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

Moelle, M.P.

Chapter VI: Conclusions and Recommendations

To "promote international co-operation and to achieve international peace and security" and "to unite our strength to maintain international peace and security" - these were the wishes of the founders of the League of Nations and the United Nations – and universal peace remains a desirable ideal.[1] Peacekeeping operations deployed by the United Nations and regional organisations have become a major tool for conflict regulation in the 21st century.

Universalist and regionalist positions, with regard to maintaining international peace and security, have converged in the practice of international organisations. Cooperation between international organisations has emerged as the key driver in defining roles or niches in the system of collective security and in establishing a division of labour for the mutual benefit of the involved organisations. This development included the institutionalisation of relations among the actors, as well as an increase in cooperation in the operational context – during the deployment of peacekeeping operations. This process benefited from the wide margin of discretion provided for the Security Council under the United Nations Charter. International law has played a double role with regard to cooperation between international organisations and the maintenance of international peace and security. On the one hand, peacekeeping operations as a tool for conflict resolution could not have been "invented" without the recognition of the concept of "implied powers" as applicable to international organisations. On the other hand, the non-existence of established international legal rules regulating the conduct of international organisations and questions of their responsibility under international law resulted in a decades long purely practice driven approach, which in turn created further legal uncertainties.

The *bon mot* that international humanitarian law is always one war behind concerning the regulation of armed conflict, as referred to in the introduction of this study, is most certainly also applicable to the context of the international responsibility of international organisations. For several centuries, following the Westphalian peace, the system of international law was based on the principle of the sovereign equality of states, and characterized by a purely bilateral conception of the relations among states. The possibility that several actors could be jointly responsible was absolutely *systemfremd* (alien to the system). The Articles on State Responsibility, as codified, in 2001 therefore only admit the possibility of joint responsibility in the limited circumstances of aid or assistance, direction and control, or coercion. In addition, an article on plurality of responsible states was

[1] Preamble of the Covenant of the League of Nations and of the Charter of the United Nations respectively.

inserted in the project, without, however, defining the necessary criteria for a joint attribution of conduct. The 2011 Articles on the Responsibility of International Organisations did not contain any assimilation of the criteria for the attribution of conduct on recent practice, but they were transferred from the previous set of articles on state responsibility. They are therefore an expression of several centuries of practice within a state-centric system, at least to the extent that they define the rules on the attribution of conduct.

As it was rightly acknowledged by the ILC and its Special Rapporteur, the practice of international organisations is sparse in some areas due to the fact that they are new entities in the international arena, at least in comparison to states. Moreover, the feedback or enthusiasm of international organisations in commenting on the project was not overwhelming, which is *per se* not surprising; from an organisational point of view, the legal uncertainties associated with the non-existence or at least non-codification of applicable rules on responsibility were outmatched by the liberty of conduct it afforded them. One could even raise the question whether the cooperation among international organisations, and in particular the high intensity of cooperation in the area of the maintenance of international peace and security had taken place if legal rules with regard to the responsibility of international organisations would have existed when the UN and the first regional organisations were founded.

The central research question, this study endeavoured to explore, whether international organisations cooperating in peacekeeping operations can be jointly responsibility for violations of international law occurring during the deployment of such operations can be responded to affirmatively. In particular the case-studies illustrated that there are instances, in which internationally wrongful acts can be attributed not only to one, but to two or several international organisations.

An analysis of the applicable legal framework to peacekeeping operations, illustrated that the complex interplay of cooperation mechanisms and arrangements is accompanied by a complicated network of applicable norms which multiplies the potential for joint responsibility of international organisations. The fact that internationally wrongful acts of peacekeepers could possibly be attributed jointly to international organisations – applying the normative control criterion – on the basis of violations of different primary norms increases the flexibility and the likelihood that international organisations can be hold responsible under international law.

In the end the Articles on the Responsibility of International Organisations have proven to be unsuitable for regulating the responsibility of international organisations in the context of peacekeeping operations as they are based on the premise that cooperation among international

organisations is the exception rather than the rule. Whereas, on the one hand, it could be seen as a lacuna, on the other hand, it was already highlighted in the discussions within the ILC that the context of peacekeeping operations might be too specific to fall under any general rule of attribution (*infra*, 4.1.3.1.). The decision of the commission to abstain from including any specific disposition on peacekeeping operations therefore allows for an elaboration of an applicable rule by other actors, as well as in practice. The present study proposed the creation of a new criterion of attribution, namely "normative control" based on the intertwined cooperation arrangements between international organisations on various levels of command and control in a peacekeeping operation and in conformity with the *lex specialis* rule contained in Article 64 ARIO.

