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

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Chapter IV: From the broader legal framework to international responsibility

4.1. Introduction

“In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of process. If one consolidates the past and calls it law, he may find himself outlawing the future.”

- Judge Manfred Lachs, President of the ICJ.¹

The present study started with an examination of legal framework for the maintenance of international peace and security under the United Nations Charter. The analysis showed that the legal framework is construed around a careful compromise between a universalist and a regionalist perception of collective security, in which the United Nations is the central pillar, although in practice roles can be reversed. This study inquired into the concept of peacekeeping as it was developed under the United Nations Charter, as well as cooperation with regional organisations, and it placed emphasis on this “collective security compromise”, as it is echoed within each of the chapters of the United Nations Charter analysed.² The Security Council is very adept at handling the legal framework with its corresponding margin of appreciation and has shown a high degree of flexibility and pragmatism in the conduct of peacekeeping operations, as well as in its relations with regional organisations.

Finally, cooperation between the United Nations and regional organisations has become a reality and a fact. All indications point towards even more cooperation between the United Nations and regional organisations, both on a vertical and on a horizontal level. This was last illustrated during the open debate organised under the Rwandan presidency of the Security Council in July 2014.³ Based on a concept note prepared by Rwanda,⁴ the members of the Security Council, representatives of other

¹ “The Twenty-fifth Anniversary of the International Law Commission”, speech delivered at a Special Commemorative Meeting of the United Nations General Assembly (12 October 1973).

² It has to be clarified that under Chapter VII it is due to the practice of the Security Council which has established the concept of peacekeeping.

³ Security Council, 7228th meeting, UN Doc. S/PV.7228 (2014). See, in particular the statements by the Secretary-General, the EU, the AU and NATO, 2-4, 4-6, 6-9, 56-57. See also M. Brosig, D. Motsama, ‘Modeling Cooperative Peacekeeping. Exchange Theory and the African Peace and Security Regime’, in (2014) 18 *Journal of International Peacekeeping*, 45, 51.

⁴ Concept note, July 2014 Security Council open debate on the theme “United Nations peacekeeping operations: the United Nations and regional partnership and its evolution”, Annex to Letter dated 3 July 2014

member states and international organisations debated about necessary steps for strengthening the relations between the UN and regional organisations with regard to peacekeeping operations and maintenance of international peace and security.

In the unanimously adopted Resolution 2167 following a long debate the Security Council expressed “its determination to take effective steps to further enhance” its relationship with regional and subregional organisations.⁵ More importantly this resolution proves that the Security Council has truly embraced the loose security system based on the triangle of organisational relations between the UN, the AU and the EU (*infra* 2.6). In its resolution, the Security Council welcomed recent developments regarding cooperation between the UN, the AU and the EU, as well as the “strong cooperation initiatives” on an operational level between these three organisations.⁶ It went even further and requested the Secretary-General to produce, in close consultation with both the AU and the EU, an assessment report and recommendations on the progress of the partnerships between the UN and relevant regional organisations in peacekeeping operations no later than 31 March 2015.⁷ Therefore, this resolution may well be the starting point for further enhanced cooperation between international organisations in peacekeeping operations which will ultimately also increase the likelihood of joint responsibility of international organisations for violations of international law committed during the deployment of peacekeeping operations. The Security Council underlined that there is also a need to enhance the UN and regional organisations’ joint planning and joint mission assessment processes.⁸ Another measure envisaged is an increased exchange of staff members between the UN and the AU in order to enhance the capacities of the latter, for instance, in mission planning and management.⁹

Another trend that can be observed with respect to the cooperation between the UN and regional organisations is the increase in the deployment of multiple simultaneous peace operations in the same conflict, which rose from 10% of all peace operations in 1992 to 70% of all peace operations in

from the Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General, UN Doc. S/2014/478 (2014), see in particular 6-7.

⁵ Security Council Resolution 2167, UN Doc. S/RES/2167 (2014), 4, para. 2. See also Secretary-General’s remarks at Summit on UN Peacekeeping, available at <http://www.un.org/sg/statements/index.asp?nid=8060>.

⁶ *Ibid.*, 4, para. 7; 5, para. 11. The Secretary-General also set apart these three organisations from other organisations by speaking of “We – the United Nations, the AU and the EU, together with other key partners”, Security Council, 7228th meeting, *supra* note 3, 3. Cf also the statements of the EU and of Ireland, *ibid.*, 5, 52.

⁷ Security Council Resolution 2167, *supra* note 5, 7, para. 28.

⁸ *Ibid.*, 5, para. 14. See also the statements of the Secretary-General and the EU, Security Council, 7228th meeting, *supra* note 3, 2, 4.

⁹ Security Council Resolution 2167, *supra* note 5, 6, paras. 18-19.

2007.¹⁰ The time-frame for the evolution of cooperation between the UN and regional organisations in peacekeeping operations has been remarkably short, and the presented facts suggest that cooperation between the organisations will continue to develop at such a pace that the necessity for legal regulation of the joint responsibility of international organisations will be even further enhanced. Whereas the EU started deploying troops in crisis management operations in 2003, the African Union, although the legal successor of the OAU, has existed only since 2000, so that it is to be expected that these two organisations in particular will further enhance and institutionalise their cooperational framework with other organisations, as well starting a new wave of activism. This assessment is made against a background in which one cannot see any trend in international relations toward a decrease of threats to international peace and security, nor a decrease to internal or international armed conflicts. In particular, the African continent unfortunately remains a nursery for conflicts, as the recent examples of Mali and the Sahel Region and the Central African Republic underline.¹¹

The analysis further highlighted the problems and challenges existing in this particular domain of international law. One can truly say that certain areas of international law resemble something of a *terra incognita* when it comes to their application to international organisations.¹² There are several reasons, which include the lack of practice by international organisations in the period of the Cold War. The opposing two blocs in the Security Council prevented the system of global collective security from operating as it was supposed to.

¹⁰ A. Ballas, 'It Takes Two (or More) to Keep the Peace: Multiple Simultaneous Peace Operations', in (2011) 15 *Journal of International Peacekeeping*, 384, 385. In Bosnia Herzegovina, for example, four international organisations deployed their own peace operations at overlapping time-periods from 1995 onwards: The United Nations with UNPROFOR and UNMIBH, NATO with SFOR and IFOR, the OSCE's Mission to Bosnia-Herzegovina as well as the EU with EUPM and EUFOR.

¹¹ In 2012, the SC held 90 meetings on African issues which account for 68% of the Council agenda, Highlights of the Security Council Practice 2012, available at: <http://www.un.org/en/sc/inc/pages/pdf/highlights/2012.pdf>. The percentage was exactly the same for the year 2011, Annex to the letter dated 2 April 2013 from the Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General, Concept note for briefing in the Security Council: Prevention of conflicts in Africa: addressing the root causes, Monday, 15 April 2013, UN Doc. S/2013/204 (2013), 2, para. 2. Africa is also the continent in which cooperation between the United Nations and regional organisations have been "most tested" and the nature of the UN's experience, in particular the failures of Somalia and Rwanda in the 1990s has influenced significantly the general approach of the UN to peacekeeping operations, J. Boulden, 'Introduction, in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 1, 3. Another continent, South America is now coming of age regarding its contributions to international peacekeeping; for a good overview, cf. K. M. Kenkel (ed.), *South America and Peace Operations. Coming of age* (2013).

¹² One may cite in this context Brownlie, who declared in 2005 in his chapter on the responsibility of states for the acts of international organisations that "[t]he subject chosen for this contribution meets the need of brevity because not very much is known about it. Most works of reference ignore it", I. Brownlie, 'The Responsibility of States for the Acts of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 355, 355.

Moreover, the “humanisation” of international law, in the form of the emergence of international human rights law, expanded the reach of norms protecting the individual to the areas of activities of international organisations.¹³ However, these norms are transported from the homogeneous “*contexte étatique*” to the heterogeneous area of international organisations. The lack of adjudicative power by International Courts and Tribunals over international organisations likewise prevented further elucidation of the applicable legal rules. The consolidation of peacekeeping operations, and the multiplication of tasks, functions and actors, contributed to the difficulty in dismantling and analysing these operations, and in determining the applicable legal framework, as well as the responsible entities. A further factor is the uniqueness of each of the organisations; each of them is an organisation *sui generis*. Thus, their relations with other organisations are based on their unique legal make-up, complicating any attempt to draw conclusions of general validity outside of their specific context. The assessment on an inter-organisational level is also true on an operational level for each and every peacekeeping operation.

It is against this comprehensive background that the study approaches the legal framework of international responsibility applicable to international organisations, as well as the practice of the United Nations therein. It is necessary to address whether the developed rules are appropriate to regulate the specific context of international organisations cooperating in peacekeeping operations. It was concluded in Chapter II that the cooperation between international organisations in peacekeeping operations has reached a level where cases of joint responsibility are not only likely to

¹³ Cf. generally T. Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, Collected Courses of The Hague Academy of International Law, Vol. 301 (2003), 9-489; T. Meron, *The Humanization of International Law* (2006). Regarding the practice of international organisations to compensate individual victims, “[i]t has [e.g.] always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore”, Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics, in, *United Nations Juridical Yearbook* (1965), 41; indeed, it was not conceived in the early days that the Security Council, in the exercise of its competences and powers regarding the maintenance of international peace and security might interfere with an individual’s rights, C. Tomuschat, ‘The European Court of Human Rights and the United Nations’, in A. Føllesdal, B. Peters, G. Ulfstein (eds.), *The European Court of Human Rights in a National, European and Global Context* (2013), 334, 335; M. Bothe, ‘Security Council’s Targeted Sanctions against Presumed Terrorists’, in (2008) 6 *Journal of International Criminal Justice*, 541, 541.

occur,¹⁴ but where international organisations are acting as equal partners, and therefore not in a subordinate-superior relationship.

1. The Law of Responsibility of International Organisations and the practice of the United Nations

As peacekeeping was invented by the UN as a tool for conflict regulation, most of the existing practice in this particular area, which has been likewise analysed by the ILC for the elaboration of the ARIOs, derives from UN operations.

Activities in the domain of international peace and security and particularly peacekeeping operations, have a great impact on the lives of the people, especially in the case of deployment of troops on the ground. Violations of human rights law and international humanitarian law and international responsibility of international organisations for these acts are consequently not a mere hypothetical possibility, but part of the reality. These acts may be committed in a private or in an official capacity, alone or by a group of individuals and they can include acts such as sexual exploitation, arbitrary detention or murder, or even the unintentional killing of civilians in the exercise of the mandate of an operation.

Sixty-seven United Nations peacekeeping missions have taken place since the establishment of the UN in 1945. Consequently, there has been a certain practice and some cases dealing with the responsibility arising for peacekeeping missions.¹⁵ The United Nations declared at an early stage that it would be responsible for all damages occurring during the deployment of peacekeeping forces¹⁶ and that it would pay for any damages caused,¹⁷ despite emphasising that this is only motivated by

¹⁴ Cf. A. Clapham, 'The Subject of Subjects and the Attribution of Attribution', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowlland-Debbas* (2010), 45, 58.

¹⁵ As the UN Legal Counsel wrote on 3 February 2004 to the Director of the Codification Division, it is "in connection with peacekeeping operations where principles of international responsibility (...) have for the most part been developed in a fifty-year practice of the Organization", cf. G. Gaja, Second Report on responsibility of international organizations, UN Doc. A/CN.4/541 (2004), at 16 fn.52.

¹⁶ M. Hartwig, *Die Haftung der Mitgliedstaaten für Internationale Organisationen* (1993), 233. As one example, cf., the agreement concluded between the United Nations and the United Arab Republic (now: Arab Republic of Egypt) concerning traffic accidents involving either UAR or UNED vehicles, Exchange of Letters constituting an Agreement between the United Nations and the Government of the United Arab Republic concerning the Settlement of Claims between the United Nations Emergency Force and the Government arising out of Traffic Accidents. Gaza, 14 October 1959 and Cairo, 15 September and 17 October 1960, United Nations Treaty Series 388, 144-8.

¹⁷ According to U.N.E.F. Regulation 15 the Secretary-General "shall make provisions for the settlement of claims arising with respect to the Force". In practice, claims arising against U.N.E.F. and the United Nations Force in the Congo were settled by the U.N., cf. F. Seyersted, 'United Nations Forces Some Legal Problems', (1961) 37 *British Yearbook of International Law*, 351, 420; also M. Tondini, 'The 'Italian Job': How to Make International Organisations Compliant With Human Rights and Accountable For Their Violation by Targeting Member States'

the “moral responsibility” of the organisation and underlining that it was not under a legally binding obligation.¹⁸ Although later on certain statements speak of “liability”, others mention that the practice emerged from a “policy” or from “considerations of equity and humanity.”¹⁹

Several arguments can be made against any generally applicable legal rule which could be derived from the practice of the United Nations. First of all, the practice of one single organisation cannot fulfil the requirements necessary to ascertain a rule of customary law applicable to all international

in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 169, 180.

¹⁸ The International Law Association also stated that “[t]here is no evidence of a presumption in law that the UN bears exclusive or primary responsibility for the tortious acts of peacekeeping operations and the law remains underdeveloped”, International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, Third Report consolidated and enlarged version of recommended rules and practices (“RRP-S”), 10. This is independent of any general rule regarding the attribution of conduct of organs or states placed at the disposal of an organisation on the basis of effective control, as the ILA rightly points out, *ibid.*, 16. However, it is also emphasised that “[t]here is no consensus on the modalities and degree of control required for attribution” (*ibid.*, 16). The ILA reaffirmed this view in 2004 notwithstanding the (then) already published two reports by ILC Special Rapporteur Gaja, International Law Association, Berlin Conference (2004), Accountability of International Organisations, 21; Further criticism came from the IMF, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/582 (2007) (International Monetary Fund), 7.

¹⁹ Hartwig, *supra* note 16, 233; So it was articulated by the United Nations Secretary-General in his letter to the Minister for Foreign Affairs of Belgium that “[the United Nations] has stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties. It is pointed out that, under these principles, the United Nations *does not assume liability for damage to persons or property which resulted solely from military operations* or which, *although caused by third parties*, has given risen to claims against the United Nations” [Emphasis added], Text of the Exchange of letters Dated 20 February 1965 between the Secretary-General of the United Nations and the Minister for Foreign Affairs of Belgium concerning the Settlement of Claims lodged against ONUC by Belgian Nationals, (1965), in UN Doc. S/6597, Annex 1. Even clearer, U Thant stated in another letter that “It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition (...) it is reinforced (...) by considerations of equity and humanity which the United Nations cannot ignore”, also in UN Doc. S/6597. For the French version, cf. J. J.A. Salmon, ‘Les Accords Spaak – U Thant du 20 Février 1965’, (1965) XI *Annuaire français de droit international*, 468, 495-97. In this context, it was expressed that “[t]he international liability of the United Nations for the activities of the United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organizations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization) and its liability in compensation. In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties”; cf. Report of the Secretary-General, Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters, Un Doc. A/51/389 (1996), paras. 6-7.

organisations, even if one were to presume that the required element of *opinio iuris* were to be present within the other organisations.²⁰

Moreover, the practice of the United Nations consists mostly of compensation cases under the domestic law of individual states; under which the conditions for a settlement, including the criterion of attribution, may differ from those applying under international law. Many of these cases under domestic law also included qualifications and limitations such as the use of statutes of limitation, restricting the period to present claims.²¹ The United Nations often only assumed responsibility on the international, external level, towards the victims, while recovering the compensation paid from the respective troop contributing states.

Under circumstances such as “loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government”²², one has to distinguish between attribution of conduct and attribution of responsibility; whereas the UN might assume the responsibility on an international level, the conduct would have been attributed to the member state and not the organisation. It is even questionable whether the practice of the UN is in conformity with the rules laid down in the ARIO.²³ The practice is also centred on the relationship between the United Nations and individual Member States.

²⁰ A contrary view on this issue is taken by Larsen who argues that the UN practice has been extensive and consistent enough as well as carried out with *opinio iuris* to qualify as international customary law, K. M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), 101.

²¹ K. Grenfell, ‘Effective Reparation for the Victims of Wrongful Acts Committed During UN Peace Operations: How Does It Work Concretely?’, in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 126, 130-32; General Assembly Resolution 52/247 Third-party liability: temporal and financial limitations, UN Doc. A/RES/52/247 (1998), particularly, 2-3, paras. 8-11; Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations, UN Doc. A/51/903 (1997), particularly, 5-11, paras. 12-46.

²² Contribution Agreement between the United Nations and [Participating State] Contributing Resources to [The United Nations Peacekeeping Operation], Annex to Administrative and Budgetary Aspects of the Financing of The United Nations Peace-keeping Operations: Financing of the United Nations Peace-keeping Operations, Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment, Note by the Secretary-General, UN Doc. A/50/995 (1996), 6, para.10; Model Memorandum of Understanding Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation], Annex to Administrative and Budgetary Aspects of the Financing of The United Nations Peace-keeping Operations: Financing of the United Nations Peace-keeping Operations, Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment, Note by the Secretary-General, UN Doc. A/51/967 (1997), 7, para. 10.

