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

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

Now the evolution of United Nations 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.<sup>1</sup>

### **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

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<sup>1</sup> Security Council, 6903<sup>rd</sup> meeting, UN Doc. S/PV.6903 (2013), 11.

maintaining international peace and security,<sup>2</sup> 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.<sup>3</sup>

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.”<sup>4</sup> Cooperation can be based on formal arrangements and agreements or also simply on practice.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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

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<sup>2</sup> 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.

<sup>3</sup> Cf. T. Tardy, ‘Hybrid Peace Operations: Rationale and Challenges’, in (2014) 20 *Global Governance*, 95, 97.

<sup>4</sup> M. Virally, *L’Organisation Mondiale* (1972), 295.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, 295-96.

<sup>7</sup> 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.

<sup>8</sup> *Ibid.*, 297.

comprehensive approach towards peacekeeping or to allow flexibility and selectivity in engaging in peacekeeping operations.<sup>9</sup>

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.<sup>10</sup>

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 (...)

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<sup>9</sup> Tardy, *supra* note 3, 95, 99-104.

<sup>10</sup> *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.<sup>11</sup>

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”<sup>12</sup> – 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.”<sup>13</sup>

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.<sup>14</sup> 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

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<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> S.D. Krasner, ‘Structural causes and regime consequences: regimes as intervening variables’, in S.D. Krasner (ed.), *International Regimes* (1982), 1, 2.

<sup>14</sup> 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.”<sup>15</sup> 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*.<sup>16</sup>

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<sup>17</sup>, 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.<sup>18</sup>

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<sup>15</sup> J. Morris, H. McCoubrey, ‘Regional peacekeeping in the post-cold war era’, in (1999) 6 *International Peacekeeping*, 129, 147.

<sup>16</sup> H. Yamashita, ‘Peacekeeping cooperation between the United Nations and regional organisations’, in (2012) 38 *Review of International Studies*, 165, 167.

<sup>17</sup> The vast majority of NATO’s members are European and the cultural ties are strong with their transatlantic fellow NATO members.

<sup>18</sup> 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. Rühle, ‘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<sup>19</sup>

### 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).<sup>20</sup> 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.<sup>21</sup> The founding of NATO was preceded by the Brussels Treaty which led to the creation of the Western European Union.<sup>22</sup> 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.<sup>23</sup> 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.”<sup>24</sup> This subordination to the primacy of the UN Charter is mirrored throughout the whole North Atlantic Treaty.

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<sup>19</sup> Final communiqué of the Meeting of the Defence Planning Committee, 11 December 1992, para. 4.

<sup>20</sup> Comecon was the economic counter-part to the Warsaw Treaty Organization of Friendship, Cooperation and Mutual Assistance, “Warsaw Pact” which was established in 1955.

<sup>21</sup> 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.

<sup>22</sup> ‘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.

<sup>23</sup> The North-Atlantic Treaty, Washington D.C. – 4 April 1949.

<sup>24</sup> 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.<sup>25</sup> 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<sup>26</sup> and it arguably fulfils the criteria to qualify as a regional organisation under Chapter VIII of the UN Charter.<sup>27</sup> Nevertheless, NATO itself has always rejected any qualifications as a regional arrangement under Chapter VIII.<sup>28</sup> 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](http://www.nato.int/cps/en/natolive/topics_50321.htm).

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> See, *infra* Chapter I.

<sup>28</sup> 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, 5007<sup>th</sup> 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.<sup>29</sup> 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."<sup>30</sup> 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."<sup>31</sup>

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."<sup>32</sup> As the statement by NATO shows<sup>33</sup>, 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.<sup>34</sup> 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.

<sup>29</sup> D. S. Yost, 'NATO and International Organizations', Forum Paper 3, NATO Defense College, September 2007, 34.

<sup>30</sup> NATO's relations with the United Nations, [http://www.nato.int/cps/en/natolive/topics\\_50321.htm](http://www.nato.int/cps/en/natolive/topics_50321.htm)

<sup>31</sup> 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.

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

<sup>33</sup> NATO's relations with the United Nations, *supra* note 30. The Alliance's New Strategic Concept, *supra* note 31, para. 41.

<sup>34</sup> 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. Röss, 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.<sup>35</sup> 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.<sup>36</sup> 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-defence 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

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<sup>35</sup> 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.

<sup>36</sup> 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.<sup>37</sup> The organisation was forced to transform and to take on new tasks and responsibilities as well as to defend its continuing existence.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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

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<sup>37</sup> See also The Alliance's New Strategic Concept, *supra* note 31, para. 1.

<sup>38</sup> 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.

<sup>39</sup> 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.

<sup>40</sup> 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<sup>41</sup> based on the principles contained in the Charter of Paris for a new Europe.<sup>42</sup> On the basis of the partnership for peace and other programmes<sup>43</sup> 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.”<sup>44</sup> 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.”<sup>45</sup>

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.”<sup>46</sup> 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.”<sup>47</sup> The interpretation of Article 5 was further expanded in the new Strategic

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<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> 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 21<sup>st</sup> century”, Active Engagement in Cooperative Security: A More Efficient and Flexible Partnership Policy (2011), para.2.

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> The Alliance’s Strategic Concept, *supra* note 28, para. 12.

<sup>47</sup> 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”<sup>48</sup>[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.<sup>49</sup> 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.<sup>50</sup> 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.”<sup>51</sup> This is somewhat astonishing as NATO has not considered it to be necessary to amend the North Atlantic Treaty accordingly.<sup>52</sup> 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.

<sup>48</sup> Strategic Concept For the Defence and Security of The Members of the North Atlantic Treaty Organisation”, Active Engagement, Modern Defence, 2010, para. 4. a.

<sup>49</sup>*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]

<sup>50</sup> 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.

<sup>51</sup> 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. See 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.

<sup>52</sup> 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.<sup>53</sup>

Although evolutionary interpretation through practice has been recognised in international law,<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

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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.

<sup>53</sup> These operations clearly do not fall under the rubric 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.

<sup>54</sup> 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.

<sup>55</sup> B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen* (2006), 36.

<sup>56</sup> S. Trifunovska, *North Atlantic Treaty Organization (NATO) (2010)*, 29-30, para. 26

<sup>57</sup> 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.<sup>58</sup> 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."<sup>59</sup>

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.<sup>60</sup> 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<sup>61</sup> [Emphasis added]

and

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<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> 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.

<sup>61</sup> 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-Herzegovina. [Emphasis added]<sup>62</sup>

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.<sup>63</sup> IFOR was replaced a year later by SFOR on the basis of another resolution by the Security Council.<sup>64</sup>

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.<sup>65</sup>

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

<sup>63</sup> 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.

<sup>64</sup> Security Council Resolution 1088, UN Doc. S/RES/1088 (1996).

<sup>65</sup> 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).<sup>66</sup>

## 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> Nevertheless NATO remains committed to expanding its institutional ties with the UN and its practical support to UN peacekeeping operations as confirmed by the organisation during the Wales Summit 2014.<sup>70</sup>

The relationship between the two organisations has developed along two main lines of cooperation in peacekeeping operations.<sup>71</sup> 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

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<sup>66</sup> 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.

<sup>67</sup> 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.

<sup>68</sup> 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.

<sup>69</sup> M.F. Harsch, J. Varwick, ‘NATO and the UN’, in (2009) 51 *Survival: Global Politics and Strategy*, 5, 8-9.

<sup>70</sup> Wales Summit Declaration, *supra* note 51, 101.

<sup>71</sup> Leurdijk, *supra* note 59, 24, 26-27.

established, collective defence against external threats.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> In addition, NATO has more than 60 years of experience in how to prepare and lead countries in complex multinational and inter-service operations.<sup>75</sup> 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.”<sup>76</sup> 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.<sup>77</sup> 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

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<sup>72</sup> 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.

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

<sup>74</sup> *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 meeting, UN Doc. S/PV.5075 (Resumption 1) (2004), 2.

<sup>75</sup> 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*.

<sup>76</sup> 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.

<sup>77</sup> 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.”<sup>78</sup> 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.”<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

### 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.<sup>82</sup> Therefore, NATO intervened in Libya on the request of the Security Council but it is currently not participating in the crisis management in Mali.

<sup>78</sup> 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.

