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Chapter V: The case-studies

This Chapter introduces the four different case-studies which are part of this study. They analyse the attribution of conduct to international organisations for internationally wrongful conduct committed by peacekeepers in Kosovo (KFOR), Darfur (UNAMID), South Sudan (UNMISS and UNISFA), and finally in Mali (AFISMA and MINUSMA). The chronological order of their examination was chosen as it allows us to highlight once again the continuously developing character of the relations among these organisations which are becoming increasingly institutionalised. In addition, this approach might also be beneficial for the purpose of further defining the criterion of attribution as the development towards more cooperation simultaneously takes place on the intra-mission level. Therefore, whereas the framework for coordination is rather limited in the case of KFOR and UNMIK, the case-study of Mali demonstrates the full integration of the whole mission within a cooperative framework. On the one hand the case-studies serve as representative examples of peacekeeping operations; on the other they provide a basis for a circumscription of the criterion of normative control. Furthermore they might allow a certain generalisation of the criterion for future peacekeeping operations.

On the basis of the chronological approach, it is possible not only to trace the development of intra-mission cooperation, but also to identify these particular features which constitute the required nexus justifying the attribution of conduct to two or several international organisations. Nevertheless, the analysis will also demonstrate that intra-mission cooperation is unique in each case and that there is no tangible blueprint for categorising it. Any application of law requires an analysis of the specific circumstances of a given case. The fact that there is a vast diversity of intra-mission cooperation arrangements underlines the necessity to thoroughly analyse the individual circumstances in each and every case-study with the aim to further circumscribe the suggested special criterion of attribution.

5.1. The Attribution of Conduct and the difficulty to classify intra-mission cooperation

1. Attribution of Conduct of KFOR

Throughout Kosovo, and bearing in mind its operational Mandate, KFOR is cooperating with and assisting the UN, the EU and other international actors, as appropriate, to support the development of a stable, democratic, multi-ethnic and peaceful Kosovo

- KFOR official homepage¹

KFOR constitutes the first of four case-studies of this chapter. The decision of the European Court of Human Rights in *Behrami/Saramati* to attribute the conduct of KFOR troops to the UN, despite being a NATO-led operation raises implicitly the question whether the conduct of KFOR troops could not have been attributed both to the United Nations as well as to NATO.² Indeed, some authors suggest that the conduct of KFOR can be generally attributed to the UN and NATO: “Nato [sic] is responsible for the ‘direction’ of KFOR and the United Nations for ‘control’ of it.”³ Another author suggests “[t]he

¹ NATO’s Role in Kosovo, <http://www.aco.nato.int/kfor/about-us/natos-role-in-kosovo.aspx>

² The ECtHR, however, reiterated its view in the follow-up decisions of *Kasumaj v. Greece* and *Gajić v. Germany*, attributing the conduct of national contingents of KFOR to the UN as well as attributing the conduct of the High Representative in Bosnia and Herzegovina to the UN, International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), General Assembly, Official Records, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10 (2009), 68, para. 10 of the commentary; International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011), 89, para. 11 of the Commentary.

³ G. Gaja, Third report on responsibility of international organisations, UN Doc. A/CN.4/553 (2005), 12, para. 28. See also *Case concerning Legality of Use of Force (Yugoslavia v. France)*, Preliminary Objections of the French Republic, 5 July 2000, 29, para. 25; 33, para. 46; A. Pellet, ‘L’imputabilité d’éventuels actes illicites. Responsabilité de l’OTAN ou des Etats membres’ in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (2002), 193, 199; N. von Woedtke, *Die Verantwortlichkeit Deutschlands für seine Streitkräfte im Auslandseinsatz und die sich daraus ergebenden Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen* (2010), 140; G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 117; General Assembly, Sixtieth session, Official Records, Sixth Committee, Summary Record of the 13th meeting, UN Doc. A/C.6/60/SR.13 (2005) (Mr. Hmoud, Jordan), 3, para. 12. In contrast Blokker suggests that whereas the UN was clearly responsible for UNMIK, KFOR or NATO could have been responsible for KFOR’s conduct, H.G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 1016, para. 1590; For a critical view of the joint responsibility of UN and UNMIK see also Häußler, U. Häußler, ‘Human Rights Accountability of International Organisations in the Lead of International Peace Missions’, in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 215, 240; P.M. Dupont, ‘Detention of Individuals during Peacekeeping Operations: Lessons Learned from Kosovo’, in R. Arnold, G.-J. A. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (2006), 249, 252; European Commission for Democracy through Law (Venice

Court could have examined in the first place KFOR's legal status and, had it satisfied itself that KFOR was a subsidiary organ of NATO, perhaps attributed its conduct to NATO."⁴ Tomuschat asserts that

[t]here could be no doubt that the political direction of the operation in Kosovo remained in the hands of the UN. KFOR was meant to ensure public safety and order until UNMIK could take responsibility for that task. It was enjoined to support UNMIK and cooperate with it; thus, it was part of a concerted action by the UN.⁵

This quick overview shows that several arguments are made to determine the legal status of KFOR, as well as which entity is responsible for the conduct of KFOR: political control vs. operational control, direction vs. control, and also the legal status of KFOR. As the present study argues that acts committed in a peacekeeping operation under the operational command and control can be also attributed to another organisation which is outside of the military chain of command of the latter, the element of "political control" or "normative control", based on the exercise of influence through institutional relations, is particularly important. Moreover, it is important as the conduct is ultimately attributed to the organisations through their respective organic structure and their political organs are at the top of the echelons. In this regard, it is preferable to focus primarily on the first phase of the provision of security in Kosovo. According to the UNMIK Report submitted to the Human Rights Committee in 2006,

[t]he provision of security on Kosovo was designed to undergo three phases:

- In the first phase, KFOR was responsible for ensuring public safety and order until the international civil presence could take responsibility for this task. Until the transfer of that responsibility, UNMIK's civilian police advised KFOR on policing matters and established liaison with local and international counterparts;
- In the second phase, UNMIK took over responsibility for law and order from KFOR and UNMIK civilian police carried out normal police duties and had executive law enforcement authority;

Commission), Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, CDL-AD (2004)033 (2004), 18, para. 79; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 518.

⁴ N. Tzagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 245, 252. The Venice Commission likewise considered KFOR as an organ of NATO, European Commission for Democracy through Law, *ibid.*, para. 63.

⁵ C. Tomuschat, 'The European Court of Human Rights and the United Nations', in A. Føllesdal, B. Peters, G. Ulfstein (eds.), *The European Court of Human Rights in a National, European and Global Context* (2013), 334, 353.

- In the third phase, which is being implemented currently, UNMIK is in the process of transferring responsibilities for law and order and border policing functions to the Kosovo Police Service. UNMIK civilian and border police are reverting to training, advising and monitoring functions.”⁶

Consequently, the incentives for cooperation between KFOR and UNMIK were the greatest in this first phase of deployment and it is thereby most interesting for the purpose of analysing the distribution of international responsibility.

The European Court of Human Rights’ judgment in *Behrami* seems to have been inspired by the writings of Sarooshi.⁷ In his book, Sarooshi argued that the adoption of resolution by the Security Council authorising the use of military force by an international organisation amounts to a delegation of powers of the Security Council to this particular organisation. Thus, in his view, the Council would have temporarily given away some of its own powers, instead of having simply authorised the use of force, a view which is taken by other scholars.⁸

The distinction between the two concepts has been highly debated in legal scholarship,⁹ but it appears in any case correct that the Court failed to distinguish between the act conferring authority to act, Security Council Resolution 1244, and the actual exercise of authority by KFOR and UNMIK.¹⁰ If the Security Council decides to authorise a peacekeeping operation under the authority of another international organisation and then “retreats into its shell” and abstains from exercising from any form of supervisory control or influence over the execution of the mandate by the peacekeeping operation, there would be no nexus at all to attribute conduct and/or responsibility to the UN.

⁶ Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999, Kosovo (Serbia and Montenegro), UN Doc. CCPR/C/UNK/1 (2006), 8, para.30.

⁷ D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of Its Chapter VII Powers* (2000), 163. Cf. *Agim Behrami and Bekir Behrami against France, Ruzdhi Saramati against France, Germany and Norway*, Decision on Admissibility, 2 May 2007, paras. 129, 135.

⁸ Cf., for example, L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l’Académie de La Haye, Volume 347 (2010), 79, 322, 324-335; M. Milanović, T. Papić, ‘As Bad As It Gets: The European Court of Human Rights’ *Behrami And Seramati* Decision And General International Law’, (2009) 58 *International and Comparative Law Quarterly*, 267, 279. So one can also ask, whether the Security Council really has “‘civil administration powers’ over Kosovo, which it delegated to UNMIK, or did it have the power to create such an administration under Chapter VII? Moreover, can it truly be said, as the Court in fact implicitly held, that the Security Council somehow has the direct power to detain persons indefinitely, which it then supposedly delegated to KFOR?”, *ibid.* 278. Häußler asserts that the ECtHR fails to distinguish between the act conferring power and the actual exercise of the (given authority): “it is on this basis that it proposes that ‘the acts of the delegate entity’ (...) ought to ‘be attributable to the UN’ where this requirements only covers [sic] the act of delegation”, Häußler, ‘Human Rights Accountability of International Organisations’, *supra* note 3, 215, 241.