Nevertheless, the present study has illustrated that the evolution of relations among the UN and regional organisations was also induced by several external and internal factors, among which are scarcities of resources and competition for legitimacy, which also led the organisations to develop their competences in complementary areas and based on different doctrines to deploy peacekeeping operations. These non-legal, external factors also add to the difficulty in defining the applicable legal framework. In addition, the relations among international organisations, and particularly, in the area of maintaining international peace and security are continuously evolving and non-static. In the course of their evolution, there may be other instances of confrontation or repositioning of certain organisations which would also affect some of the specific findings of this study, such as the emerging division of labour for maintaining international peace and security on the African continent. Furthermore, another obstacle exists in the form of a casuistic approach taken by international organisations in cooperating in peacekeeping operations. A thorough study and analysis of other case-studies of peacekeeping operations might allow shedding more light on the criterion for the attribution of conduct in peacekeeping operations.

However, two new obstacles are already on the horizon, which concern the further multiplication of actors involved in peacekeeping operations. On the one hand, inter-mission cooperation between peacekeeping operations is increasing; on the other, peacekeeping operations have now started to use private contractors for certain tasks such as guard duties around camps.[2] Furthermore, states have resorted to deploying troops in peacekeeping operations which are part of bi- or multinational cooperation arrangements, thus following the concepts of smart defence or sharing and pooling. In mid-February 2014, France and Germany announced the deployment of parts of the Franco-German

[2] With regard to the implications in terms of international responsibility for the acts of these private contractors, see e.g. P. Palchetti, 'The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations', (2013) 95 *International Review of the Red Cross*, 727, 731-732.

brigade to Mali as part of EUTM Mali.[3] The brigade itself is under joint French-German command, but it is incorporated into the command structure of Eurocorps. This new multiplication of involved actors will further increase the likelihood for joint responsibility and consequently will also increase the likelihood that the threshold for the application of the normative control criterion will be surpassed.

The development towards more cooperation between international legal entities and the multiplication of actors, however, is not confined to the particular field of peacekeeping operations, but appears in all areas of activities regulated by international law. Thus, even on a larger scale, it is necessary to reflect upon the current state of the development of the law and mechanisms of international responsibility in order to prevent a further disconnect between the legal framework and reality. The more power international organisations have, the more important the effective regulation of responsibility of international organisations is.[4] Arguments of legal certainty also warrant the formulation of such a recommendation. As it was pointed out by Thomas Franck:

> The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.[5]

Any alternative approach focusing solely on a specific field of international law could possibly also contribute to a further fragmentation of international law.

A start would be to adapt the framework for international dispute settlement which in its current state is based on a bilateral conception. As the analysis in Chapter IV illustrated, the invocation of international responsibility also raises certain problems which are in similar fashion an expression of the bilateral conception of international dispute settlement. In doctrinal writings, it has been suggested that it could be possible to establish an international or World Court for Human Rights which would have the competence to review the conduct of peacekeeping operations.[6]

However, this is an idea which would possibly cause more problems than it would solve, including a further fragmentation of international law. In any case, it is unlikely that states would subscribe to

[3] See, for example, *Defense News*, 'France, Germany To Send Parts of Joint Brigade To Mali', available at: http://www.defensenews.com/article/20140219/DEFREG01/302190033/France-Germany-Send-Parts-Joint-Brigade-Mali

[4] Cf. E. Paasivirta, P.J. Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations', in (2005) XXXVI *Netherlands Yearbook of International Law*, 169, 173.

[5] T. M. Franck, *Fairness in International Law and Institutions* (1998), 7.

[6] M. Nowak, 'The Need for a World Court of Human Rights', in (2007) 7 *Human Rights Law Review*, 251 – 259

such an idea, as the opposition of a considerable group of states towards a ratification of the Rome Statute of the ICC demonstrates. One could rather envisage the Security Council requesting an advisory opinion from the International Court of Justice regarding the application of human rights law to international organisations, as well as the criterion for the attribution of conduct to two or more international organisations. An advisory opinion of the ICJ would have the advantage over a World Court for Human Rights that it would be universally accepted, without being, legally binding, therefore safeguarding also a margin of discretion for states and international organisations.

The question is, however, whether such a proposal would correspond to the interests of the UN, other international organisations and states alike. Major changes to the international legal system are not possible without the involvement and the agreement of states. Although, in practice, the UN assumes that it is exclusively responsible for the conduct of UN Peacekeepers, it is unlikely that the United Nations would voluntarily subscribe to an acceptance of responsibility for the conduct of UN authorised forces or for any conduct of other international organisations under the concept of joint responsibility. It is also implausible that other international organisations would voluntarily accept joint responsibility.