<sup>79</sup> 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.

<sup>80</sup> 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.

<sup>81</sup> 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.

<sup>82</sup> 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.<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> Furthermore NATO has been assisting the African Union Mission in Sudan (AMIS).<sup>88</sup> During a visit of the AU High Commissioner for Peace and Security to NATO in 2007, he stated that the AU is looking

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<sup>83</sup> 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.

<sup>84</sup> 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.

<sup>85</sup> 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.

<sup>86</sup> Cf. Wittmann, ‘An Alliance for the 21<sup>st</sup> Century? Reviewing NATO’s New Strategic Concept’, *supra* note 51, 31, 36, 40.

<sup>87</sup> P.D. Williams, ‘Somalia’, in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 257, 275.

<sup>88</sup> NATO assistance to the African Union, [http://www.nato.int/cps/en/natolive/topics\\_8191.htm](http://www.nato.int/cps/en/natolive/topics_8191.htm)

for long-term cooperation with NATO,<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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."<sup>92</sup> 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.<sup>93</sup>

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

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<sup>89</sup> African Union looks to long-term cooperation with NATO, 2 March 2007, <http://www.nato.int/docu/update/2007/03-march/e0302a.html>.

<sup>90</sup> See, *infra*, 2.3.

<sup>91</sup> Active Engagement, *supra* note 82, paras. 12-13.

<sup>92</sup> 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.

<sup>93</sup> 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.”<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.”<sup>98</sup>

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.<sup>99</sup> It was suggested by Jaap de Hoop Scheffer, upon his leaving of office that NATO should focus on “the new

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<sup>94</sup> Ringsmose, Rynning, ‘Introduction. Taking Stock of NATO’s New Strategic Concept’, *supra* note 50, 7, 8-9; NATO 2020, *supra* note 77, 20.

<sup>95</sup> 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 21<sup>st</sup> 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.

<sup>96</sup> Interview with Jaap de Hoop Scheffer in The Hague, 18 April 2013.

<sup>97</sup> 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.

<sup>98</sup> *Ibid.*, 44.

<sup>99</sup> 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"<sup>100</sup>, the 2010 Strategic Concept is also considered as a tool to re-engage NATO member states with the core principles of the organisation.<sup>101</sup>

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.

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<sup>100</sup> 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.

<sup>101</sup> 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<sup>102</sup>

"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)<sup>103</sup>

"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<sup>104</sup>

### 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.<sup>105</sup> Member states of the European Communities started intergovernmental consultations and cooperation mechanisms on foreign policy and law and order.<sup>106</sup> The Reactivation of the WEU in the 1980s carved the way for the European Security and

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<sup>102</sup> 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>

<sup>103</sup> 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)

<sup>104</sup> 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.

<sup>105</sup> 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.

<sup>106</sup> 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.”<sup>107</sup>

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 2<sup>nd</sup> pillar of the Union. Simultaneously, the treaty paved the way for the development of a European defence policy within the EU.<sup>108</sup> 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.<sup>109</sup> 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<sup>110</sup>, leaving untouched the obligations of member states under the North Atlantic Treaty.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> Nevertheless, it signified “both the growing confidence of the Union as an international player and the incremental widening of the scope of its activities.”<sup>114</sup>

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<sup>107</sup> *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.*

<sup>108</sup> 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.

<sup>109</sup> 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.

<sup>110</sup> Treaty on European Union (Maastricht, 7 February 1992), Article J.4 (2).

<sup>111</sup> *Ibid.*, Article J.4 (4)

<sup>112</sup> 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.

<sup>113</sup> Cf. Naert, *supra* note 53, 29.

<sup>114</sup> 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.”<sup>115</sup> 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.”<sup>116</sup> 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.<sup>117</sup>

The Treaty of Amsterdam (1997) introduced further changes to the European security architecture. The framing of a European defence policy became a reality<sup>118</sup> 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.”<sup>119</sup> 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.”<sup>120</sup>

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

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<sup>115</sup> Article J.1(2) TEU (Maastricht).

<sup>116</sup> 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.

<sup>117</sup> 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.

<sup>118</sup> 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.

<sup>119</sup> Naert, *supra* note 53, 36.

<sup>120</sup> Article 17 (2) of the Treaty of Amsterdam

<sup>121</sup> 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.<sup>122</sup> The Crisis management functions of the WEU were fully absorbed in the European Union in 1999.<sup>123</sup> 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.”<sup>124</sup> 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).<sup>125</sup> The Treaty of Nice consolidated and affirmed the reform steps.<sup>126</sup> The annexed Declaration on the European Security and Defence Policy established a time-frame for the full implementation of the ESDP.<sup>127</sup> It was declared fully operational by the Council during its meeting in 2003.<sup>128</sup>

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

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<sup>122</sup> Cf. also Article 17 (1) 2<sup>nd</sup> 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.

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

<sup>124</sup> 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.

<sup>125</sup> 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).

<sup>126</sup> 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.

<sup>127</sup> 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)

<sup>128</sup> 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.”<sup>129</sup> 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.”<sup>130</sup> 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.<sup>131</sup> 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).<sup>132</sup> Article 42 of this section is also the base for EU peacekeeping operations and states that

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<sup>129</sup> Joint Action of the Council of Ministers of July 12, 2004 (2004), O.J. L 245.

<sup>130</sup> 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).

<sup>131</sup> 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.

<sup>132</sup> 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<sup>133</sup> [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.<sup>134</sup> Moreover, the distribution of competences in the area of CFSP is not clear.<sup>135</sup> 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.<sup>136</sup> 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.”<sup>137</sup> A better explanation

<sup>133</sup> Article 42 1. Treaty on European Union.

<sup>134</sup> 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.

<sup>135</sup> 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.

<sup>136</sup> 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.

<sup>137</sup> 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.<sup>138</sup>

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.”<sup>139</sup> 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<sup>140</sup> as well as its “autonomous administrative structure and the development of its working methods.”<sup>141</sup>

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

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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.

<sup>138</sup> Also because of the clarification about its legal status under international law as an international organisation.

<sup>139</sup> Koutrakos, *supra* note 108, 60-61.

<sup>140</sup> The 41<sup>st</sup> 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.

<sup>141</sup> Koutrakos, *supra* note 108, 64-67. See also especially Thym, *supra* note 136, 453, 460-67.

Ministers of Foreign Affairs all have to agree.<sup>142</sup> 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).<sup>143</sup> 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).<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup> 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,<sup>147</sup> whereby the state whose headquarters are chosen will act as the framework state for the implementation of the mission.<sup>148</sup> 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.<sup>149</sup>

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<sup>142</sup> 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.

<sup>143</sup> N. Tsagourias, ‘EU Peacekeeping Operations: Legal and Theoretical Issues’, in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 102, 114.

<sup>144</sup> 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.

<sup>145</sup> Koutrakos, *supra* note 108, 64; Thym, *supra* note 136, 453, 465.

<sup>146</sup> 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.

<sup>147</sup> The UK, Italy, France, Germany and Greece.

<sup>148</sup> Koutrakos, *supra* note 108, 101-102.

<sup>149</sup> Council Decision 2012/173/CFSP of 23 March 2012 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.”<sup>150</sup> 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.”<sup>151</sup> 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<sup>152</sup> and therefore preferred a plan to locate the EU Operational Headquarters at NATO SHAPE.<sup>153</sup> Nevertheless, the “Big Five”<sup>154</sup> 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.”<sup>155</sup> 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.<sup>156</sup>

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.

<sup>150</sup> 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.

<sup>151</sup> 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>.

<sup>152</sup> *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.

<sup>153</sup> R.H. Ginsberg, S. Penska, *The European Union in Global Security* (2012), 191-192.

<sup>154</sup> France, Germany, Italy, Spain and Poland.

<sup>155</sup> 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>.

<sup>156</sup> 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.<sup>157</sup> 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.”<sup>158</sup>

#### 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.”<sup>159</sup> 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.<sup>160</sup> These pledges

<sup>157</sup> The scope of this disposition also remains vague, Koutrakos, *supra* note 108, 63.

<sup>158</sup> 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.

<sup>159</sup> 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).

<sup>160</sup> “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.<sup>161</sup> In 2004, however, the deadline was extended to 2010, but was once again not met.<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup>

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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.

<sup>161</sup> 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.