⁹ See, for instance, E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004).

¹⁰ Häußler, ‘Human Rights Accountability of International Organisations’, *supra* note 3, 215, 241.

Apart from the scenario, in which the Security Council does not exercise any supervision over a peacekeeping operation deployed by a regional organisation, circumstances may even arise under which there would be *de facto* no delegation of powers by the Security Council. If one bears in mind that regional organisations are allowed under Article 53 of the UN Charter (*infra* 1.3) to deploy peacekeeping operations without an authorisation of the Security Council, provided that the use of force is limited to cases of self-defence, in such circumstances any authorisation of the Security Council would not add or transfer any additional powers to the regional organisation, at least from the perspectives of the internal law of the regional organisation and from the perspective of international law.¹¹ However, under internal UN law, one could arguably consider the Security Council authorisation as effectively delegating some of the powers of the Council to these member states of the UN who are simultaneously members of the authorised regional organisation.¹²

The degree of force authorised by the Security Council would then actually be decisive to determine if powers of the Security Council have been delegated to the regional organisation or not. In this context, one also has to recall that in practice there have been cases in which the distinction between peacekeeping and peace enforcement has been effectively blurred (*infra* 1.2.3.). Thus, any attempt to determine as to whether powers of the Security Council have been effectively delegated to a regional organisation on the basis of the use of force authorised appears at least to be questionable.

The law of international responsibility has also adopted a different approach to determine if an authorisation by an international organisation will give rise to international responsibility of the organisation.¹³ It is very unlikely that the Security Council will adopt a resolution authorising conduct which would be internationally wrongful if committed by it.

On the contrary, as the previous Chapters of this thesis illustrated and as the other case-studies will further demonstrate, the recent practice of the UN and regional organisations illustrates that the UN is not limiting its role to solely handing out authorisations without any element of cooperation in the planning or deployment of the operation. This enhanced input of the UN, in the form of cooperation arrangements and mechanisms, in peacekeeping operations operated by regional organisations is also possibly precisely a reaction to judicial decisions with regard to peacekeeping forces, including the judgments from Dutch courts and the Behrami/Saramati decision of the ECtHR. In fact, it is rather

¹¹ This argument could also be used to distinguish further between authorisation and delegation of powers as it is debated in academic writings.

¹² Cf. for instance de Wet, *supra* note 9, 260.

¹³ Article 17 ARIO requires in order that an authorising entity may be held responsible that the authorising organisation circumvents one of its own obligations by authorising an act which would be internationally wrongful if committed by itself and that the act in question is committed because of that authorisation.

ironic that the criticised decision in particular of the ECtHR in *Behrami/Saramati* which arguably might not have involved any delegation of powers by the Security Council, has boosted an increase in cooperation between the UN and regional organisations which might justify holding the organisations jointly responsible on the basis of their framework of cooperation.

Nevertheless, as pointed out in the previous Chapter, there may of course be cases in which the amount of cooperation by the UN in the deployment of a peacekeeping operation by a regional organisation would not justify to consider it jointly responsible under the criterion of normative control. The basis to determine whether the normative control criterion is applicable, is if the involvement of the respective “external organisations”, the organisations cooperating with the organisation which was entrusted with the mandate by the Security Council is of such an intensity as to justify the application of the normative control criterion. If the analysis leads to the conclusion that the normative control criterion is not applicable, there is, indeed, a lacuna in the ARIO, as acts of aid and assistance require the element of intent, which under normal circumstances could not be established on behalf of the UN (*infra* 4.1.2.2.).

Should the ECtHR, however, continue to rely on its approach as developed in *Behrami/Saramati* and further developed in *Al-Jedda* (*infra* 4.1.2.1.), the UN would possibly even then not be able to escape responsibility.¹⁴

Generally with regard to the distinction between UN and UN authorised operations, it has been argued in Chapter IV, that this distinction is not truly relevant as cooperation between the UN and regional organisations has generally emerged as part of the division of labour between these organisations. Therefore, the case-study analyses whether the conduct of KFOR troops can be attributed to both the UN and NATO on the basis of the newly proposed criterion of attribution. The following section introduces to the application of the law of international responsibility.

1. The attribution of conduct of acts and omissions of KFOR under the law of international responsibility of international organisations

1. The application of the law of international responsibility

The analysis of the law of international responsibility is conducted following a two-step procedure. According to Article 4 of the ARIO, there is an internationally wrongful act of an international organisation when conduct consisting of an action or omission:

¹⁴ At least indirectly, as the UN is not a contracting party of the ECHR.

- (a) is attributable to that organization under international law; and
- (b) constitutes a breach of an international obligation of that organization.

The analysis will therefore start with the question as to which international organisation(s) the conduct of KFOR is attributable. As a principle, “the command and control framework of all peacekeeping operations is similar, no matter whether under OPCON of the United Nations, NATO, the European Union, (...) accordingly, equivalent legal considerations apply.”¹⁵

Also relevant for the analysis are resolutions of the Security Council and other documents pertaining to the mandate, structure and functioning of the operation e.g. the rules of engagement,¹⁶ as well as documents being part of the internal law of the respective organisations.

2. Attribution of Conduct of KFOR – the institutional and normative framework

1. KFOR Mandate

KFOR’s mandate is derived from Security Council Resolution 1244. NATO was not directly authorised to establish “the international security presence” which would become KFOR, but the Council authorised “Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below.”¹⁷ One day prior to the adoption of Security Council Resolution 1244, the North Atlantic Council (NAC) had decided to implement the “Joint Guardian” operation order concerning the deployment of KFOR; the deployment was authorised on 11 June 1999, the day following the adoption of the resolution by the Security Council.¹⁸ Paragraph 9 stipulates that the responsibility of the international security presence (KFOR) include:

- (a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2; (...)

¹⁵ Häußler, ‘Human Rights Accountability of International Organisations’, *supra* note 3, 215, 236 fn. 70.

¹⁶ Regarding the rules of engagement, it can be problematic to interpret and apply these rules during the deployment on the ground, cf. B. Klappe, ‘Rules of Engagement’, in M. Odello, R. Piotrowicz, *International Military Missions and International Law* (2011), 145, see especially the examples of Rwanda, 150-52 and the DRC, 154 – 56.

¹⁷ Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), 2, para.7.

¹⁸ *Case concerning Legality*, *supra* note 3, 32, para.42. For the process of deploying a NATO operation, cf. also comments by NATO, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 12-13, para.5.

- (c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;
- (d) Ensuring public safety and order until the international civil presence can take responsibility for this task; (...)
- (h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;¹⁹

According to Point 4 of Annex 2 to the Resolution, “[t]he international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to *establish a safe environment for all people in Kosovo* and to facilitate the safe return to their homes of all displaced persons and refugees.”²⁰ In addition, NATO concluded a military-technical agreement (MTA) with the Federal Republic of Yugoslavia which further defines the powers and competences of Yugoslavia.²¹ So it contains an authorisation also by the governments of the Federal Republic of Yugoslavia and of the Republic of Serbia to use all necessary action to establish and maintain a secure environment for all citizens of Kosovo.²² Both countries authorised KFOR:

- (a) To monitor and ensure compliance with this agreement and to respond promptly to any violations and restore compliance, using military force if required. This includes necessary actions to:
 - (i) Enforce withdrawals of Federal Republic of Yugoslavia forces;
 - (ii) Enforce compliance following the return of selected Federal Republic of Yugoslavia personnel to Kosovo;
 - (iii) Provide assistance to other international entities involved in the implementation or otherwise authorized by the Security Council;²³

Military command of KFOR was initially conferred on the Supreme Allied Commander Europe (SACEUR) who delegated it to the Commander in Chief Allied Forces, Southern Europe (CINCSOUTH), the former was responsible to the NAC. The KFOR commander was appointed by NATO and he is responsible to CINCSOUTH.²⁴ The operation *per se* is not part of the NATO military command structure but rather resembles an *ad hoc* force, comprising 35 states, including 12 non-NATO

¹⁹ *Ibid.*, 3, para.9.

²⁰ *Ibid.*, 6, para.4.

²¹ Enclosure, Military-technical agreement between the international security force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Letter dated 15 June 1999 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1999/682 (1999), 3-10.

²² *Ibid.*, 3, para.2; 9, paras.1-2.

²³ *Ibid.*, 9, para. 4.

²⁴ M. Zwanenburg, *Accountability of Peace Support Operations* (2005), 47.

members whereas the majority of positions at KFOR headquarters are held by personnel from NATO member states. As mentioned, KFOR is NATO-led and a *de facto* NATO-commanded operation.²⁵

2. Cooperation between UNMIK (UN) and KFOR (NATO)

The following parts analyse the cooperation between UNMIK (UN) and KFOR (NATO) on various levels to ascertain whether the cooperation arrangements on a practical and an operational level justify a joint attribution of conduct to both organisations or whether the UN might rather be held responsible as an accessory.

