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

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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.