<sup>162</sup> 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

<sup>163</sup> 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.

<sup>164</sup> 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.

<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup>

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.<sup>169</sup> 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.<sup>170</sup> 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.

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<sup>166</sup> Brussels European Council 11 and 12 December 2008 Presidency Conclusions, Doc. 17271/1/08 REV 1, 11, para.29.

<sup>167</sup> 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).

<sup>168</sup> A. Toje, *The European Union as a Small Power. After the Post-Cold War* (2010), 79-80.

<sup>169</sup> A Secure Europe, *supra* note 159, 7. Cf. also Preparing the December 2013 European Council, *supra* note 158, 4, para.II Cluster 1. 1.

<sup>170</sup> 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<sup>171</sup>

“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<sup>172</sup>

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.<sup>173</sup> 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<sup>174</sup> 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.<sup>175</sup> The European Union, thereby,

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<sup>171</sup> *Ibid.*, 5.

<sup>172</sup> Security Council 7112<sup>th</sup> meeting, UN Doc. S/PV.7112 (2014), 2.

<sup>173</sup> A. Novosseloff, United Nations – European Union Cooperation in the Field of Peacekeeping: Challenges and Projects, GGI Analysis Paper No.4/2012, 8; 2356<sup>th</sup> Council Meeting – General Affairs – Luxembourg, 11-12 June 2001; Presidency Report to the Göteborg European Council on European Security and Defence Policy, Annex (2001), para.4. The EU was the first organisation 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, 6306<sup>th</sup> meeting, UN Doc. S/PV.6306 (2010), Security Council, 6477<sup>th</sup> meeting, UN Doc. S/PV.6477 (2011).

<sup>174</sup> 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.

<sup>175</sup> 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”<sup>176</sup> but it also asserts its willingness to bear its burden, acknowledging that “Europe should be ready to share in the responsibility for global security.”<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup>

The Lisbon Treaty followed in the footsteps of this careful balancing act of the EU.<sup>180</sup> 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.<sup>181</sup> References to the United Nations and its Charter feature

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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.

<sup>176</sup> 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.

<sup>177</sup> A Secure Europe, *supra* note 159, 1.

<sup>178</sup> “Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority”, A Secure Europe, *ibid.*, 9.

<sup>179</sup> 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 “multilateralism” 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.

<sup>180</sup> 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, 11<sup>th</sup> 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).

<sup>181</sup> 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<sup>182</sup> 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.”<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup>

Likewise, the European Union has refused to submit itself – at least formally – to Chapter VIII of the UN Charter.<sup>187</sup> At the start of the cooperation between the European Union and the United Nations, a number of resolutions referred to Chapter VIII,<sup>188</sup> but now authorisations given to the EU are usually rooted on Chapter VII.<sup>189</sup> 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

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<sup>182</sup> 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.

<sup>183</sup> De Baere, Passivirta, ‘Identity and Difference: The EU and the UN as Part of Each Other’, *supra* note 175, 21, 23.

<sup>184</sup> 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.

<sup>185</sup> 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.

<sup>186</sup> *Ibid.*, 79, 185.

<sup>187</sup> Koutrakos, ‘The European Union in the Global Security Architecture’, *supra* note 179, 81, 83.

<sup>188</sup> 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.

<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup>

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.<sup>193</sup>

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<sup>190</sup> 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).

<sup>191</sup> 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.

<sup>192</sup> About the EU at the UN, available at: [http://www.eu-un.europa.eu/articles/en/article\\_9389\\_en.htm](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.

<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.”<sup>196</sup> 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.<sup>197</sup>

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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.

<sup>194</sup> 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.

<sup>195</sup> 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.

<sup>196</sup> Tsagourias, ‘EU Peacekeeping Operations: Legal and Theoretical Issues’, *supra* note 143, 102, 129.

<sup>197</sup> 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.<sup>198</sup> The reaction of the UN was to welcome the mission in two reports.<sup>199</sup>

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".<sup>200</sup> 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.<sup>201</sup>

## 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.<sup>202</sup> 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.<sup>203</sup> 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.

<sup>198</sup> Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 84.

<sup>199</sup> 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.

<sup>200</sup> 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, 7015<sup>th</sup> meeting, UN Doc. S/PV.7015 (Resumption 1) (2013), 17-18.

<sup>201</sup> *Ibid.*, 4, para.9.

<sup>202</sup> 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, 6306<sup>th</sup> meeting, *supra* note 173, 3; Security Council, 6477<sup>th</sup> 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;

<sup>203</sup> 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 Defence 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.”<sup>204</sup>

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.<sup>205</sup> 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.<sup>206</sup>

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.<sup>207</sup> 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

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<sup>204</sup> 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. Kytoëmaa, 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.

<sup>205</sup> Koutrakos, *supra* note 108, 110; A. Menon, ‘Empowering paradise? The ESDP at ten’, in (2009) 85 *International Affairs*, 227, 234.

<sup>206</sup> 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.

<sup>207</sup> 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.”<sup>208</sup> The United Nations welcomed the development of EU’s peace facility for Africa and encouraged the development of further mechanisms to support the AU.<sup>209</sup> 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.”<sup>210</sup> In exchange, the UN can provide political and legal legitimacy and endorsement of EU operations.<sup>211</sup> 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.<sup>212</sup>

### 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<sup>213</sup> and EUTM Mali.<sup>214</sup> 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.<sup>215</sup> Plans were established for an EU military operation in support of humanitarian assistance operations in Libya, but the plan

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<sup>208</sup> 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.

<sup>209</sup> 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.

<sup>210</sup> 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),

<sup>211</sup> Major, *supra* note 195, 9.

<sup>212</sup> Charbonneau, *supra* note 202, 546, 551-552.

<sup>213</sup> Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces.

<sup>214</sup> 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).

<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> 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,<sup>218</sup> 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.<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup> 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

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<sup>216</sup> 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.

<sup>217</sup> Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 85.

<sup>218</sup> The first High Representative Catherine Ashton 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 Ashton 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.

<sup>219</sup> Koutrakos, 'The European Union in the Global Security Architecture', *supra* note 179, 81, 86. See also Council conclusions on Common and Defence Policy, 3130<sup>th</sup> FOREIGN AFFAIRS Council meeting, *supra* note 216, 1, para.2; 3, para.18; European Council 13/14 December 2012, Conclusions, 10, para.22.

<sup>220</sup> 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.

<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup>

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.”<sup>225</sup> The EU therefore favours “short-term, geographically limited support operations under its direct political and military control in selected cases.”<sup>226</sup> 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).<sup>227</sup> 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

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<sup>222</sup> Devuyst, *ibid.*, 327, 332.

<sup>223</sup> 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.

<sup>224</sup> 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.

<sup>225</sup> 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, 7228<sup>th</sup> meeting, UN Doc. S/PV.7228 (2014), 6.

<sup>226</sup> *Ibid.* See also the statement on behalf of the EU, Security Council, 7015<sup>th</sup> meeting, *supra* note 200, 17.

<sup>227</sup> 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.<sup>228</sup>

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.<sup>229</sup> 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<sup>230</sup> have equally contributed to advancing this relationship.<sup>231</sup> 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

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<sup>228</sup> 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.

<sup>229</sup> 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.

<sup>230</sup> It goes without saying that the EU is also engaged extensively in the collective defence of the EU-(Atlantic) area.

<sup>231</sup> NATO is committed to the European Union, Statement by Mr. Jaap de Hoop Scheffer, Secretary-General of NATO, Security Council, 5529<sup>th</sup> meeting, UN Doc. S/PV.5529 (2006), 32.



of a mutual defence clause with NATO, as well as an integrated European army.<sup>232</sup> The clauses on cooperation between the EU and NATO in the TEU derive from the treaty on the EDC and are nearly identical.<sup>233</sup> 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.<sup>234</sup> In subsequent years the cooperation between NATO and EU/WEU increased, further developed,<sup>235</sup> and was fully implemented in 1999<sup>236</sup>

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<sup>232</sup> 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.

<sup>233</sup> 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.

<sup>234</sup> 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.

<sup>235</sup> "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.

<sup>236</sup> 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.”<sup>237</sup>

In December 2002, NATO and the EU signed the Declaration on ESDP<sup>238</sup> and in March 2003 the Agreement of the Framework on Cooperation.<sup>239</sup> 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.”<sup>240</sup> 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.<sup>241</sup>

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<sup>237</sup> '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.