1. Political Level

KFOR and UNMIK established various consultation mechanisms on the political level to ensure the coordination and cooperation of the international civil and the international military presence.

On the echelon of the Special Representative of the Secretary-General,²⁶ the Joint Planning Group of the Executive Committee of the Special Representative of the Secretary-General works with a Senior Representative of KFOR on military-civilian issues.²⁷ The Special Representative himself also oversees coordination with KFOR directly through the Executive Committee.²⁸ The Joint Planning Group Secretariat serves to provide political guidance to KFOR and the four components; whereas working-level staff from KFOR and the four components “provide operational requirements for planning and policy implementation (...), the political officers from the Office of the Special Representative

²⁵ R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo*. Operational and Legal Issues in Practice (2007), 146-147. See also the Statement of Russia in the Security Council, Security Council, 4288th meeting, UN Doc. S/PV.4288 (Resumption 1) (2001), 13. Kolb, Porretto and Vité see NATO rather as a coordinating organ for KFOR, as an organisational chaperon, R. Kolb, G. Porretto, S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoires* (2005), 287. In contrast to their view, it has to be noted that NATO military operations are based on the “need to know principle” according to which each participating member state only receives the information necessary for the implementation of his specific tasks which led the German Supreme Court to conclude in a case concerning the destruction of the bridge in Varvarin, killing 10 civilians and injuring 30, that this act could not be attributed to Germany as the latter was not aware of the mission target, German Supreme Court, III ZR 190/05, Urteil, 2. November 2006, 15, para.23.

²⁶ Generally on the role, responsibility and authority of the Special Representative of the Secretary-General see Note of Guidance on Integrated Missions; clarifying the Role, Responsibility and Authority of the Special Representative of the Secretary-General and the Deputy Special Representative of the Secretary-General/Resident Coordinator/Humanitarian Coordinator, 17 January 2006, 2, paras. 5, 7, 8.

²⁷ Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/54/494 (1999), 5, para. 10; Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/54/622 (1999), 2, para. 9.

²⁸ Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/54/807 (2000), 5, para. 7.

contribute political guidance.”²⁹ Meetings cover a wide range of issues, promoting and enhancing cross-competent coordination, including “information management, border control (...) and joint UNMIK/KFOR security issues.”³⁰ The Secretariat is the main mechanism responsible for the formation of task forces and workings groups “which develop strategy and policy recommendations and plans for the implementation of mission priorities.”³¹

On 5 December 1999, the Special Representative of the Secretary-General issued the first version of the UNMIK Strategic Planning Document which provided “a basis for periodic joint UNMIK-KFOR Strategic Planning Conferences, where the Special Representative, the Commander of KFOR and their respective Deputies synchronize aims, capabilities and support.”³² The Advisory Unit on Security, established in March 2001 is, *inter alia*, “directly involved in the coordination of policy issues in respect of KFOR and UNMIK Police.”³³ Liaison and exchange of information on security-related measures between the UN and KFOR occurs on a daily basis.³⁴

On the lower regional level, the Regional Security Supervisor who acts as the principal security advisor to the Regional and Municipal Administrators is responsible for liaising with the KFOR multinational brigade with responsibility for the Region Centre.³⁵

²⁹ *Ibid.*, 5, para. 8; Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2001 to 30 June 2002, Report of the Secretary-General, UN Doc. A/55/833 (2001), 6, para. 9.

³⁰ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/1250 (1999), 5, para. 20.

³¹ Budget for the United Nations Interim Administration Mission in Kosovo, *ibid.*, 6, para. 9. According to the first report of the Secretary-General on UNMIK, there were put in place close working relations with KFOR and various other international organisations. UNMIK and KFOR have established a comprehensive structure of coordination mechanism, which includes daily meetings of the Special Representative and the KFOR Commander, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779 (1999), 5, para. 17; 6, para. 24.

³² Financing of the United Nations Interim Administration Mission in Kosovo (2000), *supra* note 28, 5, para. 8; Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Secretary-General, UN Doc. A/55/477 (2000), 5, para. 8. See also the remarks of the President of the Security Council at the end of the 4309th meeting, Security Council, 4309th meeting, UN Doc. S/PV.4309 (2001), 24.

³³ Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2002 to 30 June 2003, Report of the Secretary-General, UN Doc. A/56/802 (2002), 6-7, para. 9. The Unit represents “the Office of the Special Representative, along with the Principal Deputy Special Representative, the Police Commissioner and the Deputy Police Commissioner, on the UNMIK/KFOR Joint Security Executive Committee and the UNMIK/KFOR Joint Security Implementation Group.”, *ibid.*, 15, para. 49.

³⁴ Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2011 to 30 June 2012, Report of the Secretary-General, UN Doc. A/65/711 (2011), 10. The monthly report from August 1999 from KFOR to the Security Council lists that “KFOR is represented at all levels of civil administration and works closely with UNMIK civil administrators. Daily coordination meetings have been established”, Annex, Monthly report to the Security Council on the operations of KFOR, Letter dated 10 August 1999 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1999/868 (1999), 4, para. 17.

³⁵ Financing of the United Nations Interim Administration Mission in Kosovo (2000) 2, *supra* note 32, 50, para. 236.

On a local level, UNMIK municipal administrative teams coordinated the activities of UNMIK components and “maintain[ed] close liaison with KFOR with respect to security and law and other matters, at the municipal level”³⁶ during the first phase of the mission.³⁷

The Security Council itself is the recipient of monthly reports of the activities of KFOR on the basis of Resolution 1244; however, the reports with an average length of 3-4 pages provide only a summary of the activities of KFOR within the past month, so they are solely provided for the Security Council’s information. However, it should be noted that there were at least instances in which the Security Council was kept very well-informed of KFOR’s activities; the Russian delegate mentioned in a statement on 6 April 2001 the arrest of Major Saramati, “the commander of a KPC brigade accused of undertaking activities threatening the international presences in Kosovo.”³⁸ Nevertheless, it is not evident from his statement how he had become aware of that arrest.³⁹

UNMIK Regulation No. 2000/47 orders KFOR personnel to respect “the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General insofar as they do not conflict with the fulfillment of the mandate given to KFOR under Security Council resolution 1244 (1999)”⁴⁰ which suggests, on the one hand, a more profound subordination of KFOR under the authority of the UN. On the other hand, this regulation also indicates that KFOR enjoyed some form of autonomy from the UN as the Special Representative was only authorised to issue directives to KFOR as long as they do not contravene KFOR’s mandate.⁴¹ Stahn consequently concludes that the role of the Special Representative of the Secretary-General towards KFOR was limited to mere tasks of coordination.⁴² Indeed, an analysis of the available documents on KFOR and UNMIK does not suggest that the cooperation on the political level surpassed the level of coordination and included essential elements of control by UNMIK and thereby the UN over KFOR.⁴³

³⁶ Financing of the United Nations Interim Administration Mission in Kosovo, *supra* note 27, 17, para. 63; Financing of the United Nations Interim Administration Mission in Kosovo (2000), *supra* note 28, 16, para. 60.

³⁷ Budget for the United Nations Interim Administration Mission in Kosovo, *supra* note 33, 29, para. 125.

³⁸ Security Council, 4350th meeting, UN Doc. S/PV.4350 (2001), 6. See also Schermers, Blokker, *supra* note 3, 1016, para. 1590.

³⁹ The short summary reports of KFOR do not contain any information about this incident.

⁴⁰ UNMIK Regulation No.2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, UN Doc. UNMIK/REG/2000/47 (2000), para. 2.2.

⁴¹ KFOR nevertheless enjoys the same privileges and immunities as UNMIK under the mentioned regulation.

⁴² C. Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (2008), 330.

⁴³ For a contrary opinion, see C. Tomuschat, ‘Attribution of International Responsibility: Direction and Control’, in M. Evans, P. Koutrakos (eds.), *The International Responsibility of the European Union* (2013), 7, 28-29, 31. He argues that “SC Resolution 1244 (1999) brought into being an operation providing for institutional machinery that ensured a strong influence of the UN. In such instances, the situation is not essentially different from patterns where the UN puts into operation its own machinery. It would be awkward, therefore, to focus on effective control of each and every individual action.”, *ibid.*, 31.

2. *Strategic Level*

On a strategic level, an UNMIK liaison officer is deployed as the strategic and operational planner and liaison officer with the KFOR planners.⁴⁴ Furthermore, UNMIK had deployed military liaison officers to the headquarters of KFOR, at regional and at the five KFOR multinational brigades level.⁴⁵ As KFOR representatives took part, “as necessary, in the work of UNMIK”, and UNMIK, in turn, participated “in KFOR’s Joint Implementation Commission (JIC), which liaised with both the Federal Republic of Yugoslavia’s armed forces and the Kosovo Liberation Army (KLA).⁴⁶ As there are no further documents publicly available, it is difficult to assess whether these liaison officers transmit any form of control on the strategic level over the conduct of KFOR troops.