²³ The Articles limit the responsibility of an international organisation to acts in an official capacity, but *ultra vires* acts in the exercise of an official capacity are covered, cf. Article 8 of the articles. International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011), 85, para. 3 of the commentary; *mutatis mutandis* also, International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), General Assembly, Official Records, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10 (2009), 62-63, para. 2 of the Commentary. The United

It has also been pointed out that the lack of practice in a given area may be an indication that a “particular situation cannot be covered by a general rule due to the diversity of international organizations.”²⁴ The Special Rapporteur of the ILC himself acknowledged the lack of practice. It is partly in consequence of the fact that only 18 international organisations reported their practice, and he therefore commented that the practice did not add to the previous knowledge.²⁵

2. The ILC Articles on Responsibility of International Organizations

The following part analyses the question as to whether the articles developed by the International Law Commission are suitable to be applied in the context of peacekeeping operations. Bearing in mind the enhanced cooperation between international organisations, it is important to analyse and to ascertain whether the different possibilities of the attribution of conduct and of responsibility to international organisations as contained in the articles of the ILC are suitable to regulate the conduct of international organisations cooperating in peacekeeping operations. The sixty-five Articles on Responsibility of International Organizations as adopted by the International Law Commission in 2nd reading in 2011 contain several dispositions which set out the various methods to attribute conduct or simply responsibility to international organisations. The first article which will be examined is Article 7 which deals with the attribution of conduct to international organisations in the case of

Nations has – under certain conditions – also recognised responsibility for off-duty acts: In this connection, the Secretariat notes that the 1986 opinion quoted by the ILC does not reflect the consistent practice of the Organization. In 1974, the Office of Legal Affairs advised the Field Operations Service as to whether the United Nations Emergency Force (UNEF) Claims Review Board was authorized to handle and settle claims in respect of tortious acts committed during the Force members’ off-duty periods. It advised that “there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognize as engaging its responsibility”, and made a distinction between off-duty acts of Force members in circumstances closely related to the functions of the Force member (i.e., the use of a Government-issued weapon), and actions entirely unrelated to the Force member’s status as such. Accordingly, the test for the attribution of the act was whether it related to the functions of the Organization, irrespective of whether the Force member was on or off duty at the time, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637/Add.1 (2011), 15-16, para.4. NATO’s Status of Force agreement contains a similar disposition, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 4 April 1949, Article VIII.

²⁴ International Law Association, Sofia Conference (2012), Study Group on the Responsibility of International Organizations, 8. Generally on criticism of the ILC articles due to their “copy/paste nature” from the articles on State Responsibility, see, *ibid.*, 9-11; Germany took the view that, “there is no customary international law on the responsibility of international organizations”, International Law Commission, Responsibility of international organizations, Comments and observations received from Governments and international organizations, UN Doc. A/CN.4/556 (2005), 47. See, Germany, *ibid.*, 63, section D. regarding the practice of the UN to assume responsibility for peacekeeping operations.

²⁵ Gaja, Second Report, *supra* note 15, 2, para.2. The AU and ECOWAS did not submit any comments regarding their practice. This lack of practice was also criticised in the joint submission of 14 international organisations which declared that the articles would not sufficiently take into account of the diversity of international organisations, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 10-11, para.2.

organs of states or organs or agents of international organisations seconded to another international organisation.

1. Article 7 of the Articles on the International Responsibility of International Organizations

Article 7 prescribes that “[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”²⁶

As explained in the previous chapter (*infra*, 3.2.1.), states retain a certain amount of control over peacekeepers which are not fully seconded to an international organisation so that peacekeeping operations are deemed to fall under the provision of Article 7.²⁷ Although this article also covers the conduct of an organ of an international organisation placed at the disposal of another international organisation, the practice in this area is rare; the commentary to the article lists one example.²⁸ All cases in the context of peacekeeping operations dealing with the international responsibility of a state or an international organisation have been decided on the basis of a criterion of control, but the jurisprudence is varied to say the least.

The controversial *Behrami* case deviated completely from the criterion of “effective control” but held that “the United Nations Security Council retained ultimate authority and control so that operational

²⁶ For a good general overview of the origins, history and content of Article 7, see B. Montejo, ‘The Notion of ‘Effective Control’ under the Articles on the Responsibility of International Organizations’, in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 389-404.

²⁷ Report of the International Law Commission, Sixty-third session, *supra* note 23, 85, para.1; The position of the ILC contains a “slight divergence” from the official UN position according to which peacekeeping forces are “subsidiary organs” of the United Nations, without “any significant differences.” The practice of the UN corresponds rather to Article 8 than to Article 7. Regarding UN authorised operations, the troops deployed do not become organs of the UN so that attribution must be based on Article 7. Tomuschat, ‘The European Court of Human Rights and the United Nations’, *supra* note 13, 334, 344-50; A. Sari, ‘UN Peacekeeping Operations and Article 7 ARIO: The Missing Link’, in (2012) 9 *International Organizations Law Review*, 77, 78. Sari criticises the distinction between Articles 6 and 7 as unconvincing as any organ seconded by a State to an international organisation remains to a certain extent under the control of the seconding entity as otherwise it would “cease to exist as own of its organs.” Therefore, she submits that Article 6 could be applicable to national contingents in peace operations, *ibid.* 79-80. In contrast, Shraga supports the distinction between Article 6 and Article 7, D. Shraga, ‘ILC Articles on Responsibility of International Organizations: The Interplay between the Practice and the Rule (A View from the United Nations)’, in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 202-205.

²⁸ Report of the International Law Commission, Sixty-third session, *supra* note 23, 91, para.16.

command only was delegated.”²⁹ The European Court of Human Rights set out the chain of command in detail:

Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international security presence, KFOR. NATO fulfilled its command mission via a chain of command (from the NAC, to SHAPE, to SACEUR, to CIC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.³⁰

On the basis of this analysis, the Court concluded that “[t]his delegation model demonstrates that, contrary to the applicants’ argument (...), direct operational command from the UNSC is not a requirement of Chapter VII collective security missions.”³¹ The Court thus attributed the conduct of a UN authorised operation to the United Nations contrary to the “practice” of the United Nations.³² The Court confirmed its jurisprudence in *Kasumaj v. Greece*³³ and *Gajic v. Germany*.³⁴ In *Berić and others v. Bosnia*,³⁵ the Court, although quoting extensively from *Behrami*, relied on the notion of “effective overall control”.³⁶ In yet another case, *Stephens v. Cyprus, Turkey and the United Nations*, the European Court first of all denied the attribution of the alleged violations to the two respective states and then carried on to declare that as to the complaints directed against the UN “UNFICYP,

²⁹ *Agim Behrami and Bekir Behrami against France, Ruzdhi Saramati against France, Germany and Norway*, Decision on Admissibility, 2 May 2007, para. 133. Crawford asserts that the Chamber “seemed to employ more formalistic criteria to determine responsibility”, J. Crawford, *State Responsibility. The General Part* (2013), 198. For further critique of the judgment, see the references on page 199, fn. 174.

³⁰ *Ibid.*, para. 135.

³¹ *Ibid.*, para.136.

³² Report of the International Law Commission, Sixty-third session, *supra* note 23, 89, para. 15 and fn.115 for selected publications criticising the decision. It will not be dealt with further here, as *Behrami* will be one of the case-studies.

³³ *Kasumaj v. Greece*, First Section, Decision as to the Admissibility, 5 July 2007.

³⁴ *Gajic v. Germany*, First Section, Decision as to the Admissibility, 28 August 2007, para.1.

³⁵ *Berić and others v. Bosnia*, Fourth Section, Decision as to the Admissibility, 16 October 2007

³⁶ *Ibid.* 15-16, paras. 27-28. It has to be emphasised that the Court does not pronounce itself on the utilised criterion of jurisdiction which is the first step before determining the attribution of conduct. In *Behrami/Saramati*, the Court also relied on the notion of “effective overall control” to establish that the applications were under the jurisdiction of KFOR/UNMIK. Cf. generally, C. A. Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision’, in (2010) 42 *New York University Journal of International Law and Politics*, 501–548.

which has control over the buffer zone, is a subsidiary organ of the UN created under the UN Charter and is under the *exclusive control and command* of the UN”³⁷ [Emphasis added].

In the UK, the House of Lords was seized by a case regarding the actions of British troops after the Iraq Invasion in 2003. In *Al-Jedda*,³⁸ the Court distinguished the facts of the case presented to it from the *Behrami/Saramati* Decision before the European Court of Human Rights, and held that it could “not realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.”³⁹

Mr. Al-Jedda then seized the European Court of Human Rights which returned to some extent to the “effective control” criterion. The Court considered that “that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations.”⁴⁰ This approach seems to create yet another test of attribution, a blend of *Berić* with *Behrami/Saramati*.

On the domestic level, the Dutch Courts were engaged with claims against the Dutch Government for conduct arising out of the actions of the Dutch batallion “Dutchbat” of UNPROFOR in Srebrenica. The District Court in The Hague made only a general reference to the articles on international

³⁷ *Kyriakoula Stephens against Cyprus, Turkey and the United Nations*, First Section, Decision as to the Admissibility, 11 December 2008, 7.

³⁸ R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), Decision of 12 December 2007

³⁹ *Ibid.*, Opinion of Lord Bingham of Cornwall, 17, para. 23. He distinguished the case from *Behrami* by asserting: “By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in *Behrami* and *Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself.” (*Ibid.*). Furthermore, “The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN’s proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.”, *Ibid.*, 17, para. 24. Lord Rodger of Earlsferry equally emphasised the distinction between the two cases, 30, para. 59, he however relied on the criterion developed by the ECHR, 51, para.113. Baroness Hale of Richmond concurred with Lord Bingham, 54-55, para. 124. So did Lord Carswell, 57, para. 131. Lord Brown of Eaton-under-Heywood also distinguished the case from *Behrami/Saramati* and attributed the conduct to the UK, 61-64, paras. 141-149.

⁴⁰ *Case of Al-Jedda v. The United Kingdom*, Judgment, Grand Chamber, Judgment, 7 July 2011.

responsibility of international organisations, and concluded that “these acts and omissions should be attributed strictly, as a matter of principle to the United Nations.”⁴¹

In July 2011, the Court of Appeal in The Hague delivered its judgment in the same affair and reversed the attribution of conduct, judging that the Netherlands would be responsible. The Court based its judgment on the notion of “effective control” as derived from international law literature and the work of the ILC, including Article 6 [now: 7] of the articles on Responsibility of International Organisations.⁴² More important however, the Court held that “the possibility that more than one party has 'effective control' is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.”⁴³ However, the Court did not substantiate this particular finding.⁴⁴ The Court also distinguished between two criteria to determine if an entity exercises “effective control”, first of all “whether that conduct constituted the execution of a specific instruction” and “if there was no such instruction, the UN or the State had the power to prevent the conduct concerned.”⁴⁵

On 6 September 2013, the Supreme Court of the Netherlands rendered its judgment in the two affairs, confirming the judgments of the Court of Appeal. The Supreme Court confirmed not only that conduct can be attributed to both an international organisation and a state if they “exercise effective control”⁴⁶, but also that “all factual circumstances” and the special context of the case must be taken into account.”⁴⁷

⁴¹ District Court in The Hague, Nuhanović v. The Netherlands, Judgment, LJN: BF0181, Case No. 265615 / HA ZA 06-1671(english translation), 10 September 2008, para. 4.8, see also, paras. 4.11, 4.13, 4.15., District Court in The Hague, Mustafić v. The Netherlands, Judgment, LJN BF0182, Case No. 265618 / HA ZA 06-1672 (English translation), 10 September 2008, para. 4.13, see also paras. 4.10, 4.15., 4.17. . It is evident that this decision was informed by the official United Nations position which makes Article 7 nearly redundant, considering peacekeeping operations to be UN organs according to Article 6, C. Ryngaert, ‘Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the ‘Effective Control’ Standard after Behrami’, in (2012) 45 *Israel Law Review*, 151, 159. According to this “binary model” pursuant to which the criterion of “effective control” is not affected by circumstances such as the break-down of the chain of command or the elements of control retained by troop-contributing countries, it matters alone whether it is a United Nations operation or a United Nations authorised operation, *ibid.* 159.

⁴² Court of Appeal in The Hague, Nuhanović v. The State of the Netherlands, Judgment, LJN: BR5388, Case No. 200.20.174/01, 5 July 2011, para. 5.8; Court of Appeal in The Hague, Mustafić v. The State of the Netherlands, Judgment, LJN: BR5386 , Case No. 200.020.173/01, 5 July 2011, para. 5.8 ; See generally T. Dannenbaum, ‘Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct, (2012) 61 *International and Comparative Law Quarterly*’, 713-728.

⁴³ *Ibid.*, para. 5.9. in both judgments.

⁴⁴ *Ibidem.*

⁴⁵ *Ibidem.*

⁴⁶ Supreme Court of the Netherlands, The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović, Judgment, First Chamber, 12/03324, LZ/TT, 6 September 2013, 22-23, para. 3.11.2; Supreme Court of the Netherlands, The State of the Netherlands (Ministry of Defence and Ministry of Foreign

The Court of First Instance of Brussels was seized in a civil law case for compensation for acts of war crimes in the conduct of operation UNAMIR in Rwanda. The Court attributed the conduct to the Belgian State and not to the United Nations. The Belgian soldiers were withdrawn from UNAMIR and were therefore under the authority of the Belgian state. The Court did not itself pronounce on any rule of attribution applicable under international law.⁴⁸

This overview of jurisprudence shows that there is no discernible rule under international law for the attribution of responsibility of an organ seconded to an international organisation by another state or another international organisation. In other words, there is no consensus regarding the variant of control required to attribute conduct to an international organisation. The European Commission expressed a similar view:

The question must be asked whether the international practice is presently clear enough and whether there is identifiable *opinio juris* that would allow for the proposed standard of the International Law Commission (which thus far has not been followed by the European Court of Human Rights) to be codified in the current draft. There is no doubt that this remains a controversial area of international law, in relation to which one can expect a steady stream of case law not only from the European Court of Human Rights, but also from domestic courts, in addition to voluminous academic writings.⁴⁹

Affairs) v. Mehida Mustafić, Damir Mustafić, Alma Mustafić, Judgment, First Chamber, 12/03329, LZ/TT, 6 September 2013, 21-22, para.3.11.2.

⁴⁷ *Ibid.* 24, para. 3.11.3; respectively, 22-23, para. 3.11.3. In July 2014, the District Court in The Hague reconfirmed the application of the “effective control” criterion in a civil law suit against the Netherlands, District Court in The Hague, Stichting Mothers of Srebrenica and Others v. The Netherlands, Judgment, Case No. C/09/295247 / HA ZA 07-2973, 16 July 2014, paras. 4.33-4.34. An interesting feature of the judgment is that the Court determined the limits accorded to the attribution of acts of Dutchbat to the Netherlands by using both a temporal and a spatial element. The Netherlands were deemed to have effective control during the transitional period but only with regard to providing humanitarian assistance and the preparation of the evacuation of refugees in the mini safe area, *ibid.*, para. 4.87.

⁴⁸ Tribunal civil de Bruxelles, (71e chambre), M. et autres / Etat belge, ministre de la Défense nationale et A. et autres, 8 décembre 2010, paras. 38, 40; Cf. also N. Gal-Or, C. Ryngaert, ‘From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN’, in (2012) 13 *German Law Journal*, 511, 534-536.

⁴⁹ Responsibility of international organizations, Comments and observations received from international organizations 2, *supra* note 25, 22. The EU made this statement in the explicit context of the *Behrami/Saramati* decision and enforced her criticism by pointing out “that the commentaries to the draft article are largely devoted to United Nations practice and to a discussion of the case law of the European Court of Human Rights”, *ibid.* 22; Cf. also K. M. Larsen, ‘Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test’, in (2008) 19 *European Journal of International Law*, 509, 518. An even more blunt statement by the EU/Council of Europe can be found in the Draft Accession Agreement where it says: “More specifically, as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation there was a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members.”, EU/Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the

Further critique came from the United Nations which emphasised that the test of “effective control” has never been used to determine the division of responsibility between the organisation and its troop contributing states⁵⁰ but that the test of effective control is used on a horizontal level in joint operations to distinguish between a United Nations operation under UN command and control and a United Nations authorised operation conducted under national or regional command and control.⁵¹

Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg, 5 April 2013, 19, para.24.

⁵⁰ The UN acknowledges this fact equally and frankly: “It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are ‘transformed’ into a UN subsidiary organ, and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, *regardless of whether the control exercised over all aspects of the operation was, in fact, ‘effective’*. In the practice of the United Nations, therefore, the test of ‘effective control’ within the meaning of Article 6 [now Article 7] has never been used to determine the division of responsibilities for damage caused in the course of any given operations between the United Nations and any of its troop-contributing States.” [Emphasis added], Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 13-14, para. 3, see equally paras. 1-2. As such, the UN sees Article 7 as a mere “guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization, including possibly in connection with activities of the Organization in other contexts.”, *ibid.*, 14 para.6. The Secretary-General confirmed this position while reacting to the Behrami/Saramati judgment: “It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control.”, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354 (2008), 4 para. 16; A previous statement of the Secretary-General was similar: In authorized chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. *In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised.*” [Emphasis added], Report of the Secretary-General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing the United Nations peacekeeping operations, UN Doc. A/51/389 (1996), 6, paras.17-18; International Law Commission, Responsibility of international organizations, Comments and observations received by international organizations, UN Doc. A/CN.4/545 (2004), 18; A summary of UN practice regarding United Nations and UN-authorized operations is contained in, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 10-12, paras. 2-10.