<sup>238</sup> 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.

<sup>239</sup> 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 transatlantic 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.

<sup>240</sup> NATO-EU: a strategic partnership, [http://www.nato.int/cps/en/natolive/topics\\_49217.htm](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](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>

<sup>241</sup> '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.<sup>242</sup> 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.<sup>243</sup>

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."<sup>244</sup> 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.<sup>245</sup>

Nevertheless, the progressing relations between NATO and the EU were not free of competition.<sup>246</sup> 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](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.

<sup>242</sup> 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.

<sup>243</sup> 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.

<sup>244</sup> *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.

<sup>245</sup> 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.

<sup>246</sup> 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 CSDP, including the absorption of the WEU, while NATO was transforming in and expanding as a more political organisation.<sup>247</sup> Moreover, the construction of the CSDP was an expression of the political will of the EU to act outside of NATO.<sup>248</sup> 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.<sup>249</sup> 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.”<sup>250</sup> 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.”<sup>251</sup> 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.<sup>252</sup> This safeguarding compromise was also facilitated by increased cooperation between the two organisations following the US government’s

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<sup>247</sup> 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.

<sup>248</sup> 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.

<sup>249</sup> 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.

<sup>250</sup> Terpan, ‘EU-NATO Relations: Consistency as a Strategic Consideration and a Legal Requirement’, *supra* note 242, 270, 277.

<sup>251</sup> 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.

<sup>252</sup> 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.<sup>253</sup> 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’.”<sup>254</sup> 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.<sup>255</sup>

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.<sup>256</sup> One author argues that the following two independent NATO and EU operations in Sudan were a consequence of and a reaction to the lack of NATO consultation for Operation Artemis.<sup>257</sup> In contrast, other examples underline a good degree of cooperation between

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<sup>253</sup> 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.

<sup>254</sup> Krieger, ‘Common European Defence: Competence or Compatibility with NATO’, *supra* note 195, 174, 194.

<sup>255</sup> Krieger, *ibid.*

<sup>256</sup> 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 contrast 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.

<sup>257</sup> Buharali, *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.<sup>258</sup> 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;<sup>259</sup> 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.<sup>260</sup>

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<sup>261</sup> after the percentage of the US contribution to NATO has increased from 63% to 77% in the decade since 2001.<sup>262</sup> However, the EU remains the closest partner for NATO. The financial crisis of the past years,

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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.

<sup>258</sup> 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.

<sup>259</sup> Interview with Jaap de Hoop Scheffer in The Hague, 18 April 2003.

<sup>260</sup> N. H. Hedegaard, 'NATO's Institutional Environment: 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.

<sup>261</sup> 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 21<sup>st</sup> 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.

<sup>262</sup> Opening Address by High Representative Catherine Aston at the symposium 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”<sup>263</sup> as well as with the EU under its “Pooling and Sharing initiatives.”<sup>264</sup> 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.<sup>265</sup> Many of the initiatives of “Smart Defence” are carried out, however, on a smaller multinational and not on an Alliance level.<sup>266</sup> 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.<sup>267</sup>

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 it has “failed miserably.”<sup>268</sup> Despite these apparent failures, other authors paint a more optimistic portrait for the

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<sup>263</sup> 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 multinational Smart Defence projects, e.g., sharing of smart munition, a longer-term program for Joint Intelligence, Surveillance and Reconnaissance, *ibid*.

<sup>264</sup> 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, , 3130<sup>th</sup> 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.

<sup>265</sup> J. Gordon, S. Johnson, F.S. Larrabee et al., ‘NATO and the Challenge of Austerity’, in (2012) 54 *Survival*, 121, 121.

<sup>266</sup> B. Giegerich, ‘NATO’s Smart Defence: Who’s Buying?’, in (2012) 54 *Survival: Global Politics and Strategy*, 69, 71.

<sup>267</sup> 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.

<sup>268</sup> 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 donor in the Libyan crisis and strongly engaged in the domain of sanctions, *ibid.*, 15.

European Union's future.<sup>269</sup> 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."<sup>270</sup>

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.<sup>271</sup> 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."<sup>272</sup> 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.<sup>273</sup>

## 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.<sup>274</sup> The EU expressed its intention to work towards more formalised relations with the AU in 2005.<sup>275</sup> Two

<sup>269</sup> 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.

<sup>270</sup> 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.

<sup>271</sup> 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.

<sup>272</sup> Council conclusions on Common Security and Defence Policy, *ibid.*, 7, para.15. b.

<sup>273</sup> Wales Summit Declaration, *supra* note 51, para. 102.

<sup>274</sup> 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.

<sup>275</sup> 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.<sup>276</sup>

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.<sup>277</sup> 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.”<sup>278</sup> 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”.<sup>279</sup>

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<sup>280</sup> as well as meetings at the ministerial and ambassadorial level.<sup>281</sup> The second action plan noted positively the

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<sup>276</sup> Report on the Implementation, *supra* note 167, 11.

<sup>277</sup> 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.

<sup>278</sup> 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 2<sup>nd</sup> 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.

<sup>279</sup> 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.

<sup>280</sup> 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.

<sup>281</sup> 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.<sup>282</sup> 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.<sup>283</sup>

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.<sup>284</sup> The Joint Africa EU Strategy Action Plan (2011-2013) emphasised the need for further efforts for the operationalisation of the APSA,<sup>285</sup> following the critique contained in the 2010 Assessment Study, in particular of the “mandate-resource gap” of the AU.<sup>286</sup> 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.”<sup>287</sup>

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.<sup>288</sup> 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

<sup>282</sup> “[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.

<sup>283</sup> Delegation of the European Union to the African Union, [http://eeas.europa.eu/delegations/african\\_union/about\\_us/welcome/index\\_en.htm](http://eeas.europa.eu/delegations/african_union/about_us/welcome/index_en.htm).

<sup>284</sup> 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.

<sup>285</sup> 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.”

<sup>286</sup> African Peace and Security Architecture (APSA), 2010 Assessment Study, 26, para.68.

<sup>287</sup> Information Brief on Amani Africa.

<sup>288</sup> 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.<sup>289</sup> 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.”<sup>290</sup>

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.”<sup>291</sup>

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.<sup>292</sup> A further 750 million Euros have been committed for the APF under the new Three Year Action Programme covering the period from 2014 – 2016.<sup>293</sup> 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.”<sup>294</sup> Furthermore,

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<sup>289</sup> 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.

<sup>290</sup> <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*.

<sup>291</sup> 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.

<sup>292</sup> 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](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.

<sup>293</sup> Joint Press Release, The African Union Commission and the European Union Hold the 9<sup>th</sup> Meeting of the Africa Peace Facility (APF) Joint Coordination Committee, 3 June 2014, 1.

<sup>294</sup> Council Regulation (EC) No 617/2007 of 14 May 2007 on the implementation of the 10<sup>th</sup> 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.<sup>295</sup> 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.<sup>296</sup> 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*.<sup>297</sup> 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.<sup>298</sup> 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.<sup>299</sup> 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

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report, The African Peace Facility 2010, 5, para.2.5.; Poulton, Trillo, Kukuk, *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, 7<sup>th</sup> 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.

<sup>295</sup> 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.

<sup>296</sup> 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.

<sup>297</sup> 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.

<sup>298</sup> 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 crisis [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.

<sup>299</sup> 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.<sup>300</sup>

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.<sup>301</sup> 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.<sup>302</sup>

### 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.<sup>303</sup> 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.<sup>304</sup> 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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<sup>300</sup> Council of the European Union, The Africa-EU Strategic Partnership, *supra* note 277, para. 21. Moreover, the UN itself could be responsible on the basis of its own AU operations finance mechanism based on assessed contributions, *infra*, 2.5.4.4.

<sup>301</sup> Council of the European Union, The Africa-EU Strategic Partnership, *supra* note 277, para. 21.

<sup>302</sup> *Ibid.* See, *infra* 2.5.4.4.

<sup>303</sup> 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.