3. *Operational/Mission Level*

Operational cooperation between UNMIK and KFOR is centered on the conducting of joint patrols between UNMIK (police) and KFOR troops. In period up to 30 June 2002 alone UN Civilian Police had conducted 11,161 joint patrols with KFOR.⁴⁷ In 2000, KFOR decided to establish joint operations centres with UNMIK police at brigade and battalion levels, with “the aim of fostering closer cooperation between both organizations.”⁴⁸ In this context, a Political Violence Task Force staffed by senior staff of UNMIK police and KFOR was established to coordinate activities at the local, regional and central levels. On 2 July 2002, UNMIK police and officials of KFOR signed a memorandum of understanding which established a process to transfer the responsibility of KFOR over general public security, management of demonstrations and other related tasks in the Mitrovica region to UNMIK.⁴⁹

⁴⁴ Financing of the United Nations Interim Administration Mission in Kosovo (2000) 2, *supra* note 32, 66, para.3.

⁴⁵ Report of the Secretary-General on the United Nations Interim Administration Mission, *supra* note 31, 11, para.50.

⁴⁶ *Ibid.*, 6, para.25.

⁴⁷ Performance report on the budget of the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2001 to 30 June 2002, Report of the Secretary-General, UN Doc. A/57/678 (2002), 9; Annex, Monthly report to the United Nations on the operations of the Kosovo Force, Letter Dated 18 November 1999 From the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/1185 (1999), 3, para.9.

⁴⁸ Annex, Monthly report to the United Nations on the operations of the Kosovo Force, Letter dated 28 June 2000 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2000/634 (2000), 3 para. 14.

⁴⁹ Annex, Monthly report to the United Nations on the operations of the Kosovo Force, Letter dated 9 September 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/984 (2002), 4, para. 19; Statement by Hédi Annabi, Assistant Secretary-General for Peacekeeping Operations, Security Council, 4249th meeting, UN Doc. S/PV.4249 (2000), 3.

Therefore an analysis of the cooperation on the operational level on the basis of the available documents does not allude to any exercise of control by UNMIK over the operation of KFOR on the ground. However, it cannot be excluded that the UN and NATO could be jointly responsible, under specific circumstances, for the conduct of UNMIK (police) and KFOR troops during their joint patrols. One specific joint patrol which gave reason to serious criticism by Serbia underlines this assessment. A monthly report of KFOR to the UN Security Council notes the following:

On 17 March, after a formal request for support from UNMIK to KFOR, an operation to retake the courthouse was launched by UNMIK police supported by KFOR. Seven platoons of the UNMIK formed police unit took part. UNMIK police arrested 35 Kosovo Serb protesters, while KFOR blocked off nearby roads. With KFOR assistance to clear the route, UNMIK police delivered the detainees to the detention facility in Pristina. However, as UNMIK attempted to transport the detainees to Pristina for processing, a large crowd gathered and started to throw stones, Molotov cocktails, grenades and other objects at the security forces; AK-47 rifles and pistols were also fired. UNMIK police and KFOR responded to the violence using tear gas, baton rounds and warning shots using live rounds in accordance with the agreed rules of engagement. In the end, 48 KFOR soldiers, 7 officers of the Kosovo Police Service and 35 UNMIK police officers were wounded, including a Ukrainian police officer who later died of his wounds.⁵⁰

As noted by the Secretary-General in his report from 18 September 2000, “the level and sophistication of the joint security operations conducted by UNMIK police and KFOR continued to develop in many regions.”⁵¹ The Security Council Mission to Kosovo reported likewise that “[t]he level of cooperation and coordination between UNMIK Police and KFOR is extremely high.”⁵² UNMIK police also arrested Mr. Saramati on KFOR orders, and, as a result, it is worthwhile to inquire whether UNMIK could not have aided and assisted KFOR for the purposes of the law of international responsibility.

⁵⁰ Annex, Monthly Report to the United Nations on the operations of the Kosovo Force, Letter dated 3 June 2008 from the Secretary-General to the President of the Security Council, UN Doc. S/2008/362 (2008), 2-3, para.14. Serbia recalls the events differently in its letter to the President of the Security Council, it is stated that UNMIK and KFOR forces opened fire and that a sniper was also shooting from the Court building, resulting in 150 wounded, Comments on the report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/211), Annex to the Letter dated 17 April 2008 from the Permanent Representative of Serbia of the United Nations addressed to the President of the Security Council, UN Doc. S/2008/260 (2008), 10-11, para.14. Cf. in this matter also the report of the Secretary-General, 3-4, para. 7.

⁵¹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2000/878 (2000), 5, para. 26.

⁵² Report of the Security Council Mission on the implementation of Security Council resolution 1244 (1999), 27 to 29 April 2000, UN Doc. S/2000/363 (2000), 5, para. 18. KFOR provided, for example, also medical services to UNMIK personnel, Financing of the United Nations Interim Administration Mission in Kosovo, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/55/624 (2000), 9, para. 45.

2. *Assessment of the cooperation arrangements and implications for the attribution of conduct*

It has been stressed previously that the element of “normative control” based on institutional relations between the involved organisations is particularly important in the determination of the attribution of conduct and responsibility.⁵³ The analysis showed that the degree of cooperation on a political level between KFOR and UNMIK is certainly high and that arguably UNMIK is exercising some form of control on a political level via “political guidance”, but that element of control has not penetrated the strategic or operational level of cooperation.

Bearing in mind, that joint responsibility as envisaged in this present study presupposes that one organisation makes more than a “substantial contribution” to surpass “aid and assistance” under Article 14 ARIO, any attribution of conduct of KFOR to the UN would require that there is a strong nexus between the control exercised on a political level, outside the military chain of command, and the control exercised on strategic and operational levels.

There must be an *intimate link* between the control exercised on a political level and on the other levels to justify holding both organisations jointly responsible, precisely because the UN is not part of the chain of command of NATO. Otherwise, one cannot hold both organisations jointly responsible, at least on the basis of the suggest criterion of normative control. The disjuncture between these elements in the present case of KFOR is underlined by the hybrid base of authority of KFOR; on the one hand, its authority is derived from Security Council Resolution 1244, and on the other hand, it stems from the MTA.

One therefore has to conclude that the responsibility for the conduct of KFOR lies at least primarily with NATO and to a lesser extent with the UN.⁵⁴ There are, indeed, instances, in which KFOR and, consequently, NATO act independently from any UN involvement by virtue of its powers granted under the MTA. For example, the Security Council welcomed “the decision taken by the North Atlantic Treaty Organization (NATO) to authorize the commander of KFOR to allow the controlled

⁵³ One could also use the term “normative power” as it is used by Boisson de Chazournes regarding partnerships among International Financial Institutions, L. Boisson de Chazournes, ‘United in Joy and Sorrow : Some Considerations on Responsibility Issues under Partnership among International Financial Institutions’, in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 213, 215.

⁵⁴ Cf. *Case concerning Legality*, supra note 3, 33, para. 45.

return of forces of the Federal Republic of Yugoslavia to the Ground Safety Zone as defined in the military-technical agreement.”⁵⁵

In conclusion, the conduct of KFOR troops can generally not be attributed jointly both to the UN and NATO on the basis of an analysis of the cooperation arrangements. As the Articles of the ILC articulate the requirement of intent for one organisation to be aiding and assisting another, UNMIK would also not be responsible for having aided or assisted KFOR. Nevertheless, there may be specific circumstances which warrant the attribution of conduct to both the UN and NATO. The question one could ask now is whether there is another lacuna in the Articles of the ILC regarding such cases. As cooperation generally becomes more institutionalised between international organisations, it is at least questionable whether the focus on individual acts and intent and knowledge is always appropriate. The next case-study, UNAMID illustrates that particular point as well. The wider political process to resolve the conflict in Darfur is intrinsically linked to the deployment of the peacekeeping operation and so is the control of the political actors over the operation.

2. Attribution of Conduct of UNAMID

The Hybrid Operation is not a joint force. Let there be no confusion about it. We are not talking about any joint force by the United Nations and the African Union

- Ambassador Abdalmahmood Abdalhaleem of Sudan⁵⁶

In fact, the hybrid nature of the Mission has optimized the level of complementarity between the UN and AU.

- Report of the Chairperson of the Commission of the AU, 23 September 2013⁵⁷

1. Introduction

The deployment of AMIS and later on UNAMID came as the reaction of the international community to military clashes between the Sudanese government and the Arab *Janjaweed* militia against the Sudanese Liberation Movement/Army (SLM/A) and the Justice Equality Movement (JEM) who claim

⁵⁵ Statement by the President of the Security Council, UN Doc. S/PRST/2001/8 (2001), 2.

