057 (2012), 5, paras. 13, 16-17.
[127] Security Council Resolution 1996, *supra* note 123, 3-4, para. 3 (b) (iv), (v).
[128] The Security Council confirmed this authorisation its resolution 2057, Security Council Resolution 2057, *supra* note 126, 4, para.5. UNMISS is allowed to use all necessary to protect civilians under imminent threat or physical violence, irrespective the source of such violence which translates to an authorisation to act even against agents of the Government of South Sudan, Security Council Resolution 2109, UN Doc. S/RES/2109 (2013), 4, paras. 3-4; 5, para. 8.
[129] Security Council Resolution 2057, *ibid*., 3-4, paras. 3-4.
[130] Peace and Security Council, 387th Meeting at Ministerial Level, 29 July 2013, Addis Ababa, Ethiopia, PSC/MIN/COMM.1(CCCLXXXVII), 1, para.4; 3, para. 14.
[131] Annex, Letter dated 14 February 2002 from the Chairperson of the African Union Commission addressed to the Secretary-General, Letter dated 6 March 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/135 (2012), 2-3.
[132] Statement by the President of the Security Council, UN Doc. S/PRST/2012/5 (2012), 3; Statement by the President of the Security Council, UN Doc. S/PRST/2012/12 (2012), 2. The Cooperation is based on the AU's Roadmap and Security Council Resolution 2046, Statement by the President of the Security Council, UN Doc. S/PRST/2012/19 (2012), 1. See especially Statement by the President of the Security Council, UN Doc. S/PRST/2013/14 (2013), 1-2; Statements by various members of the Security Council during the 6583rd meeting, Security Council, 6583rd meeting, UN Doc. S/PV.6583 (2011).

the Secretary-General's Special Envoy.[133] Following the failure of both Governments to reach an agreement on all issues until the deadline of 2 August 2012, the AU PSC decided to grant an additional six weeks extension of the deadline, a decision which was endorsed by the Security Council subsequently.[134] UNMISS ensures strategic and operational coordination with other international partners, "in particular the African Union (…) the European Union and the World Bank", on a political level UNMISS is charged with "bringing together international actors to speak with one voice in helping the new Government to address its peace consolidation challenges."[135] Under its mandate UNMISS is also obliged to provide a summary of cooperation and to share information with UNAMID, MONUSCO and regional and international partners in addressing the threat posed by the Lord's Resistance Army (LRA).[136] In that context, once could ask as to whether the sharing of information which might be used to facilitate military attacks against the LRA could engage the responsibility of UNMISS.

3. Inter-mission cooperation

Under its mandate, UNMISS shall share information with UNAMID, MONUSCO and regional and international partners in support of addressing threats.[137] Following the escalation of combats in South Sudan, the Secretary-General decided to transfer troops to UNMISS from MONUSCO, UNAMID, UNISFA, UNOCI and UNMIL including five infantry battalions and three attack helicopters,[138] a decision which was approved by the Security Council in resolution 2132.[139]

[133] Report of the Chairperson of the Commission, *supra* note 57, 3, para. 8.
[134] Report of the Secretary-General on the Sudan and South Sudan, UN Doc. S/2012/877 (2012), 6, para. 18.
[135] Special report of the Secretary-General on the Sudan, *supra* note 125, 8, para. 39. See e.g. Security Council Resolution 1996, supra note 123, 6-7, paras. 18, 20.
[136] Security Council Resolution 1996, *ibid*., 6, para.15. In this context, the Secretary-General is explicitly authorised to take the necessary steps "In order to ensure inter-mission cooperation (…) [including] appropriate transfer of troops from other missions, subject to the agreement of the troop-contributing countries and without prejudice to the performance of the mandate of these United Nations missions", *ibid.*, 6, para.17; Security Council Resolution 2057, *supra* note 126, 1, Preamble. The Security Council confirmed these tasks given to the Secretary-General in Resolution 2057, Security Council Resolution 2109, *supra* note 128, 7, paras. 25-26. See also Security Council Resolution 2047, UN Doc. S/RES/2047 (2012), 4, para. 16; Security Council Resolution 2075, UN Doc. S/RES/2075 (2012), 5, para. 18.
[137] Budget for the United Nations Mission in South Sudan for the period from 1 July 2011 to 30 June 2012, Report of the Secretary-General, UN Doc. A/66/532 (2011), 7, para. 17.
[138] Letter dated 23 December 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/758 (2013), 1.
[139] Security Council Resolution 2132, UN Doc. S/RES/2132 (2013), 2, paras. 3, 5.

4. Assessment

Despite the scarcity of available documents regarding UNISFA and UNMISS one can draw several conclusions regarding the attribution of conduct. First of all, whereas the African Union is the leading political actor in South Sudan, its political influence on the peace process and on the peacekeeping operations, especially on UNISFA, is not mirrored in the strategic and operational control arrangements. In contrast, the division of labour between the UN and the AU is quite distinct. The lack of any "input" or "control" of the AU on the strategic or operational level of both operations is rather surprising. A possible explanation might be that the UN as the ultimate authority for maintaining international peace and security is unwilling, on the basis of its special position, to allow any external contribution by the AU towards the operations under its authority, outside of the political framework and the context for conflict resolution.

The following case-study of Mali will allow a verification as to whether this hypothesis is true or not. A particular feature of UNISFA and UNMISS is the emphasis on inter-mission cooperation. However, the lack of further information and the extent of inter-mission cooperation do not justify any suggestion that the AU could be jointly responsible with the UN for the conduct of AFISMA and/or UNMISS via the back-door of inter-mission cooperation with UNAMID. Nevertheless, it underlines that for future peacekeeping operations, the network of cooperation between the involved actors is enriched by another layer. Consequently, it proves that the main hypothesis of this present study, the need for a criterion of joint attribution is valid and warranted. Furthermore, it cannot be excluded that during the deployment of future peacekeeping operations, responsibility may also arise on the basis of inter-mission cooperation.[140]

[140] It should, of course, be noted that inter-mission cooperation is not a new feature, one could, for example, refer to the Liberia crisis and cooperation between the parallel UN and ECOWAS operations. The difference is that inter-mission cooperation in South Sudan is an explicit mandate of the operations and it is executed in the form of a continuing, permanent, institutionalised mechanism and not in the form of ad hoc cooperation in the field.

4. Attribution of Conduct of AFISMA and MINUSMA

> In Mali, the efforts by the two organizations [the AU and the UN] have focused both on the political and the peacekeeping aspects of the crisis
>
> - Report of the Chairperson of the AU Commission, 23 September 2013[141]

1. Introduction

In January 2012, a Tuarag rebellion led by the National Movement for the Liberation of Azawad (NMLA) began in Northern Mali which quickly took over control of the Northern part of the country. Islamist groups saw their chance to take over control of a part of the country themselves and turned against the NMLA after having helped to defeat the Malian government and started to introduce the Sharia law in the territory under their control.

A coup d'état against the legitimate Malian government increased the anxiety of the international community that the situation in Mali would spin completely out of control and threaten international peace and security within the whole region. A major concern was the fact that the Sahel region extends over the Northern part of Mali which has been used for a longer period for "drug cartel operations, cross-border banditry, smuggling, human trafficking, kidnapping-for-ransoms and money-laundering"[142] as well as a hide-out for Al-Qaida's Northern African branch which is active within the region. The prospects of increased terrorism, migration and destabilisation led the international community to adopt a harmonised approach from the very beginning to confront the political as well as the Security crisis in Mali: "advocat[ing] a double strategy based on two axes of action, one a political process and the other military action, if necessary."[143] In this context, it was emphasised that the UN and other international organisations operate, indeed, "in a new geopolitical context (…) fac[ing] threats that have not been encountered before in a peacekeeping context."[144] The Under-Secretary-General for Peacekeeping Operations spoke in a similar vein of "a peacekeeping operation

[141] Report of the Chairperson of the Commission, *supra* note 57, 5, para. 15.
[142] Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/189 (2013), 11, para. 61
[143] Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, UN Doc. S/PV.6952 (2013), 4.
[144] Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, UN Doc. S/PV.6944 (2013), 5.

in a geopolitical context characterized by asymmetrical threats not previously encountered in a United Nations peacekeeping environment."[145]

The response of the international community to the coup d'état in Mali and the wider security crisis was coordinated from the early hours, primarily between the UN, the AU and ECOWAS.[146] Following the gain of territory by the Islamist armed groups in Northern Mali; it was decided to curtail the mandate and the deployment of AFISMA in favour of the quickest possible deployment of MINUSMA. The analysis of the attribution of conduct starts with AFISMA, followed by an examination of MINUSMA.

2. AFISMA

1. Establishment and Elaboration of the Mandate

The occupation of the North of Mali by armed groups, "including terrorists, drug traffickers and criminals of every sort" led to a severe security crisis in Mali, prompting the Government to request help by ECOWAS as well as to request the adoption of a UN Security Council Resolution authorizing the intervention of an international military force under Chapter VII.[147]

Originally, ECOWAS and the AU had requested a Security Council mandate authorising the deployment of an ECOWAS stabilization force and the Council expressed its readiness to further examine the request once additional information had been provided. This decision followed the positive response of the AU PSC to a request by ECOWAS to deploy elements of its Standby Brigade in Mali.[148] The Security Council then requested that the Secretary-General supports the Commissions

[145] Statement by Mr. Hervé Ladsous, Under-Secretary-General for Peacekeeping Operations, Security Council 6985th meeting, UN Doc. S/PV.6985 (2013), 7.

[146] Mediation efforts in the Mali crisis were made by the UN, the AU and ECOWAS, Annex to the letter dated 12 June 2012 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, Communiqué of the consultative meeting between members of the Security Council of the United Nations and the Peace and Security Council of the African Union, UN Doc. S/2012/444 (2012), 5, para. 22.

[147] Annex, Letter dated 18 September 2012 from the interim President and the Prime Minister of Mali addressed to the Secretary-General, Letter dated 28 September 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/727 (2012), 2.

[148] With a mandate that included the restoration of State authority over the northern part of the country and combating terrorist and criminal networks, Report of the Chairperson of the Commission on the Strategic Concept for the Resolution of the Crises in Mali and Other Related Aspects, PSC/PR/3.(CCCXXXIX) (2012), 1, para. 2. As pointed out by the representative of Côte d'Ivoire, speaking on behalf of ECOWAS in the Security Council:

"The ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security in the subregion enables the immediate deployment of the ECOWAS Standby Force

of ECOWAS and AU in "preparing such detailed options."[149] The plans for the ECOWAS operation MICEMA, however, never went beyond the planning stage, due in particular to the absence of consensus within ECOWAS on the approach to be taken for resolving the crisis and particularly also with regard to financial and logistical constraints.[150]

An initial planning conference was held in Abidjan from 11 to 15 June 2012 for which the UN provided advisory and planning support.[151] The following technical assessment mission with representatives of ECOWAS and the AU – under ECOWAS leadership – included also a multidisciplinary UN team in advisory capacity as well.[152] A further planning conference held from 9 to 13 August 2012 including representatives of the AU, the UN, and the EU further developed the concept of operations for the ECOWAS force which was envisaged to be deployed in Mali.[153]

At yet another joint planning conference with participants of all the four organisations, a harmonised joint concept of operations was developed and subsequently endorsed by both ECOWAS and the AU.[154] Thus, the concept of operations for the envisaged operation, which would ultimately

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in the case of crises, following a decision of the ECOWAS Mediation and Security Council, and above all with the consent of the legal authorities of the country concerned.

Those two conditions were satisfied in the case of the Mali crisis. However, mindful of supporting its action in Mali on a robust international legitimate basis, ECOWAS requested the prior authorization of the African Union and the United Nations Security Council before any deployment took place. Resolution 2085 (2012), adopted by the Security Council on 20 December 2012 to authorized the deployment of the African-led International Support Mission in Mali (AFISMA), was obtained at the end of lengthy negotiations that reflected the full complexity of peacekeeping mandates.", Statement by Mr. Bamba, speaking on behalf of ECOWAS, Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 51-52.

[149] Security Council Resolution 2056, UN Doc. S/RES/2056 (2012), 4, paras. 17-18; Security Council Resolution 2071, UN Doc. S/RES/2071 (2012), 2, Preamble; 3-4, para. 7.

[150] L.-A. Théroux-Bénoni, 'The long path to MINUSMA: Assessing the international response to the crisis in Mali', in M. Wyss, T. Tardy (eds.), *Peacekeeping in Africa: The evolving security architecture* (2014), 171, 172.

[151] Report of the Secretary-General on the situation in Mali, UN Doc. S/2012/894 (2012), 11, para .46. The UN also provided further support to ECOWAS and the AU "in developing the objectives, means and modalities of the envisaged deployment", *ibid.*

[152] *Ibid*., 11, para. 47.

[153] *Ibid*., 11, para. 48; Also Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 3, para.9.

[154] Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, paras. 50-51; 20, para. 85; See also Attachment 1, Overview of the situation in Mali and efforts of the international community to find lasting solutions to the crises, in Letter dated 8 November 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/825 (2012), 14, para. 15. It is too early to say whether the joint elaboration of the concept of operations will become standard practice between the UN and regional organisations on the African continent, but it has to be noted that the UN also deployed planners to the AU to support the operational planning meeting between the AU and ECCAS for the concept of operations of MISCA – France, the USA, the EU and the International Organization of la Francophonie also participated in the meeting, Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 22 of Security Council Resolution 2121 (2013), UN Doc. S/2013/677 (2013), 4, para. 16. The AU PSC itself, in its recent decision on the partnership between the AU and the UN called for "adequate, timeous, informal and formal consultations with the AU (…), as may be relevant, on the drafting of resolutions, presidential statements and

become AFISMA, was developed in cooperation between four international organisations: the AU, the UN, the EU and ECOWAS. The late reaction of the Security Council with regard to authorising the deployment of such an operation led to criticism from ECOWAS[155] and ultimately to the French intervention with "Operation Serval" for which France was applauded by the Secretary-General.[156]

The concept of operations (CONOPS) was revised in mid-February 2013 upon a request of the AU PSC[157] following developments on the ground by military and civilian experts of the AU and ECOWAS Commissions, Mali and other bilateral and multilateral partners.[158]

The troop strength of AFISMA was increased[159] and the leadership of AFISMA was entrusted to the AU which "had overall authority over the Mission."[160] The UN was heavily involved by not only providing planning support through UN military planners, but also helping in establishing coordination mechanisms as well as supporting the development of key documents for AFISMA, including "operational directives, guidelines for the protection of civilians, rules of engagement and a code of conduct."[161] The Conclusions of the Meeting of the Follow-up and Support Group and an AU report suggest that the EU was also involved in the joint planning, in cooperation with the three other international organisations, Mali and other stakeholders, but in a subsidiary role to the three

statements to the press on matters relating to Africa", which suggests that there is a common interest on behalf of both organisations to cooperate further in this activity, Peace and Security Council, 397th Meeting at the Level of the Heads of State and Government, New York 23 September 2013, PSC/AHG/COMM/1.(CCCXCVII), 3, para. 8 a. v.

[155] Letter dated 2 December 2010 from the President of the Commission of the Economic Community of West African States addressed to the Secretary-General, Transmission of the communiqué of the Council of Ministers of the Economic Community of West African States, Enclosure, Communiqué of the Council of Ministers on the report of the Secretary-General of the United Nations, UN Doc. S/2012/905 (2012), 3, para. 2. See also, *ibid.*, 3, para.7; 4, para. 9.

[156] Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6905th meeting, UN Doc. S/PV.6905 (2012), 2; Report of the Secretary-General on the situation in Mali, supra note 142, 1-2, para. 4.

[157] *Ibid*., 8, para. 45.

[158] Progress Report of the Chairperson of the Commission on the African-led International Support Mission in Mali, Peace and Security Council, 358th Meeting, 7 March 2013, PSC/PR/2(CCCLVIII), 3, para. 9; Solemn Declaration of the Assembly of the Union on the Situation in Mali, Addis Ababa, 27 and 28 January 2013, 3, para. 7 (a); Peace and Security Council, 358th Meeting, 7 March 2013, Addis Ababa, Ethiopia, PSC/PR/COMM.(CCCLVIII), Communiqué, 2, paras. 10-12.

[159] Report of the Secretary-General on the situation in Mali, *supra* note 142, 8, para. 45.

[160] 6th Ordinary Meeting of the Specialised Technical Committee on Defence, Safety and Security, Preparatory Meeting of Chiefs of Staff, Addis Ababa, Ethiopia, 29 – 30 April 2013, RPT/Exp/VI/STCDSS/(i-a)2013, 5, para. 20; 6, para. 23. Apparently, despite several planning meetings, ECOWAS didn't succeed in preparing a strategic concept for the operation which was satisfactory for the UN Security Council, ECOWAS Peace and Security Report, Issue 1 October 2012, Mali: making peace while preparing for war, 5.

[161] Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 4; Report of the Secretary-General on the situation in Mali, *supra* note 142, 9, para. 47. See also Security Council Resolution 2085, UN Doc. S/RES/2085 (2012), 5, para. 11.

other organisations.[162] The previously existing concept of operations for the international military mission, which would become AFISMA, was transmitted to the Security Council "to seek the latter's total support for its effective implementation."[163]

2. Mandate

AFISMA was endowed with a robust, coercive mandate involving an authorisation of offensive combat operations, together with the Malian Defence Forces, including simultaneously the strong protection of civilians.[164] According to the joint strategic concept of operations, the strategic objectives include, *inter alia*, the protection of "the population with respect to international human rights and international humanitarian and refugee law" as well as the reduction of threats posed by terrorist and transnational criminal groups and the establishment of a safe and secure environment in Mali.[165] The Security Council authorised AFISMA to "take all necessary measures, in compliance with applicable international humanitarian law and human rights law" to carry out*, inter alia*, the following tasks:

(b) To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations,

[162] The three organisations were requested to prepare a joint work plan for finalising the planning, Meeting of the Support and Follow-Up Group on the Situation in Mali, Bamako, Mali, 19 October 2012, Conclusions, 3, para. (iii); Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 1, para. 2; 3, para. 10. See also Assembly of the Union, Twentieth Ordinary Session, 27-28 January 2013, Addis Ababa, Ethiopia, Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa, Assembly/AU/3(XX), 35, 121.

[163] Enclosure 1, Communiqué on the situation in Mali, in Letter dated 8 November 2012, *supra* note 154, 4, para. 7. ECOWAS had requested the AU PSC to endorse the Concept and to ensure its transmission, together with the Strategic Concept to the United Nations Secretary-General within the deadline under SC Resolution 2071, Extraordinary Session of the Authority of ECOWAS Heads of State and Government, Abuja, Federal Republic of Nigeria, 11 November 2012, 3, para. 9; Annex, Letter dated 13 November 2012 from the Commissioner for Peace and Security of the African Union addressed to the Secretary-General, Letter dated 23 November 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/876 (2012), 2.

[164] Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Council Decision 2013/178/CFSP of 25 February 2013 on the signing and conclusion of the Agreement between the European Union and the Republic of Mali on the status in the Republic of Mali of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Council Decision 2013/87/CFSP of 18 February 2013 on the launch of a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Enclosure I, Joint Strategic Concept of Operations for the International Military Force and the Malian Defense and Security Forces to Restore the Authority of the State of Mali Over Its Entire National Territory, Letter dated 23 November 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/876 (2012), 11, para. b (Phase 2).

[165] Enclosure I, Revised joint strategic concept of operations for the African-led International Support Mission in Mali and the Malian Defence and Security Forces to restore the authority of the State of Mali over its entire national territory, Letter dated 15 March 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/163 (2013), 7, para. 11(d), (e), (f).

including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population;

(c) To transition to stabilisation activities to support the Malian authorities in maintaining security and consolidate State authority through appropriate capacities;

(d) To support the Malian authorities in their primary responsibility to protect the population; (…)

(f) To protect its personnel, facilities, premises, equipment and mission and to ensure the security and movement of its personnel;[166]

3. Political and Strategic Control of AFISMA

Cooperation on a strategic level is exercised through the established Mali Integrated Task Force (MITF) based at the AU Commission[167] in Addis Ababa which is composed of representatives of the AU, ECOWAS and the United Nations and is "responsible for coordination at the strategic level of AFISMA"[168] in the form of "strategic guidance and advice for AFISMA."[169] It is furthermore responsible to "ensure coordinated strategic implementation of the relevant decisions of the three organizations on the situation in Mali."[170] The Secretary-General also recommended that the Security Council plays an active role in ensuring that the African-led international military operation is "held fully accountable."[171] The Security Council encouraged the AU, ECOWAS, the EU and the UN to maintain coordination through the task force in its Resolution 2100 establishing MINUSMA,[172] as well as through the Support and Follow-up Group and it stressed "the importance of continued coordination" between the UN, the AU and ECOWAS.[173]

4. Operational Control

A joint coordination mechanism (JCM) for the implementation of Security Council Resolution 2085 was established in Bamako at the operational coordinational cell, under the leadership of the AU High Representative for Mali and the Sahel, President Pierre Buyoya who was appointed as the

[166] Security Council Resolution 2085, *supra* note 161, 4, para. 9. The Security Council also emphasised that all support provided by the UN, regional and subregional organisations and Member States "in the context of the military operation in Mali shall be consistent with international humanitarian and human rights law and refugee law" and mandated the Secretary-General accordingly to observe the adherence to IHL and human rights law through a to-be-established multidisciplinary UN presence in Mali, *ibid.*, 6, para. 18; 7, para. 23.
[167] Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para. 33.
[168] Progress Report of the Chairperson of the Commission, *supra* note 158, 2, para. 6; Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, supra note 144, 4.
[169] Statement by His Excellency, Mr. Téte António, Permanent Observer of the African Union to the United Nations, Security Council, 6905th meeting, *supra* note 156, 8.
[170] Solemn Declaration of the Assembly of the Union, *supra* note 158, 3, para. 7 (c).
[171] Report of the Secretary-General on the situation in Mali (2012), supra note 151, 21, para. 89.
[172] Security Council Resolution 2100, UN Doc. S/RES/2100 (2013), 3, Preamble.
[173] *Ibid.*, 5, para.5.

Special Representative and Head of AFISMA,[174] following consultations with ECOWAS.[175] It is co-chaired by the AU and the UN.[176] Its tasks are to facilitate "regular consultations on political leadership, resource mobilization and accountability as well as the monitoring and assessment of expenditures"[177], thereby coordinating support to the mission.[178] The ECOWAS Special Representative in Mali, Ambassador Cheaka Touré of Togo was appointed to his Deputy position.[179] It includes representatives of the AU, ECOWAS and the United Nations as well as members from Mali and other partners.[180] One can only speculate as to why the early plans of an ECOWAS Mali force[181] were changed to an AU-led international military force, but it is reasonable to presume that a wider range of capacities and resource acquirement by the AU were a determinative factor. Moreover, the Memorandum of Understanding between the AU and the RECs as part of the African Peace and Security Architecture might have triggered this development.