⁵¹ Responsibility of international organizations, Comments and observations received from international organizations, *ibid.*, 13, para.2. In contrast, the Secretary-General said “The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation”, Report of the Secretary-General, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, *ibid.*, 6, paras. 17-18, which prompted the ILC to declare “[w]hat has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.”, Report of the International Law Commission, Sixty-third session, *supra* note 23, 88, para. 9.

It is even less clear – in the framework of the articles – under which conditions international organisations could be jointly responsible. The Special Rapporteur remarked that there are cases of joint attribution of conduct, but one could also consider “that the infringing acts are attributed to either the State or the United Nations, while omission, if any, of the required preventive measures is attributed to the other subject. Similar conclusions may be reached with regard to infringements by members of peacekeeping forces that affect other areas of the protection of human rights.”⁵²

Dealing with the particular case of the European Community, he expressed the view that “joint, or joint and several, responsibility does not necessarily depend on dual attribution (...) in case of an infringement (...) that does not distinguish between the respective obligations of the EC and its member States – either directly, or by referring to their respective competencies – responsibility would be joint towards the non-member State party to the agreement.”⁵³ Specifically referring to military operations, he declared that “one may argue that attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution to a State rule out attribution to an international organization. Thus, one possible solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.”⁵⁴

One other author even suggests that the UN has no “real authority or means to control the peacekeepers, absent the TCC’s concurrence.”⁵⁵ It is also questionable whether the distinction between organs made available under Article 6 and organs seconded under Article 7 is not simply artificial and somehow redundant. Article 6 stipulates that the

However, once again, these examples refer to joint operations between an international organisation and (a) state(s) and the statement by the Secretary-General and the ILC refers to the vertical level of responsibility in contrast to the horizontal level (of distribution) of responsibility.

⁵² Gaja, Second Report, *supra* note 15, para. 42.

⁵³ Gaja, *ibid.*, 4-5, para. 8. In his report he referred to C-316/91, *European Parliament v. Council of the European Union*, Judgment of the Court of 2 March 1994, I-664 – I-665, para. 29. It is thus, a legal rule derived from the internal European legal order, but it does not diminish the potential to draw upon the reasoning as a model for attribution in other circumstances; In the same way, Report on the work of its sixty-first session, *supra* note 23, 56, para.4 of the commentary; Report of the International Law Commission, Sixty-third session, *supra* note 23, 81, para. 4 of the commentary; See generally S. Talmon, ‘Responsibility of International Organizations: Does The European Community Require Special Treatment’, in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 405 – 421.

⁵⁴ Gaja, Second Report, *supra* note 15, 4, para.7.

⁵⁵ C. Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’, (2009) 10 *Melbourne Journal of International Law*, 346, 360. A proposal by Special Rapporteur Gaja taking “these considerations somewhat in account” was not taken up by the ILC, *ibid.*, 361. He proposed that the conduct were to be attributed “to the extent that the organization exercises effective control over the conduct of the organ”, Gaja, Second Report, *supra* note 15, 23, para.48. For a general critique of the criterion of “effective control” as formulated in Article 7, see F. Messineo, ‘Attribution of Conduct’, SHARES Research Paper 32 (2014), available at www.sharesproject.nl, 30-34.

conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

The ILC relied on the jurisprudence of the ICJ, making reference to the UN, to define the content of agent under this article. In this context, “agent” has to be interpreted “in the most liberal sense” as it was held by the ICJ in the *Reparation case*⁵⁶ and the notion “refers not only to officials, but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.”⁵⁷ Therefore this disposition is supposed to cover also organs of states which are “absorbed” by the organisation to the extent that the sending State does not retain any form of control.

Nevertheless, any transferring entity, be it a state or an international organisation, will always retain a “substantial degree of authority over any organ” as they would otherwise cease to be organs of the transferring entities. Thus there is a necessity for the transferring entities under their domestic or internal law to keep a certain oversight over their transferred organs.⁵⁸ Therefore, the difference between the two articles is “at best one of degree [of retained and transferred control], but not of principle.”⁵⁹

The ILA recognises the possibility of joint responsibility and differentiates between joint responsibility *per se* and cases of aid and assistance of an international organisation in the commission of other wrongful acts.⁶⁰ The ILC commentary does not state whether cases of joint responsibility could fall under Article 7, but it seems to suggest that Article 7 is a disposition which

⁵⁶ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* (11 April 1949), p. 177; Report of the International Law Commission, Sixty-third session, *supra* note 23, 84-85.

⁵⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* of 29 April 1999, 88-89, para.66; Report of the International Law Commission, Sixty-third session, *ibid.*, 85.

⁵⁸ Cf. A. Sari, R. A. Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, in B. Van Vooren, S. Blockmans, J. Wouters (eds.), *The EU’s Role in Global Governance: The Legal Dimension* (2013), 126, 132.

⁵⁹ *Ibid.*, 132; B. Boutin, ‘Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peacekeeping’, in (2012) 25 *Leiden Journal of International Law*, 521, 527. Further critique came by Larsen who considers the complexities of practice not to be fully reflected by the criterion of effective control, Larsen, *supra* note 49, 518.

⁶⁰ The ILA distinguishes between joint responsibility *per se* and aid and assistance by other international organisations: “The responsibility of an IO does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act. There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO”, International Law Association, Berlin Conference (2004), *supra* note 18, 28.

decides whether conduct has to be attributed to the contributing State or organisation or to the receiving organisation⁶¹ which implicitly excludes joint responsibility under this article.⁶²

2. Aid and assistance – compatible with cooperation in peacekeeping operations?

Article 14 of the ARIO states as follows:

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

- (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organization.

This article is based on Article 16 of the Articles on State Responsibility.

The commentary does not provide a single example of a case in which an international organisation has aided or assisted another international organisation and incurred responsibility under international law.⁶³ However, the Commentary refers to the example of MONUC, the previous peacekeeping operation in the DRC, assisting the security forces of the government, and thereby a state:

An example of practice of aid or assistance concerning an international organization is provided by an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Forces armées de la République démocratique du Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law.⁶⁴

⁶¹ Report of the International Law Commission, Sixty-third session, *supra* note 23, 86, para. 5.

⁶² One could ask under which article UNAMID would fall.

⁶³ Report of the International Law Commission, Sixty-third session, *supra* note 23, 104-105. The Commentary only refers to the mentioned example of MONUC.

⁶⁴ Report of the International Law Commission, Sixty-third session, *ibid.*, 102, para. 6. As Peter Taksoe-Jensen, in charge of the Office of Legal Affairs wrote to Mr. Le Roy: "MONUC cannot participate in any form of joint operation with FARDC units, or support an operation by those units if there are substantial grounds for believing there to be a real risk of them violating international humanitarian law, human rights law or refugee law in the course of the operation. (...)in the event that elements of the FARDC violate international humanitarian, human rights or refugee law in the course of the operation, MONUC must immediately intercede with the FARDC, both at the command and operational levels, with a view to dissuading the units concerned from continuing in such violations. Should the efforts fail and violations continue, MONUC must reassess its relations with the units concerned and, if the violations are widespread or serious, must cease its participation

MONUC was told to stop all support to the FARDC in the case of violations of IHL, human rights or refugee law, including logistic or service support. The United Nations specified that MONUC was a case where (solely) “the possibility of United Nations aid or assistance being used to facilitate the commission of unlawful acts arose (...) [a]nd [that] it remains a unique example.”⁶⁵ As stated by the UN, it must be made clear that responsibility for aid and assistance is entailed not for the wrongful act itself, but for the organisation’s own conduct, which has been the cause of or contributed to that wrongful act.⁶⁶ Nevertheless, as it was also declared by the UN in its comments upon the ARIO: “[T]he Secretariat wishes to underscore the fundamental difference between States and international organizations, whose aid and assistance activities in an ever-growing number and diversity of areas, often constitute their core functions.”⁶⁷

Thus, whereas cooperation may be one of the core functions of international organisations, it is highly questionable whether the application of this article properly reflects the reality of cooperation between international organisations in peacekeeping operations which goes beyond cases of mere assistance. Assistance implies that an organisation acts in an auxiliary function to another organisation.⁶⁸ Subject to the specific arrangements in each operation,⁶⁹ the reality of cooperation

in the operation as a whole. In an extreme case, MONUC may need to take appropriate action, up to and including the use of armed force, against FARDC units or personnel in order to prevent or put a stop to violations of international humanitarian, human rights or refugee law, if those violations involve the use, or the imminent threat of the use, of physical violence against civilians.”, Note to Mr. Le Roy, MONUC – Operation Kimia 2, 1, para.7; 2, para. 10. In addition, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Patricia O’Brien wrote: “if MONUC has reason to believe that FARDC units involved in an operation are violating one or other of those bodies of law [international humanitarian, human rights and refugee law] and if, despite MONUC’s intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely (...)MONUC may not lawfully provide logistics or “service” support to any FARDC operation if it has reason to believe that the FARDC units involved are violation any of those bodies of law (...) this follows directly from the Organization’s obligations under customary international law and from the Charter to uphold [sic]promote and encourage respect for human rights, international humanitarian law and refugee law”, Attachment to Ms. O’ Brien’s Note of 12 October 2009 to Mr. Le Roy, 3-4, paras. 11-12. All documents were published by the New York Times on 9 December 2009 and are available via: <http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1> .; See generally, H.P. Aust, ‘The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces’, (2014) *Journal of Conflict and Security Law*, Advance Access published 24 June 2014, 1-13; J. Labbé, A. Boutellis, ‘Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces’, in (2013) 95 *International Review of the Red Cross*, 539-559. See also Shraga, ‘ILC Articles on Responsibility of International Organizations’, *supra* note 27, 201, 205-206.

⁶⁵ Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 17-19, main paras. 1, 5. For more information on MONUC and the UN reaction, *ibid.*, paras. 2-5.

⁶⁶ *Ibid.*, 17-19, para. 7.

⁶⁷ *Ibid.*, 19, main para. 7, sub-para. 5.

⁶⁸ So the United Nations acknowledges that “aid and assistance activities in an ever-growing number and diversity of areas often constitute (...) core functions” of international organisations”, Responsibility of

between international organisations in recent peace-keeping operations is reminiscent of co-perpetration of these internationally wrongful acts rather than of cases in which an international organisation is subordinated to another one. Furthermore, under Article 14, it is necessary that the aiding or assisting organisation has “knowledge of the circumstances of the internationally wrongful act” and that the organisation intended “by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed.”⁷⁰ These strict requirements regarding the intention of the aiding or assisting organisation also do not reflect the reality of cooperation between international organisations in peacekeeping operations.⁷¹ On the contrary, there are no cases in which international organisations cooperate intentionally in peacekeeping operations to commit violations of international law, but the cooperation agreements and particularly the existing control arrangements, such as the reports to be submitted to the Security Council, seek to prevent or at least minimise the risk of violations of international law. In the majority of academic writings, this intent requirement has also been criticised as “unwarranted”.⁷²

The comments and observations received by international organisations focused on the practice of International Financial Institutions of lending funds to states,⁷³ especially in the context of development assistance.⁷⁴ In Chapter II an inquiry was made into the financing of AU peacekeeping operations by the EU and the UN. It was stressed that the element of control exercised by both the UN and the EU on the basis of these financial arrangements is substantial. Both organisations could actually block the deployment of an AU peacekeeping operation by refusing to provide funds or at least demand that certain specific requirements are fulfilled so that, on the one hand, they would facilitate the occurrence of an internationally wrongful act, but on the other hand, the amount of the control they have seems to surpass a case of aid or assistance and thereby the application of Article

international organizations, Comments and observations received from international organizations, *supra* note 23, 19, para. 5.

⁶⁹ Of course, there may be cases of pure aid and assistance by an international organisation, even in peacekeeping operations, as was pointed out by the representative of Portugal in the Sixth Committee, General Assembly, Fifty-eight session, Official Records, Sixth Committee, Summary Record of the 15th meeting, UN Doc. A/C.6/58/SR.15 (2003), (Mr. Tavares, Portugal), para. 27. In these cases, this article would be applicable and Article 7 would arguably be applicable for the international organisation which commits the internationally wrongful act.

⁷⁰ The ILC cites here from the commentary of the Articles on State Responsibility, Report of the International Law Commission, Sixty-third session, *supra* note 23, 104, paras.3-4.

⁷¹ Cf. also V. Lanovoy, ‘Complicity in an Internationally Wrongful Act’, SHARES Research Paper 38 (2014), available at: www.sharesproject.nl, 27, 31.

⁷² Aust, ‘The UN Human Rights Due Diligence Policy’, *supra* note 64, 8, with further references.

⁷³ Criticism came from the EU: “[s]ince aid or assistance is often used in a financial context, it would seem desirable that this draft article and its interpretation be kept as narrow as possible”, Responsibility of international organizations, Comments and observations received from international organizations 2, *supra* note 25, 27.

⁷⁴ International Law Association, Sofia Conference (2012), *supra* note 24, 29.

14 – in fact, one can say, that they actually are dominating the relationship with the AU if they decide to provide funds. Consequently, as international organisations cooperate in various areas in peacekeeping operations and if financial assistance provided in the peacekeeping context could already surpass the application of Article 14, it results, *a fortiori*, from their cooperation on various other levels that their interaction does not correspond to “aid and assistance” and cannot legally be regulated by the application of Article 14.⁷⁵

3. Article 15: Direction and control

Another article which has to be mentioned is Article 15, which deals with the direction and control of an international organisation over the commission of an internationally wrongful act by another international organisation. The only example the ILC refers to is KFOR based on the submission by the French government. Assuming that KFOR is an international organisation, it is “an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act”⁷⁶, whereas “NATO is responsible for the ‘direction’ of KFOR and the United Nations for ‘control’ of it.”⁷⁷ The ILC remarked that “[a] joint exercise of direction and control was probably envisaged.”⁷⁸ The UN Secretariat itself states that it “knows of no practice supporting the rule on “direction and control” (...) and doubts the propriety of applying it by analogy from the articles on the responsibility of States for internationally wrongful acts” as also “[m]any aspects of this rule, the threshold (...), its nature (...) remain unclear.”⁷⁹

It is also questionable if this article can be applicable to international organisations cooperating in peacekeeping operations besides the alleged example of KFOR. This article presupposes a very one-sided relationship between two international organisations, “cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or

⁷⁵ Cf. also again, Gaja, Second Report, *supra* note 15, 4, para.7, regarding joint military planning.

⁷⁶ Report of the International Law Commission, Sixty-third session, *supra* note 23, 103, para. 3. The Secretariat indicated furthermore its preference that the example of KFOR should be not included as an example as it is “controversial, as it has never been judicially determined, but in using it the Commission may be seen as endorsing the argument that in Kosovo the United Nations had exercised control over KFOR, which was not the case.”, *ibid.*, para.4.

⁷⁷ *Case concerning Legality of Use of Force (Yugoslavia v. France)*, Preliminary Objections of the French Republic, 5 July 2000, 33, para. 46.

⁷⁸ Report of the International Law Commission, Sixty-third session, *supra* note 23, 103, para. 3; A. Reinisch, ‘Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts’, in (2010) 7 *International Organizations Law Review*, 63, 75.

⁷⁹ Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 19-20, para.3. Shraga also states that it is not likely that any practice in support of this rule will emerge (at the UN), Shraga, ‘ILC Articles on Responsibility of International Organizations’, *supra* note 27, 201, 208.

concern.”⁸⁰ In that context, “the word ‘directs’ does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.”⁸¹ The directed or controlled organisation has to be seen as being given no discretion to conduct itself in a specific manner.⁸²

4. *Assessing the ARIO*

Thus, an analysis of the relevant Articles from the ILC leads to the conclusion that the concept of joint responsibility is only covered in the form of auxiliary functions by one organisation, aid and assistance, or for situations in which one organisation is clearly dominating the conduct of another through direction and control. For any other potential cases, the concept of joint responsibility does not fit under the articles of the ILC.⁸³ The articles therefore contain a lacuna with respect to cases of joint responsibility. Indeed, although Article 48 of the Articles holds that one or several international organisations may be responsible for the same wrongful act, it “fails to define when and how this would operate.”⁸⁴ The ILC has even specifically mentioned – early in the process of elaborating the articles – the possibility that two international organisations will be simultaneously responsible as equals, but once again without providing any indication of the applicable criterion of attribution.⁸⁵ The reason may be that the current view in legal doctrine, and in at least some parts of judicial practice is still, that cases of dual or multiple attribution are rare, so that “the system of international

⁸⁰ The ILC relies on the commentary to the articles on state responsibility, Report of the International Law Commission, Sixty-third session, *supra* note 23, 103-04, para. 4.

⁸¹ *Ibid.*

⁸² *Ibid.* According to the ILA, referring to the ILC, “for direction and control (which includes also political and financial aspects) general domination suffices, there is no requirement for detailed instructions or authorisation of a particular act”, International Law Association, Berlin Conference (2004), *supra* note 18, 29. As stated in the report of the ILC, “varying degrees of sufficient control [are] required in different specific legal contexts”, Report of the International Law Commission on the work of its fiftieth session, 20 April-12 June 1998, 27 July-14 August 1998, General Assembly Official Records, Fifty-third Session, Supplement No.10, UN Doc. A/53/10 (1998), 160, para. 395, cf, also 164, para. 422.