⁵⁶ Cited in A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', (2007) 54 *Netherlands International Law Review*, 415, 416, fn. 2. as well as at http://www.militaryconnections.com/news_story.cfm?textnewsid=2229

⁵⁷ Report of the Chairperson of the Commission on the African-Union-United Nations Partnership: The Need For Greater Coherence, PSC/AHG/3.(CCCXCVII) (2013), 4, para. 10.

to represent the black Darfurians.⁵⁸ It is undisputed that the situation in Darfur amounts to an armed conflict for the purposes of international law. Indeed, there was no operative peace agreement in Darfur when AMIS formally handed over to UNAMID, meaning the operation was deployed in an “as-yet-unresolved war.”⁵⁹

The Peace and Security Council of the African Union decided “to endorse the conclusions of the Addis Ababa High Level Consultation on the Situation in Darfur (...) which provided for a three-phased support to the African Union Mission in Sudan”⁶⁰ at its meeting in November 2006. The foreseen three-phased support included in addition to a light and a heavy support package a hybrid operation with the United Nations.⁶¹ As the AU operation evolved into a complex peacekeeping operation and owing to “uncertainty regarding its financial sustainability”, the AU supported the transition to a UN operation.⁶² The envisaged three-phased plan was preceded by the vigorous opposition of the Sudanese government to an autonomous UN peacekeeping operation in Darfur as envisaged in Security Council Resolution 1706.⁶³ The compromise was a UN-AU hybrid operation the establishment of which was supported by the Sudanese government.⁶⁴ UNAMID is a particularly important case-study as it is not only the first hybrid peacekeeping operation deployed by international organisations, but the findings regarding UNAMID could also help in the analysis of potentially envisaged hybrid AU-UN operation for Somalia.⁶⁵ Furthermore, as a hybrid operation, on

⁵⁸ Z. Yihdego, ‘Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects’, in (2009) 14 *Journal of Conflict & Security Law*, 37, 37-38.

⁵⁹ A. de Waal, ‘Sudan: Darfur’, J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 283, 293.

⁶⁰ Communiqué of the 66th meeting of the Peace and Security Council, PSC/AHG/Comm(LXVI) (2006), para. 2 chapeau.

⁶¹ Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur, Annex to Letter dated 5 June 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/307/Rev.1 (2007), 3, para. 8; 10-17, paras. 40-63.

⁶² *Ibid.*, 2, para. 4; Report of the Chairperson of the Commission on the Situation in Darfur (The Sudan), PSC/AHG/3(LXVI) (2006), 7, para. 29.

⁶³ al-Jazeera, Sudan ‘Accepts’ UN Darfur Package, 27 December 2006, available at: <http://www.globalpolicy.org/component/content/article/206/39736.html>, Security Council Resolution 1706 (2006), UN Doc. S/RES/1706, especially para. 5; Report of the Chairperson of the Commission on the Situation in Darfur, *ibid.*, 15-20 paras. 63-79.

⁶⁴ Abass, *supra* note 56, 415, 434. The solution was not a preferred one to either organisations, who allegedly “favoured an approach which would have given the primary responsibility for the operation to the UN”, C. Walter, ‘Hybrid Peacekeeping: Is UNAMID a new Model for Cooperation between the United Nations and Regional Organizations?’, in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1327, 1337. See furthermore the comments by the United States in the Security Council, Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 16.

⁶⁵ Results of the Secretary-General’s technical assessment mission to Somalia, pursuant to Security Council resolution 2093 (2013), Annex to Letter dated 19 April 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/239 (2013), 13, para. 46.

a first glance, at least, one would presume that its acts are attributed jointly to the UN and the AU.⁶⁶ Besides, UNAMID is an interesting experiment of marrying universalism and regionalism⁶⁷ and can therefore also serve to elaborate further upon the wider debate addressed in the present study upon the relationship between universalism and regionalism under the framework of the United Nations Charter.

This intervention by invitation also leads to questions concerning the existing or non-existing enforcement character of Security Council Resolution 1769 which constitutes the legal basis for UNAMID. The resolution was adopted under Chapter VII, but the records of the meeting leading to the resolution suggest that there was a clear majority for the position that the mandate of the force would not be of an enforcement nature which corresponds to the Chinese statement that “the purpose of the resolution is to authorize the launch of the hybrid operation, rather than to exert pressure or impose sanctions”.⁶⁸ In the rare cases of intervention by invitation with the right to enforcement action by the intervening party this right was formally granted through treaty ratifications as in the cases of the ECOWAS intervention in Sierra Leone (2000) and Togo (2005-2006).⁶⁹

2. Attribution of Conduct

1. Mandate of UNAMID

According to Security Council Resolution 1769, the mandate of UNAMID is as set out in paragraphs 54 and 55 of the report of the Secretary-General and the Chairperson of the African Union Commission on UNAMID.⁷⁰ Under the report, UNAMID has the general aim to contribute to the restoration of security conditions in Darfur allowing the deliverance of humanitarian assistance as well as the protection of civilian populations under imminent threat of physical violence while

⁶⁶ Tsagourias also held that “it follows (...) that joint responsibility can arise in the case of UNAMID, the joint UN/AU peacekeeping operation in Darfur”, Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, *supra* note 4, 245, 254.

⁶⁷ Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security. Towards Greater Strategic and Political Coherence, PSC/PR/2.(CCCVII) (2012), 16, para. 61.

⁶⁸ Security Council 5727th meeting, UN Doc. S/PV.5727 (2007), p. 10. The United States were taking the position that “UNAMID has the authority under Chapter VII to use force to prevent armed attacks, to protect civilians and to prevent any disruption of the implementation of the Darfur Peace Agreement, *ibid.*, p. 7.

⁶⁹ Abass, *supra* note 56, 415, 434. Another potential problem is whether UNAMID can be considered under UN law as a UN operation regarding the expenses for the operation, *ibid.*, 438.

⁷⁰ Security Council Resolution 1769, UN Doc. S/RES/1769 (2007), 3, para. 1.

supporting the political process and the AU-UN joint mediation. Paragraph 54 of the Report sets out the broad goals which include, *inter alia*:

(b) to contribute to the protection of civilian populations under imminent threat of physical violence and prevent attacks against civilians, within its capability and areas of deployment (...)

(d) To assist the political process in order to ensure that it is inclusive, and to support the African Union-United Nations joint mediation in its efforts to broaden and deepen commitment to the peace process; (...)

In order to achieve these goals, the operation's tasks include:

(a) Support for the peace process and good offices:

(i) To support the good offices of the African Union-United Nations Joint Special Representative for Darfur and the mediation efforts of the Special Envoys of the African Union and the United Nations;

(b) Security:

(i) To promote the re-establishment of confidence, deter violence and assist in monitoring and verifying the implementation of the redeployment and disengagement provisions of the Darfur Peace Agreement, (...)

(vii) In the areas of deployment of its forces and within its capabilities, to protect the hybrid operation's personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations-African Union personnel (...);⁷¹

Acting under Chapter VII of the Charter,⁷² the Security Council also adopted a mandate to protect civilians within paragraph 15 of Resolution 1769.⁷³ The Security Council further elaborated upon the "protection of civilians" mandate in Resolution 2003, declaring that UNAMID shall make full use of its mandate for the protection of civilians across Darfur, "including through proactive deployment and patrols in areas at high risk of conflict, securing IDP camps and adjacent areas, and implementation of a mission-wide early warning strategy and capacity."⁷⁴ In Resolution 2113, the Council added

⁷¹ Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 13, para. 54 (b), (d), (f); 13-15, para. 55 (a) (i), (b) (i), (vii).

⁷² The Security Council emphasized UNAMID's Chapter VII mandate in Resolution 2003, Security Council Resolution 2003, UN Doc. S/RES/2003 (2011), 3, para. 5.

⁷³ Security Council Resolution 1769, *supra* note 70, 5, para.15. In the follow-up resolution 1828, the Security Council underlined "the need for UNAMID to make full use of its current mandate and capabilities with regard to the protection of civilians", Security Council Resolution 1809, UN Doc. S/RES/1809 (2008), 3, para. 7. See also p.3, para. 11 of this resolution. The plea was repeated in Resolutions 1881, 1935, 2063 and 2113, Security Council Resolution 1891, UN Doc. S/RES/1881 (2009), 2, para. 2; Security Council Resolution 1935, UN Doc. S/RES/1935 (2010), 2, para. 2; 3, para. 4; Security Council Resolution 2063, UN Doc. S/RES/2063 (2012), 3-4, para. 3; Security Council Resolution 2113, UN Doc. S/RES/2113 (2013), 4-5, para. 4.