5. Chain of Command

The Chain of Command of AFISMA is headed by the Chairperson of the AU Commission who has delegated "overall responsibility" for all AU(-led) organisations to the Commissioner for Peace and Security. The AU exercises "operational authority" of AFISMA.[182] The Special Representative as Head of the Mission exercises "overall AUC authority over civilian, police and military components of

[174] He was appointed after consultations between the AU and ECOWAS, Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, para.52; Peace and Security Council, 358th Meeting, Communiqué, *supra* note 158, 1, para. 3.
[175] Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para. 32.
[176] Report of the Secretary-General on the situation in Mali, *supra* note 142, 6, para. 29.
[177] Statement by Mr. Bamba (Côte d'Ivoire) speaking on behalf of ECOWAS, Security Council, 6905th meeting, *supra* note 156, 9.
[178] Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para.33. See also Security Council Resolution 2085, *supra* note 161, 5, paras. 13-14.
[179] Progress Report of the Chairperson of the Commission, *supra* note 158, 2, para. 6. Previously the Chairperson of the AU Commission received the request by the PSC to initiate consultations with ECOWAS on the command and control of AFISMA, Peace and security Council, 341st Meeting, Addis Ababa, Ethiopia, 13 November 2012, Communiqué, PSC/PR/COMM.2(CCCXLI), 3, para.10. The Joint Strategic Concept of Operations foresaw that ECOWAS would, in consultation with the AU, appoint a Special Representative as Head of the Mission, Enclosure I, Joint Strategic Concept of Operations, *supra* note 164, 13, para. 36.
[180] Progress Report of the Chairperson of the Commission, *ibid*., 2, para. 6; Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 4; Report of the Secretary-General on the situation in Mali (2012), supra note 151, 12, 15, para. 64.
[181] Annex, Letter dated 28 September 2012 from the President of the Commission of the Economic Community of West African States addressed to the Secretary-General, Letter dated 4 October 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/739 (2012), 3.
[182] Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para. 32.

AFISMA" whereas the Force Commander and the Police Commander have "operational control over assigned forces."[183]

6. Operational/Financial support

The Secretary-General emphasised in his report that the UN does not possess neither capability in providing logistical support to international military forces deployed in the context of offensive combat operations against hostile armed forces.[184] Logistical support based on three possible alternatives would be funded through UN assessed contributions and comprise the equipment and support services as they would be provided to a UN operation.[185] The UN Security Council did not authorise the financing of AFISMA itself through assessed contributions,[186] but requested the Secretary-General in Resolution 2085 to establish a Trust Fund for the operation.[187] A donor's conference was convened by the AU in close consultation with ECOWAS in January 2013.[188]

The EU committed 50 million Euros through the African Peace Facility for AFISMA[189] and promised further financial and logistical support in close coordination with the AU and ECOWAS[190] following the activation of the "Clearing House" mechanisms to support AFISMA,[191] under the guidance of the

[183] *Ibid.*

[184] The AU had officially requested the authorisation of a support package funded by UN-assessed contributions, Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 1, para. 2.

[185] Letter dated 13 December 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/926 (2012), 1, 2nd paragraph; 3, 1st paragraph. A usual support package includes "provision of rations, fuel, engineering works, communications and medical support (…) [and] funding would also provide for the strategic deployment of new forces, the rotation of existing forces, the movement of equipment and supplies and additional staff to manage the delivery of the support package", *ibid.*, 3, 1st paragraph.

[186] The Security Council considered such an option in the Resolution and charged the Secretary-General to refine options within a report. Following the report and the development of events in Mali calling for the French intervention and a transfer from AFISMA to MINUSMA after 6 months, the Security-Council did not authorise the funding by assessed contributions, Security Council Resolution 2085, *supra* note 161, 6, paras. 21-22.

[187] See also Security Council Resolution 2100, *supra* note 172, 6, para. 10.

[188] Conclusions of the Donors' Conference for the African-led International Support Mission in Mali and the Malian Defense and Security Forces (2013), 1, paras. 2-3.

[189] Background, Foreign Affairs Council, Monday, 18 February 2013, in Brussels; Security Council Resolution 2085, *supra* note 161, 6, para. 20.

[190] Statement by Mr. Mayr-Harting, Head of the Delegation of the EU to the UN, Security Council, 6905th meeting, *supra* note 156, 18.

[191] EEAS provides a 'Clearing House' mechanism to support AFISMA mission in Mali, Brussels, 21 January 2013, A/30/13, 1-2.

AU High Representative for Mali and the Sahel.[192] The AU decided to contribute 50 Million US Dollars to the budget of AFISMA which amounts to 460 Million US Dollars.[193]

AFISMA also received logistical support from bilateral and multilateral donors "providing funding and reimbursement for operations, critical life support (rations, water and fuel), logistical support for strategic and in-theatre movements, direct materiel support and the training of enabling units."[194]

7. Training of Troops

EUTM Mali is supporting the training and reorganisation of the Malian Armed Forces.[195] The training includes sessions on gender and human rights.[196]

8. Coordination and cooperation between the international organisations regarding the political process

The PSC of the AU established the Support and Follow-up Group at its meeting in Banako, on 20 March 2012, to facilitate the resolution of the crisis in the North of Mali.[197] Early meetings of the Support and Follow-up Group on the situation in Mali were hosted by the EU, co-chaired by the AU, ECOWAS and the UN.[198] Later meetings of the Support and Follow-up Group were convened by the AU. The Group brings together ECOWAS, its member states, the AU, the UN, the EU, the International Organisation of *La Francophonie* (OIF), the Organisation of the Islamic Conference (OIC), all neighbouring countries, countries of the region, all permanent members of the Security Council and other bilateral partners.[199]

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[192] Council conclusions on Mali, 3222nd Foreign Affairs Council meeting, Brussels, 18 February 2013, 3, para. 8.
[193] Solemn Declaration of the Assembly of the Union, *supra* note 158, 5, para. (B) (i).
[194] Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/338 (2013), 14, para. 66.
[195] Statement by Under-Secretary-General for Political Affairs, Jeffrey Feltman, Security Council, 6905th meeting, *supra* note 156, 3. The Security Council took note of the (then) planned operation in its Resolution 2085, Security Council Resolution 2085, *supra* note 161, 4, para. 8.
[196] Statement by His Excellency, Mr. Ioannis Vrailas, Deputy Head of Delegation of the EU to the UN, Security Council, 6948th meeting, UN Doc. S/PV.6948 (2013), 33.
[197] Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 11, para. 28.
[198] Remarks to the press by High Representative Catherine Ashton following the meeting of the support and follow-up group on the situation in Mali, Brussels, 5th February 2013, 1; EU host a ministerial meeting of the Support and Follow-Up Group on the situation in Mali, European Union, Brussels, 5 February 2013, A/60/13, 1; Progress Report of the Chairperson of the Commission, *supra* note 158, 2, para. 8; 3183rd Council meeting, Foreign Affairs, Brussels, 23 July 2012, 15, para. 7. Some of the later meetings of the Support and Follow-up Group were under the joint chairmanship of the AU, the UN and ECOWAS, Meeting of the Support and Follow-Up Group on the Situation in Mali, *supra* note 162, 1, para. 1.
[199] Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 2, paras. 11, 28.

Whereas the group should remain "at the heart of international coordination on the situation in Mali"[200], the international efforts are mainly coordinated by the triumvirate of ECOWAS, the AU and the UN,[201] also via the High/Special Representatives for the Region of the involved organisations.[202] The UN favoured this close interaction as it "allow[s] the United Nations to focus on its core responsibilities", but it is also due to this close interaction and "the large numbers of actors involved, [that] the United Nations mission [MINUSMA] should provide a strong coordination mechanism."[203] Generally, there is a lot of coordination between the AU, ECOWAS, UN and the EU also through the exchange of documents[204] and through meetings on various levels.[205]

The UN supported the mediation efforts of ECOWAS through the UN Office in Mali (UNOM) and the Office of the Special Representative of the Secretary-General for West Africa (UNOWA).[206]

9. Assessment

The unprecedented peacekeeping context and the complexity of the security crisis in Mali have not triggered, on their own, such a concerted approach by the involved international organisations. External constraints, in the form of a lack of financial and logistical resources particularly, were influential in the change of plans from an ECOWAS to an African-led operation.[207] It is also plausible that the lack of time for long-term mission planning for Mali due to the land gain by the Islamist armed groups has forced the UN to interact so intensively with regional organisations which are better equipped to rapidly deploy troops than the UN. Generally speaking, one can conclude that the standard of cooperation of international organisations in the mandating, planning, deployment and supervision of AFISMA is, indeed, unprecedented.

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[200] *Ibid*., 11, para. 29; See also Statement by the Secretary-General, Security Council, 6820th meeting, UN Doc. S/PV.6820 (2012), 3.

[201] Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 11-12, para. 29. The Strategic Concept foresees nevertheless also the establishment of a working level mechanism among the UN Secretariat, The AU and ECOWAS Commissions, the EU and the OIF, and other international stakeholders as required, *ibid.*The Security Council requested in Resolution 2056 the Secretary-General to support the efforts of international and regional actors, including the Follow-up and Support Group, Security Council Resolution 2056, *supra* note 149, 5, para. 25.

[202] Letter dated 25 October 2012 from the Chairperson of the African Union Commission addressed to the Secretary-General, Annex to Letter dated 8 November 2012, *supra* note 154, 2.

[203] Report of the Secretary-General on the situation in Mali, *supra* note 142, 16, para. 84.

[204] Peace and Security Council 316th Meeting, Addis Ababa, Ethiopia, 3 April 2012, Communiqué, PSC/PR/COMM.(CCCXVI), 1, para. 5; 4, para. 16; Security Council Resolution 2056, *supra* note 149, para. 1.

[205] See e.g. Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, 8, paras. 32-33.

[206] Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 2.

[207] Théroux-Bénoni, 'The long path to MINUSMA', *ibid.,* 171, 172, 175-177.

Surprisingly, the level of cooperation is actually even higher than for the deployment of UNAMID in Darfur. The analysis of the various elements of cooperation has demonstrated that one can speak nearly of a "monolithic" peacekeeping operation; excluding the chain of command which is directed by the AU, all other elements of the operation were determined on the basis of cooperation and coordination arrangements between the AU, ECOWAS and the UN. Regarding the attribution of conduct, there is consequently no doubt that conduct arising during the deployment of AFISMA, and in violation of international law, would have to be attributed to all three organisations.

As regards the EU, it is suggested that its contributions to the deployment are also more than substantial, resulting in responsibility for the EU in partnership with the three other organisations. The EU's role in Mali has focused particularly on the purely political process of resolving the crisis in Mali, as well as on the political level of the peacekeeping operation, remaining true to its policy on the African continent. Then again, the EU has not only contributed a major part to the budget of AFISMA, but deployed a training mission (EUTM Mali) on the ground to train the Malian Armed Forces. It may be recalled that AFISMA, under its mandate, is acting also in support of the Malian Armed Forces. Furthermore, the EU has made a more than substantial contribution to the continuing operationalisation of the African Peace and Security Architecture of the AU who is the leading organisation, in terms of the chain of command of AFISMA. Therefore, it is submitted that these contributions of the EU remedy its more limited role in the other areas and, consequently, the EU has to be considered responsible for the conduct of AFISMA jointly with the AU, ECOWAS and the UN. However, it could be possible to retain a certain distinction between the EU and the AU, ECOWAS and the UN. The different input of the EU towards the command and control arrangements of AFISMA could be mirrored in the exercise of jurisdiction under human rights law. Whereas the three other organisations could possibly exercise jurisdiction on the basis of the spatial model of jurisdiction, the EU could be found to solely exercise jurisdiction on the basis of the personal model.

3. MINUSMA

1. Introduction

ECOWAS recommended the transformation of AFISMA in a UN stabilization operation, "with a robust mandate and a parallel rapid reaction force" based on one of two alternatives proposed by the Secretary-General.[208] The AU similarly requested such a transition.[209] According to a report by the

[208] Mr. Bamba, Côte d'Ivoire speaking on behalf of ECOWAS, Security Council, 6944th meeting, supra note 144, 8.
[209] Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, *supra* note 143, 4.

International Crisis Group, "the fear of sending an under-equipped African force into an extremely difficult environment requiring costly logistical support, because of the lack of reliable support", led the Security Council to quickly transform AFISMA into MINUSMA.[210] The authors of the ECOWAS report assert that the transformation was "primarily driven by France's concern", and also faced the logistical and financial constraints encountered by AFISMA.[211]

2. (Elaboration of the) Mandate

It was desired by the AU and ECOWAS to transform AFISMA into a UN operation "with an appropriate mandate"; in other words, "it should be a peace enforcement mission based on Chapter VII of the United Nations Charter."[212]

The mandate of MINUSMA was developed in cooperation with the AU: "We welcome the fact that a number of our concerns with the draft resolution have been taken into account in the current text. We are encouraged by the statements made by several parties that our remaining concerns will be taken into account when it comes to implementing the resolution."[213] Both organisations noted "that the content of the draft resolution broadly reflects the desire of both organizations, as contained in the relevant decisions" of the AU PSC and the ECOWAS Authority.[214] They emphasised that the anticipated resolution shall "fully incorporate[] the contributions that the two organizations will continue to make towards the definitive resolution of the security and institutional crisis facing Mali."[215]

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[210] International Crisis Group, Mali: Security, Dialogue and Meaningful Reform, Africa Report N°201 – 11 April 2013, 38.

[211] ECOWAS Peace and Security Report, Issue 5 July 2013, A tenuous solution in Mali: between internal constraints and external pressures, 6.

[212] Annex, Letter dated 26 March 2013 from the President of the Commission of the Economic Community of West African States addressed to the Secretary-General, Letter dated 16 April 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/231 (2013), 2; Progress Report of the Chairperson of the Commission, *supra* note 158, 3-4, paras. 12-13.

[213] Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, *supra* note 143, 4.

[214] Annex to the letter dated 3 May 2013 from the Secretary-General addressed to the President of the Security Council, Letter dated 3 May 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/265 (2013), 2. With regard to the envisaged transformation of the African-led Mission in the CAR into a UN operation, the AU stated that it "would welcome the co-authoring of the draft resolution with one of the African members of the UN Security Council" in line with a previously adopted AU communiqué and in the form of "the designation of African states as penholders/co-penholders of draft resolution [sic] that concern the continent", Peace and Security Council, 422nd Meeting, 7 March 2014, Addis Ababa, Ethiopia, PSC/PR/2.(CDXXII), 6, para. 20 (v); Peace and Security Council, 397th Meeting, *supra* note 154, 3, para. 8 a. iv.

[215] *Ibid.* This includes that the Security Council undertakes "appropriate consultations" with the AU and ECOWAS, "including on the leadership and the composition of the envisaged mission in a spirit of continuity.", Annex, Letter dated 7 March 2013 from the Commissioner for Peace and Security of the African Union to the

As also noted by the Support and Follow-up Group, the Security Council should "to ensure that the envisaged operation strengthen[s] Malian ownership, build[s] on the achievement made with ECOWAS and AU support, and foster[s] enhanced and coordinated African and international engagement in support of peace and security in Mali."[216] However, following the adoption of the Resolution establishing MINUSMA, the AU criticised the lack of consultation by the UN Security Council and noted that its concerns were not taken into account.[217] The Security Council, in turn, noted that the AU, ECOWAS, the Secretary-General and other international partners did not report back to the Security Council every 60 days as requested in its previous Resolution 2085.[218] Some members of the Security Council felt that the AU has been slow on occasions to act on urgent matters. Indeed, the limited AU representation in NY and the lack of meetings of the AU PSC members in New York mean that the African countries in the Security Council and the Council itself may not always be informed and aware of the AU PSC's decisions.[219]

MINUSMA operates in a similar way to AFISMA under robust rules of engagement and most of the military and police forces of AFISMA have been absorbed.[220] Under the mandate, MINUSMA troops will deploy from major cities in northern Mali, conducting patrols both alone and with the Malian

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Secretary-General, Letter dated 15 March 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/163 (2013), 2-3.

[216] Fourth Meeting of Support and Follow-up Group on the Situation in Mali, Bamako, Mali, 19 April 2013, Conclusions, 4, para. 14.

[217] The PSC "[**n**]**otes with concern** that Africa was not appropriately consulted in the drafting and consultation process that led to the adoption of the UN Security Council resolution authorizing the deployment of a UN Multidimensional Integrated Mission for Stabilization in Mali (MINUSMA) to take over AFISMA, and **stresses** that this situation is not in consonance with the spirit of partnership that the AU and the United Nations have been striving to promote for many years, on the basis of the provisions of Chapter VIII of the UN Charter. Council **further notes** that the resolution does not adequately take into account the foundation laid by the African stakeholders, which led to the launching of the process towards the return to constitutional order, the initiation of the ECOWAS-led mediation, the adoption of the transitional roadmap and the mobilization of the support of the international community through the Support and Follow-up Group on the situation in Mali. Council **also notes** that the resolution does not take into account the concerns formally expressed by the AU and ECOWAS and the proposals they constructively made to facilitate a coordinated international support for the ongoing efforts by the Malian stakeholders", Peace and Security Council, 371st Meeting, Addis Ababa, Ethiopia, 25 April 2013, PSC/PR/COMM.(CCCLXXI), Communiqué, para. 10. Nevertheless, the AU also accepted that its actions were limited by its own constraints. The Commissioner for Peace and Security declared accordingly that "[a]s a result of our own constraints, we had to rely on the French Operation Several (…) The Heads of State and Government, while appreciative of that timely support, felt, and rightly so, that Africa, through its continental Union and regional Mechanisms, should have played the leadership role", 7th Meeting of the Specialized Technical Committee on Defense, Safety and Security, Addis Ababa, 14 January 2014, Opening Remarks by Ambassador Smaïl Chergui, AU Commission for Peace and Security, 2.

[218] Security Council Resolution 2100, *supra* note 172, 3, Preamble.

[219] P. D. Williams, A. Boutellis, 'Partnership Peacekeeping: Challenges and Opportunities in The United Nations-African Union Relationship', in (2014) 113 *African Affairs*, 254, 260-261, 278. Cf. Report of the Security Council mission to the Democratic Republic of the Congo, Rwanda, Uganda and Ethiopia (including the African Union), UN Doc. S/2014/341 (2014), 21-22, para. 11.

[220] Statement by Mr. Hervé Ladsous, Under-Secretary-General for Peacekeeping Operations, Security Council 6985th meeting, *supra* note 145, 5.

defence and security forces whereby all MINUSMA operations "will take into account the need to minimize the risk to civilians."[221]

In this context,

> MINUSMA has a mandate to use all necessary means to ensure the implementation of many elements of its mandate, including taking active steps to deter and prevent the return of armed elements to key population centres. *While that does not describe a peace-enforcement or counter-terrorism role, which will be undertaken by others who have capacities beyond the scope of and means of the United Nations mandate and capabilities, it will require the United Nations to be as robust as possible in implementing that mandate in an environment characterized by threats.* [222] [Emphasis added]

All AFISMA troops which are re-hatted under MINUSMA will undergo "predeployment training and vetting procedures, including in accordance with the requirements of the United Nations human rights screening policy, so as to ensure that they (…) have the necessary skills to implement the mandate."[223] The transfer of AFISMA personnel to MINUSMA shall be accomplished in close coordination with the AU and ECOWAS.[224] Other UN operations in the region are required to share logistic and administrative support with MINUSMA to the extent possible.[225]

The mandate allows implicitly and expressly for the use of military force. First of all, the Resolution states that the mandate of MINUSMA shall be "to stabilize the key population centres, especially in the North of Mali, and, in this context, to deter threats and take active steps to prevent the return of armed elements to those areas."[226] In Paragraph 17 of the Resolution, however, the Security Council returns to the traditional formula explicitly authorising "MINUSMA to use all necessary means."[227] The mandate further specifically includes the protection of civilians and UN personnel:

> (i) To protect, without prejudice to the responsibility of the transitional authorities of Mali, civilians under imminent threat of physical violence, within its capacities and areas of deployment; (…)

[221] *Ibid*., 6.
[222] *Ibid*., 7. See also Report of the Secretary-General on the situation in Mali, *supra* note 142, 14, para. 75. These tasks include, e.g. maintaining checkpoints, conducting patrols and contributing to de-escalation of tensions, Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/582 (2013), 5, para. 24.
[223] Statement by Ms. Leila Zerrougui, Special Representative of the Secretary-General for Children and Armed Conflict, Security Council, 6980th meeting, UN Doc. S/PV.6980 (2013), 6.
[224] Security Council Resolution 2100, *supra* note 172, 5, para. 7.
[225] *Ibid*., 7, para. 15.
[226] *Ibid*., 7, para.16 (a), (i).
[227] *Ibid*., 9, para.17.

(iii) To protect the United Nations personnel, installations and equipment and ensure the security and freedom of movement of United Nations and associated personnel;[228]

MINUSMA shall also "monitor, help investigate and report to the Council on any abuses or violations of human rights or violations of international humanitarian law committed throughout Mali and to contribute to efforts to prevent such violations and abuses."[229]

3. Appointment of the Force Commander

ECOWAS and the AU also requested that the Special Representative leading MINUSMA is appointed after "appropriate consultations" with both organisations to contribute to the "African ownership of this effort and to optimize the efficiency of the Mission."[230] It could not be verified whether this request was approved by the UN.

4. Political Control

The AU emphasised strongly that the central political roles both of the AU and ECOWAS should be recognised "in full partnership with the United Nations Mission" and that these two organisations "would maintain a strong presence in Bamako to pursue their political commitment in Mali. Secondly, the practice of consultations that has characterized all our joint action on Mali to date should continue, especially with respect to major decisions, such as choosing contingents and selecting military and civilian leadership."[231] Both organisations have, in pursuance of their political commitment, "engaged the United Nations on possible areas of support in terms of strategic and operational-level communication, in theatre movement, accommodation, medical care and security for their personnel."[232] The AU accordingly established the AU Mission for Mali and the Sahel (MISAHEL) which was also mandated to promote regional security and cooperation.[233] On 4

[228] *Ibid*., 8, para. 16 (c), (i), (iii).
[229] *Ibid*., 8, para.16(d)(i).
[230] Progress Report of the Chairperson of the Commission, *supra* note 158, 4, para.16.
[231] Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, *supra* note 143, 4.
[232] Report of the Secretary-General on the situation in Mali (2013), *supra* note 194, 16, para. 75.
[233] Sixth Meeting of the Support and Follow-up Group on the Situaution in Mali, Bamako, 2 November 2013, Opening remarks by H.E. Dr. Nikosazana Diamini Zuma, Chairperson of the Commission of the African Union, 3-4. The priority areas of action of MISAHEL include the promotion of good governance, security cooperation and development issues. In order to enhance the effective contribution of MISAHEL to the peace process, a draft AU strategy for the Sahel Region has been developed, as well as a Plan of Action, 3rd Ministerial Meeting on the Enhancement of Security Cooperation and the Operationalisation of the African Peace and Security Architecture in the Sahelo-Saharan Region, Niamey, Niger, 19 February 2014, Second Progress Report of the Commission on the Implementation of the Conclusions of the Ministerial Meeting Held on 17 March 2013 and Prospects for the Enhancement of the Nouakchott Process, 1, para.5; 3, para. 9.