⁸³ Other relevant articles for the analysis of responsibility for a specific case will be examined in the case-studies, e.g. self-defence.

⁸⁴ J. D’Aspremont, ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’, in (2012) 9 *International Organizations Law Review*, 15, 24.

⁸⁵ International Law Commission, Report on the work of its fifty-sixth session (3 May to 4 June and 5 July to 6 August (2004), General Assembly Official Records, Fifty-ninth Session, Supplement No.10 (A/59/10) (2004), 101 para.4. Also acknowledging the possibility of joint responsibility are, e.g. J. Saura, ‘Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations’, in (2007) 58 *Hastings Law Journal*, 479, 521; although more critical, D. Stephens, ‘The lawful use of force by peacekeeping forces: the tactical imperative’, in (2005) 12 *International Peacekeeping*, 157, esp. 161-62; A. Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’, (2008) 8 *Human Rights Law Review*, 151, especially 150-60; Larsen, *supra* note 49, 509, 517, 524. For dual attribution to an international organisation and a state, A. Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, in (2011) 9 *Journal of International Criminal Justice*, 1143-57.

responsibility would be fundamentally ill-equipped to deal with issues of shared responsibility.”⁸⁶ Furthermore, as the system of international responsibility was originally conceptualised with bilateral relations and obligations in mind, it would be therefore also “ill-equipped to deal with the multiple attribution of conduct to more than one actor at once.”⁸⁷ It is true that the idea of a breach of an obligation owed to the whole community (*erga omnes*) was not foreseen, but developed in practice in the progress of the rise of international human rights law and the increased recognition of the individual in international law,⁸⁸ but it nevertheless does not pose a problem as the invocation of responsibility towards each party to which the alleged conduct is attributed, remains possible.⁸⁹ It is therefore necessary to look beyond the law of responsibility for inspiration.⁹⁰

3. The quest for a new criterion of attribution

Instances of joint responsibility of international organisations may have been rare thus far in practice; nevertheless this does not mean that they do not arise or that they will not arise more often in future. The articles of the ILC hold on to the traditional understanding of the law of international responsibility as being derived from bilateral relations existing between entities possessing international legal personality.⁹¹ However, this study has shown that in the specific area of

⁸⁶ F. Messineo, ‘Multiple Attribution of Conduct’, SHARES Research Paper No. 2012-11, available at: www.sharesproject.nl, 3. According to Nollkaemper and Jacobs, the dominant approach in international law is, indeed, based on the idea of individual or independent responsibility of states and international organisations, A. Nollkaemper, D. Jacobs, ‘Shared Responsibility in International Law: A Concept Paper’, ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl), 10. One can possibly trace this conception of the law of responsibility to the principle of sovereignty, states being thereby independent and *pares inter pares*, cf. Nollkaemper, Jacobs, *ibid.*, 14. See also Ö.F. Direk, ‘Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the ‘Effective Control’ Standard’, in (2014) 61 *Netherlands International Law Review*, 1, 9.

⁸⁷ Messineo, *ibid.*, 23-24. See also the statement of Mr. Riphagen in the ILC, Yearbook of the International Law Commission (1978) Volume I, Summary records of the thirtieth session, 233, para.7.

There is also a clash between the concept and peacekeeping operations as one could see in Behrami/Saramati; while the decentralisation of military force is undisputed, the regime of responsibility remains – according to the ECtHR in this case – centralised, cf. L. Boisson de Chazournes, V. Pergantis, ‘À propos de l’arrêt Behrami et Saramati: Un jeu d’ombre et de lumière dans les relations entre l’ONU et les organisations régionales’, in M. Kohen, R. Kolb, D. L. Tehindrazanarivelo (eds.), *Perspectives of International Law in the 21st century/Perspectives du droit international au 21e siècle* (2011), 191, 222. Cf. also L. Boisson de Chazournes, ‘United in Joy and Sorrow: Some Considerations on Responsibility Issues under Partnership among International Financial Institutions’, in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 213, 214.

⁸⁸ See e.g. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (New Application: 1962), Judgment of 5 February 1970, Second Phase.

⁸⁹ Cf., Messineo, *supra* note 86, 24.

⁹⁰ This includes the danger that the Articles will be demoted “to a cosmetic instrument”, D’Aspremont, *supra* note 84, 15, 24.

⁹¹ Crawford also came to the conclusion that “[n]one of this shows that the doctrine of joint and several responsibility is already established under that name at the international level, and the reticence of other judges suggests that a cautious approach is appropriate”, Crawford, *supra* note 29, 331.

peacekeeping operations, international organisations engage in cooperation arrangements which derogate from the general rules that the ARIOs seek to codify as they are outside the scope of the scenarios of joint responsibility regulated in the articles. In short, legal regulation of peacekeeping operations from the point of view of international responsibility requires a new criterion of attribution to allocate responsibility to two or more international organisations.

Article 64 of the ARIOs contains the possibility to derogate from the articles in the case of an existing rule of *lex specialis*. Such special rules “may be contained in the rules of the organization applicable to the relations between an international organization and its members.” As the wording shows, these special rules⁹² are not limited “to rules contained in the internal law of the organisations and applicable to the relations of the organisations and its members.”⁹³ Furthermore, Article 65 provides that “the applicable rules of international law continue to govern questions concerning the responsibility of an international organization (...) for an internationally wrongful act to the extent that they are not regulated by these draft articles.” The rules of an organisation include its practice.⁹⁴ The practice of cooperation in peacekeeping operations can therefore constitute a rule of *lex specialis* according to Article 64 ARIO, drawing inspiration from and being based on other existing rules of international law. It is therefore in line with both articles 64 and 65.⁹⁵ Moreover, as it was pointed out in the General Commentary to the ARIO:

⁹² Generally on the identification of a rule of *lex specialis* in this particular context, K.E. Boon, ‘The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations’, in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 135, 141.

⁹³ The wording of the article is problematic as it allows internal rules of the organisation to be raised to international legal rules on international responsibility, J. d’Aspremont, ‘A European Law of International Responsibility: The Articles on Responsibility of International Organizations and the European Union’, SHARES Research Paper 22 (2013), ACIL, 2013-04, available at www.sharesproject.nl and SSRN, 10.

⁹⁴ Article 2b of the articles; cf. also S.P. Sheeran, ‘A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo’, in (2011) 8 *International Organizations Law Review*, 55, 66.

⁹⁵ An application of Article 64 in the peacekeeping context is also advocated by several experts, B. Boutin, ‘SHARES Expert Seminar Report ‘Responsibility in Multinational Military Operations: a Review of Recent Practice’’, (16 December 2010, Amsterdam), published in December 2011, available at www.sharesproject.nl, 17. Article 2 (2) of the ARIOs is however not exhaustive as it allows for other issues to qualify as rules of the organisation. So it is argued that the articles contain a “rule implicitly provided” for *de facto* organs similar to article 8 on state responsibility, as “in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization”, Report of the International Law Commission, Sixty-third session, *supra* note 23, 86, para.9. One author therefore invokes the possibility of such an implicit rule which would be tantamount to codifying the rule of attribution developed in the Nicaragua Case within the ARIOs, cf. F. Salerno, ‘International Responsibility for the Conduct of ‘Blue Helmets’: Exploring the Organic Link’, in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 415, 418-419. If one were to follow this argumentation one could imagine that the conduct of peacekeeping forces which are not an organ of an organisation could nevertheless be attributed to this particular organisation on the basis of considering these peacekeeping forces also to be a *de facto* organ of this organisation, e.g. attributing conduct of AFISMA to the UN.

The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.⁹⁶

In the end, the attribution of acts of peacekeepers to the international organisation they are seconded to as enshrined in Article 7 ARIO is also based on considerations of practice. Due to their institutional status as a subsidiary organ of the respective organisation, their conduct is generally deemed to be attributable to the latter. The transfer of operational command over the troops, however, leads to the formulation of another presumption which is that the international organisation is exclusively responsible for their conduct.⁹⁷ Thus, nothing in the articles contravenes an articulation of a specific criterion of attribution in the context of cooperation of international organisations in peacekeeping operations.

1. The need for a special rule on attribution for peacekeeping operations and discussions to this effect

Due to the specific context of peacekeeping operations, it is suggested that the new criterion of attribution will be used exclusively for the purposes of this present study. In contrast, it is not submitted that the articles of the ILC are inappropriate to the regulation of any conduct of international organisations outside of the specific context of peacekeeping operations and particularly cooperation between international organisations during peacekeeping operations. Indeed, as the ICJ stated in the *Genocide* case “logic does not require the same test [on attribution] to be adopted in resolving (...) issues which are very different in nature.”⁹⁸ It is also not even argued that any future peacekeeping operation which is conducted under the auspices of one international organisation without any external participation by other organisations will not fall under the Articles of the ILC.⁹⁹

⁹⁶ Report of the International Law Commission, Sixty-third session, *supra* note 23, 67-68, para. 5.

⁹⁷ Sari, Wessel, *supra* note 58, 133-134.

⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 405. Tsagourias and White argue that UN practice and doctrine with regard to international responsibility for UN and UN authorised operations “constitutes a special regime and that, as a consequences, the rules developed by the ILC on the responsibility of international organisations do not apply in that case”, N. Tsagourias, N. D. White, *Collective Security. Theory, Law and Practice* (2013), 373.

⁹⁹ The development of practice does, however, not suggest that any such scenario will still occur.

Regarding the present subject matter, the suggestion that a specific rule or even a regime *sui generis* is necessary is not new. Article 7 of the articles of the ILC was drafted in recognition of the need to create a separate article, and thus a specific rule of attribution, applicable to situations such as peacekeeping operations.¹⁰⁰ The ILA remarked that “In some areas, *such an attempt* [of attribution of conduct to an international organisation] *can only be undertaken on a case-by-case basis, e.g. incidents occurring during operations of peacekeeping and peace enforcement. Traditional peacekeeping operations are organs of the UN and normal principles of attribution apply*”¹⁰¹ [Emphasis added]. Moreover, several members of the International Law Commission raised the question of whether, given the difficulties encountered in the area of peacekeeping operations, it would not be preferable to either study further the practice of the United Nations or, preferably, a separate rule applicable to peacekeeping operations.¹⁰² Other authors suggest an application of

¹⁰⁰ International Law Commission, Report on the work of its fifty-sixth session, *supra* note 85, 99, 110, para. 1; Leck, *supra* note 55, 346, 349.

¹⁰¹ International Law Association, New Delhi Conference (2002), *supra* note 18, 16. Generally, the ILA agrees with the application of the “effective control” test to international organisations, but it highlights again that the “test of effective control should be further specified based on the available practice, and in relation to the test of effective control as applied in the law of State responsibility”, International Law Association, Sofia Conference (2012), *supra* note 24, 25.

¹⁰² International Law Commission, Summary record of the 2800th meeting, UN Doc. A/CN.4/SR.2800 (2004) (Mr. Momtaz), para. 16. See also the statement of Mr. Matheson who declared “As to article 5, it was not entirely clear how the criterion of “effective control” would be applied in practice. For example, in the context of United Nations peacekeeping operations, it appeared that the Organization accepted responsibility for acts of all national military personnel under United Nations command, subject to any separate arrangements which might exist between the United Nations and the State in question in respect of reimbursement to the United Nations. To apply that criterion, would it depend on whether the United Nations or the State had actually given the order to commit the act in question, or on the degree to which the United Nations or the State had influenced the conduct of the forces concerned? Was there a presumption that the United Nations had effective control over forces under its command, unless demonstrated otherwise? Before producing specific wording, the Commission would do well to have a more complete compilation of the practice of the United Nations and regional organizations in the area of peacekeeping operations, drawing in particular on such organizations as the NATO, OAS and ECOWAS.” (*ibid.*, para. 19); See equally the remarks of Mr. Chee, International Law Commission, Summary record of the 2801st meeting, UN Doc. A/CN.4/SR.2801 (2004), para. 70 who argued in favour of the establishment of *sui generis* legal regimes for peacekeeping operations; Mr. Niehaus, International Law Commission, Summary record of the 2802nd meeting, UN Doc. A/CN.4/SR.2802 (2004), para. 12-3 who said that “the criterion of effective control (...) raise[s] certain problems. Firstly, on account of the wide range of situations encountered in peacekeeping operations under United Nations command, it was difficult to establish a general rule for determining in which cases the Organization exercised effective control over its forces. It would nonetheless be useful for the Commission to analyse specific cases. Secondly, effective control was not necessarily exclusive control. It was possible for a State which supplied contingents to exercise some form of de facto control over them. According to some doctrine in such cases, the State should be held responsible for wrongful acts committed by its armed forces. Some authors even affirmed that, insofar as national contingents were, in the final analysis, always subordinate to their superiors at the national level, the State would be jointly responsible for wrongful acts. At any rate, the United Nations would not be responsible if the contributing State took action and made decisions that were not in line with the instructions issued by the United Nations.”; confer also the remarks by Mr. Yamada, Summary record of the 2802nd meeting, *ibid.*, para. 19; Mr. Comissário Afonso, International Law Commission, Summary record of the 2803rd meeting, UN Doc. A/CN.4/SR.2803 (2004), para. 34. Criticism was also raised within the General Assembly: “As regards draft article 7, Conduct of organs of a State or organs or agents of an international

Articles 64 or 44 ASR generally for the conduct of armed forces based on considerations arising under international humanitarian law.¹⁰³

The recommendation of a special rule for peacekeeping operations was to a certain extent examined as the ILC considered the inclusion of a specific disposition specifying that a contributing state or organisation could derogate from the general rule of attribution in its relations with the host organisations under the form of an agreement.¹⁰⁴ However, in the end, the Commission decided against it, following the opinion of the Special Rapporteur Giorgio Gaja, who was opposed to a specific rule for peacekeeping operations for two reasons, the first one being purely methodological - namely that such a specific rule would have been “at odds with the pattern of the articles on State responsibility.”¹⁰⁵ Secondly, any such rule would be difficult to establish due to the lack of an agreed definition of “peacekeeping operation”.¹⁰⁶

In doctrine it is, *inter alia*, argued that it is impossible to construe a general rule for attribution of conduct in UN peacekeeping operations.¹⁰⁷ The difficulty with which the ILC was faced in developing the articles was that the rules needed to be wide enough to take into account the diversity of international organisations, while simultaneously being universally applicable.¹⁰⁸

organization placed at the disposal of another international organization, the point was made that the criterion of “effective control” was logical but that caution was required in assessing such control. According to another remark, there was reluctance to endorse the criterion of “effective control”, believing instead that the responsibility of an international organization for acts or omissions by organs or agents placed at its disposal arose from the mere fact of their transfer.”, General Assembly, International Law Commission, Sixty-fourth session, Report of the International Law Commission on the work its sixty-third session (2011), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat, Addendum, UN Doc. A/CN.4/650/Add.1 (2012), 6, para. 14.

¹⁰³ B. Stern, ‘The Elements of an internationally Wrongful Act’, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 193, 203; B. Kondoch, ‘The Responsibility of Peacekeepers, their Sending States, and International Organizations’, in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 515, 529. Kondoch argues that it is in accordance with Article 3 Hague Convention IV as well as with Article 91 of Additional Protocol 1 to the Geneva Conventions; See also R. Burke, ‘Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets’, in (2012) 16 *Journal of International Peacekeeping*, 1, 42.

¹⁰⁴ “Notwithstanding the provisions of paragraph 1, an agreement between a contributing State or an international organization and the host international organization may contain a different rule on the attribution of conduct. Such a rule may be applicable to a third party only if the latter knew, or should have known, the rule at the time of the conduct.” Such an arrangement would however only been valid between the parties and it was thus discarded, International law Commission, Summary record of the 2810th meeting, UN Doc. A/CN.4/SR.2810 (2004), para. 17.

¹⁰⁵ Gaja, Second Report, *supra* note 15, 16, para.34.

¹⁰⁶ Gaja, *ibid.*, 16, para.34.

¹⁰⁷ G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 201.

¹⁰⁸ J. Wouters, J. Odermatt, ‘Are All International Organizations Created Equal?’, in (2012) 9 *International Organizations Law Review*, 7, 12.

2. Defining the new rule of attribution

Two main points have to be addressed for the establishment of a new criterion of attribution. First of all, it would be preferable if the new criterion were to have an ascertainable legal basis. Secondly, the threshold of control over the conduct has to be determined.¹⁰⁹ In this regard, one has to distinguish between the levels in the chain of command for the attribution of conduct to two or more international organisations. As the present study examines the possibility of joint responsibility of international organisations, it is concerned with the highest level in the chain of command within the organisations, the organisations to which responsibility is ultimately attributed. Thus, force commanders of a peacekeeping operation might exercise “effective control” over a given specific act, whilst the Security Council as the organ on top of the chain exercises a different kind of control, which also has political connotations. This argument is even more relevant in the context of two or more international organisations.¹¹⁰ The criterion needs to be construed in such a way as to reflect the “equal standing” of two or more international organisations.