⁷⁴ Security Council Resolution 2003, *supra* note 72, 3, para. 3 (a).

another qualification according to which UNAMID shall make “enhanced efforts to respond promptly and effectively to threats of violence against civilians.”⁷⁵ Furthermore, the Council *urged* UNAMID to deter any threats against itself and its mandate.⁷⁶ Reviews of UNAMID’s mandate are conducted by the Secretary-General, in close consultation with the AU.⁷⁷ Accordingly, UNAMID military and police units are operating on the basis of a very robust mandate regarding the use of military force. Both components of the operation were instructed that attacks upon UNAMID patrols “are to be responded to robustly and in accordance with the rules of engagement, proactive measures are to be taken to protect civilians.”⁷⁸ The updated strategy for the protection of civilians outlines among the four main objectives the protection of civilians from physical acts of violence.⁷⁹

2. The political process to resolve the conflict in Darfur and political oversight of UNAMID

The deployment of UNAMID is directly linked to the political process to resolve the conflict in Darfur under the leadership of both the AU and the UN. The Political Process is managed by Joint AU and UN Mediation Activities in respect of talks between the Government of Sudan and non-signatory movements⁸⁰ on the basis of the AU-UN Roadmap⁸¹ which was later replaced by the Framework for African Union and United Nations facilitation of the Darfur peace process.⁸² In 2011, the Government and the Liberation and Justice Movement (LJM) signed the Agreement for the Adoption of the Doha Document for Peace in Darfur.⁸³

⁷⁵ Security Council Resolution 2113, *supra* note 73, 4, para. 4.

⁷⁶ *Ibid.*, 5, para.5. In this regard, the Council also urged UNAMID to take all necessary measures within its rules of engagement to protect United Nations personnel and equipment, *ibid.*, 6, para. 11.

⁷⁷ See e.g., Security Council Resolution 2113, *supra* note 72, 4, para. 3.

⁷⁸ Report of the Chairperson of the Commission on the African Union-United Nations Hybrid Operation in Darfur (UNAMID) and the Situation in Darfur, PSC/PR/2(CCLVIII) (2011), 1, para. 3.

⁷⁹ *Ibid.*, 3, para.13. The Under-Secretary-General for Peacekeeping Operations Le Roy stated likewise before the Security Council that “UNAMID is basically a protection operation”, Security Council 6170th meeting, UN Doc. S/PV.6170 (2009), 3.

⁸⁰ Report of the Chairperson of the Commission on the African Union-United Nations Hybrid Operation in Darfur, PSC/PR/2.(CCCXLVIII) (2012), 3, para.11. The Security Council repeatedly emphasised the importance of promoting the AU-UN led peace and welcomed the efforts of the AU High Level Panel for Sudan in this regard, see, for example, Security Council Resolution 2003, *supra* note 72, 3, para. 4; 4, para. 7.

⁸¹ Joint AU-UN Road-map for Darfur Political Process, 8 June 2007.

⁸² Annex, Framework for African Union and United Nations facilitation of the Darfur peace process, Letter dated 19 March 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/166 (2012), 2-10. See e.g. also Annex to the letter dated 19 February 2009 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council, Government of Sudan, African Union and United Nations Tripartite Committee on UNAMID, UN Doc. S/2009/173 (2009), 2, para. 2; 4, para. 6.

⁸³ Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2011/814 (2011), 1-4, paras. 2-17; 14, para. 75. Following this adoption, the Joint Special Representative and Joint Chief Mediator ad interim of the AU and the UN promoted further talks between non-signatory movements and the Government of Sudan with the aim of reaching an inclusive peace agreement through

The Joint Chief Mediator reports to both the UN Secretary-General and the Chairperson of the AU Commission through the Under-Secretary-General of the DPKO and the Commissioner for Peace and Security. According to his mandate he is entrusted with the AU/UN-led political process and mediation efforts between the parties to the Darfur Conflict, in the exercise of which he maintains “close liaison” with the Joint Special Representative.⁸⁴

The most interesting feature is, however, that the implementation of the political process is generally managed directly by UNAMID. The Darfur political process secretariat, which was established at UNAMID headquarters, is responsible for “strategic planning and management of the Darfur political process, overseeing its implementation (...) and monitoring and maintaining an overview of substantive discussion during the process.”⁸⁵ For that purpose, Darfur political process sub-units were established at each sector office. In the exercise of its duties, the secretariat directly reports to the Joint Special Representative and the chair of the AU High-level Implementation Panel.⁸⁶

As to the political oversight by the respective organs of the AU and the UN, the AU Peace and Security Council requested the AU Commission to ensure that there is regular interaction with UNAMID, including briefings to the Peace and Security Council every 90 days.⁸⁷ A review exercise of UNAMID uniformed personnel by the AU Commission and the UN Secretariat was conducted in February 2012, in accordance with Security Council Resolution 2003.⁸⁸ The Mandate of UNAMID is extended by both organisations through decisions of the AU PSC and the UN Security Council.⁸⁹

their participation, Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2012/231 (2012), 2, para. 11.

⁸⁴ Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/64/685 (2010), 5-6, para. 7.

⁸⁵ Report of the Secretary-General on the implementation of the Darfur political process, UN Doc. S/2011/252 (2011), 5, para. 18. The secretariat comprises representatives of several UNAMID sections, including political affairs, civil affairs, human rights, humanitarian liaison, legal affairs, rule of law, the joint mission analysis centre, security, the joint logistics operation centre, mission support, as well as staff of the AU High-level Implementation Panel, *ibid.*

⁸⁶ The Security Council praised UNAMID for its continuing efforts “in support of and as a complement to the work of the Joint Chief Mediator and the African Union/United Nations-led political process for Darfur”, Report of the Secretary-General on the implementation of the Darfur political process, *ibid.*, 2, para. 6. See also, Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur (UNAMID), UN Doc. S/2010/543 (2010), 2, para. 7; 4-5, paras. 15-19; Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2011/244 (2011), 3, paras. 9-11.

⁸⁷ Peace and Security Council, 371st Meeting, Addis Ababa, Ethiopia, 25 April 2013, PSC/PR/COMM.3(CCCLXXI), Communiqué, 2, para. 13.

⁸⁸ Peace and Security Council, 328th Meeting, Addis Ababa, Ethiopia 24 July 2012, Communiqué, PSC/PRC/COMM.(CCCXXVIII), 2, para. 11.

⁸⁹ Peace and Security Council, 328th Meeting, *ibid.*, 3, para. 14; Annex, Letter dated 20 July 2011 from the Chairperson of the African Union Commission addressed to the Secretary-General, Letter dated 27 July 2011 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2011/466 (2011), 2, 2nd para; 5-6, para. 12.

The Tripartite Coordination Mechanism on UNAMID which includes representatives of both the AU and the UN as well as of the Government of Sudan serves as another instrument to resolve issues and challenges related to UNAMID deployment and operations.⁹⁰

3. Strategic Control

Strategic guidance of UNAMID is provided from New York from both the UN and the AU.⁹¹ The military concept of operations was developed jointly by the AU and the UN focusing on three core complementation functions: protection, liaison, and monitoring and verification.⁹² The same procedure was used for the elaboration of various other strategic and legal documents, including the military command directive for the Force Commander of UNAMID and the UNAMID rules of engagement.⁹³

4. The Chain of Command and Operational Control

The distribution of tasks between the two organisations foresees that whereas “the [m]ission shall benefit from United Nations backstopping and *command and control structures and systems*”⁹⁴, the African Union shall merely decide upon the size of the force and should also appoint the force commander.⁹⁵

As support, command and control structures for UNAMID are provided by the UN alone, the overall management of the operation is likewise based on UN standards, principles and established practices. To compensate the AU for the United Nations’ dominance in that area, it was agreed between both that “all efforts will be made to ensure that the peacekeeping force will have a predominantly African character” regarding the force and personnel generation.⁹⁶ In order “to

⁹⁰ See e.g., Press Release, 16 Apr 13 – Tripartite Meeting on UNAMID focuses on Darfur security, access, available at: <http://unamid.unmissions.org/Default.aspx?ctl=Details&tabid=11027&mid=14214&ItemID=22335>.

⁹¹ Opening Remarks by Ambassador Ramtane Lamamra, African Union Commissioner for Peace and Security, on the occasion of the 15th Session of the UNAMID Tripartite Coordinating Mechanism meeting, 15th April 2013, Addis Ababa, 3.

⁹² Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 18, para. 73; Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2007/517 (2007), 2, para. 7; 4, para. 13.

⁹³ Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2007/596 (2007), 3-4, para. 13.

⁹⁴ Communiqué of the 66th meeting, *supra* note 60, para. 2 c)

⁹⁵ *Ibid.*, para. 2 b), d).

⁹⁶ Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 27, para. 113; Security Council Resolution 1769, *supra* note 70, 4, para.8. Interestingly, though, the Convention on the Privileges and Immunities of the United Nations applies to the whole operation, see Agreement between

maintain the joint nature of the mission, and to ensure joint decision-making and input into operational decisions and procedures for UNAMID, it was agreed that the Secretary-General and the Chairperson of the African Union would appoint a joint special representative and that strategic guidance would be jointly provided by the United Nations and the African Union.⁹⁷ This decision was also taken as a reaction to the fact that the daily operational command and control of the mission, however, resides with the United Nations.

The Joint Special Representative of the Chairperson of the AU Commission and the Secretary-General of the UN has overall authority over UNAMID, overseeing the implementation of its mandate and being responsible for the operation's functioning and management.⁹⁸ He is in charge of analysing and implementing the strategic directives issued by the Under-Secretary-General of the DPKO of the UN and the AU Commissioner for Peace and Security, and he reports, through them, to the UN Secretary-General as well as to the Chairperson of the AU Commission.