November, the AU affirmed at the ministerial meeting held in Bamako "its readiness to work for the establishment of a joint secretariat" on the basis of the UN integrated strategy for the Sahel.[234] This "flexible technical Secretariat" will serve to support coordination efforts within the region, co-chaired by the UN and the AU and also comprising the Arab Maghreb Union (AMU), ECOWAS, ECCAS, the Community of Sahelo-Saharan States (CENSAD), the World Bank Group, the African Development Bank (ADB), the Islamic Development Bank (IDB), the EU and the OIC.[235] The Security Council sent a mission to Mali from 31 January to 3 February 2014 which was not only an expression of the full support of the Council for the peace process, but also a way of gathering information in order to exercise political control.[236] The AU and the EU have developed own strategies for the Sahel aimed at increasing the cooperation with the other international actors; similar efforts have been undertaken by ECOWAS.[237] In its resolution renewing the mandate of MINUSMA, the Security Council also called upon the AU, ECOWAS, the EU and other key actors to coordinate their efforts for the promotion of lasting peace with the Special Representative of the Secretary-General and MINUSMA.[238]

5. Strategic and Operational Level

The UN Secretariat deepened its cooperation with the AU and ECOWAS regarding the transition from AFISMA to MINUSMA through meetings of multidisciplinary teams including "the conduct of a joint planning session and the subsequent establishment of a joint AFISMA-MINUSMA mechanism in Bamako."[239] Cooperation and coordination is also continued through the Mali Integrated Task Force which was established for AFISMA. [240]

6. Cooperation with the EU/EUTM Mali

Regarding EUTM, the Security Council called upon the EU, notably its Special Representative for the Sahel, "to coordinate closely with MINUSMA (…) to assist the transitional authorities of Mali in the Security Sector Reform."[241]

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[234] Statement by Ambassador Mr. Téte António, Permanent Observer of the African Union to the United Nations, Security Council, 7081st meeting, UN Doc. S/PV.7081 (2013), 7.
[235] Statement by the President of the Security Council, UN Doc. S/PRST/2013/20 (2013), 2.
[236] Letter dated 30 January 2013 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2014/72 (2014), Annex, Security Council mission to Mali: terms of reference, 2, para. 5; 3, para. 9.
[237] 3rd Ministerial Meeting on the Enhancement of Security Cooperation, *supra* note 233, 3, paras. 9-10.
[238] Security Council Resolution 2161, UN Doc. S/RES/2164 (2014), 5, para. 10.
[239] Report of the Secretary-General on the situation in Mali (2013), *supra* note 194, 14, para.67.
[240] Security Council Resolution 2100, *supra* note 172, 3, Preamble, 3rd Paragraph.
[241] *Ibid*., 9, para.22.

7. Assessment

The analysis of the structure of MINUSMA, from the point of view of control via and by other international organisations than the UN, reaffirms the assessment made regarding the UN operations in South Sudan. Indeed, it appears that the influence, control and input of other international organisations in UN mandated peacekeeping operations is more limited than the respective control and influence exercised by the United Nations over authorised operations.

In comparison to AFISMA, the inter-institutional control and cooperation arrangements are by far more constricted. The complaints raised by the AU about the lack of inclusion in the elaboration and formulation of the mandate and the reply by the Security Council relating to the non-submission of reports, indicates that there are inter-institutional tensions which might derive from the AU and ECOWAS not being willing to limit their engagement immediately after the transfer of authority from AFISMA to MINUSMA. Despite these problems, Mali may represent the beginning of a new era in peacekeeping operations in which the political process for conflict resolution and the deployment of a peacekeeping operation are included within a wide concerted approach by two or more international organisations. The political process and political consultation serve thereby as the "focus point" for the development of the strategy for the to-be-deployed peacekeeping operation.

It is also noticeable that the EU has been completely marginalised in the debate on and in the documents relating to MINUSMA. Bearing in mind the general concept of division of labour as it has emerged between the AU, the EU and the UN on the African continent, it corresponds to the limited engagement the EU plays in peacekeeping operations on the African continent when it comes to direct (military) involvement in peacekeeping operations.

The overwhelming control exercised by the UN over MINUSMA prevents any contribution by and any cooperation with other international organisations from reaching the degree of "more than substantial" for the purposes of the law of international responsibility such that it is submitted that there is no joint, immediate responsibility of the UN in union with other organisations for the conduct of MINUSMA. This does not touch upon the question whether the AU and ECOWAS could not be responsible as accessories.

4. The attempt of a typology of intra-mission relationships, its implications on international responsibilityand a clarification of the normative control criteria

The inquiry into the six different peacekeeping operations allowed defining further the contours of the suggested criterion of attribution in the context of cooperation in peacekeeping operations. The

analysis also showed that the cooperation arrangements existing in each peacekeeping operation are unique – for a variety of reasons including political and security interests of the involved actors, the availability and lack of resources and institutional cooperation agreements.

Nevertheless, this part of Chapter V will now attempt to establish a typology of possible relationships in intra-mission cooperation based on the different levels of control and cooperation as part of the operational framework of a peacekeeping operation. Naturally, such an exercise would be more probative where an analysis of all peacekeeping operations of the organisations which include a cooperative element, was conducted, but such an exercise would go beyond the scope of the present study.

The examination of the six operations showed that the mandate of the operations was developed on the basis of cooperation in all operations, aside from UNMISS and UNISFA.[242] Regarding the political level, five operations, excluding UNMISS, included cooperation arrangements on the political level, partially stretching over to the strategic level.

Once again, the degree of cooperation in this particular field varies, from limited support by the AU and ECOWAS to MINUSMA over equal participation of both the AU and the UN on the political level, exclusive strategic control of the UN to joint strategic planning of the UN and KFOR or even the exercise of a high amount of strategic control directly by the peacekeeping operation, as in the case of UNAMID. Regardless of these differences, this comparison confirms the particular relevance of cooperation and control on a political level for the attribution of conduct.

On the operational level, UNMISS and UNISFA are under the exclusive control of the UN and KFOR is under the exclusive control of NATO. Operational control over AFISMA was effectively executed by all four organisations, whereas MINUSMA is under UN control, but supported by the AU and ECOWAS. Bearing in mind the debate surrounding the adoption of MINUSMA's mandate, when the AU ultimately complained of the lack of consultation in the adoption of the mandate, one could *prima facie* reason that this debate has diminished the involvement of both organisations on the operational level.

However, the analysis showed that the AU and the ECOWAS were eager to contribute to MINUSMA on an operational level and this fact rather points towards a general distinction between UN and UN-mandated operations. It appears that the UN is less willing to incorporate the contribution of other actors in its own operations than it is willing to participate itself in UN-authorised operations. This particular behaviour is, of course, conditioned also by the role of the United Nations in maintaining

[242] In addition to Security Council Resolution 1244, KFOR's powers are also derived from the MTA concluded.

international peace and security and its long experience, but nevertheless, it could also be an expression of a certain *chasse gardée* the UN maintains, in practice.

Consequently one can formulate a first clarification to identify a case of normative control triggering the joint responsibility of international organisations. If the peacekeeping operation is a UN operation, the amount and level of intra-mission cooperation is likely to be more limited than in the case of a non-UN operation so that it is consequently also less likely that the required threshold of cooperation will be surpassed to justify an application of the normative control criteria. Furthermore, one can formulate a general presumption that a partially competitive relationship between two international organisations will translate into political cooperation in a peacekeeping operation and less operational cooperation. This nexus between political control and control on other operational levels is required to trigger and justify the application of the criterion of normative control. In this regard, one can formulate another general presumption. If the deployment of the peacekeeping operation and the political process is based on a comprehensive approach steered by the same institutional actors, it reinforces the control and oversight executed over the operation by all these institutional actors, increasing thereby the likelihood of a case of joint responsibility. The findings of the previous Chapters as in this Chapter further allow writing out in full a possible definition of the normative control criterion as developed throughout this study:

(1) Internationally wrongful acts committed during the deployment of a peacekeeping operation may be jointly attributed to two or several international organisations if:

a) the international organisation(s), other than the international organisation(s) under whose auspices the peacekeeping operation is deployed, effectively exercise the same degree of control over the conduct of the peacekeeping operation as the deploying organisation(s) on the basis of:
   (i) existing cooperation arrangements and mechanisms on an inter-institutional level between the external organisation(s) and the deploying operation(s) with regard to peacekeeping operations and;
   (ii) existing cooperation arrangements and mechanisms on the mission level between the external organisation(s) and the deploying organisation(s) and;
   (iii) a direct and immediate link between these cooperation arrangements and mechanisms on a political level and those cooperation arrangements and mechanisms on a tactical and strategic level in existence between the external organisation(s) and the deploying organisation(s) so that command and control over the operation is effectively shared (normative control).

(2) That article is without prejudice to the question if one or several member states of the international organisation(s) under whose auspices the peacekeeping operation is deployed may be also responsible for internationally wrongful acts occurring during the deployment of the operation on the basis of the relevant dispositions of the Articles on the Responsibility of International Organisations.

In this context, a direct and immediate link has to be interpreted in the sense that the exercise of political control is in fact indivisible from the exercise of control on both strategic and tactical levels of command and control.

To return to Virally's classification of relations between international organisations (*infra*, Chapter II), all the peacekeeping operations, which were used as case-studies, show that the relations between these organisations are based on coordination and cooperation, rather than confrontation. A variety of reasons were established throughout this study for this development which is even more evident on the institutional level. The lack of resources in various areas is one main reason and it also explains why the relations between the organisations are not completely free of competition. However, one can even go so far to ask as to whether regional organisations are not even obliged to carry out the decisions of the Security Council with regard to the deployment of a peacekeeping operation.

Chapter I traced the mechanisms for cooperation with regional organisations under the UN Charter, but *en passant* the basic fact was mentioned that regional organisations *per se* as non-members of the UN are not directly bound by the Charter. In the analysis presented in this study, we have seen the development of institutionalised relations between the UN and regional organisations, both on the institutional level, as well as in the operational context so that it does not "[seem] to be sufficient" to limit a legal duty under the UN Charter to member states, contrary to what is asserted in the Commentary to Article 48 (2) of the UN Charter.[243]

Therefore, on the basis of an analysis of the potential legal foundations, it might also be possible to shed even more light upon the application of the normative control criterion to peacekeeping operations because if regional organisations were obliged to cooperate or even to implement decisions of the Security Council, it would raise questions with regard to direction and control in the context of cooperation in peacekeeping operations. Could the UN be responsible on the basis of the

[243] A. Reinisch, G. Novak, 'Article 48', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1376, 1381, mn. 10

fact that regional organisations were obliged to carry out its decision regarding the deployment of a peacekeeping operation and how would that impair the responsibility of these regional organisations?

5. *Chapter VIII revisited – regional organisations as being bound by the system of collective security*

Regarding the question whether the UN Charter and particularly decisions of the Security Council are binding upon entities which are non-members of the UN, Article 2(6) of the Charter comes to mind. According to that disposition, the organisation "shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." In addition, Article 48 (2) of the UN Charter stipulates that decisions of the Security Council for maintaining international peace and security shall be carried out by the Members of the UN "directly and through their action in the appropriate international agencies of which they are members."

The wording and the context of Article 2 (6) do not suggest that the obligations therein do extend to other international organisations.[244] However, in the Commentary it is argued that the limited scope of Article 2(6) does not allow the organisation to adequately address external threats to international peace and security and accordingly it has been "superseded by a universal system of collective security which is based upon the relevant Charter provisions but does not derive its legal force from the Charter as a treaty (…) [i]t subjects all relevant international actors to the authority of the UN, and in particular the SC, with regard to measures necessary for the maintenance of international peace and security."[245] They are all "under an obligation to give the UN every assistance in any action it takes in accordance with the Charter; and in particular to accept and carry out the decisions of the SC."[246] The practice of the UN, and States and non-member States confirms that the UN is competent to create obligations for members and non-members alike.

In 1953, the Security had already expressed the view that it can create obligations for non-members; in Resolution 101 the Council recalled "to the Governments of Israel and Jordan", non-members at that time, their obligations under Security Council Resolutions and reaffirmed "that it is essential (…)

[244] S. Talmon, 'Article 2(6)', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 252, 262, mn. 32.
[245] *Ibid*., 252, 265, mn. 39-41.
[246] *Ibid*., 252, 265, mn.40.

that the parties abide by their obligations under (…) the resolutions of the Security Council."[247] Since the adoption of Resolution 418 in 1977, the Security Council has addressed all resolutions containing binding obligations regarding sanctions to all states, although at that time, there were still more than 10 States which were not members of the organisation.[248] The Security Council made clear in that resolution that it is binding upon all states.[249]

The reference to non-members of the organisation has been continuously replaced over the years with references to all international and regional organisations, starting in 1991. Organisations such as the EU "have consistently implemented economic and other sanctions decisions of the SC, indicating an intention to be bound."[250] Talmon argues that, although the EU is not bound by the UN Charter *per se*, it is "subject to the universal system of collective security and thus bound to comply with the decisions of the SC",[251] a view which seemed to be confirmed in Declaration 13 annexed to the Treaty of Lisbon, according to which the EU *per se*, as well as its Member States remain bound by the provisions of the Charter of the United Nations, including the primary responsibility of the Security Council for the maintenance of international peace and security.[252]

Member-States of the UN have expressed repeatedly over the years the opinion that the powers of the UN with respect to maintaining international peace and security apply also to non-members.[253] The ICJ in the *Namibia* advisory opinion held that non-members of the UN were not bound by Art. 24 and 25 of the Charter, but that certain decisions of the SC are "opposable to all States (…) [and] that it is for non-member States to act in accordance with those decisions."[254] Although the Court's advisory opinion was given within the specific circumstances of the Namibia case, the termination of

[247] Security Council Resolution 101, UN Doc. S/RES/101 (1953), paras. B2, C1. Cf also SC Resolutions 50 and 54 which were also addressed at Israel and Jordan when they were non-members of the organisation, Security Council Resolution 50, UN Doc. S/RES/50 (1948), Security Council Resolution 54, UN Doc. S/RES/54 (1948).
[248] Talmon, 'Article 2(6)', *supra* note 244, 252, 268, mn.46. There have been some later resolutions when the SC referred expressly to "States non members" and "States", but the large majority of resolutions has been simply addressed to all States and the occasional distinction does not seem to have any significance regarding the binding effect of the resolutions, *ibid.*, 268-269, mn. 47-48.
[249] C. Tomuschat, Obligations Arising for States Without or Against Their Will, Recueil des cours de l'Académie de La Haye, Volume 241(1993), 195, 245.
[250] Talmon, 'Article 2(6)', *supra* note 244, 252, 269, mn 49; See also D. Bethlehem, 'The European Union', in V. Gowlland-Debbas, *National Implementation of United Nations Sanctions. A Comparative Study* (2004), 123 – 165.
[251] Talmon, 'Article 2(6)', *supra* note 244, 252, 269 mn. 50.
[252] 13. Declaration concerning the common foreign and security policy, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, 30.3.2010, Official Journal of the European Union, C 83/343, 9.
[253] Several members e.g. expressed the view that Indonesia would remain "amenable to the jurisdiction of the Security Council", when the country decided to withdrew from the UN. Also for further references, Talmon, 'Article 2(6)', *supra* note 244, 275, mn. 64-64.
[254] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971)*, paras. 126, 133.

the mandate, it nevertheless shows that non-member States are supposed to assist actions taken by the UN.

In the *Kosovo* advisory opinion, the ICJ had another opportunity to express its views on the issue and the judges declared that "it has not been uncommon for the Security Council to make demands *on actors other than* United Nations Member States and *inter-governmental organizations*"[255] [Emphasis added]. So it appears, the ICJ considered it to be existing practice that the Security Council would adopt resolutions binding also upon international organisations.

Nevertheless, it raises questions about the legal basis of such a binding regime of collective security which transcends the boundaries of the UN Charter. One possibility would be to rely on the dictum in the *Reparations* judgment (*infra*, Chapter III) regarding "the objective international personality" with which the UN was created and to argue that the majority of the international community could create an "objective" and universal system of collective security. However, as rightly pointed out by Talmon, it is very unlikely that the ICJ intended to attribute general-law making power to the UN in its advisory opinion.[256] Moreover, such an interpretation does not provide an answer regarding a valid source of international law for such a system. The lack of a recognised basis in international law is the same problem encountered by arguments of constitutionalism which perceive the Charter as the constitution of the international community. Under this theory, the rules of the Charter supersede ordinary rules and are binding on all members of the international community.[257] The problem with this theory is also that its legal source is the preconceived idea on which it is based, so that in the end it is a circular argument.

The only realistic and legally sound argument is that on the basis of practice of the UN and the SC, the opinions expressed by member states and the practice of non-member States and regional organisations, "at least since the 1990s, the provisions of the Charter dealing with international peace and security have acquired the status of customary international law that are binding on non-members, both States and non-State actors alike, independently of the Charter."[258]

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[255] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 116.
[256] Talmon, 'Article 2(6)', *supra* note 244, 252, 277, mn. 70.
[257] *Ibid*., 252, 278, mn. 72-73.
[258] *Ibid*., 252, 279 mn. 75. See also A. Tzanakopoulos, *Disobeying the Security Council. Countermeasure against Wrongful Sanctions* (2011), 78; T. M. Franck, 'Is the U.N. Charter a Constitution ?', in J.A. Frowein, K. Scharioth, I. Winkelmann et al. (eds.), *Verhandeln für den Frieden – Negotiating for Peace. Liber Amicorum Tono Eitel* (2003), 95, 97. Klein, writing in 1992, held that "it is unanimously held today that the United Nations may direct sanctions against non-members as well as against members", E. Klein, 'Sanctions by International Organizations and Economic Communities', in (1992) 30 *Archiv des Völkerrechts*, 101, 104.

The present study has demonstrated that there is an abundance of interaction, practice and cooperation between the UN and regional organisations. In this context, the primary responsibility for maintaining international peace and security of the Security Council has been emphasised by all regional organisations which are part of this study in official documents, as well as in practice. The clear trend of regional organisations to seek the authorisation for the deployment of peacekeeping operations also suggests that regional organisations consider themselves to be bound by the provisions of the UN Charter, on a customary law basis.[259] One could therefore say that regional organisations have voluntary submitted themselves to the legal obligations which exist under the collective system for maintaining international peace and security.

Are there any implications for the distribution of responsibility between international organisations for the purpose of the present study?

Firstly, in the context of resolutions of the Security Council, it is necessary to distinguish between non-binding provisions and provisions which – by the language and the context of the resolution – are binding upon regional organisations. Mere recommendations do not create legal obligations and they could therefore also not hold the SC responsible if they are acted upon by a regional organisation.[260] However, the question is, whether specific obligations in mandates of peacekeeping operations would legally bind the regional organisations which are mandated. It is now standard practice of the Security Council to include dispositions regarding the protection of civilians in the mandates as well as dispositions such as "during the deployment of operation X, organisation Y shall ensure the respect of the applicable human rights, international humanitarian and refugee law."

The Security Council emphasised again the importance of the protection of civilians in the context of peacekeeping operations, in a Presidential Statement accompanied by a 78 pages long *aide-memoire* in February 2014.[261] Thus, the question arises as to what the implications regarding the law of responsibility would be if a binding obligation by the Security Council addressed to a regional organisation is either not executed or violated in practice. This question has to be seen in the wider context of a breach of an international obligation which will be analysed in the following part of the thesis. First of all, one has to distinguish between the different kinds of obligations; the conditions for

[259] Cf. Article 38 of the 1986 VCLT between States and International Organizations or Between International Organizations.

[260] Authorisations addressed to Member States or organisations by an international organisation to commit an act that would be internationally wrongful if committed by the latter lead to the authorising organisation being responsible under Article 17 ARIO.

[261] Statement by the President of the Security Council, UN Doc. S/PRST/2014/3 (2014). See also Human Rights due diligence policy on United Nations support to non-United Nations security forces, Annex to Identical letters dated 25 February 2013 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, UN Doc. A/67/777–S/2013/110 (2013).

a breach of a due diligence or an obligation of means by a regional organisation are different from the conditions for a breach of an obligation of result. Moreover, if one accepts the view that regional organisations are bound by the system of collective security of the UN Charter on the basis of customary international law, would the breach of an obligation owed to the Security Council on the basis of a mandate amount automatically to a breach of international law or would it be a breach of UN internal law only?

5.2. Breach of an international obligation

1. Breach of an international obligation in the form of a mandate of a peacekeeping operation

Article 10 (2) ARIO stipulates that a breach of an international obligation by an international organisation "includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization." The Commentary of the ILC to Article 10 explains that Paragraph 2 of the disposition includes generally – contrary to that which its wording might suggest – all rules of the organisation which may form part of international law.[262] Consequently Article 10 (2) has to be interpreted as covering also cases of breaches of an international obligation by an organisation under its own rules towards other legal entities than than its members.

Resolutions of organs of an organisation are considered to be part of the rules of the organisation according to Article 2 b) ARIO.[263] Thus, it can be questioned whether the breach of a mandate in the form of a Security Council Resolution by a peacekeeping operation would amount to a breach of an international obligation. According to the Commentary of the ILC, it is disputed which or whether rules of international organisations are part of international law or can only be seen as part of the "internal" law of the organisation.[264]

The ICJ observed in the *Kosovo* advisory opinion that "[t]he Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law" and concluded that "Security Council resolution 1244 (1999) and the Constitutional Framework form

[262] Report of the International Law Commission, Sixty-third session, *supra 2*, 98, para.8.
[263] The UN itself in its comments to the ILC stated that decisions and resolutions of the principal organs of the UN may fall under the rules of the organisation as well as the establishment and conduct of peacekeeping operations which has developed almost entirely through practice, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637/Add.1 (2011), 7, para.5.
[264] Report of the International Law Commission, Sixty-third session, *supra 2*, 97-98, para.5.

part of (…) international law."[265] Mandates of the Security Council, in the form of a resolution, are nowadays rather lengthy documents containing various, specific obligations. Therefore, it appears first of all that it would be necessary to determine not whether the resolution is part of international law, but rather whether one or several specific dispositions are part of international law.

Regarding the specific context of peacekeeping operations, recent mandates, in particular, contain dispositions for the protection of civilians, based on ideas derived from human rights and humanitarian law. Article 10 (1) stipulates that the breach of an international obligation exists "regardless of the origin or character of the obligation concerned." Therefore, any breach of a rule of international law as enshrined in the mandate of a peacekeeping operation would be a breach of an international obligation, without prejudice to the question as to whether the potentially corresponding human rights obligation of the international organisation was also breached.[266]

Thus, if a United Nations mandated peacekeeping operation breaches an obligation owed to the Security Council, which is also part of international law, there are two consequences. Firstly, it establishes responsibility under international law for these entities and the conduct could be attributed to them. In this context, the question arises as to whether the fact that the obligation was also owed to the United Nations and the Security Council impairs upon the attribution of conduct. If one were to argue that the Security Council, binding the peacekeeping operation to adopt a certain specific conduct was bound itself to monitor the implementation of that resolution, it would, indeed influence the attribution of conduct and responsibility, by distinguishing the positive obligations of the SC to monitor the conduct and the negative obligation of the peacekeeping operation to abstain from certain conduct.[267]

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[265] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, 42-43, paras. 88-89, 93.

[266] It is therefore not necessary to construe the violation of a Security Council Resolution as a violation of an international obligation through a piggybacking approach; considering the mandate of the Resolution to contain implicit or explicit obligations under human rights law, IHL or any other particular body of law. The same argument is also presented by Verdirame without, however, referring to the *Kosovo* advisory opinion, Verdirame, *supra* note 3, 98. In contrast the UN emphasised that it would be necessary for the UN to make clear in its definition of rules that not a violation of the rules as such – entails the responsibility of the organisation, but the violation of the international law obligations it might contain, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 263, 7, para. 6. The District Court in The Hague likewise considered UNPROFOR's mandate as having "a powers-creating character" but not as "calling to life" enforceable obligations under international law, District Court in The Hague, Stichting Mothers of Srebrenica and Others v. The Netherlands, Judgment, Case No. C/09/295247 / HA ZA 07-2973, 16 July 2014, para. 4149. But as argued, one has to look at each specific mandate in order to determine whether it contains obligations derived, for instance, from human rights law or from IHL.