Of course, a UN internal attempt of regulation would also be feasible, for instance, within the Sixth Committee of the GA which is the primary forum for the consideration of legal questions in the GA, or even within the SC – Article 64 ARIO refers expressly to the existence of *lex specialis* rules. With regard to the Security Council, however, the Latin expression of "*Quis custodiet ipsos custodies?*" (Who guards the Guardian?) comes to mind. Bearing in mind the mandate of the Security Council, it could be questioned as to whether the Security Council could possibly elaborate a just and fair rule of attribution or as to whether such an attempt at regulation would not correspond to putting the fox in charge of the henhouse. The wider participation in the GA might be better suited to accommodate any such concerns.

The law of international responsibility in its current state of development also enhances the probability of a further augmentation of cooperation among states and international organisations alike. As long as they do not enter into cooperation arrangements with the intent of committing violations of international law, the existing legal framework will not allow joint responsibility.

The dispositions under the ARIO, as well as under the Articles on State Responsibility, require an element in the form of intent to allow the attribution of conduct also to one or more other actors and as indicated above, they do not define the criterion under which states or international organisations could otherwise be held responsible. Therefore, the lack of effective regulation creates

some leeway for international organisations and states to enhance their cooperation arrangements without a real or substantial risk of being held accordingly responsible.

Consequently, although international organisations might be unwilling to contribute to the regulation of cases of joint responsibility, their involvement in any attempt at regulation, be it in the form of cooperation agreements specifying the distribution of responsibility or via a request of an advisory opinion of the ICJ, would be, from their point of view, beneficial as it would allow them to influence and even steer the outcome. In any case, they could contribute their expertise to the regulation attempts. The alternative is that courts and tribunals will attempt to regulate this question insofar as they have jurisdiction. Bearing in mind the forthcoming accession of the EU to the European Convention of Human Rights, further judgments not only on the responsibility of international organisations but also on joint responsibility, can be expected.[7]

The role of states with regard to potential further regulations of joint responsibility appears to be unclear. On the one hand, the elaboration of rules on the joint responsibility of international organisations will possibly increase their protection from being held responsible for acts of organs which were seconded to these organisations. On the other hand, the development of rules on the joint responsibility of international organisations could trigger the development of similar rules for states; the ARIO were also based upon the Articles on State Responsibility. An important aspect in this discussion is the arrangement for financial restitution within the different international organisations. So far, there is no standard model for international organisations to process claims for financial restitution and to pay compensation, including for damages arising in the context of peacekeeping operations. Of course, reasons of legal certainty and transparency support a proposal of a standardised regulation of financial damages by international organisations. The problem is that states, despite being generally willing to cooperate with international organisations, could be opposed to any regulation at the organisational level as it could be perceived as a transfer of competences and a loss of sovereignty.[8]

According to Article 40 ARIO, a responsible international organisation "shall take all appropriate measures (…) to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter" and the "members of a responsible international organization shall take all the appropriate measures that may be required (…) in order to enable the organization to

[7] The ECtHR in *Al-Skeini* and also the Dutch Court of Appeal in the Srebrenica cases did not exclude the possibility of joint responsibility.

[8] In contrast, from the perspective of international organisations, it is a rather appealing idea as it also creates jobs within the organisation. This ambivalent attitude of states was also confirmed during interviews with members of staff at the General Staff College of the German Armed Forces, as well as at the German Ministry of Defence.

fulfil its obligations." Thus, depending on the nature of arrangements for financial restitution in an international organisation, the main contributors to the budget of the organisation might be opposed to any efforts or undertakings which would increase the likelihood of international organisations being responsible, if compensation would be paid by the general budget of the organisation and not primarily or entirely by those states whose agents or organs might have contributed to or caused the internationally wrongful act. Thus, it appears that within the wider framework of the international community, any attempt or undertaking to further regulate the responsibility of international organisations can only be carried out effectively if states agree.[9]

Focusing once more on the specific subject of the present study, several practical recommendations can be made.

First, with regard to the fields of human rights and humanitarian law, it would be commendable if the UN and regional organisations were to engage in activities regarding the clarification of rules applicable in peacekeeping operations. The United Nations could, for example, adopt a bulletin on human rights obligations to be observed while deploying peacekeeping operations.[10] Legal uncertainty, particularly in the form of diluted responsibility, can also negatively impair the efficiency and performance during the deployment of a peacekeeping operation "as the various actors involved might not feel fully in charge."[11]

Moreover, bearing in mind in particular the complex cooperation arrangements for AFISMA, it is recommended that the UN and regional organisations include dispositions regarding the distribution of responsibility in their respective agreements if they cooperate in peacekeeping operations.[12] It is even more relevant and necessary to prevent blame shifting between the various involved actors as in the Srebrenica cases where both theNetherlands denied responsibility and the UN claimed immunity, which in the end, also corresponds to a denial of responsibility.[13]

---

[9] Their participation is in any case necessary, as members of the organisations, who ultimate decide upon the actions undertaken by the organisations whose members they are.