The Force Commander and the Police Commander were both appointed by the AU in consultation with the UN and report to the Joint Special Representative while exercising command and control over the military and police activities, respectively.⁹⁹

The important feature of the command and control arrangements on an operational level is that the deployment of UNAMID is coordinated through the Joint Support and Coordination Mechanism (JSCM) established in Addis Ababa and "tasked with empowered liaison" between the DPKO and the AU Peace and Security Department.¹⁰⁰ Another part of the mandate of the JSCM is the coordination

The United Nations and the African Union and the Government of Sudan Concerning the Status of the African Union/United Nations Hybrid Operation in Darfur (2008), 1, para. 1(f); 2, para. 2.

⁹⁷ Report of the Secretary-General on United Nations-African Union cooperation in peace and security, UN Doc. S/2011/805 (2011), 11-12, para. 39.

⁹⁸ Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *supra* note 84, 5, para. 5.; Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/65/740 (2011), 5, para. 4. His Office" comprises the Office of the Chief of Staff, inclusive of the Planning Unit; the Office of Legal Affairs; and the Joint Mission Analysis Centre" as well as the Office of the Deputy Joint Special Representative, Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2008 to 30 June 2009, Report of the Secretary-General, UN Doc. A/62/791 (2008), 5-6, para. 10.

⁹⁹ Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *supra* note 84, 5, para.6; Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, *ibid.*, 5-6, para. 7.

¹⁰⁰ Security Council Resolution 1769, *supra* note 70, 4, para. 7; Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *ibid.*, 6, para. 8. The review of UNAMID by the UN found that the JSCM "performs important coordination, support and liaison functions effectively", despite the challenges the UN and the AU are faced with to coordinate with one another on joint strategic guidance to UNAMID, Special report of the Secretary-General on the review of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2014/138 (2014), 10, para. 38. The Joint Special Representative also maintains communications with the heads of the other UN operations in the region to ensure complementarity, Budget for the African Union-United Nations Hybrid Operation in Darfur (2010), *supra* note 84, 12, para. 39. Further coordination is

and support of the implementation of the mandate of UNAMID in the form of operational directives as well as deepening “the current collaboration between the two institutions.”¹⁰¹

3. *Assessment of the Control Arrangements*

The analysis of the command and control structures of UNAMID on the basis of the available documents showed that in contrast to the first case-study, the deployment of UNAMID as a peacekeeping operation is directly included in and part of the wider political framework for a peaceful resolution of the Darfur crisis. In fact, the political process is not only intrinsically connected to the deployment of UNAMID, but the latter is actually steering the implementation and management of the process. The cited report of the Secretary-General indicates that the strategic planning of the peace process is also part of the therefore established secretariat at UNAMID headquarters. Then again, the overall authority over UNAMID is exercised by the Joint Special Representative whose functions include the supervision of UNAMID’s mandate and the implementation of strategic directives issued by the AU and the UN.

It was stressed in the previous case-study that in order to justify that two international organisations are held jointly responsible on the basis of the proposed criterion of attribution, there has to be a strong nexus between the control exercised on the political level by the organisations and the control performed by the responsible organs in the peacekeeping operation. In the present context of UNAMID, it appears that the set-up of the operation actually transcends the required intimate link; part of the wider political control has been allocated to the peacekeeping operation itself, although ultimately under the authority of both organisations. UNAMID can, to a certain extent, navigate the political process autonomously. This fact also raises the question as to whether there is a heightened responsibility of the UN and the AU. The attribution of responsibility to international organisations

performed through the DPKO in New York and the AU Observer Office to the UN including information sharing regarding the deployment of UNAMID and the political process, *ibid.*, 13, para. 44; Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2013 to 30 June 2014, Report of the Secretary-General, UN Doc. A/67/806 (2013), 7, para. 8. For an overview of the quite extensive cooperation with UNMIS, see Budget performance of the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2010 to 30 June 2011, Report of the Secretary-General, UN Doc. A/66/596 (2011), 9, para. 34.

¹⁰¹ Budget for the African Union-United Nations Hybrid Operation in Darfur 2010), *ibid.*, 7, para. 13. In order to enhance collaboration between the UN and the AU on UNAMID, the Secretary-General and the Under-Secretary-Generals for the DPKO, the Department of Political Affairs and the DFS as well as the Joint Special Representative participated in the AU summit in 2011, Budget performance of the African Union-United Nations Hybrid Operation, *ibid.*, 10, para. 37. See also Communiqué of the 198th Meeting of the Peace and Security Council, Annex to the letter dated 24 July 2009 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, UN Doc. S/2009/388 (2009), 5, para. 18; Report of the Secretary-General and the Chairperson of the African Union Commission, *supra* note 61, 16, para. 57.

cannot only be seen as a sliding scale upon which the amount of control exercised by international organisations reflects the likelihood of the attribution of conduct to that organisation. In contrast, another factor is the autonomy of the respective organ (the peacekeeping operation); not autonomy in the sense of a lack of control by the organisation, but autonomy due to a transfer of certain tasks to the organ whose implementation by the organ binds the organisation. This corresponds to a more “mature” relationship between the organ and the organisation, as the latter has actually done more by entrusting certain specific functions to that organ. One author speaks in this context of the “hierarchy of influence” which is more about *auctoritas* than *potestas*, a very fitting description for this particular cooperation arrangement in UNAMID.¹⁰²

One can draw two conclusions here. Firstly, UNAMID reconfirmed the particular relevance of political control, as well as of the translation of that control over the mission. Secondly, it became evident that a comprehensive approach towards the political peace process and the deployment of a peacekeeping operation, involving the same institutional actors, reinforces the control and oversight executed over the operation.

Regarding the distribution of responsibility between the UN and the AU, the analysis highlighted that, notwithstanding the provision of backstop and command and control structures solely by the UN, all decisions regarding the deployment, the operations on the ground, the appointment of personnel, the revision of operational directives and other issues are taken jointly by both organisations. Therefore, even if the UN enjoys greater control and influence over UNAMID than the AU due to an advantage in resources and experience,¹⁰³ it does not compromise the fact that all decisive strategic and operational decisions are taken jointly by both operations.¹⁰⁴ Thus, the daily operational command and control of the mission by the UN does not impair the essential and predominant hybrid character of the operation.

The available documents do not give any indication that the UN exercises any more supplementary control by paying for the budget of the operation; neither does the financing of the operation by the UN affect the decision-making processes within the operation.

¹⁰² J.J. Piernas López, ‘Regionalism in the Field: The Case of South Sudan’, *European Society of International Law, Conference Paper Series*, Conference Paper No. 7/2012, 14.

¹⁰³ A. Bashua, ‘Challenges and Prospects of AU-Un Hybrid Operations’, in (2014) 18 *Journal of International Peacekeeping*, 92, 99-100.

¹⁰⁴ The SOFA of UNAMID also stipulates that the AU and the UN shall ensure that UNAMID conducts its operations in full conformity with international humanitarian law, Agreement between The United Nations and the African Union and the Government of Sudan, *supra* note 96, 3, para. 6 a).

Furthermore, the UN and the AU are not only acting together in the operation of UNAMID, but all political activities are equally led jointly by the two institutions, through their joint Chief Mediator and in coordination – when necessary – with the Government of Sudan.

Naturally, the United Nations is in a slightly stronger moral position than the AU due to the Security Council being at the forefront of the international system of collective security. Another factor is the extensive experience of the organisation in the deployment of peacekeeping operations. In the end, the UN and the AU cooperate on the political, strategic and operational levels as equals so that any conduct of UNAMID personnel, in violation of international law is to be attributed jointly to the AU and to the UN.

The next section, on South Sudan, will highlight in particular the relevance of not only the political process but also of inter-mission cooperation as another contributing factor to the analysis of the responsibility of international organisations in the context of peacekeeping operations.

3. Attribution of Conduct of UNISFA and UNMISS

1. Introduction

Since the beginning of the Sudan and Darfur crisis, the African Union has led the international community in dealing with the situation.¹⁰⁵ That leadership of the AU on the political level is undisputed by all other international actors; the AU Roadmap for the settlement of the unresolved issues between Sudan and South Sudan of April 2012, following hostilities between the two states along the border, and as adopted by the AU Peace and Security Council was not only accepted by the Parties, but endorsed by the Security Council just one week later in Resolution 2046.¹⁰⁶ In that Resolution the Council, while determining that the prevailing situation along the border between Sudan and South Sudan constitutes a serious threat to international peace and security, decided that both states shall, *inter alia*, immediately cease all hostilities, including aerial bombardments and

¹⁰⁵ *Ibid.*, 7.