[267] In the context of human rights law, a regional organisation owes in any case obligations also to the UN as at least some human rights norms are considered to be obligations *erga omnes* and *vice versa*.

Returning to the distinction between an obligation under the mandate of a peacekeeping operation and an independently existing obligation under human rights law, a derogation from human rights law by the peacekeeping operation would *per se* not constitute a violation of human rights law as it contains a separate obligation under international law.

This particular issue became, however, relevant in the case of *Al-Jedda* before the ECtHR and in the form of Article 103 of the UN Charter. The Court concluded that there was no contradiction between human rights law and Security Council Resolution 1546 and did not, accordingly, pronounce itself on the potential effect of Article 103 of the Charter.[268]

However, in the present context of cooperation between the UN and regional organisations, Article 103 is generally not relevant.[269] First of all, it applies to the member states of the UN and to agreements concluded by them which are contradictory to their obligations under the UN Charter. Moreover, at least the most fundamental human rights norms are considered to be part of *jus cogens* and they would prevail over Article 103 at least, arguably, on their customary law basis. Nevertheless, if one takes the view that Article 103 applies equally to the UN itself, it would allow the organisation to invoke that disposition to justify non-compliance with an international obligation, also with regard to Article 32 ARIO which stipulates that ""[t]he responsible international organization may not rely on its rules as justifications for failure to comply with its obligations under this Part."[270]

The most interesting aspect is that such an application of Article 103 could even have an impact upon the distribution of responsibility between the UN and regional organisations in the context of peacekeeping operations. If conduct arising during the deployment of a UN mandated operation were to be attributed jointly to the UN and a regional organisation and the Security Council would have explicitly derogated in the resolution from a specific human right,[271] the subsequent analysis of the breach of an international obligation would lead to the paradoxical situation that the UN could

[268] The European Court of Human Rights was seized of the question in *Al-Jedda*, but concluding that there was no contradiction between human rights law and Security Council Resolution 1546, the Court did not have to pronounce itself on the potential effect of Article 103, Case *of Al-Jedda v. The United Kingdom*, Grand Chamber, Judgment, 7 July 2011, 56-60, paras. 101-109; Cf. A. Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?', in (2013) 18 *Journal of Conflict & Security Law*, 233, 253.

[269] Unless one were to take the view that on the basis of customary law obligations of regional organisations towards the UN, as it was just argued, regional organisations could also be entitled to invoke Article 103 regarding obligations under international law which would be contravening their obligations towards the UN.

[270] The UN commented upon this particular point in its submissions to the ILC, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 263, 36 para. 3.

[271] Presupposing that IHL would not be applicable as otherwise the UN might be nevertheless bound by the corresponding or even *lex specialis* rule of IHL.

rely on Article 103 as a derogation in breach of any violation, whereas the regional organisation would, potentially, be responsible on its own,[272] despite the fact that the conduct was attributed to both of them.

It is not likely to arise in practice as the mandates given out by the Security Council do not generally contain obligations which would derogate from human rights law – rather the opposite – nor be so concise and specific to correspond to a particular human rights.[273] Although the mandate of recent peacekeeping operations are more precise regarding the competences and powers granted to the peacekeeping forces, the Security Council continues to rely likewise on the formula of "all necessary means".[274]

But this theoretical argument nevertheless underlines not only the complexity of the whole issue, but also the importance of the internal law of international organisations in applying the law of responsibility. In summary, if regional organisations are considered to be bound by the system of collective security as established by the United Nations, specific obligations handed out to these organisations by the UN Security Council could also impair the distribution of responsibility between the organisations.

2. Breach of an international obligation in the form of the obligations arising under the Internal Law of the organisations

Breaches of international obligations of international organisations in the context of peacekeeping operations may also arise in the form of violations of the internal law of these organisations if these rules are also part of international law. The following part contains a brief analysis of the internal law of the AU, the UN and the EU on the basis of their particular relevance and involvement in all examined case studies.

[272] It is harder to assess whether the result would be the same in the case of a UN-authorised operation. If one considers the SC Resolution establishing the operation as a mere authorisation and not of a delegation of powers of the Council, it would be difficult to argue that Article 103 would be applicable which could leave room for an application of Article 17 ARIO.
[273] Conte, *supra* note 268, 233, 260.
[274] Member states are very aware of the problems associated with such vague mandates. As pointed out by Gowlland-Debbas: "It is understandable, therefore, that member states have treated such a delegation of the Council's powers to individual actors with extreme caution and that they have made numerous efforts to circumscribe Council authorisations, consistently insisting that the Council retain a degree of authority and control over such operations and avoid providing 'a blank cheque for excessive and indiscriminate use of force.", V. Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', (2000) 11 *European Journal of International Law*, 361, 369.

1. African Union

Since 2009, the African Union has prioritised the development of a protection of civilians approach for AU-mandate peacekeeping operations[275] leading in 2010 to the adoption of the Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations. According to the guidelines, the protection of civilians includes "to ensure the full respect for the rights of (…) the individual recognised under regional instruments including the African Charter of Human and Peoples' Rights (…), international law, including humanitarian, human rights and refugee law.[276] In the same year, the Commission decided to mainstream the draft Guidelines for the Protection of Civilians in Peace Support Missions.[277] For the further elaboration of the Guidelines, the AU has consulted on a regular basis with the UN "to ensure that the development of the Guidelines (…) is aligned to the UN approach as closely as possible."[278] Regarding the specific case of detentions in peacekeeping operations, one official document suggests that the ASF policy documents do not contain any official AU detention policy.[279]

Regarding specifically the application of IHL, the status of mission agreement of the African Union for the Ceasefire Commission in the Darfur region states that the African Union shall ensure that the operation is conducted with full respect of the principles and rules of the Geneva Conventions and Additional Protocols.[280] The same disposition is inserted in the SOMA for AMISOM[281] so that one can probably conclude that it is the current practice of the AU now to demand respect for the principles and rules of the Geneva Conventions. In short, the internal documents of the AU confirm the application of human rights law and international humanitarian law without containing further specific rules regarding the application of these two areas of international law.

[275] Progress Report of the Chairperson of the commission on the Development of Guidelines for the Protection of Civilians in African Union Peace Support Operations, PSC/PR/2(CCLXXIX) (2011), 1, para.5.
[276] Proposed Guidelines for the Protection of Civilians in African Union Peace Support Operations For Considerations By African Union (2010), 2, para.1.
[277] Report of the Chairperson of the Commission on the Situation in Somalia, PSC/MIN/1(CCLXLV) (2010), 8, para. 33; Report of the Chairperson of the Commission on the Situation in Somalia, PSC/MIN/1(CCLXV) (2010), 9, para. 33; 22, para.83 (iii).
[278] Progress Report of the Chairperson of the commission, *supra* note 275, 3, para.12.
[279] AMANI Africa, Implementation Plan, Draft, African Union Peace Support Operations Division, 11.
[280] Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC) (2004), para. 8 a), available online at: http://www.africa-union.org/Darfur/Agreements/soma.pdf
[281] Status of Mission Agreement (SOMA) between the Transnational Federal Government of the Somali Republic and The African Union on The African Union Mission in Somalia (AMISOM), 5, paras.9-10.

2. United Nations

Specifically regarding the United Nations, it is suggested that this organisation is bound by human rights on the basis of its internal law. The Charter of the United Nations contains several references to the promotion and promulgation of human rights. These references are however, very generic and do not contain specific substantive obligations for the United Nations.[282] On the contrary, the human rights provisions in the United Nations Charter are rather "scattered, terse, even cryptic"[283], so that one cannot read in the Charter what is not there.[284] But it is uncontroversial that international organisations "may be bound by obligations arising under its constituent instrument."[285] So it is beyond doubt that without the activities of the United Nations, human rights would not have become a "subject of international interest" and it seems difficult to imagine if not illogical or immoral to consider the United Nations not to be bound at least by the most fundamental human rights and obligations it is promoting.[286] The Capstone document, defines international human rights as an integral part of the normative framework of peacekeeping operations, but emphasises simultaneously that peacekeeping operations "should be conducted/should act in accordance with (…) international human rights law."[287]

As confirmed by the Secretary-General in his report of 2011, the Bulletin on Observance by United Nations forces of international humanitarian law is "binding upon all members of United Nations peace operations (…)[and]signal[s] formal recognition of the applicability of International Humanitarian Law to United Nations peace operations."[288] The bulletin covers the quintessential dispositions of international humanitarian law, including some which might not yet be deemed of

[282] Cf. also Kolb, Porretto, Vité, *supra* note 25, 258-259.
[283] H. Steiner, P. Alston, R. Goodman, *International Human Rights in Context: Law, politics, morals* (2008), 135.
[284] A. Tzanakopoulos, 'Hierarchy in International Law: The Place of Human rights', in E. De Wet, J. Widmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012), 42, 61. It appears, that, indeed the UN is rather called upon promoting the human rights obligations in the Charter, N. Quénivet, 'Human Rights Law and Peacekeeping Operations', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 99, 118-19.
[285] Verdirame, *supra* note 3, 73.
[286] Cf. Kolb, Porretto, Vité, *supra* note 25, 259-260 ; see also F. Mégret, F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', in (2003) 25 *Human Rights Quarterly*, 314, 317-20. Verdirame suggests also that the direct and express references in the UN Charter "are sufficient to establish a legal basis for their general applicability to the activities of the UN", Verdirame, *ibid.,* 74. In his view, a general obligation of the UN to respect human rights arises from a combination of Article 1 and Article 2, *ibid.*
[287] United Nations Peacekeeping Operations, Principles and Guidelines (2008), the so-called "Capstone Doctrine", 14, para. 1.2.; Note of Guidance on Integrated Missions, *supra* note 26, para. 3, para.16.
[288] Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc. A/56/326 (2001), 9, para. 19. But see also Verdirame, *ibid.,* 205-206; Zwanenburg, *supra* note 24, 176. See generally, K. Grenfall, 'Perspective on the applicability and application of international humanitarian law: the UN context', in (2013) 95 *International Review of the Red Cross*, 645-652.

enjoying a customary law character.[289] But it is not applicable to UN authorised operations, and the responsibility "to protect and ensure the respect" for international humanitarian law in the latter case rests with the state or regional organizations conducting the operation.[290] The Bulletin is applicable in peacekeeping operations when the use of force is permitted in self-defence.[291] It provides particularly that the UN force shall "make a clear distinction at all times between civilians and combatants (…) Attacks on civilians (…) are prohibited."[292] It is binding only on an internal level, but does not possess a binding effect on the external sphere.[293]

3. European Union

Article 6(1) TEU states that EU is founded on the principle of liberty, democracy, respect for fundamental rights and fundamental freedoms, and thereby it lays the ground for the incorporation of IHL into the European legal order, it would be a misnomer if principles "so fundamental to the respect of the human person" would not fall under this formula.[294] Regarding the particular field of the CFSP, Article 21 TEU stipulates that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation (….) the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity."[295]

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[289] D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', in (2005) 94 *American Journal of International Law,* 406, 408.

[290] *Ibid*., 406, 408; Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 (1999), 1, para.1.1. In this regard, in Resolution 2085, the Security Council decided that AFISMA "shall take all necessary mesures, in compliance with applicable international humanitarian law and human rights law", *supra* note 161, 4, para. 9. Thus, although the Council did not oblige AFISMA to respect the bulletin, it nevertheless obliged the peacekeeping operation to respect the applicable legal framework.

[291] Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 (1999), para.1.1. It has to be pointed out that the Bulletin codifies some of the fundamental principles of IHL, but that it is not always in accordance with the respective dispositions of IHL. In Para. 1.1 it is stated that "The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement." Combatants can normally be always attacked under IHL whereas civilians can only be attacked during the time of their direct participation in hostilities, thus the Bulletin considers peacekeeping forces to be falling in-between the two categories.

[292] *Ibid*., para.5.1.

[293] B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen* (2006), 71-72.

[294] V. Falco, 'The Internal Legal Order of the European Union as a Complementary Framework for Its Obligations under IHL', in (2009) 42 *Israel Law Review*, 168, 191; O. De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51, 106-107.

[295] D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 660; Council of the European Union, EU Strategic Framework and Action Plan on Human Rights on Democracy, Luxembourg, 25 June 2012, 1-2; EU

Further human rights obligations of the EU derive from the EU's Charter of Fundamental Rights[296] which has the same legal value as the EU Treaties. Naert argues that the EU is already bound by the ECHR in substance on the basis of an operation of Article 6 TEU.[297] In contrast, Gaja argues that the status of the ECHR under EU law is not completely clear. Article 6 (3) speaks of fundamental rights as guaranteed by the ECHR which points towards a binding effect within EU law, and suggests a status of the ECHR under EU law equivalent to other provisions in the treaties.[298]

Guidelines, Human Rights and International Humanitarian Law (2009), 3, 12-13; Cf. also Council of the European Union, Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment – An up-date of the Guidelines, Brussels, 15 March 2012, 2; EU Guidelines on Children and Armed Conflict, 2, para.7; Mainstreaming Human Rights and gender into European Security and Defence Policy (2008), 11-12.

[296] The Status of the European Union Charter of Fundamental Rights and Freedoms was left open, not only for formal but also for political reasons as the integration of human rights in any given political system cannot only unite but as well divide the Community, especially concerning sensitive issues, D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 237; A. Clapham, 'A Human Rights Policy for the European Community', in (1990) 10 *Yearbook of European Law*, 309, 311. The Court of Justice started referring to it as a source of fundamental rights following the failure of the Constitutional Treaty, but it has always been relied upon as an alternative source and it was then proclaimed with slight institutional modifications following the signing of the Lisbon Treaty, D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 238, for the case-law of the Court, see, i.e., C-540/03, *European Parliament v. Council of the European Union*, Judgment of the Court (Grand Chamber of 27 June 2006, p. I - 5822 – I - 5823, para. 38-39; I - 5841, para. 107; C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, Judgment of the Court (Grand Chamber) of 29 January 2008, paras. 1, 61-70; Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Papierfabrik August Koehler AG (C-322/07 P), Bolloré SA (C-327/07 P) and Distribuidora Vizcaína de Papeles SL (C-338/07 P) v. Commission of the European Communities*, Judgment of the Court (Third Chamber) of 3 September 2009), especially para. 80. Therefore, Article 52 (3) of the Charter prescribes that any right contained in the Charter corresponding to a right contained in the ECHR shall be the same in its meaning and scope as the right in the ECHR, see e.g. C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, Judgment of the Court of 23 September 2003, paras. 58-60; C-540/03*, European Parliament v. Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 June 2006 , especially para. 38, but see also paras. 52-59.

[297] F. Naert, 'Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 45, 47-48. See also D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010),. 230.

[298] G. Gaja, 'Accession to the ECHR', in A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon* (2012), 180, 194. It has to be pointed out that, although the ECHR will acquire – *per* se - a lower status under EU law than treaty provisions as an EU agreement because of the accession of the EU, it status will not be modified due to the continuing effect of Article 6 (3) TEU. Chalmers takes an intermediate position and submits that the application of Article 6 (1) TEU) results in "formal autonomy and substantive dependence", D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 230; See, i.e. C-415/05 P, *Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Opinion of Advocate General Poiares Maduro, 23 January 2008, para. 44; Joined Cases c-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities,* Judgment of the Court (Grand Chamber) of 3 September 2008, paras. 283-85; C-11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970, para.3. In Nold, the Court held that international human rights treaties are a source of fundamental rights under EU law, providing guidelines "which should be followed within the framework of Community law, C-4/73, J*. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities,* Judgment of the Court of 14 May 1974, p. 507, para. 13. The ECHR was recognized as a source of fundamental rights under EU law in Rutili, C-36/75, *Roland Rutili v. Ministre de L'intérieur*, Judgment of the Court of 28 October 1975, p. 1232, para. 32; The ECHR has a particular status in this regard, C-299/95,

Regarding the application of IHL under the EU's internal law, it is submitted that the updated EU Guidelines on promoting compliance with international humanitarian law (IHL) cannot be considered as binding the EU, by a unilateral act, to comply with IHL.[299] But it can be argued that, indirectly, although on a policy-level, they induce a behavior of compliance of the EU *per se* with IHL. EU Heads of Mission as well as Commanders of EU civilian and military operations are obliged to include an assessment of the IHL situation in their reports about a given State or conflict. Furthermore, the importance of preventing and suppressing violations of IHL by third parties shall be considered, where appropriate in the drafting of mandates of EU crisis management operations.[300] Therefore, this strict policy, which may also include sharing information for the purposes of criminal prosecution by the ICC,[301]also puts pressure on EU staff to comply with IHL. Furthermore, the EU should cooperate, where appropriate, with the United Nations and relevant regional organisations for the promotion of compliance with IHL.[302] As the United Nations and other international organisations have adopted a similar policy, monitoring and ensuring the compliance of IHL by third parties, there is an overlapping network of policy mechanisms to ensure compliance with IHL, also ensuring respect of IHL by the staff of international organisations.[303]

In summary, the protection of human rights and humanitarian law has been incorporated in the internal law of the majority of the examined international organisations. By this fact, it may give rise to international responsibility, potentially independent of other violations of human rights or humanitarian law, and purely on the basis of international law.

Friedrich Kremzow v. Republic Österreich, Judgment of Court (Fifth Chamber) of 29 May 1997, p. I – 2646, para. 19. The ICCPR has been considered as a source in the case of Orkem, C-374/87 *Orkem v. Commission of the European Communities*, Judgment of the Court of 18 October 1989, p. 3351, para. 31.

[299] They rather correspond to the 2nd obligation of states under the Geneva Conventions, not only to respect, but also *to ensure respect of* international humanitarian law. See generally F. Naert, 'Observance of international humanitarian law by forces under the command of the European Union', in (2013) 95 *International Review of the Red Cross*, 637-643.

[300] Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), (2009/C 303/06), paras.15 (b), 16 (f).

[301] *Ibid.*, para.16 (f).

[302] *Ibid.*, para. 16(e).

[303] See, e.g. Security Council Resolution 1502, UN Doc. S/RES/1502 (2003), Preamble, Statement by the President of the Security Council with Annex, Protection of Civilians in Armed conflict, Aide memoire, UN Doc. S/PRST/2009/1 (2009); Statement by Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs at 30th Annual Seminar for Diplomats on International Humanitarian Law, 20 March 2013; Secretary-General's Bulletin, supra note 291, ; ICRC, Customary IHL, Rule 139. Respect for International Humanitarian Law, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule139

5.3. Circumstances precluding wrongfulness

The Articles on the Responsibility of International Organisations contain a set of provisions, entitled circumstances precluding wrongfulness, which similarly to dispositions in criminal law justify internationally wrongful acts or simply preclude their wrongfulness. Regarding the subject of this study, two articles are particularly relevant: consent and self-defence.

1. Consent – Article 20 ARIO

As the commentary to the ARIO states: ""What is generally relevant is consent by the State on whose territory the organization's conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct."[304]

In all recent peacekeeping operations, consent of the host-state is a requirement for the deployment of the operation, notwithstanding the possibility that the Security Council could authorise the deployment of an operation under a Chapter VII mandate with the consent of the host-state.

The UN observed in its comments that

> the consent of the host State is not necessary a circumstance precluding the wrongfulness of conduct, but rather a condition for that conduct, as it is, in fact, a condition for the deployment of any United Nations presence in a State's territory (i.e., a United Nations conference, a United Nations Office, a peacekeeping operation (other than a Chapter VII non-judicial accountability mechanism). A State's consent for the presence of the United Nations or for the conduct of its operational activities in its territory is thus the legal basis for the United Nations deployment, without which the conduct would not take place.[305]

Consequently, consent under the ARIO is not a circumstance precluding wrongfulness, which *ex-post facto* remedies the wrongfulness of a certain act, but it prevents the act from being wrongful in the first place. The UN also therefore further pointed out in its comments that "in the practice of the

[304] Report of the International Law Commission, Sixty-third session, *supra 2*, 1110, para.1.
[305] Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 263, 23-24, para.2

United Nations there are no instances of an unlawful act or conduct of the Organization consented by, or remedied by consent of, the "injured" entity."[306]

Consent of the host state on whose territory the peacekeeping-operation is deployed cannot be invoked as an excuse for human rights or any other violations of international law committed by the peacekeeping operation. The consent of the host state is given *bona fide* towards the deployment of the peacekeeping operation and not as a form of *carte blanche* regarding all potential violations of international law by the operation.[307] In fact, the Status of Forces Agreement (SOFA) or the Status of Mission Agreement (SOMA) which are normally concluded between the peacekeeping operation and the host-state regulate the questions of compensation and complaint procedures for violations which might arise during the deployment of the operation. In summary, consent of the host state prevents the deployment of the peacekeeping operation on the territory from being unlawful, but it does not touch upon any potential violation of human rights or humanitarian law as it might arise during the deployment of the troops.

2. Self-Defence – Article 21 ARIO

From a conceptual point of view, self-defence like consent should be seen as a primary, permissive, rule rather than as a secondary rule or as a circumstance precluding wrongfulness, a fact which was also recognised by the ILC. The Commission nevertheless decided to include a specific disposition in order to state that "the principle that the use of force in self-defence precludes the wrongfulness of the acts in which force is so used." [308]

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[306] *Ibid.*, para.4. As observed by Kolb, Porretto and Vité, consent by a state cannot remedy a violation of IHL by another entity as the customary and treaty norm which prescribes the international community to respect IHL at all times prohibits any other interpretation, Kolb, Porretto, Vité, *supra* note 25, 342.

[307] See also G. Simm, *Sex in Peace Operations* (2013), 68. The Report and Commentary of the ILC state nevertheless that "with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct", International Law Commission, Report on the work of its sixty-first session, *supra* note 2, 94, para.2 of the commentary; Report of the International Law Commission, Sixty-third session, *supra 2*, 110, para.1 of the commentary.

[308] Yearbook of the International Law Commission (1980), Volume II Part Two, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (1980), 60, para.23.See also International Law Commission, Report on the work of its sixty-first session, *supra* note 2, 96, para. 2 of the commentary; International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), General Assembly Official Records, Sixty-first Session, Supplement No. 10 (A/61/10) (2006), 266, para. 2; Cf. General Assembly, Sixty-first session, Official Records, Sixth Committee, Summary Record of the 15th meeting, UN Doc. A/C.6/61/SR.15 (2006) (Ms. Williams, United Kingdom), 5, para. 26; International Law Commission, Provisional Summary Record of the 2876th meeting, UN Doc. A/CN.4/SR.2876 (2006) (Mr. Mansfield), 7; .E. David, 'Primary and Secondary Rules', in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 27, 30-31; J.-M. Thouvenin, 'Circumstances precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence' in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 455, 459-61.

Article 21 of the Articles of the ILC stipulates that "[t]he wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law." This article therefore relegates to the primary rules of international law.[309] The commentary to the corresponding article on self-defence in the articles on state responsibility further explains that

> the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.[310]

Special Rapporteur Gaja therefore also proposed the deletion of such a specific disposition in his seventh report.[311] As this proposal was not accepted by the majority of the commission[312], Mr. Gaja abstained from reiterating it in the 8th report.[313]

Self-defence under Article 21 has to be distinguished from "self-defence" as it is used in the context of peacekeeping operations. The Commentary of the ILC explicitly acknowledges that, in the practice of UN forces, self-defence "has often been used in a different sense" and it stipulates that it covers those cases other than when an international organisation responds to an armed attack by a state.[314]

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[309] Report of the International Law Commission, Sixty-third session, *supra 2*, 113, paras. 1-2; 114, paras.3-5.