<sup>304</sup> 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,<sup>305</sup> the AU and the EU cooperate more closely with the UN during the deployment of operations than with each other.<sup>306</sup> The lack of resources of the AU means that “African ownership” can often not be generated,<sup>307</sup> 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.<sup>308</sup> The EU’s response to the Darfur crisis and the deployment of the EU’s Support Operation AMIS II<sup>309</sup> was, in essence, a response to the shortcomings of the AU operation<sup>310</sup> and it sidelined the general capacity-building work of the EU, forcing the organisation to do on-the-job capacity building for AMIS.<sup>311</sup> 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.<sup>312</sup> Altogether, the EU and its member states spent more than one billion Euros for humanitarian aid and capacity-building for AMIS.<sup>313</sup> 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.<sup>314</sup> 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,<sup>315</sup> and it was executed in multilateral cooperation with the UN and with a clear exit option.<sup>316</sup>

<sup>305</sup> For Somalia see also, *Infra*, 2.5.4.5.

<sup>306</sup> 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.

<sup>307</sup> See for example AMANI Africa, Implementation Plan, Draft, African Union Peace Support Operations Division, 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.

<sup>308</sup> Brosig, ‘The African Union a Partner for Peace’, *supra* note 281, 292, 300; Franke, Esmenjaud, *supra* 221, 137, 149.

<sup>309</sup> Council Joint Action 2005/557/CFSP, *supra* note 303.

<sup>310</sup> Brosig, *supra* note 12, 107, 117.

<sup>311</sup> International Crisis Group, The EU/AU Partnership in Darfur: Not Yet A Winning Combination, Africa Report N°99 – 25 October 2005, 9.

<sup>312</sup> 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.

<sup>313</sup> European Union Factsheet, European Union response to the Darfur Crisis, July 2006, 1.

<sup>314</sup> Brosig, *supra* note 12, 107, 118.

<sup>315</sup> 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 bridging 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-tchadrc/legal-basis?lang=en>.

<sup>316</sup> 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.<sup>317</sup>

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.<sup>318</sup> 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.<sup>319</sup> 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.”<sup>320</sup>

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.<sup>321</sup> Thus, there is no systematic EU strategy to support capacity-building for RECs, but the EU has led individual support for specific RECs.<sup>322</sup>

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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*.

<sup>317</sup> 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”.

<sup>318</sup> Security Council Resolution 1809, UN Doc. S/RES/1809 (2008), 3, para. 5. See also Paragraph 6 of the resolution.

<sup>319</sup> 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.

<sup>320</sup> *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.

<sup>321</sup> *Ibid*. 3, 4. B. Provision of a list of relevant EU documents,

<sup>322</sup> 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."<sup>323</sup>

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

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<sup>323</sup> Brosig, *ibid.*, 292, 299.

types of military operations, those requiring NATO assets as larger scale operations and those of a lower scale and intensity.<sup>324</sup>

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.<sup>325</sup> 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.”<sup>326</sup> Nevertheless, the main limiting factors

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<sup>324</sup> M. Reichard, ‘Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement’, in (2004) 73 *Nordic Journal of International Law*, 37, 42.

<sup>325</sup> 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.

<sup>326</sup> 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<sup>327</sup> and political inactivity among the EU member states to further develop the CSDP.<sup>328</sup>

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-

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<sup>327</sup> 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.

<sup>328</sup> 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.”<sup>329</sup> 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.<sup>330</sup>

## 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.<sup>331</sup>

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.<sup>332</sup>

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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<sup>329</sup> 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 de maintien de la paix’, in (2012) 18 *African Yearbook of International Law*, 345, 352-353.

<sup>330</sup> 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.

<sup>331</sup> Article 3 of the Treaty of ECOWAS.

<sup>332</sup> 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.<sup>333</sup> The Authority (of Head of states) remains the highest decision-making body in the domain of peace-keeping and conflict-management,<sup>334</sup> but the Mediation and Security Council is mandated by the Authority to take appropriate decisions for the implementation of the Mechanism.<sup>335</sup> 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.”<sup>336</sup> ECOMOG or the ECOWAS Standby Force (ESF) as it is also called<sup>337</sup> is charged, *inter alia*, with peacekeeping and the

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<sup>333</sup> Article 20 of Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (1999).

<sup>334</sup> Article 6 of the Protocol.

<sup>335</sup> 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.

<sup>336</sup> 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.

<sup>337</sup> 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.”<sup>338</sup> 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.<sup>339</sup>

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.<sup>340</sup> 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.<sup>341</sup> The organisation has been implicitly recognised by the Security Council in Resolution 788.<sup>342</sup> 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.”<sup>343</sup>

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.<sup>344</sup> Article 27 of the Protocol seems to suggest that

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<sup>338</sup> Article 40 of the Protocol.

<sup>339</sup> Article 28 of the Protocol.

<sup>340</sup> 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.

<sup>341</sup> “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.

<sup>342</sup> Security Council Resolution 788, UN Doc. S/RES/788 (1992), 1-2, Preamble; 2, paras. 1-2, 4, 6.

<sup>343</sup> 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.

<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup> 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.<sup>347</sup> 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.<sup>348</sup>

### 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.

<sup>345</sup> 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.

<sup>346</sup> 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.

<sup>347</sup> 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.

<sup>348</sup> 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.<sup>349</sup> 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;<sup>350</sup> however the Security Council issued a statement commending the efforts of ECOMOG once unity had been reached.<sup>351</sup> 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.<sup>352</sup> 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.<sup>353</sup> The main reason of the opposition was however political as Nigeria dominates ECOWAS as the biggest economic player in the region which evoked resistance.<sup>354</sup>

In the absence of a Security Council mandate, the intervention by ECOWAS occurred in violation of the United Nations Charter,<sup>355</sup> but it was welcomed by the United Nations and the international

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<sup>349</sup> 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.

<sup>350</sup> 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.

<sup>351</sup> Note on behalf of the President of the Security Council, UN Doc. S/22133 (1991); Adebayo, *ibid.*, 466, 471.

<sup>352</sup> J. O. C. Jonah, 'The United Nations', in A. Adebajo, I. O. D. Rashid, *West Africa's Security Challenges* (2004), 319, 323 – 26.

<sup>353</sup> 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.

<sup>354</sup> 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.

<sup>355</sup> 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.<sup>356</sup> For the first time, the UN “sent military observers to support an already established sub-regional force”<sup>357</sup> and in a statement laid down in a Note by the President of the SC, the Security Council also commended the efforts of ECOMOG.<sup>358</sup> 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).<sup>359</sup> 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).<sup>360</sup> 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.<sup>361</sup>

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”.<sup>362</sup> 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

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<sup>356</sup> 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.

<sup>357</sup> Adebayo, ‘The Security Council and Three Wars in Africa’, *supra* note 336, 466, 466.

<sup>358</sup> Security Council, Note by the President of the Security Council, UN Doc. S/22133 (1991).

<sup>359</sup> Adebayo, ‘The Security Council and Three Wars in Africa’, *supra* note 336, 466, 472.

<sup>360</sup> Security Council Resolution 866, *supra* note 356.

<sup>361</sup> 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.

<sup>362</sup> 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."<sup>363</sup>

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."<sup>364</sup> 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.<sup>365</sup>

A jointly chaired Implementation Monitoring Committee which included representatives from the EU and the AU<sup>366</sup> started meeting in November 2003 to oversee the disarmament of the factions.<sup>367</sup> 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.<sup>368</sup> 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

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<sup>363</sup> 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.

<sup>364</sup> Adebayo, *ibid.*, 466, 474.

<sup>365</sup> 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.

<sup>366</sup> Adebayo, 'The Security Council and Three Wars in Africa', *supra* note 336, 466, 475.

<sup>367</sup> 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).

<sup>368</sup> 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.<sup>369</sup> 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.<sup>370</sup> 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.<sup>371</sup> 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.<sup>372</sup>

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.<sup>373</sup>

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.<sup>374</sup> The United

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<sup>369</sup> 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.

<sup>370</sup> Cf. Allain, *supra* note 349, 237, 261; Security Council Resolution 1132, UN Doc. S/RES/1132 (1997).

<sup>371</sup> 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.

<sup>372</sup> 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).

<sup>373</sup> Allain, *supra* note 349, 237, 262.

<sup>374</sup> 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.<sup>375</sup> 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.<sup>376</sup> 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."<sup>377</sup> 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.<sup>378</sup>

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*

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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.