A new criterion of attribution has to take into account particularly the “organisational element”. International organisations are complex entities with different organs, chains of command and control mechanisms, and this also affects peacekeeping operations carried out by international organisations, especially modern, integrated operations. If two or more organisations then decide to cooperate in this complex matter, it is evident that these internal organisational arrangements, as well as the inter-organisational arrangements, do not only have to be taken into account, but they also have to be part of the basis of the criterion of attribution. An excellent remark was made by

¹⁰⁹ N. Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 245

¹¹⁰ E.g., in United Nations peace-keeping operations, one distinguishes between three levels of command: “(1) overall political direction, the purview of the Security Council; (2) executive direction and control, provided by the Secretary-General; and (3) command in the field, residing in the chief of mission, i.e., the Special Representative of the Secretary-General or, in cases where no Special Representative is approved, the Force Commander or Chief Military Observer”, *Comprehensive review of the whole Question of Peace-keeping Operations in all their Aspects: Command and Control of United Nations peace-keeping operations*, Report of the Secretary-General, UN Doc. A/49/681 (1994), 2, para. 4. Indeed, although “[t]he three levels constitute a conceptual whole in that each can only be understood in relation to the others, and [although] they comprise a practical continuum in that none can be fully effective in isolation (...) the distinctions among levels are real and are important to maintain conceptually as well as operationally, avoiding a blurring of functions and responsibilities. Just as overall political objectives reflecting the will of the international community could not be readily formulated in the field, so it would not be wise to decide matters at United Nations Headquarters in New York that require an understanding of operational conditions which can only be acquired in the field.”, *ibid.*, 2, para. 5. See also Department of Peacekeeping Operations and Department of Field Support, *Policy, February 2008, Authority, Command and Control in United Nations Peacekeeping Operations*, 3-4, paras.7-11. For the EU, see Council of the European Union, *EU Concept for Military Command and Control*, Brussels, 24 September 2012.

Bodeau-Livinec in this context. Commenting on the position of the ILC regarding the notion of “control”, he stated:

La position de la CDI paraît plus conforme aux prescrits classiques du droit international en la matière, qui se fondent sur l’emprise exercée sur un comportement plutôt que sur l’autorité exercée sur une personne ou une entité : la responsabilité est déterminée à raison de faits, et non de liens entre sujets.¹¹¹

This is exactly the crux of the problem with the current notion of “control”, that it still adheres to this very limited view of control over the specific conduct in a specific moment, while completely ignoring the fact that such a notion cannot be operational in a system which becomes gradually more institutionalised and complex.¹¹² Although the notion is well established in international law, it has not been fully explored yet in a theoretical manner.¹¹³ Control is also a requirement of the internal law of an international organisation, e.g. the UN, “and must not be confused with control as a distinct basis of attribution of conduct.”¹¹⁴ But it is exactly through these institutionalised mechanisms and channels that international organisations also contribute to, and exercise control over, conduct amounting to a violation of a rule under international law.¹¹⁵

Furthermore, the importance of the element of control has to be questioned particularly in the context of the responsibility of international organisations, which operate as international legal entities without being sovereigns of any territory. As explained, e.g. by Eagleton: “[R]esponsibility derives from control. The responsibility of a state rests largely upon a territorial basis, but behind this

¹¹¹ P. Bodeau-Livinec, ‘Le cadre juridique général de la détermination de la responsabilité pour faits illicites commis au cours d’opérations de maintien de la paix : les principes d’attribution et leurs implications’, in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 83, 93. Eagleton, for example, wrote in 1950: “Responsibility derives from control” C. Eagleton, *International Organization and the Law of Responsibility*, Collected Courses of the Hague Academy of International Law, Vol. 076 (1950), 320, 385.

¹¹² Cf. Sari, Wessel, ‘International Responsibility for EU Military Operations’, *supra* note 58, 126, 132. Major sees a trend towards more “hybrid operations”, involving different institutional actors requiring “increased cooperation and coordination.”, C. Major, ‘EU-UN cooperation in military crisis management: the experience of EUFOR RD Congo in 2006’, Occasional Paper, n°72, September 2008, EUISS, 7. Cf. also Direk, *supra* note 86, 1, 19.

¹¹³ Gal-Or, Ryngaert, *supra* note 48, 511, 529.

¹¹⁴ Sari, Wessel, ‘International Responsibility for EU Military Operations’, *supra* note 58, 126, 133.

¹¹⁵ Therefore, one can quite argue that the decision of the ECtHR in *Behrami* was “a realistic reflection on the factual and legal situation in military actions conducted under the auspices of the UN by multinational forces” despite all the critique of the decision, Meeting Summary, Legal Responsibility of International Organisations in International Law, Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011, 7. The same can, of course, be also true for states as mentioned briefly by the District Court in The Hague in its judgment in July 2014, *Stichting Mothers of Srebrenica and Others v. The Netherlands*, *supra* note 47, para. 4117.

territorial basis lies the broader concept of control.”¹¹⁶ The attribution of extra-territorial conduct to a state developed later, particularly also in the practice of the European Court of Human Rights, and is limited to specific circumstances. International organisations, however, neither act territorially nor extraterritorially, but “unterritorially” from their point of view and “territorially” from the point of view of the state in whose territory they are engaged. Therefore it is also important that the criterion of control in its traditional understanding has to be less decisive in determining the responsibility of an international organisation.¹¹⁷

Indeed, even in the early writings of modern international law, one can find arguments for taking into account other factors for the attribution of conduct and responsibility. Grotius not only acknowledged the possibility of the attribution of conduct to several actors,¹¹⁸ but he also emphasised as a determinative factor that their action gave a determinative cause to the whole violation and the resulting damage or parts of both.¹¹⁹ Emphasising the element of contribution to injury instead of the very same wrongful act, would allow one to articulate responsibility based on the idea of a single, undivided injury, an avenue which was closed in the articles of the ILC.¹²⁰

¹¹⁶ Eagleton, *supra* note 111, 320, 386. The idea of a state exercising control over a given territory and generally the definition of a state under international law, derives originally from the writings of Jellinek and his *allgemeine Staatslehre*, G. Jellinek, *Allgemeine Staatslehre* (1900), 396. He defined the state as “die mit ursprünglicher Herrschaftsmacht ausgerüstete Körperschaft eines sesshaften Volkes (Gebietskörperschaft), *ibid.*; K. Holzinger, *EMRK und international Organisationen. Die Zulässigkeit der Übertragung von Hoheitsrechten aus Sicht der EMRK und ihre Folgen für die konventionsrechtliche Verantwortlichkeit der Mitgliedsstaaten* (2010), 33.

¹¹⁷ Eagleton came to a similar conclusion, stating that “[s]ince the extent of control possessed by the United Nations is much smaller than that of the average state, its range of possible responsibility would be smaller than that of a state.”, It is, thus, “since the United Nations has no territory (or little if any) and no population, and indeed is not a government, that therefore it should not be held responsible in the usual way for the protection of persons injured by it.”, *ibid.*, 386, 403. The ILC to some extent acknowledged these differences, but once again remained also in a state-focused context and did not further elaborate the exact notion of “effective control”. Report of the International Law Commission, Sixty-third session, *supra* note 23, 88, para. 5. One can therefore argue, that Article 7 was not supposed to be reflecting the ICJ’s Nicaragua decision, Dannenbaum, *supra* note 42 713, 724.

¹¹⁸ “Neben dem, der selbst und unmittelbar den Schaden verursacht hat, sind auch andere durch ihre Handlungen oder Unterlassungen haftbar, und zwar bei Handlungen an erster und an zweiter Stelle. An erster Stelle, wenn jemand die Tat befohlen hat; wenn er die erbetene Einwilligung erteilt hat, wenn er Hilfe geleistet hat, wenn er Sachen verhehlt oder sonst am Vergehen sich beteiligt hat.

An zweiter Stelle haftet er, wenn er Rat erteilt, die Tat gelobt oder ihr zu-gestimmt hat. „Denn welcher Unterschied bestände zwischen dem, der zu Handlung überredet, und dem, der sie billigt?“, sagt Cicero“, H. Grotius, *De jure belli ac pacis, Libri tres* (1625), in the German version by Dr. W. Schätzel (1950), published in the e-book edition by Textor Verlag, Frankfurt am Main (2008), 304, paras. VI.-VII.

¹¹⁹ “Übrigens haften alle obgenannten Personen nur, wenn sie den Schaden wirklich verursacht haben, dh. Einen entscheidenden Anlaß zum ganzen Schaden oder zu einem Teil desselben gegeben haben.“, *ibid.*, 305, para. X.

¹²⁰ N. Nedeski, A. Nollkaemper, ‘Responsibility of International Organizations ‘in connection with acts of States’’, in (2012) 9 *International Organizations Law Review*, 33, 50.

The following example may helpfully illustrate the issues at stake:¹²¹

An ECOWAS peacekeeper, in an operation XY with the authorisation to use all necessary means to defend the mandate, due to misinterpreting the ROEs and unclear circumstances on the ground and faulty communication equipment, shoots and kills a civilian on the ground. The operation was paid for by the EU through the African Peace Facility Fund. The Soldier was trained as part of the ASF in a joint training exercise of the AU in cooperation with ECOWAS and in coordination with the EU and NATO. Logistical support to the operation was provided by the United Nations in the form of a Support package based on “assessed contributions.” The mission plans were developed in cooperation between the AU, ECOWAS and the United Nations. The mandate of this operation is based first of all on the implementation of the ECOWAS Mechanism, which was authorised by the AU, which itself was authorised by the United Nations Security Council.

So, why would one break down this whole structure and simply look at which entity was exercising “effective control” over a specific act if the whole mission is based on cooperation and interaction between several actors? Even the ICJ in its Nicaragua decision spoke of “effective control of the (...) operations in the course of which the alleged violations were committed.”¹²² The more complex the situation in which responsibility for an internationally wrongful act arises, the more artificial it becomes to ignore all pertinent circumstances for the establishment and execution of the peacekeeping operation, and it would become even more important to respond to and to develop a norm which takes into account these complex circumstances, also from the perspective of justice and equity.¹²³ The very same argument is made for the responsibility of troop-contributing countries (TCC) and international organisations for peacekeeping operations. Leck states that “TCCs can

¹²¹ Based roughly on AFISMA in Mali.

¹²² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), 14, para.115.

¹²³ See, for example, R. G. Teifel, *Humanity’s Law* (2011), see especially 141-64. D’Aspremont who is highly critical of both the articles on state responsibility as well as the articles on the Responsibility of International Organisations supports this view. He states “Indeed, in the view of the author of the present contribution, it is when causation, either in attribution or in reparation, has not been able to apportion responsibility between the multiple participants in the wrongdoing that a situation of shared responsibility *stricto sensu* arises. More specifically, situations of shared responsibility *stricto sensu* originate in the cumulative presence of the indivisibility of the wrong and the indivisibility of the damage. *In other words, a situation of shared responsibility, stricto sensu arises when attribution of conduct and attribution of responsibility do not allow apportionment among responsible actors while causal analysis does not allow to share the burden of reparation among those involved in the commission of the wrong*” [Emphasis added], d’Aspremont, *supra* note 84, 15, 22-23. It is therefore that the articles are of limited use “to ascertain, unravel and address situations involving a plurality of wrongdoers.”, *ibid.*, 23; Tomuschat, although referring UN operations in the context of distinction between responsibility of troop contributing states and the organisation is equally opposed to a reliance on the criterion of “effective control” and he acknowledges the “cooperative organisational structures” within peacekeeping operations, Tomuschat, ‘The European Court of Human Rights and the United Nations’, *supra* note 13, 334, 357-358. Direk also acknowledges that “the contribution of all the relevant actors forms a coherent whole in the commissions of the disputed conduct”, Direk, *supra* note 86, 1, 15.

scrutinise and consent to the minutiae of the employment of their peacekeepers prior to deployment, provide input to the development of concept of operations and [rules of engagement]; and, through the NCCs, can disagree with (or have to agree to) any changes in employment of their peacekeepers in-mission. This suggests that peacekeepers are not under the effective control of the UN, but are perhaps under the dual or joint control of both the UN and the TCC.”¹²⁴ Tomuschat argues similarly on the organisational level, and contends that the UN may also entail responsibility for an authorised operation (of several states) if “the Security Council may be so tightly involved in the activities endorsed by it that the operation concerned may become legally attributable to the UN.”¹²⁵

Consequently, in order to further define the new criterion of attribution it appears necessary to look to other areas of law for inspiration. In this context, Judge Simma described in his separate opinion in the *Oil Platforms* case the difficulty of establishing the responsibility of multiple tortfeasors as a “textbook situation calling for (...) an exercise in legal analogy.”¹²⁶ In particular, criminal law and international criminal law may provide useful guidance for the present purposes.¹²⁷

3. *Drawing inspiration from other international legal rules: (international) criminal law*

As with international criminal law, the law of international responsibility can also only promote compliance and exude a deterrent effect if responsibility is attributed to those entities which are truly responsible, thereby preventing an actor from taking a free ride on account of another entity being held responsible unjustly on its own.¹²⁸ Taking a wider perspective, there are other undertakings on the international level that have the aim of limiting the exercise of powers on an international level and by international organisations, for example, the emergence of global administrative law.¹²⁹ There are also arguments put forward for a constitutionalisation of international law, according to which acts need to be in conformity with the constitutional values of

¹²⁴ Leck, *supra* note 55, 346, 359.

¹²⁵ C. Tomuschat, ‘Case Note. R (on the Application of Al-Jedda) v. Secretary of State for Defence. Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists’, in (2008) 9 *Melbourne Journal of International Law*, 391, 394; Also J.-P. Schütze, *Die Zurechenbarkeit von Völkerrechtsverstößen im Rahmen mandatierter Friedensmissionen der Vereinten Nationen* (2010), 137.

¹²⁶ *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003 (Judge Simma, Separate Opinion), 354, para.66.

¹²⁷ The view that private law analogies are particularly helpful in discussing responsibility and joint conduct is also further supported in academia, see Crawford, *supra* note 29, 328-329, with further references.

¹²⁸ Cf. Ryngaert, *supra* note 41, 151, 154.

¹²⁹ Cf. for example, S. Cassese, B. Carotti, L. Casini et al (eds.), *Global Administrative Law: The Casebook* (2012) and especially J. Arato, ‘Material Limits to the Power of the United Nations Security Council: Between Law and Politics’, *ibid.*, 59, 65-67.

the international legal order which includes, for example, human rights, and are therefore also binding international organisations in their actions.¹³⁰

In its *Tadić* decision, the ICTY stated:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.¹³¹

The clear chain of command in peacekeeping operation, as in any military operation, appears in that context as beneficial for the exercise of command and control in the complex circumstances of peacekeeping operations. Consequently, it seems to be justified, as it was ultimately held by the ICTY to inquire whether the nature and degree of organisation of an organ, over which control is exercised, is relevant for the purposes of attributing control and justifies adapting the required degree of control.¹³²

But *Tadić* is also a good example of cognisance of the interweaving (*Verpflechtung*) of international actors for the purposes of the attribution of conduct.¹³³ This case is even more relevant as it also

¹³⁰ J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', in (2011) 8 *International Organizations Law Review*, 285, 286-287; A. von Bogdandy, M. Steinbrück Platise, 'ARIO and Human Rights Protection: Leaving the Individual in the Cold', in (2012) 9 *International Organizations Law Review*, 67, 68, 70. Shared responsibility (of an international organisation and its member states) is also relevant because of international organisations exercising "public authority" over an individual despite the conduct breaching a human rights norm being attributed to a state, *ibid.*, 70. The same logic can apply in an inter-organisational setting when the UN, i.e. leaves another international organisation no discretion in the implementation of a Security Council, similar to the *Bosporus Case*.

¹³¹ *Prosecutor v. Duško Tadić a/k/a "Dule"*, Judgment, Case No. IT-94-1, Ap. Chamber, 15 July 1999, 56, para. 131; 58-59, para. 147. See also J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations', in (2006) 39 *Vanderbilt Journal of Transnational Law*, 1447, 1460.

¹³² Crawford is correct in pointing out that in some circumstances, for example, the exercise of control over a single terrorist such an adapted lower standard of control would not lead to a different conclusion, but once again, it always depends on the specific circumstances. See, Crawford, *supra* note 29, 153-154. But there are also other instances in which other thresholds than "effective control" over a specific act for the attribution of conduct were used, for example, *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am Ct. H.R., para. 172. Other authors, although against lowering the threshold of control along the standard used in *Tadić* argue that the standard should nevertheless be adapted to the type of control required as the notion of (de facto) organ combines both factual and institutional considerations, Sari, Wessel, 'International Responsibility for EU Military Operations', *supra* note 58, 126, 138-139. Following the 9/11 attacks the debate upon the necessary degree of control was reignited. Slaughter and White considered the "effective control" test to be insufficient, A.-M. Slaughter, W. Burke-White, 'An International Constitutional Moment', in (2002) 43 *Harvard International Law Journal*, 1, 19-20. See also K.N. Trapp, *State Responsibility for International Terrorism* (2011), 44-45.