[310] International Law Commission, Report on the work of its sixty-first session, *supra* note 2, para.1 of the commentary; International Law Commission, Report of the International Law Commission, Sixty-third session, *ibid.*, 111, para. 1 of the commentary.

[311] G. Gaja, Seventh report on responsibility of international organizations, UN Doc. A/CN.4/610 (2009), 21, para.59. A good overview of the problems associated with the notion of self-defence in the context of the ARIO was provided by Ms. Williams, the Representative of the UK in the 6th Committee: "Much of the discussion in the commentary was based on the use of self-defence in peacekeeping operations, but the right of self-defence arose in many cases from the terms of the mandate of a peacekeeping force. It was difficult to extrapolate from those specific mandates to a wider right that would exist in different circumstances. The considerations that applied to self-defence in the context of international organizations were different from those that applied to the exercise of the right of self-defence by a State. Moreover, as a practical matter, only certain international organizations would ever be in a position to exercise the right of self-defence", General Assembly, Sixty-first session, Official Records, *supra* note 308, Ms. Williams, United Kingdom, 5, para. 26.

[312] See, e.g. International Law Commission, Provisional Summary Record of the 3000th meeting, UN Doc. A/CN.4/SR.3000 (2009) and International Law Commission, Provisional Summary Record of the 3001st meeting, UN Doc. A/CN.4/SR.3001 (2009); A summary of the debate within the ILC is contained in the statement of the chairman of the International Law Commission before the 6th committee, General Assembly, Sixty-fourth session, Official Records, Sixth Committee, Summary Record of the 15th meeting, UN Doc. A/C.6/64/SR.15 (2009) (Mr. Petric), 4, para. 13.

[313] G. Gaja, Eighth report on responsibility of international organizations, UN Doc. A/CN.4/640 (2011), 22, para.62.

[314] Report of the International Law Commission, Sixty-third session, *supra 2*, 114, para.3. As Special Rapporteur Gaja wrote in his fourth report: "While the mandates of peacekeeping and peace-enforcement forces vary, references to self-defence confirm that self-defence constitutes a circumstance precluding wrongfulness. This

First of all, it appears correct to observe that self-defence by international organisations in peacekeeping operations is closer to "self-defence" as defined in national law, governing principally "interindividual relations."[315] Secondly, in the practice of the UN, references to self-defence "have been made also in relation to the 'defence of the mission'"[316] or to "the defence of the safe areas and the civilian population in those areas."[317] So, in these references, "the term is given a meaning that encompasses cases other than those in which (…) an international organization responds to an armed attack by a State" and they do therefore not fall under Article 21; "the question of the extent [and the conditions] to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission."[318]

Thus, Article 21 is not applicable to the conduct of peacekeeping operations, unless the peacekeeping forces respond to an armed attack in the sense of Article 21. Otherwise, their mandate as well as the applicable provisions of international human rights and humanitarian law provide the conditions under which they may resort to military force in "self-defence".

5.4. Assessment of Chapter V

Starting with the different case-studies with regard to the attribution of conduct, followed by an analysis of breach of an international obligation and an examination of relevant circumstances precluding wrongfulness, this Chapter highlighted the complexity of the topic of the present study, as well as the legal uncertainties associated with many aspects, e.g. the question if and under which conditions regional organisations are directly bound by the UN Charter.

The case-studies confirmed the previously formulated view that any appraisal of the attribution of conduct hinges on the specific circumstances of the case. In this context, in order to attribute the conduct of a peacekeeping operation to organisation(s) that are not part of the chain of command,

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conclusion is not affected by the fact that the provisions in question appear to envisage a reaction against attacks that are directed against United Nations forces mainly by entities other than States and international organizations. No distinction is made according to the source of the attack", G. Gaja, Fourth report on responsibility of international organisations, UN Doc. A/CN.4/564 (2006), 6, para.17. See also Peacekeeping, The Right of Self-Defence of United Nations Peacekeeping Forces and the Exercise of that Right – Article 51 of the Charter of the United Nations, Memorandum to the Senior Political Adviser to the Secretary-General, (1993) *United Nations Juridical Yearbook*, 371-372.

[315] Kolb, Porretto, Vité, *supra* note 25, 341. See also International Law Commission, Provisional Summary Record of the 2876th meeting, UN Doc. A/CN.4/SR.2876 (2006) (Mrs. Escarameia), 4.

[316] Report of the International Law Commission, Sixty-third session, *supra 2*, 111, para. 3.
International Law Commission, Report on the work of its sixty-first session, *supra* note 2, 96, para. 3 of the commentary; Report of the International Law Commission, Sixty-third session, *supra 2*, 111-12, para. 3 of the commentary.

[318] Report of the International Law Commission, Sixty-third session, *ibid.*, 111-112, paras. 3-4.

an intimate link in the form of a strong nexus between the political control they exercise and control over the operational conduct of the operation is necessary. The existence of such a link could also serve as a main sign that the required threshold for an application of the criterion of normative control is reached and that one of the involved organisations would assume the responsibility on behalf of the other involved organisations in any possibly existing case in court.[319]

The case-studies confirmed furthermore that there is, indeed, a division of labour emerging between the different organisations regarding the deployment of peacekeeping operations, particularly with regard to the African continent. Depending on the specific situation, the involvement of each organisation varies in conformity with its defined "niche" within the established division of labour. The EU, which is deploying a training mission in Mali, has announced the deployment of a civilian mission in Mali in mid-February 2014.[320] In Somalia, the EU deployed a training mission, whereas in the Central African Republic, it will deploy a limited military operation.

With regard in particular to AFISMA, the question is also raised if the traditional distinction between not only peacekeeping and peace enforcement operations, but also UN and UN-authorised operations is still valid or already out of date.[321] The cooperation mechanisms in AFISMA illustrated an involvement of the UN, and also other organisations, on various levels of command and control.

[319] Unless the Court would have jurisdiction over all involved organisations.

[320] Address by EU High Representative Catherine Ashton at the UN Security Council on the cooperation between the EU and the UN on international peace and security, New York 14 February 2014, 140214/02. The mandate of the training m ission was extended until 18 May 2016, Council of the European Union, Luxemburg 15 April 2014, EU training mission in Mali extended, Doc. 8775/14, 1.

[321] Cf. N. Blokker, 'The Security Council and the Use of Force: On Recent Practice', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality. A Need for Change?* (2005), 1, 15-17, 28.

Chapter VI: Conclusions and Recommendations

To "promote international co-operation and to achieve international peace and security" and "to unite our strength to maintain international peace and security" - these were the wishes of the founders of the League of Nations and the United Nations – and universal peace remains a desirable ideal.[1] Peacekeeping operations deployed by the United Nations and regional organisations have become a major tool for conflict regulation in the 21st century.

Universalist and regionalist positions, with regard to maintaining international peace and security, have converged in the practice of international organisations. Cooperation between international organisations has emerged as the key driver in defining roles or niches in the system of collective security and in establishing a division of labour for the mutual benefit of the involved organisations. This development included the institutionalisation of relations among the actors, as well as an increase in cooperation in the operational context – during the deployment of peacekeeping operations. This process benefited from the wide margin of discretion provided for the Security Council under the United Nations Charter. International law has played a double role with regard to cooperation between international organisations and the maintenance of international peace and security. On the one hand, peacekeeping operations as a tool for conflict resolution could not have been "invented" without the recognition of the concept of "implied powers" as applicable to international organisations. On the other hand, the non-existence of established international legal rules regulating the conduct of international organisations and questions of their responsibility under international law resulted in a decades long purely practice driven approach, which in turn created further legal uncertainties.

The *bon mot* that international humanitarian law is always one war behind concerning the regulation of armed conflict, as referred to in the introduction of this study, is most certainly also applicable to the context of the international responsibility of international organisations. For several centuries, following the Westphalian peace, the system of international law was based on the principle of the sovereign equality of states, and characterized by a purely bilateral conception of the relations among states. The possibility that several actors could be jointly responsible was absolutely *systemfremd* (alien to the system). The Articles on State Responsibility, as codified, in 2001 therefore only admit the possibility of joint responsibility in the limited circumstances of aid or assistance, direction and control, or coercion. In addition, an article on plurality of responsible states was

[1] Preamble of the Covenant of the League of Nations and of the Charter of the United Nations respectively.

inserted in the project, without, however, defining the necessary criteria for a joint attribution of conduct. The 2011 Articles on the Responsibility of International Organisations did not contain any assimilation of the criteria for the attribution of conduct on recent practice, but they were transferred from the previous set of articles on state responsibility. They are therefore an expression of several centuries of practice within a state-centric system, at least to the extent that they define the rules on the attribution of conduct.

As it was rightly acknowledged by the ILC and its Special Rapporteur, the practice of international organisations is sparse in some areas due to the fact that they are new entities in the international arena, at least in comparison to states. Moreover, the feedback or enthusiasm of international organisations in commenting on the project was not overwhelming, which is *per se* not surprising; from an organisational point of view, the legal uncertainties associated with the non-existence or at least non-codification of applicable rules on responsibility were outmatched by the liberty of conduct it afforded them. One could even raise the question whether the cooperation among international organisations, and in particular the high intensity of cooperation in the area of the maintenance of international peace and security had taken place if legal rules with regard to the responsibility of international organisations would have existed when the UN and the first regional organisations were founded.

The central research question, this study endeavoured to explore, whether international organisations cooperating in peacekeeping operations can be jointly responsibility for violations of international law occurring during the deployment of such operations can be responded to affirmatively. In particular the case-studies illustrated that there are instances, in which internationally wrongful acts can be attributed not only to one, but to two or several international organisations.

An analysis of the applicable legal framework to peacekeeping operations, illustrated that the complex interplay of cooperation mechanisms and arrangements is accompanied by a complicated network of applicable norms which multiplies the potential for joint responsibility of international organisations. The fact that internationally wrongful acts of peacekeepers could possibly be attributed jointly to international organisations – applying the normative control criterion – on the basis of violations of different primary norms increases the flexibility and the likelihood that international organisations can be hold responsible under international law.

In the end the Articles on the Responsibility of International Organisations have proven to be unsuitable for regulating the responsibility of international organisations in the context of peacekeeping operations as they are based on the premise that cooperation among international

organisations is the exception rather than the rule. Whereas, on the one hand, it could be seen as a lacuna, on the other hand, it was already highlighted in the discussions within the ILC that the context of peacekeeping operations might be too specific to fall under any general rule of attribution (*infra*, 4.1.3.1.). The decision of the commission to abstain from including any specific disposition on peacekeeping operations therefore allows for an elaboration of an applicable rule by other actors, as well as in practice. The present study proposed the creation of a new criterion of attribution, namely "normative control" based on the intertwined cooperation arrangements between international organisations on various levels of command and control in a peacekeeping operation and in conformity with the *lex specialis* rule contained in Article 64 ARIO.

Nevertheless, the present study has illustrated that the evolution of relations among the UN and regional organisations was also induced by several external and internal factors, among which are scarcities of resources and competition for legitimacy, which also led the organisations to develop their competences in complementary areas and based on different doctrines to deploy peacekeeping operations. These non-legal, external factors also add to the difficulty in defining the applicable legal framework. In addition, the relations among international organisations, and particularly, in the area of maintaining international peace and security are continuously evolving and non-static. In the course of their evolution, there may be other instances of confrontation or repositioning of certain organisations which would also affect some of the specific findings of this study, such as the emerging division of labour for maintaining international peace and security on the African continent. Furthermore, another obstacle exists in the form of a casuistic approach taken by international organisations in cooperating in peacekeeping operations. A thorough study and analysis of other case-studies of peacekeeping operations might allow shedding more light on the criterion for the attribution of conduct in peacekeeping operations.

However, two new obstacles are already on the horizon, which concern the further multiplication of actors involved in peacekeeping operations. On the one hand, inter-mission cooperation between peacekeeping operations is increasing; on the other, peacekeeping operations have now started to use private contractors for certain tasks such as guard duties around camps.[2] Furthermore, states have resorted to deploying troops in peacekeeping operations which are part of bi- or multinational cooperation arrangements, thus following the concepts of smart defence or sharing and pooling. In mid-February 2014, France and Germany announced the deployment of parts of the Franco-German

[2] With regard to the implications in terms of international responsibility for the acts of these private contractors, see e.g. P. Palchetti, 'The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations', (2013) 95 *International Review of the Red Cross*, 727, 731-732.

brigade to Mali as part of EUTM Mali.[3] The brigade itself is under joint French-German command, but it is incorporated into the command structure of Eurocorps. This new multiplication of involved actors will further increase the likelihood for joint responsibility and consequently will also increase the likelihood that the threshold for the application of the normative control criterion will be surpassed.

The development towards more cooperation between international legal entities and the multiplication of actors, however, is not confined to the particular field of peacekeeping operations, but appears in all areas of activities regulated by international law. Thus, even on a larger scale, it is necessary to reflect upon the current state of the development of the law and mechanisms of international responsibility in order to prevent a further disconnect between the legal framework and reality. The more power international organisations have, the more important the effective regulation of responsibility of international organisations is.[4] Arguments of legal certainty also warrant the formulation of such a recommendation. As it was pointed out by Thomas Franck:

> The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.[5]

Any alternative approach focusing solely on a specific field of international law could possibly also contribute to a further fragmentation of international law.

A start would be to adapt the framework for international dispute settlement which in its current state is based on a bilateral conception. As the analysis in Chapter IV illustrated, the invocation of international responsibility also raises certain problems which are in similar fashion an expression of the bilateral conception of international dispute settlement. In doctrinal writings, it has been suggested that it could be possible to establish an international or World Court for Human Rights which would have the competence to review the conduct of peacekeeping operations.[6]

However, this is an idea which would possibly cause more problems than it would solve, including a further fragmentation of international law. In any case, it is unlikely that states would subscribe to

[3] See, for example, *Defense News*, 'France, Germany To Send Parts of Joint Brigade To Mali', available at: http://www.defensenews.com/article/20140219/DEFREG01/302190033/France-Germany-Send-Parts-Joint-Brigade-Mali

[4] Cf. E. Paasivirta, P.J. Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations', in (2005) XXXVI *Netherlands Yearbook of International Law*, 169, 173.

[5] T. M. Franck, *Fairness in International Law and Institutions* (1998), 7.

[6] M. Nowak, 'The Need for a World Court of Human Rights', in (2007) 7 *Human Rights Law Review*, 251 – 259

such an idea, as the opposition of a considerable group of states towards a ratification of the Rome Statute of the ICC demonstrates. One could rather envisage the Security Council requesting an advisory opinion from the International Court of Justice regarding the application of human rights law to international organisations, as well as the criterion for the attribution of conduct to two or more international organisations. An advisory opinion of the ICJ would have the advantage over a World Court for Human Rights that it would be universally accepted, without being, legally binding, therefore safeguarding also a margin of discretion for states and international organisations.

The question is, however, whether such a proposal would correspond to the interests of the UN, other international organisations and states alike. Major changes to the international legal system are not possible without the involvement and the agreement of states. Although, in practice, the UN assumes that it is exclusively responsible for the conduct of UN Peacekeepers, it is unlikely that the United Nations would voluntarily subscribe to an acceptance of responsibility for the conduct of UN authorised forces or for any conduct of other international organisations under the concept of joint responsibility. It is also implausible that other international organisations would voluntarily accept joint responsibility.

Of course, a UN internal attempt of regulation would also be feasible, for instance, within the Sixth Committee of the GA which is the primary forum for the consideration of legal questions in the GA, or even within the SC – Article 64 ARIO refers expressly to the existence of *lex specialis* rules. With regard to the Security Council, however, the Latin expression of "*Quis custodiet ipsos custodies?*" (Who guards the Guardian?) comes to mind. Bearing in mind the mandate of the Security Council, it could be questioned as to whether the Security Council could possibly elaborate a just and fair rule of attribution or as to whether such an attempt at regulation would not correspond to putting the fox in charge of the henhouse. The wider participation in the GA might be better suited to accommodate any such concerns.

The law of international responsibility in its current state of development also enhances the probability of a further augmentation of cooperation among states and international organisations alike. As long as they do not enter into cooperation arrangements with the intent of committing violations of international law, the existing legal framework will not allow joint responsibility.

The dispositions under the ARIO, as well as under the Articles on State Responsibility, require an element in the form of intent to allow the attribution of conduct also to one or more other actors and as indicated above, they do not define the criterion under which states or international organisations could otherwise be held responsible. Therefore, the lack of effective regulation creates

some leeway for international organisations and states to enhance their cooperation arrangements without a real or substantial risk of being held accordingly responsible.

Consequently, although international organisations might be unwilling to contribute to the regulation of cases of joint responsibility, their involvement in any attempt at regulation, be it in the form of cooperation agreements specifying the distribution of responsibility or via a request of an advisory opinion of the ICJ, would be, from their point of view, beneficial as it would allow them to influence and even steer the outcome. In any case, they could contribute their expertise to the regulation attempts. The alternative is that courts and tribunals will attempt to regulate this question insofar as they have jurisdiction. Bearing in mind the forthcoming accession of the EU to the European Convention of Human Rights, further judgments not only on the responsibility of international organisations but also on joint responsibility, can be expected.[7]

The role of states with regard to potential further regulations of joint responsibility appears to be unclear. On the one hand, the elaboration of rules on the joint responsibility of international organisations will possibly increase their protection from being held responsible for acts of organs which were seconded to these organisations. On the other hand, the development of rules on the joint responsibility of international organisations could trigger the development of similar rules for states; the ARIO were also based upon the Articles on State Responsibility. An important aspect in this discussion is the arrangement for financial restitution within the different international organisations. So far, there is no standard model for international organisations to process claims for financial restitution and to pay compensation, including for damages arising in the context of peacekeeping operations. Of course, reasons of legal certainty and transparency support a proposal of a standardised regulation of financial damages by international organisations. The problem is that states, despite being generally willing to cooperate with international organisations, could be opposed to any regulation at the organisational level as it could be perceived as a transfer of competences and a loss of sovereignty.[8]

According to Article 40 ARIO, a responsible international organisation "shall take all appropriate measures (…) to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter" and the "members of a responsible international organization shall take all the appropriate measures that may be required (…) in order to enable the organization to

[7] The ECtHR in *Al-Skeini* and also the Dutch Court of Appeal in the Srebrenica cases did not exclude the possibility of joint responsibility.

[8] In contrast, from the perspective of international organisations, it is a rather appealing idea as it also creates jobs within the organisation. This ambivalent attitude of states was also confirmed during interviews with members of staff at the General Staff College of the German Armed Forces, as well as at the German Ministry of Defence.

fulfil its obligations." Thus, depending on the nature of arrangements for financial restitution in an international organisation, the main contributors to the budget of the organisation might be opposed to any efforts or undertakings which would increase the likelihood of international organisations being responsible, if compensation would be paid by the general budget of the organisation and not primarily or entirely by those states whose agents or organs might have contributed to or caused the internationally wrongful act. Thus, it appears that within the wider framework of the international community, any attempt or undertaking to further regulate the responsibility of international organisations can only be carried out effectively if states agree.[9]

Focusing once more on the specific subject of the present study, several practical recommendations can be made.

First, with regard to the fields of human rights and humanitarian law, it would be commendable if the UN and regional organisations were to engage in activities regarding the clarification of rules applicable in peacekeeping operations. The United Nations could, for example, adopt a bulletin on human rights obligations to be observed while deploying peacekeeping operations.[10] Legal uncertainty, particularly in the form of diluted responsibility, can also negatively impair the efficiency and performance during the deployment of a peacekeeping operation "as the various actors involved might not feel fully in charge."[11]

Moreover, bearing in mind in particular the complex cooperation arrangements for AFISMA, it is recommended that the UN and regional organisations include dispositions regarding the distribution of responsibility in their respective agreements if they cooperate in peacekeeping operations.[12] It is even more relevant and necessary to prevent blame shifting between the various involved actors as in the Srebrenica cases where both theNetherlands denied responsibility and the UN claimed immunity, which in the end, also corresponds to a denial of responsibility.[13]

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[9] Their participation is in any case necessary, as members of the organisations, who ultimate decide upon the actions undertaken by the organisations whose members they are.

[10] N. Quénivet, 'Human Rights Law and Peacekeeping Operations', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 99, 102. The Human Rights due diligence policy on United Nations support to non-United Nations security forces as adopted in 2013 may be considered as a first step in the right direction, Annex to Identical letters dated 25 February 2013 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, UN Doc. A/67/777–S/2013/110 (2013). See also H.P. Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces', (2014) *Journal of Conflict and Security Law*, Advance Access published 24 June 2014, 1, in particular 11-13.

[11] T. Tardy, 'Hybrid Peace Operations: Rationale and Challenges', in (2014) 20 *Global Governance*, 95, 112.

[12] Cf. also A. Orakhelashvili, *Collective Security* (2011), 328.

[13] A. Nollkaemper, D. Jacobs, 'Shared Responsibility in International Law: A Concept Paper', ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl), 20.

Regarding the wider question of the relationship between the UN and regional organisations, it is recommended to elaborate upon a standard model agreement which may be used to expand and formalise consultation and cooperation between the UN and regional organisations for the specific context of the maintenance of international peace and security.[14] It could even include articles regarding the question of international responsibility. The AU had also recommended enhanced consultations between the AU PSC and the UN Security Council.[15]

As noted by the Security Council itself, there is a need "for a comprehensive analysis of lessons learned from practical cooperation between the United Nations and the African Union"[16] and this statement is equally valid for the practical cooperation between the United Nations and other regional organisations.

Regarding the interaction and the relations with the AU, the Security Council needs to address in a systematic manner the issue of the funding of AU peace support operations undertaken with the consent of the UN, through the use of UN assessed contribution.[17] Such an engagement is not only necessary to increase the effective maintenance of international peace and security on the African continent, but also in order to address the legal implications of the power wielded by the UN over the AU with regard to the payment of AU peacekeeping operations. Naturally, the EU is also advised to do so accordingly for the financial mechanisms on the basis of its African Peace Facility.

The example of Mali showed that the UN and regional organisations have to adapt to new security challenges and that includes increasing the rapid deployment capacities of all international organisations.[18]

Finally, it is recommended that NATO institutionalises its relations with the UN and establishes a permanent mission to the UN in New York.[19] It would allow the Alliance to be more actively involved

[14] Cf. Report of the High-Level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565 (2004), 85, para.272 (b).
[15] *Ibid.*
[16] Security Council Resolution 2033, UN Doc. S/RES/2033 (2012), Preamble, 2.
[17] Report of the Chairperson of the Commission on the African-Union-United Nations Partnership: The Need For Greater Coherence, PSC/AHG/3.(CCCXCVII) (2013), 3, para.6.
[18] ECOWAS criticised that the UN was unable to respond more effectively to the offensive by terrorist groups in the south of Mali and the deadly hostage-taking situation at the natural gas facility in Algeria and that there "is a need to further explore the possibilities offered by the normative framework for peacekeeping operations, in particular in the timely articulations of the provisions of Chapters VI, VII and VIII of the Charter of the United Nations.", Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), Statement by Mr. Bamba (Côte d'Ivoire) speaking on behalf of ECOWAS, Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 52.
[19] Such a proposition was already contained in the report NATO 2020: Assured Security; Dynamic Engagement. Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO, 17 May 2010, 25. The AU decided to strengthen its Permanent Mission to the UN in New York in September 2013, "including through the establishment of a dedicated standby team to support African members on the Security Council",

in debates at the UN and it would prevent that NATO is further sidelined regarding the deployment of peacekeeping operations.