<sup>375</sup> 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.

<sup>376</sup> 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*.

<sup>377</sup> Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/751 (2000), paras. 54 – 56.

<sup>378</sup> 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.*<sup>379</sup>

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.”<sup>380</sup> 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.<sup>381</sup>

#### 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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<sup>379</sup> 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.

<sup>380</sup> 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.

<sup>381</sup> “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.<sup>382</sup> 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.<sup>383</sup> 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.<sup>384</sup> Following that resolution, there was gradually more cooperation between the AU, the United Nations and ECOWAS in the peace process in Côte d'Ivoire.<sup>385</sup>

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.<sup>386</sup> 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*"<sup>387</sup> [Emphasis added].

Moreover, the African Union urged the UN to act "to expedite the deployment of the UN operation in Côte d'Ivoire"<sup>388</sup> and it mandated ECOWAS "to take necessary action to ensure full restoration of operations of states in Côte d'Ivoire immediately."<sup>389</sup> The Security Council decided then to create an international consultative organ which included among its members, the EU, the AU and ECOWAS.<sup>390</sup>

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<sup>382</sup> See, *infra* 2.5.

<sup>383</sup> The AU's mediator managed to get the parties 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.

<sup>384</sup> Security Council Resolution 1633, UN Doc. S/RES/1633 (2005), paras. 5-6; Griep, *supra* note 73, 141.

<sup>385</sup> 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.

<sup>386</sup> 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).

<sup>387</sup> Communiqué of the Third Session of the Peace and Security Council, PSC/PR/Comm. (2004) (III), paras. 2-3.

<sup>388</sup> *Ibid.*, para. 5

<sup>389</sup> 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.

<sup>390</sup> 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,<sup>391</sup> drawing on their strength as the African organisation with the most experience in peacekeeping operations.<sup>392</sup> However, efforts at capacity-building are still necessary to improve the functioning of the organisation and communication within its institutions.<sup>393</sup>

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.”<sup>394</sup>

## 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.<sup>395</sup>

## 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

<sup>391</sup> 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.

<sup>392</sup> Brosig, ‘The African Union a Partner for Peace’, *supra* note 281, 292, 292.

<sup>393</sup> 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).

<sup>394</sup> 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).

<sup>395</sup> 50 Million as pledged for at the donor’s conference hosted by ECOWAS on the margins of the AU summit in Addis Ababa on 29<sup>th</sup> 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 5749<sup>th</sup> meeting, 25 September 2007, of the Security Council on the Head of State/Ministerial Level (France presiding)<sup>396</sup>

“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.<sup>397</sup>

### 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.”<sup>398</sup> 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.”<sup>399</sup> In its conclusions, the International Panel of

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<sup>396</sup> Security Council 5749<sup>th</sup> meeting, UN Doc. S/PV.5749 (2007), 15.

<sup>397</sup> *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.*

<sup>398</sup> 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.

<sup>399</sup> 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 genocide 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.”<sup>400</sup>

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.”<sup>401</sup> 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.”<sup>402</sup> In the 50<sup>th</sup> Anniversary Solemn Declaration, the Member States of the AU reconfirmed their determination to “end all wars in Africa by 2020.”<sup>403</sup>

## 2. The AU’s normative framework for the maintenance of international peace and security

The normative framework 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”,<sup>404</sup> 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<sup>405</sup> 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

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<sup>400</sup> *Ibid.*, Conclusions at Chapter 24.

<sup>401</sup> Allain, *supra* note 349, 237, 264.

<sup>402</sup> Article 1 (e), (f).

<sup>403</sup> 50<sup>th</sup> 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.

<sup>404</sup> Allain, *supra* note 349, 237, 277.

<sup>405</sup> 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.”<sup>406</sup>

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.<sup>407</sup> 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.<sup>408</sup> The African Peace and Security Architecture (APSA) comprises the Peace and Security Council as the highest authority of the African Union.<sup>409</sup> 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<sup>410</sup> 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

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<sup>406</sup> Solemn Declaration On a Common African Defence and Security Policy, para. 15.

<sup>407</sup> 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.

<sup>408</sup> S. Dersso, ‘The African Peace and Security Architecture’, in T. Murithi (ed.), *Handbook of Africa’s International Relations* (2014), 51, 51.

<sup>409</sup> 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.

<sup>410</sup> 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]<sup>411</sup>

The Peace and Security Council has a fairly broad mandate reaching from anticipation and prevention of conflicts to peace-building and post-conflict construction,<sup>412</sup> 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.”<sup>413</sup> 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<sup>414</sup> and there are no contrary arguments why the African Union does not fall under Chapter VIII.<sup>415</sup>

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<sup>411</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).

<sup>412</sup> Article 3 of the Protocol.

<sup>413</sup> 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 discharge of its responsibilities does so require. Cf. also Article 13 (4).

<sup>414</sup> Security Council Resolution 199 (1964), Preamble and para.6.

<sup>415</sup> 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):<sup>416</sup> It “provided clear evidence, in the view of African states, that [sic] they should seek to rely on their own forces in such circumstances.”<sup>417</sup>

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<sup>416</sup> 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.”<sup>418</sup> 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.<sup>419</sup> 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.<sup>420</sup> 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,<sup>421</sup> a point which is taken up by the Solemn Declaration on a Common African Defence

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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.

<sup>417</sup> 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, Doktor, *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.

<sup>418</sup> Protocol on Amendments to the Constitutive Act of the African Union (2003), Article 4.

<sup>419</sup> 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.

<sup>420</sup> *Ibid.*, 195.

<sup>421</sup> 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.<sup>422</sup> 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.”<sup>423</sup> A similar approach can be expected by the African Union, which is also subject to other constitutional limitations.<sup>424</sup> 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.<sup>425</sup> 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

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<sup>422</sup> 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).

<sup>423</sup> Maluwa, *supra* note 421, 232, 237. It is suggested that the “lack” [of definition] was intentional. At San Francisco 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.

<sup>424</sup> 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.

<sup>425</sup> 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.”<sup>426</sup> On the contrary – *argumentum a fortiori* – 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,<sup>427</sup> 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.<sup>428</sup> 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).<sup>429</sup>

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.”<sup>430</sup> 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.<sup>431</sup>

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<sup>426</sup> Kioko, *ibid.*, 807, 816.

<sup>427</sup> Muhire, *supra* note 416, 201.

<sup>428</sup> K. Kindiki, ‘Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives’, ISS Monograph Series, n° 131, 46.

<sup>429</sup> 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.

<sup>430</sup> 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.

<sup>431</sup> 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.<sup>432</sup>

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.*”<sup>433</sup> 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.<sup>434</sup>

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.<sup>435</sup> Upon closer inspection, this view cannot, however, withstand legal scrutiny.<sup>436</sup> 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

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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.

<sup>432</sup> Boisson de Chazournes, *supra* note 185, 79, 290.

<sup>433</sup> Abass, *supra* note 417, 415, 425.

<sup>434</sup> *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.

<sup>435</sup> 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.

<sup>436</sup> 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.<sup>437</sup> 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.<sup>438</sup>

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.<sup>439</sup>

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

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<sup>437</sup> 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.

<sup>438</sup> 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.

<sup>439</sup> 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.<sup>440</sup>

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.<sup>441</sup>

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.<sup>442</sup>

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.”

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<sup>440</sup> 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, ‘Reimagining 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, 7<sup>th</sup> 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. Björner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 137, 143.

<sup>441</sup> Allain, *supra* note 349, 237, 275.

<sup>442</sup> 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.”<sup>443</sup> 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).<sup>444</sup> 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 outside of the limits set under the UN Charter.”<sup>445</sup>

On the contrary, distinguishing between the internal law of the AU of which the Protocol is part<sup>446</sup> 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.<sup>447</sup> 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.”<sup>448</sup> 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.<sup>449</sup> Without an authorisation of the

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<sup>443</sup> 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.

<sup>444</sup> Boisson de Chazournes, *supra* note 185, 79, 290.

<sup>445</sup> Dersso, *supra* note 435, 77, 85.

<sup>446</sup> 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.

<sup>447</sup> 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.

<sup>448</sup> 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 12<sup>th</sup> 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.