[10] N. Quénivet, 'Human Rights Law and Peacekeeping Operations', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 99, 102. The Human Rights due diligence policy on United Nations support to non-United Nations security forces as adopted in 2013 may be considered as a first step in the right direction, Annex to Identical letters dated 25 February 2013 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, UN Doc. A/67/777–S/2013/110 (2013). See also H.P. Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces', (2014) *Journal of Conflict and Security Law*, Advance Access published 24 June 2014, 1, in particular 11-13.

[11] T. Tardy, 'Hybrid Peace Operations: Rationale and Challenges', in (2014) 20 *Global Governance*, 95, 112.

[12] Cf. also A. Orakhelashvili, *Collective Security* (2011), 328.

[13] A. Nollkaemper, D. Jacobs, 'Shared Responsibility in International Law: A Concept Paper', ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl), 20.

Regarding the wider question of the relationship between the UN and regional organisations, it is recommended to elaborate upon a standard model agreement which may be used to expand and formalise consultation and cooperation between the UN and regional organisations for the specific context of the maintenance of international peace and security.[14] It could even include articles regarding the question of international responsibility. The AU had also recommended enhanced consultations between the AU PSC and the UN Security Council.[15]

As noted by the Security Council itself, there is a need "for a comprehensive analysis of lessons learned from practical cooperation between the United Nations and the African Union"[16] and this statement is equally valid for the practical cooperation between the United Nations and other regional organisations.

Regarding the interaction and the relations with the AU, the Security Council needs to address in a systematic manner the issue of the funding of AU peace support operations undertaken with the consent of the UN, through the use of UN assessed contribution.[17] Such an engagement is not only necessary to increase the effective maintenance of international peace and security on the African continent, but also in order to address the legal implications of the power wielded by the UN over the AU with regard to the payment of AU peacekeeping operations. Naturally, the EU is also advised to do so accordingly for the financial mechanisms on the basis of its African Peace Facility.

The example of Mali showed that the UN and regional organisations have to adapt to new security challenges and that includes increasing the rapid deployment capacities of all international organisations.[18]

Finally, it is recommended that NATO institutionalises its relations with the UN and establishes a permanent mission to the UN in New York.[19] It would allow the Alliance to be more actively involved

[14] Cf. Report of the High-Level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565 (2004), 85, para.272 (b).
[15] *Ibid.*
[16] Security Council Resolution 2033, UN Doc. S/RES/2033 (2012), Preamble, 2.
[17] Report of the Chairperson of the Commission on the African-Union-United Nations Partnership: The Need For Greater Coherence, PSC/AHG/3.(CCCXCVII) (2013), 3, para.6.
[18] ECOWAS criticised that the UN was unable to respond more effectively to the offensive by terrorist groups in the south of Mali and the deadly hostage-taking situation at the natural gas facility in Algeria and that there "is a need to further explore the possibilities offered by the normative framework for peacekeeping operations, in particular in the timely articulations of the provisions of Chapters VI, VII and VIII of the Charter of the United Nations.", Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), Statement by Mr. Bamba (Côte d'Ivoire) speaking on behalf of ECOWAS, Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 52.
[19] Such a proposition was already contained in the report NATO 2020: Assured Security; Dynamic Engagement. Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO, 17 May 2010, 25. The AU decided to strengthen its Permanent Mission to the UN in New York in September 2013, "including through the establishment of a dedicated standby team to support African members on the Security Council",

in debates at the UN and it would prevent that NATO is further sidelined regarding the deployment of peacekeeping operations.

The limited scope of this study only permitted an insight into the specific field of cooperation of the United Nations and four regional organisations in peacekeeping operations. The study confirmed the original premise it was set out to explore, the question as to whether the existing legal framework would be appropriate to regulate the conduct of international organisations cooperation in peacekeeping operations. But it also became evident that a major transformation of international law is currently taking place towards a less state-centric, multi-actor network of institutionalised and multifarious relations which poses questions with regard to the general regulation of international responsibility under international law, as well as the general direction and conception of international law as a system. This study might serve as a stepping stone for further studies and inquiries with regard to these complex questions the international community is confronted with.

Peace and Security Council, 397th Meeting at the Level of the Heads of State and Government, New York 23 September 2013, PSC/AHG/COMM/1.(CCCXCVII), 5, para.9 v.