The limited scope of this study only permitted an insight into the specific field of cooperation of the United Nations and four regional organisations in peacekeeping operations. The study confirmed the original premise it was set out to explore, the question as to whether the existing legal framework would be appropriate to regulate the conduct of international organisations cooperation in peacekeeping operations. But it also became evident that a major transformation of international law is currently taking place towards a less state-centric, multi-actor network of institutionalised and multifarious relations which poses questions with regard to the general regulation of international responsibility under international law, as well as the general direction and conception of international law as a system. This study might serve as a stepping stone for further studies and inquiries with regard to these complex questions the international community is confronted with.

Peace and Security Council, 397th Meeting at the Level of the Heads of State and Government, New York 23 September 2013, PSC/AHG/COMM/1.(CCCXCVII), 5, para.9 v.

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Cooperation of International Organisations in Peacekeeping Operations and Issues of International Responsibility – Summary

Cooperation between international organisations in peacekeeping operations has emerged as a major tool in the past few years to maintain international peace and security, in various forms and including different actors. In Sudan, the UN and the AU deployed a hybrid peacekeeping operation, whereas in Yugoslavia in the 1990s, NATO and the UN used the so-called "dual key" arrangements for the authorisation of airstrikes. Nevertheless the potential implications of these cooperation arrangements between international organisations in terms of the law of international responsibility had been neglected nearly entirely until recently. Various studies and reports by international bodies such as the ILA or *the Institut de droit international* opted for a state-centric approach, focusing on the responsibility of international organisations *per se* or in connection with their respective members. In similar fashion, the doctrinal approach was predominated by publications with regard to the responsibility of member-states with international organisations or for acts of the latter, also following the adjudication of several cases such as *Behrami/Saramati* before the European Court of Human Rights. The Articles on the Responsibility of International Organisations (ARIO) adopted by the International law Commission (ILC) of the UN in 2011 also only provide for joint responsibility of international organisations in very limited circumstances, for instance, aid and assistance.

This study therefore sets out to explore – as the main research question – whether international organisations cooperating in peacekeeping operations could be jointly responsible for violations of international law occurring during the deployment of the operation. For various reasons, including the geographic origin of the institutional actors and their prominence in deploying and contributing to peacekeeping operations, the scope of this study shall be limited to the UN and four regional organisations, NATO, the EU, the AU and ECOWAS.

The study follows to a certain extent, the approach taken for the implementation of the law of international responsibility by starting the analysis with the consideration of the question if acts of international organisations cooperating in peacekeeping operations could be attributed to more than one international organisation. In this regard, it is necessary to analyse the legal framework applicable to the maintenance of international peace and security under the UN Charter (Chapter VII), for cooperation between the UN and regional organisations (Chapter VIII), as well as the evolution of inter-institutional arrangements of cooperation between the UN and regional organisations.

Chapter I of this thesis commences with a short analysis of the drafting history of these two chapters of the UN Charter at Dumbarton Oaks and the "re-activation" of the Security Council following the end of the Cold War during which the effective implementation of the mandate of the Council was hindered by the two opposing blocks within the Security Council and their veto rights, i.e. the USA and the USSR. The drafting history of the Charter portrays the relevant Chapters of the UN's constituent instrument as a compromise between supporters of a regionalist and universalist conception of the system of collective security. This balanced approach towards the maintenance of international peace and security is an incentive for cooperation between the UN and regional organisations. Indeed, the ensuing examination of the practice of the UN following the end of the Cold War, and the legal framework for peacekeeping and peace enforcement operations shows that cooperation between the UN and regional organisations in matters pertaining to international peace and security has risen dramatically following the end of the Cold War. Peacekeeping operations have been transformed from small lightly armed ceasefire-monitoring forces to massive, multidimensional operations with mandates involving both military and civil objectives such as state-building.

In this regard, several observations can be made. First of all, there is an emerging division of labour between the UN and regional organisations with regard to peacekeeping operations. The former focuses on the deployment of multidimensional, traditional operations, whereas more "robust" operations are put on the ground by regional organisations. However, the inquiry into the practice of the UN shows that the Security Council has on various instances handed out mandates which effectively blur the distinction between peacekeeping and peace enforcement operations. The very latest examples of practice seem to indicate a tentative trend towards an abolishment of the distinction between these two concepts.

This aspect is particularly relevant as depending on the qualification of a military operation as either a peacekeeping or peace enforcement operation, an authorisation by the Security Council for a regional organisation could be necessary under Chapter VIII of the UN Charter. The following section consequently analyses the legal framework for cooperation between the UN and regional organisations under Chapter VIII of the Charter. It became evident that the compromise between regionalism and universalism within the whole UN Charter is mirrored within the specific dispositions of Chapter VIII of the Charter. Article 52 of the UN Charter gives priority to regional organisations for the settlement of local disputes, whereas Article 53 itself is a compromise itself between the universalist and the regionalist perception of collective security. On the one hand, the UN may use regional organisations for enforcement action under its authority; on the other, regional organisations may not take enforcement action on their own without an authorisation by the Security Council. Under the first scenario, enforcement action is and has been interpreted less

restrictive in practice; the Security Council may rely on regional organisations for any kind of enforcement action including non-military measures. In contrast, should regional organisations decide to act on their own, an authorisation of the Security Council is only necessary for these enforcement actions involving the use of military force. It is therefore only traditional peacekeeping operations by regional organisations with a mandate limited to the use of force in self-defence that would not fall under the authorisation requirement of Article 53.

In reality, nowadays the Security Council relies exclusively on Chapter VII to mandate regional peacekeeping operations and invokes Chapter VIII solely with regard to the institutional relations between the UN and regional organisations.

Overall, a complex structure for maintaining international peace and security has emerged between the UN and regional organisations in which the gap between universalism and regionalism is bridged by flexible and pragmatic cooperation between these actors. The emerging division of labour between the UN and regional organisations in peacekeeping operations based on cooperation is an impetus for a scenario in which the UN and regional organisations might be jointly responsible. The casuistic approach taken in practice by the Security Council also requires that any criterion of attribution is capable of capturing this varied nature of interaction between the involved organisations.

The following Chapter II proceeds with the top-down approach of analysis chosen for the topic of the present study and tries to ascertain whether the findings of Chapter I can be further corroborated by examining the relations between the UN and regional organisations. Therefore, having explored the wider legal framework under the UN Charter in Chapter I, Chapter II of the study seeks to verify and reappraise the findings of Chapter I by analysing the evolution of the institutional relations between the different international organisations.

The analysis shows that an increasing complexity of institutionalised relations between the UN and regional organisations, involving elements of check and balances and mutual interdependencies has developed.

Furthermore, a certain division of labour not only between the UN and one regional organisation, but also between the UN and several regional organisations is emerging. Following the end of the Cold War, NATO has transformed itself into a global security actor with an array of various partnership programmes around the globe, while simultaneously limiting core strategic interests and its engagement in peacekeeping operations to the Euro-Atlantic area. NATO's engagement in peacekeeping operations on the African continent is limited to small-scale support of air transport and other facilities following explicit requests. This aloofness of NATO can be partially explained by

the fact that the former colonial powers which are members of NATO and the EU alike prefer to act in Africa through the various instruments at disposal of the latter. In contrast to NATO, the EU is very active in peacekeeping efforts on the African continent and a loose triangle of security actors has emerged for that purpose. Whereas the UN will provide and mandate multidimensional peacekeeping operations with a rather traditional mandate, in terms of the use of force, the AU has stepped up as the organisation focusing on providing troops for operations with more tangible mandates, pending a potential transformation later on to a UN operation. The EU itself focuses on two issues in particular. First of all, the EU provides financial and other support, such as training of troops for the operationalisation of the African Peace and Security Architecture (APSA) under the legal framework of the AU. This activity also includes for instance the funding of AU peacekeeping operations such as AMISOM. Moreover, the EU has taken up to deploy short-term and small-scale operations under a Security Council mandate in support of UN operations or in the form of a bridging operation until a UN operation can be deployed. These short-term deployments comprise civil or training missions, for instance EUTM Mali.

The ongoing collaborative efforts to operationalize the African Peace and Security Architecture have seen ECOWAS prevented from developing substantial relations with the UN, NATO or the EU. On the contrary, as part of the APSA, the attention of the non-African organisations has focused on the AU as the organisation with a mandate to maintain international peace and security on nearly the whole African continent. However, as the example of Mali illustrates, ECOWAS is also emerging as a somehow independent security provider in its region alongside the AU and in cooperation with the other international organisations.

Several external and internal factors have induced these involuntarily and voluntary developments. Scarcities of resources and competition for legitimacy have driven the organisations to develop their competences in complementary areas for the deployment of peacekeeping operations. On an internal level, an acquired awareness of the fact that today's conflicts require complex solutions which cannot be carried out by a single actors, has led them to seek cooperation with other organisations.

The analysis of the various cooperation agreements, partnerships and declarations also allows the shedding of light upon the potential distribution of responsibility among the international organisations with regard to violations of international law occurring in peacekeeping operations. The extensive analysis shows that cooperation between international organisations in peacekeeping operations now covers all levels of an operation from the training of troops to pre-planning to the deployment on the ground. This fact increases the likelihood that two or several international organisations will, indeed, be jointly responsible. In particular, the provision of funding by the EU – in

the form of the African Peace Facility – and the UN – by assessed contributions – for AU peacekeeping operations has underlined the influence and control that one organisation can also exercise over another due to specific cooperation arrangements. Both financial mechanisms provide for a request by the AU for funding which has to be approved by either the Political or Security Committee of the EU or the UN Security Council, as well as reporting requirements. The denial of funding by the organisations could effectively prevent an AU peacekeeping operation from being deployed and it therefore furnishes both organisations with an effective tool in order to make their political aims for any AU peacekeeping operation to be effectively heard.

With regard to the question of joint responsibility, the analysis of cooperation arrangements and mechanisms in Chapter II demonstrates an increasingly interplay between all organisations. This continuing institutionalisation of relations among these organisations indicates that it is, in fact, rather likely that conduct arising in the context of a peacekeeping operation and in violation of international law will entail the responsibility of two or more international organisations. The triangle of relations between the UN, the EU and the AU suggests that it is quite likely that these three organisations will be jointly responsible in the context of a peacekeeping operation on the African continent. In contrast, it emerges that ECOWAS and NATO play more of a supporting role in the context of African peacekeeping operations and that accordingly their responsibility might be limited to a supportive role. Nevertheless Chapter II demonstrates once more the pragmatic and casuistic approach taken by all involved actors and it underlines the necessity to critically analyse the specific cooperation arrangements and mechanisms within a given peacekeeping operation.

In order to hold an international organisation responsible, it is required that conduct is not only attributable to that given organisation, but that the latter is also in breach of an international law obligation. Chapter III therefore serves to shed some light on the material law applicable to peacekeeping operations. It starts with a brief overview of the concept of legal personality which is a requirement to hold any international entity responsible under international law. It is then followed by a short section on the dual nature of peacekeeping operations, as organs deployed by an international organisation, but also consisting of troops whose sending states have normally only transferred operational command and control to the international organisation.

Depending on the mandate of a peacekeeping operation and circumstances on the ground, both human rights and international humanitarian law might be applicable to international organisations. As international organisations are not contracting parties to conventions in either of these fields of law, it is necessary to examine other foundations for primary obligations under international law. It becomes evident rather soon that there are many legal uncertainties pertaining to the application of

human rights and international humanitarian law which specifically concern the scope *ratione materiae*, *ratione loci* of these bodies of law.

With regard to human rights law, several theories have been advanced to justify the application of human rights law to international organisations including arguments binding international organisations on the basis of human rights obligations of their member states. The exercise of jurisdiction by international organisations and the question of the application *ratione loci* of human rights law are notably problematic. As international organisations are *per se* aterritorial entities without territory of their own, it is argued that they could only exercise jurisdiction under human rights law in circumstances similar to a state acting extraterritorially.

International jurisprudence generally accepts two models of extraterritorial jurisdiction based on control over a territory (spatial model) or based on control over a person (personal model of jurisdiction), although both models have been also conflated in practice. On the basis of their limited international legal personality, international organisations can be only bound by these specific human rights, which are pertaining to activities they are operating in under their constituent instruments.

The application of international humanitarian law to international organisations is insofar less problematic than human rights law as it is not bound to a specific territory and as it is triggered automatically by any active participation in a conflict. However, the scarcity of practice by international organisations is the cause of other problems. Thus, whereas the general application of IHL to international organisations is not disputed, there is no agreement in legal scholarship and jurisprudence as to whether peacekeepers would be qualified as civilians or combatants under international law and whether the law of international or non-international armed conflict would be applicable if a peacekeeping operation of an international organisation becomes directly involved in a specific conflict, depending also on which side of a conflict an international organisation intervenes.

Violations of international law as they occur during the deployment of peacekeeping operations are normally violations of the most fundamental norms which are equally protected under the law of international armed conflict, the law of non-internal armed conflict, as well as under human rights law. Human rights law is nowadays deemed also to apply in times of armed conflict which raised the question how to determine the applicable law in times of a conflict of norms of IHL and human rights law. Following the jurisprudence of the ICJ in the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* advisory opinion and in particular in its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, it appears preferable to determine the respective *lex specialis*

norm on a case-by-case basis whereby it should generally be tried to interpret conflicting norms harmoniously.

The common feature throughout the analysis of the law applying to peacekeeping operations is that its application is always dependent on specific circumstances and in that regard its application corresponds well to the casuistic approach of peacekeeping operations. This actually increases the likelihood that two or more international organisations can be jointly responsible for violations of international law occurring in a peacekeeping operation.

One possibility is that the joint attribution of conduct to international organisations is based on violations of different primary norms. Whereas the UN might have been exercising jurisdiction on a territorial basis in a given situation and was bound to prevent a certain conduct, another regional organisation could have been exercising jurisdiction on a personal basis and was obliged to abstain from a certain conduct.

The final section of Chapter III looks into the application of the law of occupation to peacekeeping operations. The application of this body of law requires that a peacekeeping operation has to exercise a degree of control over a given territory similar to that of the national state – which has only happened rarely in practice, such as in the case of UNMIK. Moreover, the international administration of a territory by a peacekeeping operation aims at rebuilding a state and functioning government structures and the maintenance of peace and security which is not in conformity with the law of occupation whose aim it is to safeguard the *status quo* of a given territory. Bearing in mind other arguments, such as the practice by the UN, it therefore argued that the law of occupation is not applicable to peacekeeping operations.

Chapter IV examined the law of international responsibility to ascertain whether the articles on the responsibility of international organisations as developed by the International Law Commission are adequate and fit to regulate the cooperation of international organisations in peacekeeping operations, bearing in mind the results of the analysis conducted in Chapters I to III. It starts with an analysis of the specific circumstances provided for in the ARIO to hold international organisations jointly responsible for violations of international law. Article 7 ARIO regulates the attribution of conduct to international organisations in cases of organs placed at their disposal by other international organisations or states. It stipulates that if the receiving international organisation is exercising effective control over the seconded organ, acts of the latter are considered as acts of the international organisations and are attributed to it accordingly. This disposition is the gateway to an analysis of the law of responsibility for peacekeeping operations as it is deemed generally applicable to ascertain whether a troop-contributing country and member state of an organisation or the

organisation itself is responsible for the conduct of the peacekeeping operation. However an analysis of case-law by national and international courts and tribunals demonstrates that in practice there is no discernible rule under international law for the attribution of an organ seconded to an international organisation by another international organisation or by a state. In fact, although Article 48 ARIO and comments by the Special Rapporteur of the ILC stipulate that two or more organisations may be jointly responsible, the ARIO fail to provide any indication of the required conditions outside the context of two other specific dispositions contained in the ARIO. Article 14 and 15 allow for the attribution of conduct to an international organisation which is aiding or assisting another international organisation in the commission of an internationally wrongful act (Article 14) or exercising direction and control over another international organisation committing an internationally wrongful act (Article 15). These articles, however, operate on the presumption that one organisation is acting in an auxiliary capacity (Article 14) or that the acting international organisation is completely dominated by another organisation (Article 15). They are therefore simply not appropriate or nor capable of regulating the cooperation of international organisations in peacekeeping operations based on cooperative contributions by various international organisations on different levels and in varied forms depending on the specific circumstances of the case.

The suggestion is therefore, in accordance with Articles 64 and 65 ARIO, to elaborate a *lex specialis* criterion of attribution for the specific context of cooperation in peacekeeping operations, referred to as normative control in order to remedy for the existing lacuna under the ARIO. The argument is that the network of cooperation between international organisations in this particular area necessitates a different approach than contained in the articles of the ILC, according to which the attribution of conduct to an international organisation is not based upon a contribution to a specific single act, but stems from the exercise of control over the operation via several components of the whole framework under which a peacekeeping operation is set up. It is emphasised that such a criterion has to be applied depending on the specific circumstances, last but not least, because each peacekeeping operation is unique in its mandate and with regard to the political circumstances. An important feature of the criterion of normative control is the exercise of influence and control on the basis of the institutional ties existing between the involved organisations, both on the inter-institutional, as well as on the mission level.

The applicability and suitability of this newly suggested criterion of attribution in the context of international organisations cooperating in peacekeeping operations is reviewed in Chapter V which included several case-studies. These case-studies consist of KFOR in Kosovo, UNAMID in Sudan, UNMISS and UNISFA in South Sudan and AFISMA and MINUSMA in Mali. Using this chronological approach it is possible to highlight once more the continuously developing character of the relations

among these organisations which are becoming increasingly institutionalised. Another benefit of this approach is that it allowed to further define the suggested criterion of normative control based on the fact that the evolution towards more cooperation between international organisations in peacekeeping operations takes place simultaneously on the intra-mission level. Therefore, whereas the framework for cooperation is rather limited in the case of KFOR and UNMIK, the case-study of both operations in Mali demonstrate the full integration of the whole mission and the linked political process within a cooperative framework. KFOR as the first case-study confirms the hypothesis that an intimate link between the control exercised on a political and on the other levels is necessary to justify holding one or several organisations responsible for the acts of a peacekeeping operation formally deployed by another international organisation. This is based on the fact that the cooperating organisations are not part of the military chain of command of the respective peacekeeping operation. The documents published with regard to KFOR did not justify holding both the UN and NATO jointly responsible for the acts of KFOR, in contrast to the decision of the European Court of Human Rights in *Behrami/Saramati* in which acts of KFOR were considered to be attributable to the UN.

UNAMID in Darfur is unique as a peacekeeping operation as it was set up from the beginning as a hybrid operation by both the UN and the AU. A main difference to KFOR is that the deployment of UNAMID is directly linked to the management of the political process in Darfur. In fact, UNAMID was even responsible itself for steering the implementation and the management of the peace process. With regard to the required nexus between political control based on the institutional relations among the organisations and control on operation-related levels, UNAMID's organisational make-up surpasses this threshold so that it appears justified to submit that both organisations would normally be jointly responsible for violations of international law occurring during the deployment of the operation. UNAMID further allows the formulation of the assumption that the involvement of the same actors within the political peace process and on the operational level is likely to result in a reinforced exercise of control and oversight over the peacekeeping operation by all actors, thereby increasing the potential for joint responsibility.

A different picture presents itself in South Sudan. UNISFA and UNMISS were both deployed under UN auspices. Whereas the peace process in South Sudan is led by the AU, its influence and political control over the peacekeeping operation is not mirrored in the strategic and operational control arrangements. South Sudan therefore confirms the presumption formulated in the context of UNAMID that a situation where the same institutional actors are steering both the political process, as well as the operational and strategic levels of a peacekeeping operation is likely to lead to a joint attribution of conduct. In contrast to UNAMID, it is not justified to attribute any potential violations

of international law occurring during to the deployment of UNISFA and UNMISS to both the UN and the AU. However, it is possible to formulate yet another assumption: As the UN is not only the international organisation with the primary responsibility for maintaining international peace and security but also the organisation with the highest amount of related practice, it appears that it is less willing to accept external cooperation than peacekeeping operations deployed by the regional operations which are part of the present study. A final interesting feature of UNMISS and UNISFA is the inter-mission cooperation mechanisms with UNAMID. The lack of detailed information on these arrangements does not warrant to consider even the possibility that the AU may be jointly responsible for the conduct of UNMISS or UNISFA through this yet additional layer of cooperation.

AFISMA which was deployed in Mali before being transformed to MINUSA can be seen as the prime example for cooperation among the UN and regional organisations. The level of cooperation between the UN, the AU, ECOWAS and also the EU surpasses all other previously examined peacekeeping operations and justifies the consideration of all organisations to be jointly responsible with the qualification that the more limited operational engagement of the EU could be compensated by its more substantial involvement and control by providing funds through the African Peace Facility.

MINUSMA confirms the previously formulated assumption that the degree of cooperation between the UN and regional organisations appears to be more restricted in operations under UN auspices. Nevertheless, MINUSMA and Mali generally may represent the beginning of a new era in peacekeeping operations in which the political process for conflict resolution and the deployment of a peacekeeping operation are included within a wide concerted approach by two or more international organisations. The overwhelming degree of control of the UN exercised over MINUSMA prevented any contribution by and any cooperation with the other international organisations from reaching the degree which would trigger and justify the application of the criterion of normative control.

The following attempt of a typology of intra-mission relationships illustrates again the casuistic approach taken to peacekeeping operations by international organisations. However, all peacekeeping operations demonstrate an approach based on coordination and cooperation, rather than confrontation. The section afterwards scrutinises anew Chapter VIII of the UN Charter from the point of view that the practice of the UN and regional organisations has created a customary law basis under which the regional organisations could be directly bound themselves by the UN Charter. Indeed, bearing in mind, in particular the abundance of practice examined in this study and the fact that regional organisations increasingly seek the authorisation of the Security Council for the deployment of peacekeeping operations, it is justified to consider regional organisations being

directly bound by the UN Charter on a customary law basis. The implication of this argument is that it creates an additional layer of obligations by regional organisations which could give rise to the responsibility of international organisations in the form of precise obligations contained in a Security Council Resolution authorising the deployment of a peacekeeping operation. Furthermore, it increases once again the likelihood of joint responsibility as one could consider the UN to have breached its obligation under human rights law and a regional organisation to have breached an obligation under the mandate of the operation, presupposing that a violation of a UN mandate and thereby UN internal law also corresponds to a violation of international law. This particular question is analysed in the subsequent part of Chapter V and responded to affirmatively. In addition to creating an additional layer obligations in the form of primary norm for regional organisations, there are other consequences, for instance, a derogation from human rights law in the mandate of a peacekeeping operation would not correspond to a derogation from human rights law *per se*, as the mandate has to be considered independently of the corresponding human rights obligation. The regional organisations which are part of this study also possess further obligations under their own internal law prescribing obligations based on considerations of human rights and international humanitarian law, a quick overview of which is presented in the final part of Chapter V. The very end of the final Chapter of this thesis also deals with circumstances precluding wrongfulness which could justify internationally wrongful acts similar to dispositions in criminal law. The consent of a host-state to the deployment of a peacekeeping operation regularly constitutes the legal basis for the deployment of the operation in the first place, but it cannot be seen as a *carte blanche* by the host-state consenting to all potential violations of international law occurring during the deployment of the operation as also follows from the Status of Force Agreements or Status of Mission Agreements concluded regularly between the international organisations and the host-state. The wording of Article 20 ARIO likewise stipulates that the wrongfulness of the act in question would be only precluded in relation to the international organisation or State which has given its consent, meaning, the host-state.