¹³³ This is without prejudice to the decisions of the ICJ in the *Nicaragua Case* and in *Congo v. Uganda*. But it has nevertheless to be pointed out that a main reason for the ICJ to refuse the validity of *Tadić*, the broadening of the Scope of State responsibility can be disregarded in the specific peacekeeping context. The Court explained in the *Genocide case* that the test developed in *Tadić* "broaden[s] the scope of State responsibility well beyond

established the notion of “joint criminal enterprise” under international law.¹³⁴ According to this concept:

[T]o hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrators physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.¹³⁵

The aim of this concept of liability in criminal law is to prevent crimes from going unpunished which have been committed in very complex organisational settings. As explained in the *Amicus Curiae* Brief in the *Duch* Case:

When such crimes are committed, it is extremely difficult to point out the specific contribution made by each individual participant in the collective criminal enterprise because (i) not all participants acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing, or otherwise contributing to the criminal conduct, and (ii) the evidence related to each individual’s conduct may prove difficult if not impossible to find (...) To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law.¹³⁶

the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf”, *Application of the Convention, supra* note 98, para.406. However, as pointed out by Dannenbaum, “this fundamental concern is significantly reduced in the U.N. peacekeeping context, because (...) of the unique features of peacekeepers (...) [which] act on behalf of both their governments and the United Nations itself”, T. Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’, (2010) 51 *Harvard International Law Journal*, 113, 155. Buchan argues in favour of applying the test of “overall control” for purposes of attributing conduct to an international organisation, R. Buchan, ‘UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?’, in (2012) 32 *Legal Studies*, 282, 298, 301. In his view it does not make any “material difference” that the ICJ was seized in Nicaragua with issues of state responsibility, instead of responsibility of international organisations, but that nevertheless due to factual differences a different test might be appropriate, *ibid.*, 288.

¹³⁴ In *Tadić* it was still called “common purpose” and it is derived especially from post WWII military tribunal decisions. The very same argument was also made by Nollkaemper and Jacobs which equally suggest that international law might be better equipped to deal with questions of shared responsibility on such a different criterion, Nollkaemper, Jacobs, *supra* note 86, 15.

¹³⁵ *Prosecutor v. Duško Tadić a/k/a “Dule”*, *supra* note 131, 82-83, para. 192.

¹³⁶ A. Cassese and Members of the Journal of International Criminal Justice, ‘Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine’, in (2009) 20 *Criminal Law Forum*, 289, 301 ; H. Olasolo, ‘Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?’, in (2009) 20 *Criminal Law Forum*, 263, 265.

Particularly in domestic law, one can compare it with the notion of “co-perpetration”¹³⁷, although the concept of co-perpetration is also another method of criminal responsibility under international criminal law.¹³⁸ In international criminal law, another concept is derived particularly from German criminal law, according to which an individual can be held legally responsible for inducing others to commit crimes through a hierarchically structured organisation under his or her control, thereby acting as “*der Täter hinter dem Täter*”, the perpetrator behind the perpetrator,¹³⁹ has been applied by the ICC.¹⁴⁰ Especially relevant for the present purposes are the instances in which the individual acts by means of “control over an organisation” (*Organisationsherrschaft*), often also in a military context.¹⁴¹ As pointed out by the ICC, this approach can be distinguished from the notion of joint criminal enterprise.¹⁴² Moreover, it covers cases of “political and military leaders, who are each of them in control of a different hierarchical organisation (...) [and who] direct their different organisations to implement in a coordinated manner a common criminal plan.”¹⁴³ Interestingly, it

¹³⁷ For example, under § 25 of the German Criminal Code, “If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).”

¹³⁸ For instance, Article 25 (3)(a) second alternative of the Rome Statute of the ICC.

¹³⁹ Decision on the Confirmation of Charges, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, 167, para. 496. See also generally and for a critique, T. Weigend, ‘Perpetration through an Organization. The Unexpected Career of a German Legal Concept’, in (2011) 9 *Journal of International Criminal Justice*, 91, 94 – 111; This concept was developed by the influential German legal scholar Claus Roxin in 1963, for a recent contribution by him on this issue, see C. Roxin, ‘Organisationsherrschaft und Tatentschlossenheit’, in (2006) 1 *Zeitschrift für internationale Strafrechtsdogmatik*, 293-300. In Germany, this concept was relied on in context of shootings and other (mostly) lethal human rights violations at the previous inner-German border between the FRG and the GDR, Weigend, *ibid.* 94 with references to case-law. For its role in International Criminal Law, cf. also S. Manacorda, C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise. Concurrent Approaches in the Practice of International Criminal Law?’, in (2011) 9 *Journal of International Criminal Justice*, 159 – 178 ; S. Eldar, ‘Exploring International Criminal Law’s Reluctance to Resort to Modalities of Group Responsibility’, in (2013) 11 *Journal of International Criminal Justice*, 331 – 349.

¹⁴⁰ Decision on the Confirmation of Charges, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, paras. 322-367. See especially Decision on the Confirmation of Charges, *ibid.*, paras. 487-518. The rendered judgment by Trial Chamber I against Thomas Lubanga Dyilo is limited to an analysis of Lubanga’s responsibility as a direct co-perpetrator, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, 423, para.978. Nevertheless, the Court confirmed its previous jurisprudence that criminal liability also includes individuals who “in spite of being removed from the scene of the crime, control or mastermind its commission”, *ibid.*, 433 para.1003. This corresponds nearly literally to decisions of the Pre-Trial Chamber against Lubanga and against Katanga and Chui, Decision on the Confirmation of Charges, *Prosecutor v. Thomas Lubanga Dyilo*, *ibid.*, para. 330; Decision on the Confirmation of Charges, *ibid.*, para. 488.

¹⁴¹ Decision on the Confirmation of Charges, *ibid.*, 167-168, para. 498; Olasolo, *supra* note 136, 263, 269. Generally, K. Ambos, ‘Command Responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the ‘most responsible’’, in A. Nollkaemper, H. van der Wilt (eds.), *System Criminality in International Law* (2009), 127 – 157.

¹⁴² Decision on the Confirmation of Charges, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), *ibid.*, para. 338-341. Cf. Manacorda, Meloni, *supra* note 139, 159 – 178 .

¹⁴³ Olasolo, *supra* note 136, 263, 269; Decision on the Confirmation of Charges, *supra* note 139, paras. 540-582; Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Combo (ICC-01/05-01/08), Pre-Trial Chamber III, 10 June 2008, paras. 69-84; *Prosecutor v. Milomir Stakić*, Judgment, Case No. IT-97-24-T, T. Ch. II, 31 July 2003, paras. 738-744, 774, 818, 822 and 826.

was even held in the *Eichmann* trial that the blameworthiness and responsibility of an individual increases with depending on their position within the organisation and thus, the complexity of the structure of the latter.¹⁴⁴

4. A new notion of control: normative control

It is not to suggest that the new notion of control for the purposes of attribution will be based on something similar to the idea of a “crime of states.”¹⁴⁵ However, the new notion of attribution will be based on the idea that international organisations are jointly responsible in peacekeeping operations because they cooperate in various areas and that this “cooperative effort” is also causal for violations of international law in a given case.¹⁴⁶ This is precisely why the notion of control has to be broader than “factual control”.¹⁴⁷ As explained, factual control alone is also not sufficient due to the territorial differences between states and international organisations. Also important is “normative control”

¹⁴⁴ In *Eichmann*, the Court held that “[i]n the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hand and reach the higher ranks of command.”, Jerusalem District Court, *The Attorney General v. Eichmann*, Case No. 40/61, Judgment, 36 I.L.R. 5-14, 18-276, 12 December 1961, para.197.

¹⁴⁵ The draft articles of the ILC distinguished between international delicts and international crimes, whereas the latter was a qualification for serious breaches of the most fundamental norms, including rules being nowadays recognised as *jus cogens*, for example, for example, slavery, genocide and apartheid, Yearbook of the International Law Commission (1976) Volume II Part Two, Report of the Commission to the General Assembly on the work of its twenty-eighth session, 95-112. The Commission responded to a suggestion by the Special Rapporteur Roberto Ago who had suggested such a distinction in his Hague Academy Course from 1939, R. Ago, *Le délit international*, Recueil des cours de l’Académie de La Haye, Volume 068 (1939), 415, 499-531. The whole field of the law of responsibility of states developed around the notions of states being sovereign equals, a rather positivist approach, first formulated by Anzilotti and an approach taking into account also the interest of the wider community. Among the latter’s supporters were Ago and also Hersch Lauterpacht. From the current perspective, one could call it a human rights induced view on state responsibility, cf. G. Nolte, ‘From Dionisio Anzilotti to Roberto Ago: The Classical International Law of Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations’, in (2002) 13 *European Journal of International Law*, 1083 – 1098. Such a distinction between different categories of acts of states entailing international responsibility is still supported in doctrine, see e.g. A. Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’, in (1999) 10 *European Journal of International Law*, 425, 426. The International Law Commission replaced the distinctive categories of delict and crimes of states with breaches of obligations under international law and serious breaches of obligations under peremptory norms of general international law (Articles 40, 41 of the articles).

¹⁴⁶ Note that the ICJ held that “it is not necessary for the Court to make findings of fact with regard to each individual incident alleged [regarding human rights violations] (...) the coincidence of reports from credible sources is sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed”, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 206.

¹⁴⁷ It is therefore not surprising that the UN Secretariat expressed doubts whether a binding decision could constitute “direction and control” under Article 14 as has been pointed out by Boisson de Chazournes, *supra* note 87, 213, 220-221; Responsibility of international organizations, Comments and observations received from international organizations 2, *supra* note 23, 20, para. 3 under draft article 8. Other financial institutions were likewise very critical, see Boisson de Chazournes, *ibid.*

based on institutionalised relations between the international organisations.¹⁴⁸ In the WTO *Geographical Indications Dispute*, the Panel accepted the view of the EC that Member States were to act as *de facto* organs of the Community for the implementation of its law. The dependence of the states on the EU and the control of the latter are based on a transfer of competences to the EC and thus on control derived from legal instruments, which amounts to normative control.¹⁴⁹ This case is particularly relevant as it involves normative control based on the transfer of competences over other entities possessing independent legal personality in contrast to the transfer of competences by the Security Council to a UN Peacekeeping operation.

The ICJ, in the *Genocide case* took into account these alternative bases for establishing control, declaring that “the physical acts constitutive of genocide (...) have been committed by organs (...) [and] were carried out, *wholly or in part*, on the instructions or directions of the State, *or* under its effective control”¹⁵⁰ [Emphasis added]. Effective control pervades as an alternative through the whole judgment¹⁵¹ and the “wholly or in part” also suggests that other criterion are determinative for the attribution of conduct.

The new proposed criterion does not touch upon the question of whether member states could, in individual cases, also be (jointly) responsible, which is outside of the focus of the present study.¹⁵² As

¹⁴⁸ For the purposes of the present study, “normative control” is meant to encompass not only control based on legal instruments, but also control based on the institutional relations existing between two organisations, including any form of “political” influence over the decision-making of the other organisation. Certain elements such as the “responsibility relation” between the authorising and the authorised entities are both “factual and normative. This means that the complicating effect of authorization is both a fact of life as well as a fact created by the legal system”, J. d’Aspremont, ‘The Law of International Responsibility and Multi-layered Institutional Veils: the Case of Authorized Regional Peace-Enforcement Operations’, SHARES Research Paper 24 (2013), ACIL 2013-10, available at www.sharesproject.nl and SSRN, 4. Interestingly, Galicki had already suggested in 2004 while being a member of the ILC to replace “effective control” with “within their apparent authority or general scope of authority”. Brownlie said later during the same meeting that the test should be or “authority, or apparent authority” which also reflects more accurately the wider character of “normative control”, International Law Commission, Summary record of the 2803rd meeting, UN Doc. A/CN.4/SR.2803 (2004), 86-87, para. 8; 90, para. 36. See also more generally, A. Nollkaemper, ‘Power and Responsibility’, SHARES Research Paper 42 (2014), ACIL 2014-22, available at www.sharesproject.nl and [SSRN](http://ssrn.com), in particular p. 12.

¹⁴⁹ WTO Panel Report, European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, DS174, 15 March 2005, paras 7.98 and 7.269; Cf. Sari, Wessel, ‘International Responsibility for EU Military Operations’, *supra* note 58, 126, 139.

¹⁵⁰ *Application of the Convention*, *supra* note 98, para. 401.

¹⁵¹ *Ibid.*, e.g. ,paras. 400, 406, 412-13; Cf. also Dannenbaum, *supra* note 133, 113, 154.

¹⁵² Cf. Ryngaert, *supra* note 41, 151, esp. 155-57, 165-66. Particularly relevant is when military operations of individual or several member states grant support to a UN operation and these arrangements provide for an element of oversight and control over these military forces. An example would be the cooperation agreement between the French mission “Force Licorne” and the UN Operation in Côte d’Ivoire (UNOCI). The cooperation agreement itself is not available to the public, but Security Council Resolution 1528 provides (para. 16), for instance, that the French troops shall use all necessary means to support UNOCI and “intervene at the request of UNOCI in support of its elements whose security may be threatened, *ibid.*, 157-58; Security Council

states equally increase coordination on a bi- and multi-national level outside of an international organisation, the complexity of an examination of attribution of conduct to states will increase, as well as the amount of cases of joint responsibility of states.¹⁵³ In contrast to these cases, however, it should not be apprehended that the attribution of responsibility to two or more international organisations instead of one will diminish the willingness of member states to contribute troops to military operations of international organisations as it is argued pursuant to a “utilitarian approach” which “emphasises the end-goal (...) rather than the intrinsic fairness of the regime.”¹⁵⁴ In contrast, the benefits of a regime of shared responsibility are that it prevents “behavioural externalities and other undesirable consequences.”¹⁵⁵

Responsibility under criminal law necessitates an element of intent (*mens rea*) which can also be found in the articles of the ILC which presuppose “knowledge” by the organisation in aiding or abetting another international organisation. But one cannot completely reconcile the law of

Resolution 1528, UN Doc. S/RES/1528 (2004), para. 16. To complete the picture, one has also to mention the employment of private military and security contractors by peacekeeping organisations; ECOWAS relies on PMSCs to rectify the lack of capabilities of its members in certain given areas, UNAMSIL and MONUC used PMSCs for logistical support and demining is nearly completely outsourced by the UN, R. Buchan, H. Jones, N.D. White, ‘The Externalization of Peacekeeping: Policy, Responsibility and Accountability’, (2011) 15 *Journal of International Peacekeeping*, 281, 286. Although the treaties concluded by the UN specify that the employees of these companies will not in any form be considered as agents of the UN and it also appears highly unlikely that the UN will exercise “effective control” over them, the issue *per se* is problematic *ibid.*, 293-296). For an excellent overview of how private companies are also influencing training and planning of UN peacekeeping operations, see, A.G. Østensen, ‘In the Business of Peace: The Political Influence of Private Military and Security Companies on UN Peacekeeping’, in (2013) 20 *International peacekeeping*, 33-47. Kofi Annan had already proposed to hire a private security company to control the camps in Rwanda in 1994, S. Brayton, ‘Outsourcing War: Mercenaries and the Privatization of Peacekeeping’, in (2002) 55 *Journal of International Affairs*, 303, 317. In 2013, MONUSCO decided to run a selection process for a contractor to run the deployment of unmanned aerial vehicles (UAVs) for the whole operation. So far there are no plans to arm the drones, but there are requests for further high technology weaponry and other equipment, Briefing by Lieutenant General dos Santos Cruz, Force Commander MONUSCO to the UN Security Council, Security Council 6987th meeting, UN Doc. S/PV.6987 (2013), 2-3.

¹⁵³ Germany and the Netherlands signed a declaration of intent on 28 May 2013 covering 38 specific points under which the cooperation between the two countries in the field of defence will be increased; e.g., their Mobile Brigade will be put under the control of the German Division of Rapid Forces (Division Schnelle Kräfte). The German Minister of Defence spoke of a unprecedented level of cooperation, German Ministry of Defence, ‘Smarte Militärkooperation mit den Niederlanden’, 29 May 2013, available at: https://www.bmvg.de/portal/a/bmvg/!ut/p/c4/NYvBCslwEET_aDcRBPXW0ovXImi9pW0IK022rJv20o83OTgD7zCPwTeWJrdRcEqc3llvHca6jTuMcQvw4SxihUijvuqFcsRn_cweJk5eK9UnpclgTllgZdGlmixSDNCMg7Fda6z5xx7Xy7l59Maeunvb4xpi8wNupiMx/, H. Kiesel, ‘Deutschland will für Europas Sicherheits-Rahmen sorgen’, 28 May 2013, available at: <http://www.dw.de/deutschland-will-f%C3%BCr-europas-sicherheits-rahmen-sorgen/a-16842457>.

¹⁵⁴ Ryngaert, *supra* note 41, 151, 164. Nevertheless, States also have a legitimate interest in accepting responsibility, the refusal of which would be tantamount to admitting that the State in question has no control whatsoever about its troops placed at the disposal of an international organisation, *ibid.*, 165.