<sup>449</sup> 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."<sup>450</sup>

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."<sup>451</sup> 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.<sup>452</sup>

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.<sup>453</sup>

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.<sup>454</sup> 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

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<sup>450</sup> Muhire, *ibid.*, 237.

<sup>451</sup> 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 5868<sup>th</sup> 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, 5868<sup>th</sup> meeting, UN Doc. S/PV.5868 (2008), 11, 20.

<sup>452</sup> 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.

<sup>453</sup> Rodt, Okeke, *supra* note 297, 211, 219.

<sup>454</sup> *Ibid.* See also, Franke, Gänzle, *supra* note 297, 88, 102.

commitment vis-à-vis the AU.”<sup>455</sup> 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.<sup>456</sup> 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.<sup>457</sup> Among these states are some which are also members of ECOWAS.<sup>458</sup> 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.<sup>459</sup> 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 enforcement actions. Similarly, the RECs/Regions will seek AU authorisation of their interventions.”<sup>460</sup> [Emphasis added] In

<sup>455</sup> Franke, Gänzle, *ibid.*, 88, 102.

<sup>456</sup> 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, 5<sup>th</sup> 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.

<sup>457</sup> *Ibid.*, 8-9.

<sup>458</sup> 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.

<sup>459</sup> 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.

<sup>460</sup> 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.<sup>461</sup>

#### 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.<sup>462</sup> 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.”<sup>463</sup> 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

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<sup>461</sup> 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.

<sup>462</sup> 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.

<sup>463</sup> 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 Tiekou, ‘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<sup>464</sup> 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*.”<sup>465</sup>

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.<sup>466</sup> 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.<sup>467</sup> 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.”<sup>468</sup> As four African Union or ECOWAS Peacekeeping Operations have been reassigned to United Nations Peacekeeping operations,<sup>469</sup> there is a conviction within the United Nations that “[t]he African Union’s basic assumption is that the African Standby Force will undertake

<sup>464</sup> Kioko, *supra* note 355, 807, 821.

<sup>465</sup> Allain, *supra* note 349, 237, 287; Yamashita, *supra* note 16, 165, 177-178.

<sup>466</sup> “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.

<sup>467</sup> Report of the African Union-United Nations panel, *ibid.*, 13, para. 39.

<sup>468</sup> 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.

<sup>469</sup> 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.”<sup>470</sup> 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.<sup>471</sup>

## 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.<sup>472</sup> The United Nations pledged to “support the development and implementation of a ten-year plan for capacity-building with the AU.”<sup>473</sup> The start of this support came in the form of a Framework Declaration which was adopted a year later in 2006.<sup>474</sup> 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.”<sup>475</sup> [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

<sup>470</sup> Report of the Secretary-General on the relationship, *supra* note 11, 11, para. 29.

<sup>471</sup> 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.

<sup>472</sup> 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.

<sup>473</sup> 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.

<sup>474</sup> 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).

<sup>475</sup> 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.<sup>476</sup> 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.<sup>477</sup>

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.<sup>478</sup>

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<sup>476</sup> 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.

<sup>477</sup> 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.

<sup>478</sup> 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.<sup>479</sup> 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.<sup>480</sup>

### 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.<sup>481</sup> 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

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under the right conditions", Report of the Secretary-General on United Nations-African Union cooperation, *ibid.*, 10, para. 31.

<sup>479</sup> 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.

<sup>480</sup> "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.

<sup>481</sup> 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 Building 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.”<sup>482</sup> 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.<sup>483</sup>

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.<sup>484</sup>

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<sup>485</sup> under one of the six conflict scenarios envisaged.<sup>486</sup> The interest of the United

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<sup>482</sup> 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.

<sup>483</sup> 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.

<sup>484</sup> “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.

<sup>485</sup> 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.<sup>487</sup> 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.<sup>488</sup> 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.<sup>489</sup>

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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<sup>486</sup> 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.

<sup>487</sup> 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.

<sup>488</sup> United Nations Peacekeeping Operations Factsheet 31 May 2013.

<sup>489</sup> Briefing by the United Nations Office to the African Union, Security Council, 6561<sup>st</sup> 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.<sup>490</sup> 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.<sup>491</sup>

#### 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.”<sup>492</sup> 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.<sup>493</sup> The Secretary-General stressed that the “current financial framework for partnerships in peacekeeping operations are not conducive to building a sustainable long-term strategy.”<sup>494</sup> The Prodi report called likewise for contributions to AU peacekeeping operations based on assessed contributions.<sup>495</sup> The

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<sup>490</sup> 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*.”

<sup>491</sup> 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.

<sup>492</sup> 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.

<sup>493</sup> 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, 6409<sup>th</sup> 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.

<sup>494</sup> Support to African Union peacekeeping operations (2010), *supra* note 475, 16, para. 61.

<sup>495</sup> 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.”<sup>496</sup> 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.<sup>497</sup> 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.”<sup>498</sup> Therefore, the Security Council factually retains a certain

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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.*

<sup>496</sup> 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.*

<sup>497</sup> 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.

<sup>498</sup> 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<sup>499</sup>, whereas a lack of financial means constitutes the main problem preventing the AU from effectively acting upon its mandate.<sup>500</sup> In practice, the AU seeks authorisation for all its operations<sup>501</sup>, including peacekeeping operations which – as it was established<sup>502</sup> – 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.<sup>503</sup>

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.<sup>504</sup> 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.<sup>505</sup>

All, in all, there are more than “130 different contributions channeled to the African Union – each with its own reporting and monitoring requirements.”<sup>506</sup> 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

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Article 54 of the Charter or under Chapter VII and as defined in the Security Council Resolution authorising the operation.

<sup>499</sup> Cf. also Griep, *supra* note 73, 360.

<sup>500</sup> 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.”

<sup>501</sup> See, *infra*, 2.5.3.

<sup>502</sup> See, *infra*, Chapter I, 1.3.

<sup>503</sup> Dersso, *supra* note 486, 73, 81.

<sup>504</sup> 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.

<sup>505</sup> Report of the African Union-United Nations panel, *supra* note 466, 8, para.16.

<sup>506</sup> *Ibid.*, 17, para. 58.

and the UN.”<sup>507</sup> 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.<sup>508</sup> 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.<sup>509</sup> 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.<sup>510</sup> 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.”<sup>511</sup>

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.”<sup>512</sup> The establishment of AFISMA in Mali proves that the AU is committed to live up to

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<sup>507</sup> 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.

<sup>508</sup> See, *infra* 2.3.9.

<sup>509</sup> 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.

<sup>510</sup> 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.

<sup>511</sup> 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, 6702<sup>nd</sup> 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, 307<sup>th</sup> 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.

<sup>512</sup> 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.<sup>513</sup> 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”.<sup>514</sup> The AU therefore decided to improve its quick reaction capacities through the African Immediate Crisis Response Capacity (AICRC).<sup>515</sup> 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.)<sup>516</sup>. Security Council Resolution

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<sup>513</sup> 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 establishment 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.

<sup>514</sup> W. Lacher, D. M. Tull, ‘Mali: Beyond Counterterrorism’, SWP Comments, February 2013, 4-5. See, *infra*, Chapter V, 5.1.4.

<sup>515</sup> 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 Response 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.

<sup>516</sup> 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.”<sup>517</sup> Nevertheless the mandate of MINUSMA is comparatively robust and allows for the use of military force.<sup>518</sup> 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.<sup>519</sup>

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.”<sup>520</sup> In the mean-time, the UN Political Office in Somalia shall be replaced with a new expanded Special Political Mission<sup>521</sup> which will also include the UN Support Office for AMISOM (UNSOA)<sup>522</sup> and which will operate alongside AMISOM<sup>523</sup> “until conditions permit a peacekeeping operation.”<sup>524</sup> 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.<sup>525</sup> 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

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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).

<sup>517</sup> Security Council Resolution 2100, UN Doc. S/RES/2100 (2013), 5, para.8.

<sup>518</sup> *Ibid.*, paras. 16 (a) (i), (c) (i), (iii), (d) (i), 17.

<sup>519</sup> 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. Tété António, Permanent Observer of the African Union to the United Nations, Security Council 7128<sup>th</sup> 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.

<sup>520</sup> Security Council Resolution 2093, UN Doc. S/RES/2093 (2013), 5, para.19.