Self-defence under Article 21 ARIO has to be interpreted in the traditional understanding under international law as a reaction involving the use of force to an armed attack so that it generally has to be distinguished from the understanding of “self-defence” in the context of peace operations. Self-defence in peacekeeping operations is understood to cover acts for the defence of the mandate and is primarily conceived as covering “interindividual relations”. However, should a peacekeeping operation respond to an armed attack as defined in Article 21 ARIO, that disposition would be applicable.

The final Chapter VI contains the conclusions and recommendations. Cooperation between international organisations has emerged as the key driver in defining roles or niches in the system of collective security in this study. International Law was two-fold beneficial for this development. The non-existence of established international legal rules applicable to international organisations resulted in a decade long, purely practice driven approach, which, although creating legal uncertainties, might not have been possible if legal rules applicable to international organisations were to have existed when the UN was founded. Peacekeeping operations *per se* would not have been possible without the recognition that international organisations possess "implied powers". The evolution of cooperation between international organisations cannot be seen as purely voluntary, but was also a result of external factors providing urgent incentives such as the scarcity of resources or claims for legitimacy. New further obstacles might arise resulting from the further multiplication of actors. Peacekeeping operations are increasingly deploying private contractors for specific purposes such as guard duties and states have started to deploy binational or multinational brigades such as the French-German brigade of which parts are deployed to EUTM Mali. The development towards more cooperation between international actors as encountered in this study is not limited to the particular field of peacekeeping operations, but rather part of a general development within international law. It is therefore generally necessary to further develop the law of international responsibility to prevent a further disconnect between the legal framework and reality. A lacuna remains in the ARIO as international organisations entering into cooperation arrangements without the intent to commit violations of international law cannot be hold responsible.

A starting point might be an attempt to reform the system of dispute settlement, but any such undertaking requires the support of states and international organisations alike. Doctrinal propositions include a World Court of Human Rights, but it is unlikely that states would support any such idea. An alternative would be to request an advisory opinion of the ICJ on the application of human rights law to international organisations and the required criterion for the attribution of conduct to two or several international organisations. The persisting obstacle with all suggestions for an enhancement of the regulation of conduct by cooperating international organisations is that the involved actors would refuse any ideas that are contrary to their interests. External pressure such as the accession of the EU to the ECHR may therefore beneficial as it might motivate international organisations and state alike to participate in any undertaking of regulation which can also be appealing for these actors as it would allow them to influence or possibly even steer the outcome.

In similar fashion, there are arguments for and against states to get involved in any attempt of further regulation of the joint responsibility of international organisation. Any such clarification could

possibly increase their protection from being held responsible for acts of organs seconded to international organisations, such as peacekeeping operations. Nevertheless there are two reasons why they might to refuse to support such a measure. First of all, any further development of the rules of international organisations could trigger the development of similar rules for states. Secondly, in particular the main contributing countries to a budget of an international organisation might be also opposed to any efforts which would increase the likelihood of international organisations being responsible. Effective changes therefore require the participation of states and international organisations alike.

With regard to the specific topic of the study, some specific recommendations can be made. The UN and regional organisations should engage in activities clarifying the application of IHL and human rights law to peacekeeping operations. One possibility would be for the UN to adopt a bulletin on the applicability of human rights law. The UN and regional organisations should include dispositions regarding the distribution of responsibility in their respective agreements if they engage in cooperation activities in peacekeeping operations. The UN should also give thought to developing a standard model agreement which may be used to expand and formalise consultation and cooperation between the UN and regional organisations. Finally, the issue of reliable funding for AU peacekeeping operations needs to be addressed by the UN and the EU.

Samenwerking tussen internationale organisaties tijdens vredesoperaties en vraagstukken rond internationale aansprakelijkheid – Samenvatting

De laatste jaren is de samenwerking tussen internationale organisaties tijdens vredesoperaties opgekomen als een belangrijk middel om de internationale vrede en veiligheid te bewaren, in verscheidene vormen en met inbegrip van verschillende actoren. Zo hebben hebben de VN en de AU in Soedan een hybride vredesoperatie uitgevoerd, en hanteerden de NAVO en de VN in de jaren '90 in Joegoslavië het zogenaamde "twee-sleutelsysteem" om toestemming te geven voor het uitvoeren van luchtaanvallen. Aan de potentiële gevolgen van deze samenwerkingsafspraken tussen internationale organisaties voor het internationaal aansprakelijkheidsrecht is tot voor kort echter weinig aandacht besteed. Diverse studies en rapporten van internationale instanties zoals de ILA en het *Institut de droit international* hebben de staat als uitgangspunt genomen en zich geconcentreerd op de aansprakelijkheid van de internationale organisaties of van hun respectieve leden. Het debat werd eveneens gedomineerd door publicaties over de aansprakelijkheid van lidstaten voor het handelen van internationale organisaties, bijvoorbeeld na de uitspraak van het Europees Hof voor de Rechten van de Mens in de zaak *Behrami/Saramati*. De Artikelen inzake de Aansprakelijkheid van Internationale Organisaties (AAIO), die in 2011 werden aangenomen door de Commissie voor Internationaal Recht (ILC) van de VN, behelzen ook een beperkte aansprakelijkheid van internationale organisaties in een zeer beperkt aantal gevallen, bijvoorbeeld in geval van steun en bijstand.

Deze studie stelt daarom de vraag of internationale organisaties die samenwerken in vredesoperaties gezamenlijk aansprakelijk kunnen zijn voor schendingen van het internationaal recht die plaatsvinden tijdens het uitvoeren van de operatie. Om verschillende redenen, waaronder de geografische oorsprong van de betrokken instellingen en hun rol in het inzetten van en het bijdragen aan vredesoperaties, zal deze studie zich beperken tot de VN en vier regionale organisaties: de NAVO, de EU, de AU en ECOWAS.

De studie volgt in zekere mate dezelfde benadering die gebruikt is voor de toepassing van het internationaal aansprakelijkheidsrecht, en begint de analyse met de vraag of de daden van internationale organisaties die samenwerken bij vredesoperaties kunnen worden toegerekend aan meer dan één organisatie. Hiervoor was het nodig om het juridisch kader te analyseren dat van toepassing is op de handhaving van de internationale vrede en veiligheid onder het Handvest van de VN (Hoofdstuk VII) en op de samenwerking tussen de VN en regionale organisaties (Hoofdstuk VIII),

alsmede de ontwikkeling van interinstitutionele samenwerkingsregelingen tussen de VN en regionale organisaties.

Het eerste hoofdstuk van dit proefschrift omvat allereerst een beknopte analyse van de ontstaansgeschiedenis van deze twee hoofdstukken uit het Handvest van de Verenigde Naties, tijdens de Conferentie van Dumbarton Oaks, en de "reactivering" van de Veiligheidsraad na het einde van de Koude Oorlog, waarin de effectieve uitvoering van het mandaat van de Raad gehinderd werd door de twee conflicterende machtsblokken die zitting hadden in de Veiligheidsraad en daar een vetorecht hadden, namelijk de VS en de Sovjet-Unie. Uit de ontstaansgeschiedenis van het Handvest kan worden afgeleid dat de relevante hoofdstukken van dit oprichtingsverdrag van de VN een compromis zijn tussen aanhangers van een regionalistisch en een universalistisch concept van collectieve veiligheid. Deze evenwichtige benadering ten aanzien van de handhaving van de internationale vrede en veiligheid stimuleert de samenwerking tussen de VN en regionale organisaties. Uit de hieropvolgende analyse van de handelwijze van de VN na het einde van de Koude Oorlog en van het juridische kader voor vredeshandhavings- en vredesafdwingingsoperaties blijkt inderdaad dat de samenwerking tussen de VN en regionale organisaties in zaken betreffende internationale vrede en veiligheid aanzienlijk is toegenomen na het einde van de Koude Oorlog. Vredeshandhavingsoperaties zijn veranderd van lichtgewapende troepen die toezicht houden op een staakt-het-vuren naar omvangrijke, multidimensionale operaties met mandaten die zowel militaire als civiele doelstellingen omvatten, zoals inspanningen om staten op te bouwen.

Hierbij kunnen een aantal waarnemingen worden gedaan. Allereerst neemt de arbeidsverdeling tussen de VN en de regionale organisaties bij vredesoperaties toe. Terwijl de VN zich concentreert op het inzetten van multidimensionale, traditionele operaties, worden de "robuustere" operaties uitgevoerd door regionale organisaties. De analyse van de handelwijze van de VN heeft echter getoond dat de Veiligheidsraad meermaals mandaten heeft gegeven waarin het onderscheid tussen vredeshandhavings- en vredesafdwingingsoperaties vervaagd was. De meest recente praktijkvoorbeelden duiden op een lichte tendens tot het afschaffen van het onderscheid tussen de twee concepten.

Dit aspect is in het bijzonder relevant omdat de aanduiding van een militaire operatie als een vredeshandhavings- dan wel een vredesafdwingingsoperatie bepaalt of een regionale organisatie toestemming van de Veiligheidsraad nodig heeft krachtens Hoofdstuk VIII van het Handvest van de VN. Daarom analyseert de volgende paragraaf het juridisch kader voor samenwerking tussen de VN en regionale organisaties onder Hoofdstuk VIII van het Handvest. Het werd duidelijk dat het compromis tussen regionalisme en universalisme in het gehele Handvest van de VN weerspiegeld wordt in de specifieke bepalingen in Hoofdstuk VIII van het Handvest. Artikel 52 van het Handvest

van de VN geeft voorrang aan regionale organisaties voor het behandelen van lokale geschillen, terwijl Artikel 53 in zichzelf een compromis is tussen de universalistische en de regionalistische benadering van collectieve veiligheid. Aan de ene kant kan de VN regionale organisaties gebruiken voor handhavingsmaatregelen onder haar eigen verantwoordelijkheid, aan de andere kant kunnen regionale organisaties zelf geen handhavingsmaatregelen treffen zonder toestemming van de Veiligheidsraad. In het eerste scenario worden en werden de handhavingsmaatregelen gezien als minder beperkend in de praktijk; de Veiligheidsraad kan een beroep doen op regionale organisaties voor allerlei handhavingsmaatregelen, niet alleen militaire maatregelen. Indien regionale organisaties daarentegen besluiten om zelf actie te ondernemen, is toestemming van de Veiligheidsraad alleen vereist wanneer de handhavingsmaatregelen gebruik maken van militair geweld. Om die reden vereisen alleen de traditionele vredeshandhavingsoperaties, uitgevoerd door regionale organisaties wier mandaat alleen toestemming verleent voor het gebruik van militair geweld in geval van zelfverdediging, geen toestemming krachtens Artikel 53.

In de praktijk baseert de Veiligheidsraad zich altijd op Hoofdstuk VII om een mandaat te verlenen voor regionale vredeshandhavingsoperaties, en doet het alleen een beroep op Hoofdstuk VIII wanneer het de institutionele betrekkingen tussen de VN en regionale organisaties betreft.

Globaal gesproken is er een complexe structuur voor de handhaving van de internationale vrede en veiligheid ontstaan tussen de VN en regionale organisaties, die de brug slaat tussen universalisme en regionalisme door een flexibele en pragmatische samenwerking tussen deze partijen. De opkomende arbeidsverdeling gebaseerd op de samenwerking tussen de VN en regionale organisaties in vredesoperaties is een impuls voor een scenario waarin de VN en de regionale organisaties gezamenlijk aansprakelijk zouden kunnen zijn. De casuïstische benadering die voortvloeit uit het handelen van de Veiligheidsraad vereist eveneens dat iedere afweging die leidt tot toerekening organisaties rekening houdt met het wisselende karakter van de interactie tussen de betrokken organisaties.

Hoofdstuk II vervolgt de hiërarchische benadering die is gekozen voor de analyse van dit studieobject en poogt vast te stellen of de bevindingen uit Hoofdstuk I verder bevestigd kunnen worden door middel van een onderzoek naar de betrekkingen tussen de VN en de regionale organisaties. Nadat in Hoofdstuk I het bredere juridische kader is verkend, beoogt Hoofdstuk II van deze studie de bevindingen uit Hoofdstuk I te verifiëren en opnieuw te beoordelen middels een analyse van de evolutie van de institutionele betrekkingen tussen de verschillende internationale organisaties.

De analyse toont dat er geïnstitutionaliseerde betrekkingen met een toenemende complexiteit gevormd zijn tussen de VN en de regionale organisaties, waaronder elementen van controle en waarborgen, alsmede onderlinge afhankelijkheden.

Daarnaast is geconstateerd dat er niet alleen een zekere arbeidsverdeling ontstaat tussen de VN en één regionale organisatie, maar ook tussen de VN en meerdere regionale organisaties. Na het einde van de Koude Oorlog heeft de NAVO zich omgevormd in een mondiale veiligheidsactor met een reeks samenwerkingsprogramma's in de hele wereld, en beperkt ze tegelijkertijd haar centrale strategische belangen en haar bijdragen aan vredesoperaties tot het Euro-Atlantische gebied. De betrokkenheid van de NAVO bij vredesoperaties op het Afrikaanse continent is beperkt tot kleinschalige steun, zoals luchttransporten of andere diensten, op expliciet verzoek. De afzijdigheid van de NAVO kan gedeeltelijk verklaard worden door het feit dat de voormalige koloniale machten die lid zijn van de NAVO en de EU liever in Afrika ingrijpen met gebruikmaking van de verschillende instrumenten waarover de EU beschikt. In tegenstelling tot de NAVO is de EU zeer actief betrokken bij de vredeshandhaving op het Afrikaanse continent en een losse driehoek van veiligheidsactoren heeft zich ontwikkeld met dit doel. Terwijl de VN multidimensionale vredesoperaties zal voorzien van een meer tranditioneel mandaat waar het het gebruik van geweld betreft, is de AU opgekomen als de organisatie die zich concentreert op de inzet van troepen met een meer concreet mandaat, in afwachting van een eventuele latere VN-operatie. De EU zelf concentreert zich in het bijzonder op twee kwesties. Allereerst geeft de EU financiële en andere steun, zoals de opleiding van troepen voor de operationalisering van het Afrikaans Vredes- en Veiligheidsbestel (APSA), binnen het juridische kader van de AU. Deze activiteit omvat bijvoorbeeld ook de financiering van vredesoperaties van de AU, zoals AMISOM. Daarnaast heeft de EU korte, kleinschalige operaties uitgevoerd onder het mandaat van de Veiligheidsraad ter ondersteuning van VN-operaties of om de tijd te overbruggen in afwachting van de inzet van een VN-operatie. Deze korte operaties omvatten civiele en opleidingsmissies, zoals bijvoorbeeld EUTM Mali.

De huidige gezamenlijke inspanningen om het Afrikaanse Vredes- en Veiligheidsbestel te operationaliseren hebben ECOWAS gehinderd in het aangaan van substantiële betrekkingen met de VN, de NAVO en de EU. Aan de andere kant hebben de niet-Afrikaanse organisaties zich geconcentreerd op de AU, dat deel uitmaakt van de APSA, als de organisatie met het mandaat om de internationale vrede en veiligheid te handhaven op vrijwel het gehele Afrikaanse continent. Desalniettemin, zoals geïllustreerd door het voorbeeld van Mali, komt ECOWAS op bepaalde wijze ook naar voren als een onafhankelijke waarborger van de veiligheid in haar regio, naast de AU en in samenwerking met andere internationale organisaties.

Verscheiden externe en interne factoren hebben geleid tot deze onvrijwillige en vrijwillige ontwikkelingen. Beperkte middelen en concurrentie over de legitimiteit hebben de organisaties aangemoedigd om hun eigen competenties voor vredesoperaties te ontwikkelen in werkvelden die elkaar aanvullen. Op het interne niveau hebben ze meer samenwerking met andere organisaties nagestreefd door een toenemend bewustzijn van het feit dat de conflicten van deze tijd complex zijn en niet door één enkele partij opgelost kunnen worden.

Het analyseren van de verschillende samenwerkingsovereenkomsten, partnerschappen en verklaringen wierp ook licht op de potentiële verdeling van de aansprakelijkheid onder de internationale organisaties met betrekking tot schendingen van het internationaal recht tijdens vredesoperaties. De uitvoerige analyse heeft getoond dat de samenwerking tussen internationale organisaties in vredesoperaties nu alle niveaus van de operatie beslaat, variërend van het opleiden van de troepen tot het voorbereiden van de inzet van deze troepen. Deze ontwikkeling vergroot de waarschijnlijkheid dat twee of meer internationale organisaties inderdaad gezamenlijk aansprakelijk zullen zijn. In het bijzonder de financiering door de EU – via de Afrikaanse Vredesfaciliteit – en de VN – via de vastgestelde bijdragen – van de vredesoperaties van de AU onderstrepen de invloed en de controle die de ene organisatie uitoefent over de andere door middel van specifieke samenwerkingsovereenkomsten. Beide financiële mechanismes treden in werking na een financieringsverzoek door de AU, dat door het Politiek en Veiligheidscomité van de EU of door de VN-Veiligheidsraad moet worden goedgekeurd, naast rapportageverplichtingen. Indien deze organisaties financiering weigeren kan dit feitelijk de uitvoering van de vredesoperatie tegenhouden; dit voorziet beide organisaties dus van een effectief instrument om ervoor te zorgen dat hun politieke doelstellingen bij een AU-vredesoperatie worden gehoord.

Met betrekking tot de kwestie van gezamenlijke aansprakelijkheid heeft de analyse van de samenwerkingsovereenkomsten en -mechanismes in Hoofdstuk II een toenemend samenspel tussen alle organisaties aangetoond. Deze voortgaande institutionalisering van de betrekkingen tussen organisaties leidt ertoe dat het in feite redelijk waarschijnlijk is dat een handeling die plaatsvindt ten tijde van een vredesoperatie en die het internationaal recht schendt, onder de aansprakelijkheid van twee of meer internationale organisaties zal vallen. De driehoek van de betrekkingen tussen de VN, de EU en de AU suggereert dat het behoorlijk waarschijnlijk is dat deze drie organisaties gezamenlijk aansprakelijk zullen zijn tijdens vredesoperaties op het Afrikaanse continent. ECOWAS en de NAVO spelen echter eerder een ondersteunende rol bij Afrikaanse vredesoperaties en hun aansprakelijkheid zal daarom ook daartoe beperkt blijven. Hoofdstuk II toont nogmaals de pragmatische en casuïstische benadering van alle betrokken partijen aan en onderstreept de

noodzaak om de specifieke samenwerkingsovereenkomsten en -mechanismes binnen een bepaalde vredesoperatie kritisch te analyseren.

Om een internationale organisatie aansprakelijk te kunnen stellen is het niet alleen vereist dat de handeling toerekenbaar is aan deze organisatie, maar ook dat deze een schending vormt van een verplichting onder het internationaal recht. Hoofdstuk III werpt daarom licht op het materiële recht dat van toepassing is op vredesoperaties. Het begint met een korte beschrijving van het concept van rechtspersoonlijkheid, hetgeen een vereiste is om eender welke internationale entiteit aansprakelijk te kunnen stellen uit hoofde van het internationaal recht. Hierna volgt een korte paragraaf over het tweeledige karakter van vredesoperaties, als organen van een internationale organisatie die tegelijkertijd bestaan uit troepen wier thuisland normaalgesproken ook de operationele bevelvoering en controle heeft overgedragen aan de internationale organisatie.

Afhankelijk van het mandaat van de vredesoperatie en de lokale omstandigheden kunnen zowel de mensenrechten als het internationanaal humanitair recht van toepassing zijn op de betreffende internationale organisaties. Aangezien internationale organisaties geen partij zijn bij verdragen op deze twee rechtsgebieden is het noodzakelijk om te zien of er andere bronnen zijn voor de relevante primaire verpflichtingen onder het internationaal recht. Het wordt snel duidelijk dat er veel juridische onduidelijkheden zijn bij de toepassing van de mensenrechten en het internationaal humanitair recht. Deze onduidelijkheden hebben specifiek betrekking op de materiële en geografische reikwijdte van deze rechtsgebieden.

Met betrekkingen tot de mensenrechten zijn er verscheidene theorieën geopperd om de toepassing van mensenrechten op internationale organisaties te rechtvaardigen, zoals argumenten die internationale organisaties verplichtingen opleggen gebaseerd op de verplichtingen van hun lidstaten. Het uitoefenen van jurisdictie door internationale organisaties en de kwestie van de geografische reikwijdte van mensenrechten waren in het bijzonder problematisch. Aangezien internationale organisaties per definitie entiteiten zonder eigen territorium zijn is er wel gesteld dat zij alleen jurisdictie konden uitoefenen uit hoofde van de mensenrechten onder omstandigheden die vergelijkbaar zijn met een staat die handelt buiten zijn eigen territorium.

De internationale jurisprudentie accepteert over het algemeen twee modellen voor extraterritoriale jurisdictie, gebaseerd op de controle over een territorium (het ruimtelijk model) of gebaseerd over de controle over een persoon (het persoonlijk jurisdictiemodel), hoewel beide modellen in de praktijk ook zijn samengevoegd. Gebaseerd op hun beperkte internationale rechtspersoonlijkheid kunnen internationale organisaties alleen gebonden worden aan de specifieke mensenrechten die betrekking hebben op activiteiten waar zij deel aan nemen volgens hun oprichtingsverdragen.

De toepassing van internationaal humanitair recht (IHR) op internationale organisaties is in dat opzicht minder problematisch dan mensenrechten, aangezien het IHR niet gebonden is aan een specifiek territorium en het automatisch van toepassing wordt bij iedere actieve deelname aan een conflict. Nieuwe problemen worden veroorzaakt doordat er slechts een beperkt aantal voorbeelden bestaat warbij welke internationale organisaties deze rechtsgebieden in de praktijk hebben toegepast. Hoewel de algemene toepasbaarheid van het IHR niet ter discussie staat, is er dan ook geen consensus onder juristen over de vraag of vredeshandhavers volgens het internationaal recht als burgers of als strijdenden gelden en of het recht betreffende internationaal of niet-internationaal gewapend conflict toepasbaar zou zijn indien een vredesoperatie van een internationale organisatie direct betrokken zou raken bij een specifiek conflict, hetgeen eveneens afhankelijk zou zijn van de vraag aan welke zijde in het conflict de internationale organisatie zou ingrijpen.

De schendingen van het internationaal recht die voorkomen tijdens de uitvoering van vredesoperaties zijn vaak schendingen van de meest fundamentele normen, die eveneens beschermd zijn onder het international humanitair recht, het recht in niet-internationale gewapende conflicten en onder de mensenrechten. Mensenrechten worden tegenwoordig ook geacht van toepassing te zijn ten tijde van gewapend conflict, hetgeen vragen oproept omtrent het toepasselijke recht indien de normen van het IHR en van de mensenrechten conflicteren. Volgens de jurisprudentie van het Internationaal Gerechtshof in de zaken *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* en in het bijzonder in zijn advies over de *Legality of the Threat or Use of Nuclear Weapons*, lijkt het de voorkeur te genieten om de respectievelijke norm van *lex specialis* norm voor ieder geval apart vast te stellen, waarbij in het algemeen moet worden geprobeerd om conflicterende normen op harmonieuze wijze te interpreteren.