¹⁵⁵ Leck, *supra* note 55, 346, 364.

responsibility and international criminal law as regards their inherent systemic functions.¹⁵⁶ Both bodies of law contain an inherent aspect of deterrence to prevent further violations of norms, but whereas criminal law sanctions individuals to serve a sentence in prison, the law of responsibility allows for different forms of reparation as one finds in domestic civil law.¹⁵⁷ It is actually, the requirement or non-requirement of “intent” which circumscribes the two fields of law. Whereas willful damage of property falls under criminal law and is appropriate for claims of compensation under civil law, as regards unintentional damage of property, compensation is only possible under civil law.¹⁵⁸ Moreover, one can distinguish between “intent” and “wrongful intent” and the law of responsibility is simply neutral regarding the requirement of the latter.¹⁵⁹ It so appears that despite the possibility of drawing inspiration from criminal law in the form of a criterion of attribution, one has nevertheless to differentiate between the two bodies of law in respect of the element of “intent”.¹⁶⁰ However it also remains possible to argue that such an element of *mens rea* could be found in the conduct of international organisations. It can be argued that the United Nations and regional organisations have voluntarily entered into various agreements of cooperation for the purposes of the conduct of peacekeeping operations, in the knowledge that despite all efforts, violations of human rights, humanitarian law and other potentially applicable norms by peacekeepers may occur and, as a result, they therefore possess the necessary degree of *mens rea*.¹⁶¹

The advantage of this proposed criterion is equally that it disposes of the distinction between UN authorised and United Nations operations,¹⁶² as cooperation between the organisations is

¹⁵⁶ Only about 70 years ago, Ago, in his Hague Academy Lecture, actually denied the possibility of a participation in any internationally wrongful act which would be characteristic results of the elaboration and nature of domestic criminal law, Ago, *supra* note 145 415, 523.

¹⁵⁷ See Articles 34-38 ARIO.

¹⁵⁸ See e.g. under German law, §§ 303 and 15 StGB and § 823 BGB.

¹⁵⁹ As pointed out by Sheeran the articles on State responsibility are neutral regarding the requirement or not of a “wrongful intent”, Sheeran, *supra* note 94, 55, 76.

¹⁶⁰ In other instances, the law of responsibility is, of course, synonymous with ideas and concepts of (international) criminal law. The institution of “aid and assistance” can be found in most criminal legal systems.

¹⁶¹ Cf. Tomuschat who hold similarly for member states that by “join[ing] a UN operation or a UN-mandated operation [they] may thereby manifest their will to contribute to attaining a common goal.” In contrast, to member-states, however, it is not submitted that the present study deals with “vicarious liability” by international organisations, but rather with responsibility for acts of the international organisations themselves, Tomuschat, ‘The European Court of Human Rights and the United Nations’, *supra* note 13, 334, 357.

¹⁶² The UN accordingly criticised the Behrami/Saramati decision, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 23, 10-12, paras. 9-10; P. Klein, ‘The Attribution of Acts to International Organizations’, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 297, 299-300.

independent of the question whether it is an authorised or a United Nations operation.¹⁶³ Article 17 of the Articles equally allows for an international organisation to be responsible for any binding decisions it has adopted which were implemented by its member states or international organisations (para. 1), as well as for authorisations acted upon accordingly (para.2).

5. *The challenges regarding the interpretation of Security Council Resolutions*

In this context it was also argued that authorisations for the use of force by the Security Council are exceptional. They might therefore not be suitable for the establishment of a general rule of attribution for several reasons, including the question of how to interpret a Security Council resolution as well as their legal nature.¹⁶⁴ As the ICJ stated in its *Kosovo* advisory opinion, “the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance”, but “differences between Security Council Resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account.”¹⁶⁵ These differences result from the different drafting process of Security Council

¹⁶³ Under the articles of the ILC, authorised or recommended conduct can also entail the responsibility of the organisation: “This is not to say that the authorized or recommended conduct would always entail the organization’s responsibility. This would depend on the character of the recommended or authorized conduct. Responsibility would be justified only if the recommended or authorized act was actually taken and would have been in breach of an obligation for the organization had the organization taken it directly”, G. Gaja, Third report on responsibility of international organisations, UN Doc. A/CN.4/553 (2005), para. 41. In context of a case-study, Gaja continues: “The foregoing conclusion would lead to the addition of a slight qualification to the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda:

‘insofar as ‘Opération Turquoise’ is concerned, although that operation was ‘authorized’ by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to ‘Opération Turquoise’.’

What is assumed here is that the authorized conduct does not involve any breach of an international obligation on the part of the organization”, *ibid.*, para.42. One member of the ILC supported even joint responsibility in cases of authorisations, International Law Commission, Summary record of the 2802nd meeting, *supra* note 102, (Mr. Economides), para. 21-22.

¹⁶⁴ N. Blokker, ‘Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations’, in (2010) 7 *International Organizations Law Review*, 35, 46-47. Furthermore, the authorisations handed out by the Security Council are also not uniform but reflect its varied practice as a response to each and every individual situation. As also Blokker correctly asserts it may be, indeed, questioned whether the practice of the United Nations to refuse *a priori* and not even *a posteriori* all responsibility arising from the conduct of multinational forces authorised by the Security Council is reasonable, *ibid.*, 47.

¹⁶⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 94. The Court had previously given some hints regarding the criteria for the interpretation of a resolution by the Council in its *Namibia* advisory opinion, although not referring to the VCLT, the Court indicated that determinative in the interpretation are “the terms of the Resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

resolutions, as well as from their different legal effect, as they can be binding on all members of the United Nations notwithstanding their possible non-participation in the formulation of the resolution.¹⁶⁶ Consequently, it may be necessary to examine the *travaux préparatoires* of the resolutions; statements made by members of the Council at the time of the adoption of the resolution, other resolutions on the same issue, but also “subsequent practice of relevant United Nations organs and of States affected by those given resolutions.”¹⁶⁷ The differences result from the different legal framework of constituent instruments of international organisations. On the one hand, they are international treaties concluded between sovereign states; on the other hand they form the “constitutions”¹⁶⁸ of different, independent legal entities with their own legal orders.¹⁶⁹

*notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971), p. 53. The predecessor Court, the PCIJ was seized in the case of Access to German Minority Schools in Upper Silesia concerning the interpretation of an arrangement contained in its Resolution of March 12th, 1927. The Court started by identifying the intention of the Parties on the basis of Resolution in question as well as in subsequent practice; these two elements were prioritised for the interpretation of a Resolution of the Council of the League of Nations, Permanent Court of International Justice, Series A./B., Fascicule No. 40, Access to German Minority Schools in Upper Silesia, Advisory Opinion of May 15th, 1931, 16. The ICTY in *Tadić*, used a teleological approach to interpret unclear provisions of its Statute to ascertain whether these apply only to offences in international armed conflicts or also equally to offences committed in internal armed conflicts. The Tribunal thereby also analysed statements and Resolutions leading to the establishment of the Tribunal as well as the report of the Secretary-General concerning the statement and statements by members of the Council regarding the interpretation of the Statute, *Prosecutor v. Dusko Tadić a/k/a “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, App. Ch., 2 October 1995, paras. 71-93.*

¹⁶⁶ *Ibid.* See also E. Papastavridis, ‘Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis’, in (2007) 56 *International & Comparative Law Quarterly*, 83, 86-88; J. A. Frowein, ‘Unilateral Interpretation of Security Council Resolutions – a Threat to Collective Security ?’, in V. Götz, P. Selmer, R. Wofrum (eds.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (1998), 97, 98-99; M. C. Wood, ‘The Interpretation of Security Council Resolutions’, in (1998) 2 *Max Planck Yearbook of United Nations Law*, 73, 81; H. Nasu, *International Law on Peacekeeping. A Study of Article 40 of the UN Charter* (2009), 111-120; Larsen, *supra* note 20, 27-32. The Arbitral Tribunal in the case of *Laguna del Desierto* between Chile and Argentina held that “International law has rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral instrument, an arbitral award or a resolution of an international organization. For example, the rule of the natural and ordinary meaning of the terms, the rule of reference to the context and the rule of the practical effect are all general rules of interpretation”, United Nations, Reports of International Arbitral Awards, Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy, 21 October 1994, Volume XXII pp. 3- 149 , 25, para. 72.

¹⁶⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 94. A different approach is developed by Papastavridis, although with a similar result, cf. Papastavridis, *ibid.*, 83, esp. 89-111. He correctly points out that Security Council Resolutions authorising the use of military force have to be interpreted *in strictu sensu* in respect of the maxim *exceptiones sunt strictissimae interpretationes* as well as the hierarchy of the prohibition of the use of force as a norm of *ius cogens* within the international legal order, *ibid.* 107-108. For Frowein, particularly important is the “objective view of the neutral observer as addressee” who has not contributed to the formulation of the resolution, Frowein, ‘Unilateral Interpretation of Security Council Resolutions’, *ibid.*, 97, 99. According to Wood, Security Council Resolutions also need to be interpreted *bona fide* which applies equally to treaties and resolutions and its relevance is emphasised by Article 2 (2) of the United Nations Charter which obliges states to fulfil in good faith their obligations under the Charter, Wood, *ibid.*, 73, 87, 89. Generally, Wood also subscribes to an application of the rules in the Vienna Convention, *mutatis mutandis*, as far as possible, depending also on the nature of the specific resolution, *ibid.*, 95.

¹⁶⁸ The word constitution itself has no particular meaning in international law, M. Wood, ‘The UN Security Council and International Law’, *Hersch Lauterpacht Memorial Lectures*, 1st Lecture, 7th November 2006, 6,

Drawing from national constitutional law, it is therefore that constituent instruments of international organisations disallow contracting parties to act as *Herren der Verträge* (masters of the treaties).¹⁷⁰ On the contrary, these instruments acquire a life of their own,¹⁷¹ the primacy of interpreting any such treaty lies with the institution and its organs and they are therefore “living instruments”. Consequently, any such interpretation cannot be “intended to respect residual national sovereignty” of member states.¹⁷² Both the interpretation of resolutions of an international organisation as well as the interpretation of founding documents may cause problems in practice.¹⁷³

6. *Distinguishing the new criterion of attribution from cases of other forms of responsibility (e.g. aid and assistance)*

A clear line of distinction between cases falling under the new criterion of attribution for cases of joint responsibility and cases of auxiliary responsibility is necessary. It is suggested that the distinction between these two notions can be best achieved by the form of a causal, cumulative criterion; if the cooperative involvement of one organisation in the peacekeeping operation of another organisation penetrates the operation on all structural levels and over the whole period, thereby including planning, pre-deployment and deployment, the two organisations should be held jointly responsible on the basis of this new specific criterion of attribution which includes elements used in *Nicaragua* and *Tadić*. Causality is included insofar as this involvement of the contributing organisation allows a piercing of the institutional veil of the control of the other organisation under whose *aegis* the operation is conducted. The contributing organisation would be responsible by

para.18. See generally E. Klein, S. Schmahl, ‘Die Internationalen und die Supranationalen Organisationen’, in W. Graf Vitzthum (ed.), *Völkerrecht* (2010), 263, 283-284, mn. 37-38 with further references.

¹⁶⁹ There are different reasons given to justify the special status of treaties of international organisations, cf. C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (2012), 316, with references.

¹⁷⁰ Janik, *ibid.*, 316; N. D. White, *The law of international organisations* (2005), 18, 20; H. Abromeit, T. Hitzel-Cassagnes, ‘Constitutional Change and Contractual Revision: Principles and Procedures’, in (1999) 5 *European Law Journal*, 23, 30. The UN Charter has since the early days of the UN already also be seen as a Constitution, cf. O. Schachter, ‘Review’, (1951) 60 *Yale Law Journal*, 189, 193.

¹⁷¹ B. Fassbender, ‘The United Nations Charter as a Constitution of The International Community’, in (1998) 36 *Columbia Journal of Transnational Law*, 529, 597.

¹⁷² J. E. Alvarez, ‘Legal Perspectives’, in T. Weiss, S. Daws (eds.), *The Oxford Handbook on the United Nations* (2007), 58, 62.

¹⁷³ The ICJ acknowledged this difficulty of interpretation for the United Nations Charter: “But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties”, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion* (8 July 1996), 75.

virtue of its position or functions - on the basis of the new criterion of attribution and similar to the principle of joint criminal enterprise and co-perpetration as developed in international criminal law.

The cumulative criterion shall include, for example, contributions of a normative and factual nature: normative and legal control also through the exercise of political “soft power” which cannot be truly legally ascertained, factual elements such as support in the training of troops, financing, logistical and other operational support, mission planning and the operation plan, and general involvement in the oversight and implementation of the operation. Bearing in mind the complexity of the topic and the fact that each organisation and each peacekeeping operation is unique, a clear-cut distinction will not be legally feasible, and the particularly strong involvement of one organisation through one specific element such as financing may remedy weaker involvement in another area.

Two authors suggest that the impact of the theory of the delegation of powers on the law of responsibility merits further exploration.¹⁷⁴ Indeed, it is also possible to partially conceptualise this new notion of attribution from the perspective of other international organisations as a contribution to implementing the powers of the Security Council. Implementation through the various cooperation mechanisms in peacekeeping operations would constitute a method of delegation.

The case-studies will therefore not only serve to verify the need and the relevance of such a new criterion of attribution, but they will also help to further delimit it from other cases of attribution of conduct and/or responsibility.

The difficulty resides in conceptualising a rule which is both defined and confined enough to qualify as a “rule” in a legal understanding, but simultaneously flexible enough to accommodate the different and unique cooperation arrangements and mechanisms in peacekeeping operations. As with any other legal rule, the only possibility to correspond to these requirements is in the form of a general and abstract rule.¹⁷⁵

Moreover, any wide interpretation might lead to more international organisations becoming implicated in internationally wrongful acts. Participation in internationally wrongful acts might appear as the norm rather than the exception which reduces the respect for international law and the willingness of international organisations to obey international rules.¹⁷⁶

¹⁷⁴ Boisson de Chazournes, Pergantis, ‘À propos de l’arrêt Behrami et Saramati’, *supra* note 87, 191, 220.

¹⁷⁵ Cf. M. Koskeniemi, ‘International law in the world of ideas’, in J. Crawford, M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (2012), 47, 60-61.

¹⁷⁶ Cf. H.P. Aust, *Complicity and the Law of State Responsibility* (2011), 89-90. However, as the proposed new criterion amounts to the most “severe” form of responsibility as international organisations are treated as

The conceptual nature of the new criterion of attribution adds another layer of difficulty. Similarly to the rules of complicity such as aid and assistance under Article 14,¹⁷⁷ it has some features of primary rules; it does not only address the consequences of an internationally wrongful act, but it extends their application to international organisations which would – in other circumstances – not incur responsibility.¹⁷⁸

It could be helpful to resort to the criterion of “intent” to distinguish between acts falling under the new joint criterion of attribution and cases of complicity. Another possibility would be to rely on a negative definition similar to the definition of “civilian” in IHL; any cooperative interaction between two or more international organisations which exceeds an act of complicity would be falling under the new criterion of attribution.¹⁷⁹ In other words, a contribution of such substantial character that it oversteps the threshold for joint commission would be necessary.¹⁸⁰ This matter was actually debated within the ILC during its 1978 session in the context of the definition of “aid and assistance”. Ushakov, the member from the USSR, described the problem of definition in the following terms:

[P]articipation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity.¹⁸¹

However, the exact contours of complicity in international law remain equally unclear.¹⁸² In his extensive treatise, Aust concludes that “aid and assistance” is a normative and case-specific concept, meaning that its content will have to be determined in the specific situation.”¹⁸³

equal partners, their conduct would – possibly or even most likely – fall under one of the other forms of responsibility under the ARIO.

¹⁷⁷ The ICJ held in the *Genocide* case, that “although ‘complicity’, as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the ‘aid or assistance’ furnished by one State for the commission of a wrongful act by another State”, *Application of the Convention, supra* note 98, para. 419.

¹⁷⁸ Aust, *supra* note 176, 188.

¹⁷⁹ In this context, “complicity” is just another term for the neutral concept of “aid and assistance”, cf. Crawford, *supra* note 29, 329.

¹⁸⁰ Aust, *supra* note 176, 216-217.

¹⁸¹ Yearbook of the International Law Commission (1978) Volume I, Summary records of the thirtieth session, 239, para.11.

¹⁸² Aust, *supra* note 176, 193-194. There are, indeed, various forms of complicity which can be found in different areas of international, for an overview, see e.g. A. Clapham, S. Jerbi, ‘Categories of Corporate Complicity in Human Rights Abuses’, in (2001) 24 *Hastings International and Comparative Law Review*, 339, 342-349.

¹⁸³ Given that the practice is even scarcer for international organisations than for states, there are no reasons why his conclusions cannot be applied in the context of international organisations, Aust, *ibid.*, 230. Crawford subscribed to the view of Aust, see Crawford, *supra* note 29, 405.

Another helpful way of narrowing the distinction between “aid and assistance” and “joint responsibility” could be to analyse which “entity (...) is best positioned to act effectively and within the law to prevent the abuse in question.”¹⁸⁴

7. *Application of the new criterion of „normative control“ in practice: Problems and Obstacles*

Chapter I of the ARIOs contains the provisions pertaining to the invocation of responsibility. Article 48, which is not a substantive rule of responsibility,¹⁸⁵ stipulates the principle of separate or individual responsibility: “Where an international organization and one or more (...) other international organizations are responsible for the same internationally wrongful act, the responsibility of each (...) organization may be invoked in relation to that act.” Thus, this article accommodates the primarily bilateral nature of international dispute settlement; the “plurality [of responsible actors] is reduced to bilateral relationships where issues of invocation of responsibility are concerned.”¹⁸⁶

Paragraph 2 further stipulates that “[s]ubsidiary responsibility [of another international organisation] may be invoked insofar as the invocation of the primary responsibility has not led to reparation.” The Commentary fails to define precisely which categories of states and international organisations would fall under the notion of subsidiary responsibility, but it states that the responsibility of a state member of an international organisation according to Article 62 ARIO belongs in this category.¹⁸⁷ It is rather likely that cases of aid and assistance and of direction and control would also fall into this category as they presuppose the breach of an international obligation by another organisation. Thus, their responsibility cannot be invoked without a previous determination as to the breach of an international obligation by the other international organisation(s). The vague framework providing for the invocation of international responsibility in the ARIOs therefore allows an accounting for the different arrangements of international dispute settlement in cases involving a plurality of actors.