<sup>521</sup> *Ibid.* 5, para.18

<sup>522</sup> *Ibid.*, 6, para.20.

<sup>523</sup> *Ibid.*, 6, para.21

<sup>524</sup> Report of the Secretary-General on Somalia, UN Doc. S/2013/69 (2013), 15, para.72.

<sup>525</sup> *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*.<sup>526</sup> [Emphasis added]

Thus, the statement underlines the division of labour between the two organisations on the basis of “comparative advantages.”<sup>527</sup> 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.<sup>528</sup> 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.”<sup>529</sup> 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.<sup>530</sup> Cooperation and coordination with the AU will be guaranteed, *inter alia*,

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<sup>526</sup> *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.

<sup>527</sup> 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.

<sup>528</sup> 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.

<sup>529</sup> 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.

<sup>530</sup> *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 (SRS), the Director of Mission Support, the AMISOM Special Representative of the Chairperson of the AU Commission and the AMISOM Force Commander.<sup>531</sup>

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.<sup>532</sup>

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.<sup>533</sup> 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.”<sup>534</sup>

## 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.

<sup>531</sup> *Ibid.*, 8-9, paras. 21-27.

<sup>532</sup> Report of the Chairperson of the Commission, *supra* note 460, 23-24, para. 88.

<sup>533</sup> Cf. Kioko, *supra* note 355, 807, 822.

<sup>534</sup> Security Council 7112<sup>th</sup> meeting, *supra* note 172, 2.

Union.”<sup>535</sup> 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.<sup>536</sup> The objectives of the Memorandum which is based on the principles of subsidiarity, complementarity and competitive advantage,<sup>537</sup> include a pledge to contribute to the full operationalization and effective functioning of the African Peace and Security Architecture.<sup>538</sup> 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.<sup>539</sup> 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.<sup>540</sup>

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.”<sup>541</sup> 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

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<sup>535</sup> African Peace and Security Architecture (APSA), 2010 Assessment Study, 19, para.48.

<sup>536</sup> 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.

<sup>537</sup> 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.

<sup>538</sup> 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*.

<sup>539</sup> Article III (2) (i), (iii), (vi), Article VI (1), (3) of the Memorandum of Understanding on Cooperation, *supra* note 461.

<sup>540</sup> *Ibid.*, Article IV (i), (ii).

<sup>541</sup> *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.”<sup>542</sup> 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.<sup>543</sup>

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.<sup>544</sup> ECOWAS is comparatively influential within the African Standby Force as three of the centres of excellence are based in its member states<sup>545</sup> 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

<sup>542</sup> Brosig, ‘The African Union a Partner for Peace’, *supra* note 281, 292, 293-294.

<sup>543</sup> 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.

<sup>544</sup> ECOWAS is for example less dependent on external financial support, see, *infra* 2.4.2 and 2.4.3.

<sup>545</sup> 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.<sup>546</sup> 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.<sup>547</sup>

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.<sup>548</sup> 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.”<sup>549</sup> However, it is suggested that the PSC authorised ECOWAS to intervene after finding itself too slow to respond.<sup>550</sup>

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.”<sup>551</sup> Indeed, there seems to be the awareness in both organisations that they need to coordinate more and cooperate better in

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<sup>546</sup> The ECOWAS Conflict Prevention Framework, Regulation MSC/REG.1/01/08, 11, para. 25.

<sup>547</sup> van Nieuwkerk, *supra* note 543, 169, 179.

<sup>548</sup> Mali/African Union/Peace and Security Council, 323rd Meeting New York, USA, June 12, 2012. Paragraph 14 stipulates “Reaffirm[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]

<sup>549</sup> Policy Framework for the Establishment of the African Standby Force, *supra* note 460, 15, para.3.6.

<sup>550</sup> Vines, *supra* note 543, 89, 104.

<sup>551</sup> 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.”<sup>552</sup>

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,<sup>553</sup> but on the other hand, the RECs are seen as subsidiary to the authority of the AU.<sup>554</sup> 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.<sup>555</sup> 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.<sup>556</sup> 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

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<sup>552</sup> Peace and Security Council, 371<sup>st</sup> 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.

<sup>553</sup> 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.

<sup>555</sup> Memorandum of Understanding on Cooperation, *supra* note 461, Article XX (1).

<sup>556</sup> One could mention for example UNMIK and the DRC, Griep, *supra* note 73, 228-29.

to systematise the relations between universal and regional organisations.<sup>557</sup> 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.<sup>558</sup>

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

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<sup>557</sup> Boisson de Chazournes, *supra* note 185, 79, 401.

<sup>558</sup> 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.<sup>559</sup>

As regards the nature of peace operations in Africa, those following a comprehensive peacekeeping and peace-building approach are mostly conducted by the UN.<sup>560</sup> 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.<sup>561</sup> Thus, “reciprocal dependence between them (...) has triggered the emergence of a loose security system”<sup>562</sup> in the “triangle of interorganisational relations between the AU, EU and UN.”<sup>563</sup> But once again,

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<sup>559</sup> 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.

<sup>560</sup> 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.

<sup>561</sup> Cf. Yamashita, *supra* note 16, 165, 171. See also Bjurner, ‘On EU Peacemaking’, *supra* note 256, 89, 95.

<sup>562</sup> Brosig, *supra* note 12, 107, 122; Brosig, ‘The African Union a Partner for Peace’, *supra* note 281, 292, 293.

<sup>563</sup> Statement of Rwanda, Security Council, 6919<sup>th</sup> 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.”<sup>564</sup>

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.<sup>565</sup> 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.<sup>566</sup> 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.<sup>567</sup> 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.<sup>568</sup> The same call was made by Secretary-General Ban to the SC to generally define the role

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(...) [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.

<sup>564</sup> 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 7112<sup>th</sup> meeting, *supra* note 172, 7.

<sup>565</sup> Yamashita, *supra* note 16, 165, 182.

<sup>566</sup> This means that the EU (indirectly) and the AU (directly) have had to 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.

<sup>567</sup> 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, 7228<sup>th</sup> meeting, UN Doc. S/PV.7228 (2014), 57.

<sup>568</sup> This was emphasised within the Security Council when it was meeting on Head of State/Ministerial Level, Security Council, 6621<sup>st</sup> 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.<sup>569</sup> 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.<sup>570</sup> 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.<sup>571</sup>

The Council finally adopted a Presidential Statement in which it expressed “its intention to consider further steps to promote closer and more operational cooperation.”<sup>572</sup> 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<sup>573</sup> – and it especially

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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, 4970<sup>th</sup> meeting, UN Doc. S/PV.4970 (2004); Security Council, 4970<sup>th</sup> meeting, *supra* note 487; Statement of the Secretary-General, Security Council, 5282<sup>nd</sup> meeting, *supra* note 38, 4-5; Security Council, 5529<sup>th</sup> meeting, *supra* note 231; Security Council, 5735<sup>th</sup> meeting, UN Doc. S/PV.5735 (2007); Security Council, 5735<sup>th</sup> 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, 5776<sup>th</sup> meeting, *supra* note 487; Security Council, 5776<sup>th</sup> meeting, UN Doc. S/PV.5776 (Resumption 1) (2007); Security Council, 6153<sup>rd</sup> meeting, UN Doc. S/PV.6153 (2009); Security Council, 6153<sup>rd</sup> meeting, UN Doc. S/PV.6153 (Resumption 1) (2009); Security Council, 6178<sup>th</sup> meeting, UN Doc. S/PV.6178 (2009); Security Council, 6257<sup>th</sup> meeting, *supra* note 371; Security Council, 6409<sup>th</sup> meeting, *supra* note 493.

<sup>569</sup> 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, 7015<sup>th</sup> meeting, UN Doc. S/PV.7015 (2013), 7.

<sup>570</sup> 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.

<sup>571</sup> See e.g. the statement on behalf of the EU, Security Council, 7015<sup>th</sup> 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, 7015<sup>th</sup> meeting, UN Doc. S/PV.7015 (2013), 7.

<sup>572</sup> Statement by the President of the Security Council, UN Doc. S/PRST/2013/12 (2013)

<sup>573</sup> *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.”<sup>574</sup> 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.<sup>575</sup>

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.

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<sup>574</sup> *Ibid.*, 5.

<sup>575</sup> *Ibid.*, 6.