Tijdens de analyse van het recht dat toegepast kan worden op vredesoperaties bleek dat deze toepasbaarheid altijd afhankelijk is van de specifieke omstandigheden, en daarmee komt deze toepasbaarheid overeen met de casuïstische benadering van vredesoperaties. Dit maakt het nog waarschijnlijker dat twee of meer internationale organisaties gezamenlijk aansprakelijk kunnen zijn voor schendingen van het internationaal recht tijdens vredesoperaties.

Het is mogelijk dat de gezamenlijke toerekening van daden aan internationale organisaties gebaseerd is op schendingen van verschillende primaire normen. Zo kan het gebeuren dat de VN jurisdictie heeft op een territoriale basis en ertoe verplicht is om een zekere handelwijze te voorkomen, terwijl een andere, regionale organisatie jurisdictie had op een persoonlijke basis en ertoe verplicht was om een bepaalde handeling na te laten.

De laatste paragraaf van Hoofdstuk III bekijkt de toepasbaarheid van het bezettingsrecht op vredesoperaties. Om dit rechtsgebied van toepassing te laten zijn is vereist dat een vredesoperatie een vergelijkbare mate van controle uitoefent over een gegeven gebied als een nationale staat – hetgeen slechts enkele malen in de praktijk voorgekomen is, zoals in het geval van UNMIK. Daarnaast beoogt het internationale bestuur door middel van een vredesoperatie in een gebied de staat en zijn functionerende regeringsstructuren weer op te bouwen en de vrede en veiligheid te handhaven, hetgeen niet overeenkomt met het bezettingsrecht dat juist beoogt om de *status quo* in een bepaald gebied te bewaren. Ook op basis van andere argumenten, zoals de handelwijze van de VN, is geconcludeerd dat het bezettingsrecht niet toepasbaar is op vredesoperaties.

Hoofdstuk IV onderzoekt het internationaal aansprakelijkheidsrecht om te bepalen of de artikelen over de aansprakelijkheid van internationale organisaties, ontwikkeld door het ILC, toereikend en geschikt zijn om de samenwerking tussen internationale organisaties in vredesmissies te reguleren, op basis van de resultaten van de analyse uit de Hoofdstukken I t/m III. Het hoofdstuk begint met een analyse van de specifieke voorwaarden omschreven in de AAIO waaraan voldaan moet worden om internationale organisaties gezamenlijk aansprakelijk te kunnen stellen voor schendingen van het internationaal recht. Artikel 7 van de AAIO reguleert de toerekenbaarheid van het handelen aan internationale organisaties wanneer organen aan hen ter beschikking zijn gesteld door andere internationale organisaties of staten. Het bepaalt dat, indien de ontvangende internationale organisatie effectieve controle uitoefent over het gedetacheerde orgaan, de daden van deze laatste beschouwd worden als daden van de internationale organisatie en als zodanig toerekenbaar zijn. Deze bepaling maakt een analyse mogelijk van het aansprakelijkheidsrecht voor vredesoperaties, aangezien het over het algemeen gebruikt wordt om te bepalen wie aansprakelijk is voor het handelen tijdens een vredesoperatie: een lidstaat van een organisatie die troepen stuurt, of de organisatie zelf. Uit een analyse van de jurisprudentie van nationale en internationale hoven en tribunalen blijkt echter dat er in de praktijk in het internationaal recht geen duidelijke regel bestaat voor de toerekenbaarheid aan een orgaan dat door een internationale organisatie of een staat aan een andere internationale organisatie gedetacheerd is. Hoewel Artikel 48 van de AAIO en de commentaren van de Speciale Rapporteur van de ILC bepalen dat twee of meer organisaties gezamenlijk aansprakelijk kunnen zijn, geven de AAIO geen indicatie van de voorwaarden, buiten de context van de twee andere specifieke bepalingen in de AAIO. Artikel 14 en 15 staan toe dat het handelen wordt toegerekend aan een internationale organisatie die een andere internationale organisatie help of assisteert bij het begaan van een internationaal onrechtmatige daad (Artikel 14) of die leiding geeft of controle uitoefent over een andere internationale organisatie die een internationaal onrechtmatige daad begaat (Artikel 15). Deze artikelen gaan er echter van uit dat één organisatie een ondersteunende rol heeft (Artikel 14) of dat de handelende internationale

organisatie volledig beheerst wordt door een andere organisatie (Artikel 15). Deze artikelen zijn daarom simpelweg niet passend of geschikt om de samenwerking tussen internationale organisaties in vredesoperaties te reguleren wanneer deze gebaseerd is op verschillende bijdragen van verscheiden internationale organisaties op diverse niveaus en in allerlei vormen, afhankelijk van de specifieke omstandigheden van ieder geval.

Het voorstel is daarom, in overeenstemming met de Artikelen 64 en 65 van de AAIO, om een criterium voor toerekenbaarheid als *lex specialis* uit te werken voor de specifieke context van de samenwerking tijdens vredesoperaties. Dit criterium zal worden aangeduid als 'normatieve controle', om de bestaande leemte in de AAIO te verhelpen. Het argument hiervoor is dat het samenwerkingsnetwerk tussen internationale organisaties op dit specifieke werkterrein een andere benadering vereist dan de benadering die in de Artikelen van de ILC gevonden kan worden, volgens welke de toerekenbaarheid van handelen aan een internationale organisatie niet gebaseerd is op de bijdrage aan een specifiek enkel feit, maar wordt afgeleid uit de controle die wordt uitgeoefend over de operatie via verscheiden componenten van het hele kader waarin de vredesoperatie is opgezet. Het dient te worden benadrukt dat de toepassing van een dergelijk criterium afhankelijk zou moeten zijn van de specifieke omstandigheden, niet in geringe mate vanwege het feit dat elke vredesoperatie uniek is in haar mandaat en politieke context. Een belangrijke eigenschap van het criterium van normatieve controle is het uitoefenen van invloed en controle, gebaseerd op de institutionele banden tussen de betrokken organisaties, zowel op het interinstitutionele als op het operationele niveau.

De toepasbaarheid en geschiktheid van dit nieuwe aanbevolen toerekeningscriterium in de context van internationale organisaties die samenwerken tijdens vredersoperaties wordt besproken in Hoofdstuk V dat ook verscheidene casestudies omvat, namelijk de KFOR in Kosovo, UNAMID in Soedan, UNMISS en UNISFA in Zuid-Soedan en AFISMA en MINUSMA in Mali. Door het gebruik van deze chronologische benadering was het mogelijk om opnieuw het voortdurend veranderende karakter van de betrekkingen tussen de betrokken organisaties, en het feit dat ze steeds meer geïnstitutionaliseerd raken, te belichten. Een ander voordeel van deze benadering was dat deze het mogelijk maakte om het aanbevolen criterium van de normatieve controle verder te definiëren, op basis van het feit dat de ontwikkeling van steeds meer samenwerking tussen internationale organisaties tijdens vredesoperaties tegelijkertijd ook op het operationele niveau plaatsvindt. Terwijl het samenwerkingskader nog redelijk beperkt was in de gevallen van KFOR en UNMIK, toonden de case studies van de twee operaties in Mali een volledige integratie binnen de operatie en het daaraan verbonden politieke process binnen het samenwerkingskader. De KFOR, als eerste case study, bevestigde de hypothese dat een nauwe band tussen de uitgeoefende controle en de politieke

en andere niveaus noodzakelijk is om als rechtvaardiging te dienen om één of meerdere organisaties aansprakelijk te kunnen stellen voor de daden van een vredesoperatie die formeel uitgevoerd wordt door een andere organisatie. Dit is gebaseerd op het feit dat de samenwerkende organisaties geen deel uitmaken van de militaire bevelslijn van de betreffende vredesoperatie. De documenten die gepubliceerd zijn over de KFOR rechtvaardigden niet de gezamenlijke aansprakelijkheid van zowel de VN als de NAVO voor de daden van de KFOR, in tegenstelling tot de beslissing van het Europees Hof voor de Rechten van de Mens in de zaak *Behrami/Saramati*, waarin gesteld werden dat de daden van de KFOR aan de VN toerekenbaar waren.

UNAMID, in Darfur, is uniek als vredesoperatie omdat het sinds het begin was opgezet als een hybride operatie van zowel de VN als de AU. Eén van de voornaamste verschillen met de KFOR was dat het inzetten van UNAMID rechtstreeks gekoppeld was aan het in goede banen leiden van het politieke proces in Darfur. Feitelijk was UNAMID zelfs verantwoordelijk voor het sturen van de implementatie en het in goede banen leiden van het vredesproces. Wat het vereiste verband tussen enerzijds politieke controle op basis van institutionele betrekkingen tussen de organisaties en anderzijds controle op het operationele niveau betreft, heeft de organisatiestructuur van UNAMID de drempelwaarde gepasseerd, zodat het gerechtvaardigd lijkt om te stellen dat beide organisaties normaal gesproken gezamenlijk aansprakelijk zouden zijn voor schendingen van het internationaal recht die plaatsvinden tijdens de uitvoering van de operatie. In het geval van UNAMID was het voorts mogelijk om de hypothese te formuleren dat de betrokkenheid van dezelfde partijen in het politieke vredesproces en op het operationele niveau waarschijnlijk geleid heeft tot een versterkte uitoefening van controle en overzicht over de vredesoperatie door alle partijen, waarmee het potentieel voor gezamenlijke aansprakelijkheid verhoogd is.

In Zuid-Soedan ziet de situatie er anders uit. UNISFA en UNMISS zijn beide ingezet onder auspiciën van de VN. Hoewel het vredesproces in Zuid-Soedan door de AU geleid wordt, zijn diens invloed en politieke controle over de vredesoperatie niet weerspiegeld in strategische en operationele controleovereenkomsten. Het geval van Zuid-Soedan bevestigt daarom de hypothese die geformuleerd is in het geval van UNAMID, dat een situatie waarin dezelfde partijen een sturende rol hebben tijdens het politieke proces en tevens op het operationele en strategische niveau van een vredesoperatie waarschijnlijk leidt tot een gezamenlijke toerekenbaarheid van het handelen. In tegenstelling tot de situatie rond UNAMID is het tijdens de uitvoering van UNISFA en UNMISS niet gerechtvaardigd om potentiële schendingen van het international recht toe te rekenen aan zowel de VN als de AU. Het is echter mogelijk om er nog een hypothese uit af te leiden: aangezien de VN niet alleen de internationale organisatie is met de primaire verantwoordelijkheid voor het handhaven van de internationale vrede en veiligheid, maar ook de organisatie die dit het meest in de praktijk heeft

gebracht, lijkt de VN minder bereid te zijn om samenwerking met externe partijen te accepteren dan de vredesoperaties die uitgevoerd worden door de regionale organisaties en die geanalyseerd worden in deze studie. Een laatste interessante eigenschap van UNMISS en UNISFA bestond uit de samenwerkingsmechanismes met de operatie UNAMID. Het gebrek aan gedetailleerde informatie over deze regelingen maakt het niet mogelijk om zelfs maar de mogelijkheid te toetsen dat de AU medeaansprakelijk zou kunnen zijn voor het handelen van UNMISS en UNISFA door middel van deze toegevoegde samenwerkingslaag.

AFISMA, dat actief was in Mali voordat het werd omgevormd in MINUSA, kan worden gezien als een treffend voorbeeld van samenwerking tussen de VN en regionale organisaties. Het samenwerkingsniveau tussen de VN, de AU, ECOWAS en ook de EU overtreft alle eerdere vredesoperaties hier geanalyseerd en rechtvaardigt de stelling dat al deze organisaties gezamenlijk aansprakelijk waren, met de opmerking dat de beperkte operationele betrokkenheid van de EU gecompenseerd kan worden door haar substantiëlere betrokkenheid en controle door het verstrekken van de financiële middelen via de Afrikaanse Vredesfaciliteit.

Het geval van MINUSMA bevestigt de eerder geformuleerde hypothese dat het samenwerkingsniveau tussen de VN en regionale organisaties in beperktere mate lijkt plaats te vinden wanneer een operatie onder auspiciën van de VN plaatsvindt. Desalniettemin kunnen MINUSMA en Mali in het algemeen het begin van een nieuw tijdperk in de vredeshandhaving vertegenwoordigen, waarin het politieke proces voor conflictoplossing en het inzetten van een vredesoperatie deel uitmaken van een bredere gezamenlijke benadering met twee of meer internationale organisaties. Het aanzienlijke niveau van controle dat de VN uitoefent over MINUSMA heeft voorkomen dat de bijdragen van en de samenwerking met de andere internationale organisaties het niveau bereikten waarin de toepassing van het criterium van normatieve controle gerechtvaardigd zou zijn.

Vervolgens illustreerde de poging om de betrekkingen binnen een operatie te classifiëren opnieuw de casuïstische benadering die internationale organisaties hanteren bij vredesmissies. Alle vredesmissies toonden echter een benadering op basis van coördinatie en samenwerking, en niet op basis van confrontatie. De daaropvolgende paragraaf neemt opnieuw Hoofdstuk VIII van het Handvest van de VN onder de loep, vanuit het gezichtspunt dat het handelen van de VN en regionale organisaties een gewoonterechtelijke basis heeft gecreëerd waaronder de regionale organisaties rechtstreeks gebonden kunnen zijn aan het Handvest van de VN. Inderdaad, in het bijzonder gelet op de overvloed aan concrete gevallen uit de praktijk die in deze studie aan bod komen, en ook gelet op de tendens dat regionale organisaties steeds vaker toestemming vragen aan de Veiligheidsraad om vredesoperaties in te zetten, is het gerechtvaardigd te stellen dat de regionale organisaties op een

gewoonterechtelijke basis rechtstreeks gebonden zijn aan het Handvest van de VN. Dit argument impliceert dat er door de regionale organisaties een laag verplichtingen wordt toegevoegd, hetgeen kan leiden tot aansprakelijkheid van internationale organisaties in de vorm van precieze verplichtingen die zijn vastgelegd in de Resolutie van de Veiligheidsraad die de inzet van een vredesoperatie toestaat. Bovendien vergroot het nogmaals de waarschijnlijkheid van gezamenlijke aansprakelijkheid, aangezien het voor kan komen dat de VN een mensenrechtenverplichting schendt, of een regionale organisatie een verplichting onder het mandaat van de operatie schendt, veronderstellend dat een schending van een mandaat van de VN en daarbij van intern VN-recht overeenkomt met een schending van het internationaal recht. Deze specifieke vraag wordt geanalyseerd in het volgende deel van Hoofdstuk V en bevestigend beantwoord. Naast het toevoegen van een nieuwe laag verplichtingen als primaire norm voor regionale organisaties, zijn er ook andere gevolgen. Een afwijking van de mensenrechtennormen in het mandaat van een vredesoperatie zou bijvoorbeeld niet noodzakelijkerwijs overeenkomen met een afwijking van de mensenrechten zelf, aangezien het mandaat onafhankelijk van de bijbehorende verplichting op het gebied van de mensenrechten beoordeeld dient te worden. De regionale organisaties die in deze studie aan bod komen hebben daarnaast verdere verplichtingen onder hun eigen intern recht, gebaseerd op overwegingen van mensenrechten en internationaal humanitair recht, waarvan een beknopt overzicht in het laatste deel van Hoofdstuk V gevonden kan worden. Ten slotte gaat het laatste hoofdstuk van dit proefschrift in op de omstandigheden waaronder geen onrechtmatigheid mogelijk is. Deze omstandigheden zouden een internationale onrechtmatige daad kunnen rechtvaardigen, op vergelijkbare wijze met bepalingen in het strafrecht. De toestemming van een gastland om een vredesoperatie in te zetten vormt vaak de juridische basis voor deze operatie, maar kan niet gezien worden als een *carte blanche* van het gastland om alle potentiële schendingen van het internationaal recht toe te staan die plaatsvinden tijdens het uitvoeren van de operatie, zoals eveneens volgt uit de overeenkomsten over de status van de strijdkrachten en de overeenkomsten over de status van de operatie die vaak gesloten worden tussen de internationale organisaties en het gastland. De formulering van Artikel 20 van de AAIO stelt op vergelijkbare wijze dat de onrechtmatigheid van de daad in kwestie alleen ongedaan gemaakt kan worden in verband met de internationale organisatie of de staat die toestemming heeft gegeven, hetgeen betekent: het gastland.

De zelfverdediging onder Artikel 21 van de AAIO moet geïnterpreteerd worden in de traditionele zin van het internationaal recht, als een gewelddadige reactie op een gewapende aanval, zodat het over het algemeen onderscheiden moet worden van “zelfverdediging” in de context van vredesoperaties. Onder zelfverdediging in vredesoperaties worden de daden verstaan die zijn begaan teneinde het mandaat te verdedigen. Deze daden bestaan voornamelijk uit “betrekkingen tussen individuen”.

Indien een vredesoperatie echter zou reageren op een gewapende inval in de zin van Artikel 21 van de AAIO, zou die bepaling toepasbaar zijn.

Het laatste Hoofdstuk VI bevat de conclusies en aanbevelingen. In deze studie komt de samenwerking tussen internationale organisaties naar voren als de belangrijkste factor in het bepalen van rollen en leemtes in het collectieve veiligheidssysteem. Het internationaal recht heeft deze ontwikkeling op twee manieren bevorderd. De afwezigheid van geaccepteerde internationaal rechtelijke bepalingen die van toepassing zijn op internationale organisaties heeft geleid tot een benadering die gedurende een decennium slechts door de praktijk gevoed werd, hetgeen – hoewel het juridische onzekerheden gecreëerd heeft – niet mogelijk zou zijn geweest indien er juridische bepalingen toepasbaar op internationale organisaties zouden hebben bestaan voordat de VN werd opgericht. Vredesoperaties zouden in principe niet mogelijk zijn geweest zonder de erkenning dat internationale organisaties impliciete bevoegdheden hebben. De voortgang van de samenwerking tussen internationale organisaties kan niet geacht worden vrijwillig te zijn geweest, maar ook het gevolg van externe, urgente factoren, zoals schaarse middelen en de legitimiteitseis. Nieuwe belemmeringen kunnen opkomen als gevolg van de verdere toename van het aantal actoren. Vredesoperaties maken steeds vaker gebruik van particuliere contractanten voor specifieke doeleinden zoals bewakingsdiensten, en staten zijn begonnen met het inzetten van bi- of multinationale brigades, zoals de Frans-Duitse brigade waarvan delen zijn ingezet in EUTM Mali. De ontwikkeling waarbij internationale partijen meer samenwerken, zoals uiteengezet in deze studie, beperkt zich niet tot het specifieke terrein van vredesoperaties, maar is een algemene ontwikkeling in het internationaal recht. Het is daarom algemeen noodzakelijk om het internationaal aansprakelijkheidsrecht verder te ontwikkelen, teneinde een verdere loskoppeling van het juridische kader en de praktijk te voorkomen. Er bestaat nog steeds een leemte in de AAIO, aangezien internationale organisaties die samenwerkingsregelingen aangaan zonder de intentie om het internationaal recht te schenden niet aansprakelijk gesteld kunnen worden.

Een begin zou kunnen zijn om te proberen het systeem van geschillenregeling te hervormen, maar dit streven vereist de steun van zowel staten als internationale organisaties. In de academische wereld zijn voorstellen gedaan zoals bijvoorbeeld een Internationaal Hof voor de Mensenrechten, maar het is onwaarschijnlijk dat staten een dergelijk idee zouden ondersteunen. Een alternatief zou zijn om het Internationaal Gerechtshof om een advies te vragen over de toepassing van mensenrechten op internationale organisaties en het vereiste criterium voor de toerekenbaarheid van handelingen aan twee of meer internationale organisaties. De hardnekkige belemmering voor all deze suggesties om het handelen van samenwerkende internationale organisaties te reguleren is dat de betrokken partijen ieder idee dat indruist tegen hun belangen zouden afwijzen. Externe druk,

zoals de toetreding van de EU tot het Europees Verdrag voor de Rechten van de Mens, kunnen bevorderlijk werken, aangezien deze druk internationale organisaties en staten kan motiveren om deel te nemen aan verdergaande regulering, hetgeen ook aantrekkelijk kan zijn voor deze actoren, aangezien het ze in staat stelt om de uitkomst te beïnvloeden of eventueel zelfs te sturen.

Op vergelijkbare wijze zijn er argumenten voor en tegen de betrokkenheid van staten bij pogingen om de gezamenlijke aansprakelijkheid van internationale organisaties verder te reguleren. Een dergelijke verduidelijking zou mogelijkerwijs kunnen voorkomen dat zij aansprakelijk gesteld zouden worden voor het handelen van organen die aan internationale organisaties gedetacheerd zijn, bijvoorbeeld aan vredesmissies. Desalniettemin zijn er twee redenen waarom staten een verdere regulering niet zouden steunen. Allereerst zou een verdere ontwikkeling van bepalingen voor internationale organisaties kunnen leiden tot de ontwikkeling van vergelijkbare bepalingen voor staten. Ten tweede zouden met name de landen die het grootste deel bijdragen aan de financiering van een internationale organisatie gekant kunnen zijn tegen enige poging om het waarschijnlijker te maken dat internationale organisaties aansprakelijk zouden worden gesteld. Een werkelijke verandering vereist daarom de deelname van zowel staten als internationale organisaties aan dit debat.

Wat het specifieke onderwerp van deze studie betreft kunnen een paar specifieke aanbevelingen worden gedaan. De VN en de regionale organisaties zouden deel moeten nemen aan activiteiten die de toepassing van IHR en mensenrechten op vredesoperaties verduidelijken. Eén mogelijkheid zou zijn dat de VN een bulletin zou aannemen over de toepassing van mensenrechtenwetgeving. De VN en de regionale organisaties zouden in hun verschillende overeenkomsten bepalingen moeten opnemen omtrent de verdeling van de aansprakelijkheid, indien zij samenwerkingen aangaan tijdens vredesoperaties. De VN zou eveneens moeten overwegen om een standaardovereenkomst te ontwikkelen die gebruikt kan worden om de raadpleging en de samenwerking tussen de VN en de regionale organisaties uit te breiden en te formaliseren. Ten slotte zouden de VN en de EU de kwestie van de betrouwbare financiering voor de vredesoperaties van de AU moeten oplossen.

Curriculum vitae

Moritz Moelle is a PhD Candidate in International Law at the Universities of Geneva and Leiden. As part of his PhD research, he was a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge (October – December 2010, January – September 2012) and a visiting scholar at Columbia Law School, New York (August to December 2011). Moreover he has worked as an assistant to Prof. Dr. Georg Nolte, in the International Law Commission of the UN (session of 2009) and as a trainee for the peacekeeping training programme of UNITAR. He was also a legal intern at ITLOS (2009) and an assistant editor of the Leiden Journal of International Law (2008-2009). Part of his PhD research was based on interviews and talks with current and former staff of the UN, NATO and staff of the General Staff College and the Ministry of Defence of Germany. Prior to starting his PhD, he gained master's degrees in International and European Law and in Public International Law from the Universities of Geneva and Leiden, as well as the equivalent of the LL.B.