¹⁸⁴ This argument was developed by Dannenbaum to interpret to which entity the conduct should be attributed to a state or an international organisation but it could also help to determine which organisations are to be held jointly responsible as they would be ones “best positioned to act effectively and within the law to prevent the abuse” in contrast to those organisations in a supporting role. See, Dannenbaum, *supra* note 133, 113, 157. Crawford generally considers such an interpretation, on which it was also relied by the Court of Appeal regarding the conduct of Dutchbat, as a “step forward in ensuring an effective regime of responsibility”, Crawford, *ibid.*, 209, see also pp. 206-208.

¹⁸⁵ Pierre d’Argent, ‘Reparation, Cessation, Assurances and Guarantees of Non-Repitition’, SHARES Research Paper 34 (2014), available at www.sharesproject.nl, 29.

¹⁸⁶ Messineo, ‘Attribution of Conduct’, *supra* note 55, 19-20.

¹⁸⁷ Report of the International Law Commission, Sixty-third session, *supra* note 23, 142, para. 2 of the commentary.

Finally, Article 48 (3) contains a without prejudice rule permitting the organisation paying reparation to have a right of recourse against the other responsible international organisations.

In the literature, this article has been criticised as failing to provide for “inherent differences that exist between situations with one responsible (...) international organisation and situations involving a plurality of responsible (...) organisations.”¹⁸⁸ Indeed, “[r]equiring the individualisation of responsibility leads to particular complexities in cases involving aid and assistance, coercion, the creation of joint organs, direction and control.”¹⁸⁹ Nevertheless, these are problems which are intrinsic to and inherent in the different systems for the settlement of international disputes, for whose application the ARIOs only provide a general and vague framework.

Article 49 ARIO increases the circle of international organisations and states which may invoke international responsibility beyond injured states or international organisations. In the case of *erga omnes* violations, all states are entitled to invoke international responsibility, whereas only the international organisations can invoke responsibility in the case of a breach of an *erga omnes* violation if “safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organisations invoking responsibility” (Article 49 (3)). Such a limitation upon international organisations is in conformity with the principle of speciality (*infra* 3.1.), but it could be questioned whether it is appropriate within the context of the present study. Unless one were to argue that the maintenance of international peace and security by regional organisations, such as those examined in this study, is also in the interests of the international community, regional organisations such as the AU or the EU would be precluded from invoking the international responsibility of the UN, whereas the latter could invoke the responsibility of the regional organisations.

In practice, several problems arise if one were to attempt the invocation of international responsibility in respect of a plurality of actors. These problems relate to the procedural and the substantive law applicable in international dispute settlement, and in particular to the admissibility of claims, issues of jurisdiction and standing, as well as the applicable substantive law.

Taking up the sketch of a breach of an international obligation arising during the deployment of a peacekeeping operation, as it was presented (*infra* pages 266-267), the following analysis will briefly address the main obstacles encountered, as well as suggest potential solutions and remedies with

¹⁸⁸ A. Vermeer-Künzli, ‘Invocation of Responsibility’, SHARES Research Paper 36 (2014), available at www.sharesproject.nl, 4.

¹⁸⁹ *Ibid.*, 10.

regard in particular to the application of the criterion of normative control. Any further analysis would go beyond the scope of the present study.

In the fictitious, but not unrealistic sketch of a case-scenario, a civilian was killed, which would amount to an alleged violation of the right to life. It was established earlier in Chapter III (*infra*, 3.2.2. and 3.2.2.6.2.2.) that the EU will in the near future accede to the ECHR, whereas no other international legal bodies with jurisdiction to hear cases of violations of human rights or international humanitarian law thus permit claims against international organisations. Thus, assuming that the EU had already acceded to the European Convention of Human Rights, the European Court of Human Rights could be seized of the dispute by the family of the victim.¹⁹⁰

The main problem which would arise is in which circumstances the ECtHR could assess the alleged breach of an international obligation by the EU under the Convention bearing in mind that the peacekeeping operation XY was deployed in a cooperative setting, involving various contributions by the UN, the AU, ECOWAS, as well as NATO. Generally speaking, any international organisation that is part of a group of responsible actors, but not part of the judicial proceedings invoking international responsibility, finds itself simultaneously both at an advantage and a disadvantage:

The advantage is that its responsibility and its contribution to the injury will not be identified. The disadvantage, though, is that it will be unable to argue its position, or bring additional evidence, and so on, to clear its name without compromising its position as a non-participant in the procedures.¹⁹¹

As mentioned earlier, the system of international dispute settlement is essentially bilateral in character, involving a claimant and a respondent. It is also derived from a conceptualisation of international law as a system of independent, sovereign actors whose consent is a requirement for the exercise of jurisdiction over them. To this end, the ICJ formulated the famous *Monetary Gold* principle, according to which the Court is barred from adjudicating the case “if the vital issue to be settled concerns the international responsibility of a third State [as] the Court cannot, without the consent of that third State, give a decision on that issue” if the third state’s “legal interests would not only be affected by a decision, but would form the very subject-matter of the decision.”¹⁹² In

¹⁹⁰ The question of the exhaustion of domestic remedies will not be examined. According to Article 45 (2) ARIO, the exhaustion of domestic remedies is only necessary insofar as it applies to a claim.

¹⁹¹ Vermeer-Künzli, *supra* note 188, 27.

¹⁹² *Case of the Monetary Gold Removed from Rome in 1943, Preliminary Question (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment of June 15th, 1954, 32-33. Although this case did not involve questions of shared responsibility, it is particularly relevant for that specific context, A. Nollkaemper, ‘Concerted Adjudication in Cases of Shared Responsibility’, SHARES Research Paper 40 (2014), ACIL 2014-17, available at www.sharesproject.nl and [SSRN](https://ssrn.com/abstract=2581111), 9. In its East Timor judgment, the Court specified that it cannot rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case, even if the

contrast, the Court held in the *Nauru* case that it is not banned from exercising its jurisdiction if “the determination of [third states’] responsibility [is] not a prerequisite for a decision to be taken” and their “interests (...) do not constitute the very subject matter of the judgment to be rendered.”¹⁹³ It is however doubtful whether the *Monetary Gold* principle is also applicable to international organisations. Indeed, the explicit reference to a third state suggests an application of that principle solely to states.¹⁹⁴ Nevertheless, such an application of the principle was acknowledged by Judge Schwebel in his dissenting opinion in the *Lockerbie case*.¹⁹⁵ In the case relating to the *Application of the Interim Accord*, the ICJ did not immediately reject the application of the principle to NATO, but distinguished the facts from those in the *Monetary Gold* case, thereby leaving the door open to its application to international organisations.¹⁹⁶ Nollkaemper nevertheless argues against an application of the principle to international organisations; he perceives the principle as deriving from consent. Consequently, in his view, it can only apply to these entities that have consented to the ICJ’s jurisdiction. If the Court does not exercise jurisdiction over an entity, it can also not pronounce itself – from a technical point of view – upon the rights and obligations of that given entity. Moreover, he sees the risk that an application to international organisations could be the first step to a wider application of the principle beyond states and international organisations.¹⁹⁷

In the ECtHR Statute and rules of procedure, there is no inherent prohibition on claims against more than one state. The ECtHR has decided cases against more than one state and even held one or both states responsible.¹⁹⁸ But the ECtHR always follows the law of international responsibility approach by isolating the conduct of each state and trying to establish its individual responsibility. The analysis in the previous chapters demonstrated that such a breakdown of responsibility is precisely not possible in the circumstances of cooperation between international organisations in peacekeeping operations. Moreover, on the basis of the principle of the relativity of treaties, the ECtHR can in any

right in question is a right *erga omnes*, *Case concerning East Timor (Portugal v. France)*, Judgment of 30 June 1995, 102, paras. 28-29.

¹⁹³ *Case concerning certain phosphate lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, 261, para. 55. The Court confirmed this view in the *Case of the Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, 659-660, para. 43.

¹⁹⁴ *Monetary Gold*, *supra* note 192, 32-33. Nollkaemper, ‘Concerted Adjudication’, *supra* note 192, 10.

¹⁹⁵ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998 (Dissenting Opinion of President Schwebel), 172.

¹⁹⁶ *Application of the Interim Accord*, *supra* note 193, paras. 43-44.

¹⁹⁷ Nollkaemper, ‘Concerted Adjudication’, *supra* note 192, 10-11.

¹⁹⁸ See, for example, *Bankovic and others v. Belgium and others*, Admissibility, Decision of 12 December 2001; *Behrami*, *supra* note 29; *Case of Ilaşcu and Others v. Moldova and Russia*, Judgment of the Grand Chamber, 8 July 2004; *Case of Rantsev v. Cyprus and Russia*, Judgment, 7 January 2010. For further references, see M. den Heijer, ‘Procedural Aspects of Shared Responsibility in the European Court of Human Rights’, in (2013) 4 *Journal of International Dispute Settlement*, 361, 381.

case not exercise jurisdiction over states or international organisations which are not parties to the Convention.¹⁹⁹ The *Monetary Gold* principle is generally not applied by the ECtHR,²⁰⁰ but an application of the principle would also, arguably, preclude the European Court of Human Rights from rendering a judgment with regard to the sketch of a fictitious case scenario, unless the other, involved international organisations were also part to the proceedings.

There is only one feasible and legal option that allows not only to accommodate the (legal) interests of the other international organisations involved, but also to consider their contributions to the internationally wrongful act in question – a third party intervention by these organisations under Article 36 (2) of the Convention. Intervenors can thereby present evidence and defend their legal interests. In the *Behrami/Saramati* case, the UN intervened as a third party²⁰¹ and the Draft Accession agreement of the EU likewise foresees such as possibility for other international actors.²⁰² Nevertheless, the ECtHR could only pronounce, even in the case of a third party intervention, upon the individual responsibility of the EU, unless the intervening involved international organisations were also to become members to the ECHR; a situation which would be not possible without further major changes to the Convention, in particular with regard to the *espace juridique* of the Convention, at least for the AU and ECOWAS.

Quite surprisingly, a departure from the principle of individual responsibility is contained is also contained in the Draft Accession Agreement with regard to the new co-respondent mechanism. Article 3(7) of the Protocol on the EU accession to the ECHR stipulates that the joint responsibility of the EU and member states is envisaged under the new co-respondent mechanism as the normal rule:

If the violation in respect of which a High Contracting Party has become a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless they have jointly requested the Court that only one of them be held responsible and the Court decides that only one of them be held responsible.

Although that disposition was included in order to prevent “a risk that the Court would assess the distribution of competences between the EU and its member States”²⁰³ it could also be seen as an

¹⁹⁹ Cf. also Nollkaemper, ‘Concerted Adjudication’, *supra* note 192, 4.

²⁰⁰ *Ibid.*, 11. It is, as, indeed, the parties to the Convention have given their prior consent to the exercise of jurisdiction by the Court by becoming parties to the ECHR:

²⁰¹ *Behrami*, *supra* note 29, paras. 118-120.; den Heijer, *supra* note 198, 361, 377.

²⁰² Fifth Negotiation Meeting, *supra* note 49, 23, para. 45.

²⁰³ 8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16, 19, para. 54; EU/Council of Europe, Fourth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human

acknowledgement of the fact that “the traditional attribution rules and the principle of independent responsibility are ill-suited”²⁰⁴ for cases of joint responsibility, particularly when the actions of international organisations are very intertwined. The fact that the criterion of normative control is construed precisely for those cases in which the attribution of individual organisations to a single injury cannot be distinguished adds an additional layer of difficulty to the exercise of jurisdiction by the ECtHR, which establishes the individual responsibility of each respondent in a given case. This problem is, however intrinsic to the general conceptualisation of the system of international dispute settlement.

However, the EU and the other involved organisations could contribute to reach a halfway satisfactory solution –in terms of transparency in global governance, the rule of law, and the sanctity of international obligations. The EU could accept the responsibility before the ECtHR; the other international organisations involved in the peacekeeping operation would intervene as third parties; and the EU and the other organisations would agree that the EU could recover an equal share of any reparation paid on the basis of a separate agreement concluded between all organisations or on the basis of a specific disposition in the SOMA in conformity with Article 48 (3) ARIO.²⁰⁵

This assumption of responsibility by the EU would operate similar to the practice of the United Nations, which generally assumes international responsibility for the conduct of UN peacekeeping operations with regard to the troop-contributing countries. Thus, if the degree of cooperation between international organisations during a peacekeeping operation is of such a degree as to fall under the criterion of normative control, it would be automatically assumed that one international organisation should assume the responsibility, on behalf of the involved organisations, in any case pending before a competent international body.

Generally speaking, the UN should assume a leading role. The analysed practice of the regional organisations has demonstrated that they increasingly seek authorisation for the deployment of a peacekeeping operation from the Security Council which is the ultimate guardian for the maintenance of international peace and security, thus it is highly unlikely that a peacekeeping operation which contains elements of cooperation with other international organisations will be deployed without any contribution by the United Nations. Returning to the sketch of a fictitious case

Rights, Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 8 January 2013, 12, para. 54.

²⁰⁴ den Heijer, *supra* note 198, 361, 383.

²⁰⁵ The EU and the UN are currently negotiating a Framework agreement for future peacekeeping operations which will most likely also contain a clause with regard to respective claims by the organisations against each other, Presentation by Katarina Grenfell of the Office of Legal Affairs at the United Nations at the SHARES Seminar in Amsterdam on 03 October 2014.

scenario, the EU would assume responsibility and it would arrange internally with the other involved organisations for compensation of the reparation paid. Another theoretical option would be to use cross-judging in situations of shared responsibility.²⁰⁶ This technique also presupposes that other courts and tribunals could exercise jurisdiction over the other international organisations involved in the fictitious case scenario. But despite the benefits that this option presents – such as the prevention of double-dipping, access to evidence, and the prevention or mitigation of jurisdictional disputes²⁰⁷ – it creates problems of its own.²⁰⁸

Nevertheless, there is one advantage of an application of the criterion of normative control before an international court over an application of other rules for a plurality of responsible actors, such as aid and assistance. If the application of the criterion of normative control has been triggered, the application of jurisdiction under human rights treaties will be comparatively easy in comparison to a situation in which international organisations cooperate in a peacekeeping operation, but at least one organisation would be only aiding and assisting. In the former case, the fact that the criterion of normative control is applicable signifies that all involved organisations generally also exercise jurisdiction under human rights law jointly,²⁰⁹ whether it is under the personal, the spatial or a combined personal-spatial model of jurisdiction. In the case of at least one international organisation aiding and assisting one or more international organisations, the exercise of jurisdiction under human rights law would not only have to be established individually, but their human rights obligations might also be different. The aiding and assisting organisation might only exercise jurisdiction under the personal model, whereas the other organisation(s) could be exercising jurisdiction under the spatial model; the aiding and assisting organisation could then only be bound by negative obligations under human rights law, whereas the other organisation(s) could be bound by positive human rights obligations.

In summary, the invocation of international responsibility in the context of cooperation of international organisations in peacekeeping operations raises several problems, which do, however, not only derive from the specific context of the present study, but primarily from the inherent inaptitude of the system for the settlement of international disputes to accommodate sufficiently for the intrinsic specific features of cases involving a plurality of actors.

²⁰⁶ See generally Nollkaemper, 'Concerted Adjudication', *supra* note 192.

²⁰⁷ *Ibid.*, 35.

²⁰⁸ *Ibid.*, 19-24.

²⁰⁹ See also, *infra* 3.3.

4.2. Outlook for the case studies

The case studies in the next part will explore and define this new notion of “normative control”, on the firm general foundation of the Articles of the International Law Commission. The focus of the case studies is on recent and on-going peacekeeping operations for two reasons. First of all, they display a higher degree of cooperation between international organisations, and they continue to evolve. Secondly, on-going peacekeeping operations allow the application of the law as it is and stands nowadays. Bearing in mind the findings in particular of Chapter II, as well as taking into account the nature of the specific peacekeeping operations whose geographical focus is the African continent, the following propositions can be made:

NATO, with the exception of KFOR, might find itself in an auxiliary role regarding the attribution of conduct and/or responsibility. The EU entertains strong institutional ties with both the AU and the UN, but its engagement on the African continent is more limited. Nevertheless, these three organisations might be jointly responsible. ECOWAS is probably situated somewhere in between the EU and the UN and the AU on the basis of the fact that it is also part of the African Peace and Security Architecture.

In peacekeeping operations in other geographical and political settings, the involved organisations might display a different kind of cooperation and they would then potentially, also be held responsible in a different way.