¹⁰⁶ Report of the Secretary-General on South Sudan, UN Doc. S/2012/486 (2012), 4, para. 17; Report of the African Union High-Level Implementation Panel for Sudan and South Sudan, PSC/PR/COMM.1 (CCCLIII) (2013), 1, para.2; Peace and Security Council, 319th Ministerial Meeting, Addis Ababa, Ethiopia, 24 April 2012, PSC/MIN/COMM/3.(CCCXIX) (2012), 3-4, para. 12; 5, para. 18; Report of the Chairperson of the Commission, *supra* note 57, 3, para. 8. The EU is fully supportive of the roadmap, see Council of the European Union, Council conclusions on the Roadmap for Sudan and South Sudan, 3183rd Foreign Affairs Council meeting, Brussels, 23 July 2012, 1, paras. 1-3; 2, para. 6; Statement by the High Representative Catherine Aston on the agreements concluded between Sudan and South Sudan in Addis Ababa, Brussels, 27 September 2012, A 425/12, 1; Council conclusions on Sudan and South Sudan, Foreign Affairs Council meeting, Brussels, 22 July 2013, 1, paras. 1-2; 2, para. 4.

withdraw all of their armed forces to their side of the border.¹⁰⁷ The Council also legally obliged both governments to resume negotiations under the African Union High-Level Implementation Panel on Sudan (henceforth: AUHIP).¹⁰⁸

The Agreements signed between the Governments of Sudan and South Sudan on 27 September support the primacy of the political role of the AU in dealing with the crisis involving the two states.¹⁰⁹ The Security Council in a press release, following the conclusion of the agreements, stated that it “look[s] forward to President Mbeki’s recommendations on these matters after he reports to the African Union Peace and Security Council and to the report of the Secretary-General.”¹¹⁰

A division of labour between the AU and the UN has been established, whereas the former focuses on direct interaction with the two governments and the facilitation of new agreements between them, the UN concentrates on the correct implementation of the Comprehensive Peace Agreement.¹¹¹

The United Nations is engaged with two operations in South Sudan, UNISFA and AFISMA which have different tasks and responsibilities under their mandate. As the available documents demonstrate, there is a rather close linkage between the deployment and execution of their mandates between the two operations as well as other peacekeeping operations in the area.

2. UNISFA

1. Mandate

UNISFA was established on the basis of Security Council Resolution 1990 in 2011 in order to support the implementation of the Agreement between the Government of Sudan and the Sudan’s People Liberation Movement on temporary arrangements for the disputed Abyei area, including the

¹⁰⁷ Security Council Resolution 2046, UN Doc. S/RES/2046 (2012), 3, para.1(i), (ii).

¹⁰⁸ *Ibid.*, 4, paras. 2-3. The Security Council likewise requested the Secretary-General to consult with the AU regarding the implementation of the resolution and the decisions of the AU PSC as well as to work closely with the AUHIP, *ibid.*, 4, para.6.

¹⁰⁹ The Cooperation Agreement between the Republic of the Sudan and The Republic of South Sudan, 27 September 2012, p. 2, Preamble; 3, Preamble; 4, para. 1; 6, para. 4; Agreement on Security Arrangements between The Republic of the Sudan and The Republic of South Sudan, 27 September 2012, 2-3, para. 3.

¹¹⁰ Security Council Press Statement on Sudan/South Sudan, SC/10779 (2012), 2nd paragraph.

¹¹¹ Piernas López, *supra* note 102, 9. The UN also coordinates with other international actors, including the EU, IGAD and important states such as the USA; China or the UK in the development and implementation of the CPA, *ibid.*

protection of civilians and the peaceful administration of that area.¹¹² The Security Council acted in that instance under Chapter VII of the UN Charter.¹¹³ Referring explicitly to Chapter VII later in the Resolution, UNISFA is authorised, “within its capabilities and its area of deployment to take the necessary actions to” protect UNISFA and United Nations personnel, installations, and equipment as well as to protect civilians and to ensure security in the Abyei area.¹¹⁴ UNISFA’s protection of civilians mandate “includes taking the necessary actions to protect civilians under imminent threat of physical violence, irrespective of the source of such violence.”¹¹⁵

2. Political Control/Chain of Command

The Temporary Arrangements Agreement for the Administration and Security of the Abyei Area signed in June 2011 established various mechanisms “which hinge on the effective and efficient cooperation between the AU and the UN.”¹¹⁶ It is particularly important to mention the Abyei Joint Oversight Committee (AJOC) consisting of an AU official, the UNISFA Force Commander and representatives of the two countries.¹¹⁷ In this regard, the AU commended the UN and in particular its Special Envoy and as well as UNISFA for their continued support to AU-led efforts.¹¹⁸

UNISFA was deployed consisting of Ethiopian soldiers under its own command structure on the insistence of Ethiopia which was represented the only third party that both sides would accept as an intervening agent.¹¹⁹

3. Inter-mission cooperation

Following the adoption of the Joint Border Verification and Monitoring Mechanism implementation plan by the Joint Political and Security Mechanism, UNISFA, UNMISS and UNAMID held a joint

¹¹² Budget for the United Nations Interim Security Force for Abyei for the period from 1 July 2011 to 30 June 2012, Report of the Secretary-General, UN Doc. A/66/526 (2011), 4, para.2; Security Council Resolution 1990, UN Doc. S/RES/1990 (2011), 2, para. 1.

¹¹³ The Council abstained from referring explicitly to Chapter VII but recognised in the last paragraph of the preamble of Resolution 1990 that the situation in Abyei constitutes a threat to international peace and security, *ibid.*, 2.

¹¹⁴ Security Council Resolution 1990, UN Doc. S/RES/1990 (2011), 3, para. 3. As emphasised in Resolution 2126, “UNISFA’s protection of civilians’ mandate (...) includes taking the necessary actions to protect civilians under imminent threat of physical violence, irrespective of the source of such violence, Security Council Resolution 2126, UN Doc. S/RES/2126 (2013), 4, para. 5.

¹¹⁵ Security Council Resolution 2104, UN Doc. S/RES/2104 (2013), 4, para. 4.

¹¹⁶ Report of the Chairperson of the Commission, *supra* note 57, 4, para. 9.

¹¹⁷ *Ibid.*

¹¹⁸ Peace and Security Council, 387th Meeting at Ministerial Level, 29 July 2013, Addis Ababa, Ethiopia, Communiqué, PSC/MIN/COMM.1/CCCLXXXVII), 1, para. 4.

¹¹⁹ A. M. Fitz-Gerald, ‘South Sudan’, in J. Boulden (ed.), *Responding to Conflict in Africa. The United Nations and Regional Organizations* (2013), 307, 318.

meeting in Juba on 30 November 2012 “[f]or the purpose of establishing necessary operational and strategic mechanisms.”¹²⁰ In this context, UNISFA also conducted a series of reconnaissance missions with UNMISS support.¹²¹ UNISFA draws “significantly on existing logistical arrangements and support structures in UNMISS.”¹²²

Bearing in mind that the deployment of UNISFA is coordinated with the deployment of UNMISS, it seems preferable to analyse the question of attribution of conduct following the analysis of UNMISS.

3. UNMISS

1. Mandate

The United Nations Mission in the Republic of South Sudan (UNMISS) was established as the follow-up operation to UNMIS. As its name mission instead of operation suggests, it is an integrated operation whose head the Special Representative for the Republic of South Sudan coordinates all activities of the whole United Nations System in the Republic of South Sudan.¹²³ The overall mandate is to consolidate peace and security and to help establish the conditions for development in South Sudan.¹²⁴

The government of South Sudan protested in a letter to the Security Council that the adoption of the mandate for UNMISS in 2011 under Chapter VII was not appropriate,¹²⁵ but as it was established in Chapter I, the recent practice of the Security Council has been to resort to Chapter VII for mandating peacekeeping operations. The mandate includes a strong “protection of civilians” component, which

¹²⁰ Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/59 (2013), 5, paras. 20-22.

¹²¹ Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/59 (2013), 5, para. 22.

¹²² Budget for the United Nations Interim Security Force for Abyei, *supra* note 112, 8, para. 27. UNMISS Provided UNISFA “with aviation support, spare parts, accommodations for personnel in transit, cargo movement services and full communications and information technology support while the African Union-United Nations Hybrid Operation in Darfur has provided UNISFA with staff on temporary assignment, surplus vehicles in Entebbe, Uganda, and customs clearance services in Port Sudan, and has facilitated inter-mission transfer and transportation of critical stores”, Budget for the United Nations Interim Security Force for Abyei for the period from 1 July 2011 to 30 June 2012, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/66/576 (2011), 3-4, para. 12.

¹²³ Security Council Resolution 1996, UN Doc. S/RES/1996 (2011), 3, paras. 1-3.

¹²⁴ Budget for the United Nations Mission in South Sudan for the period from 1 July 2013 to 30 June 2014, Report of the Secretary-General, UN Doc. A/67/716 (2013), 4, para. 2.

¹²⁵ The Government alleges that the safety conditions do not warrant any further qualification of the situation in the South Sudan as falling under Chapter VII of the Charter, Letter dated 13 June 2012 from the Chargé d’affaires a.i. of the Permanent Mission of South Sudan to the United Nations addressed to the President of the Security Council, UN Doc. S/2012/429 (2012), 2. The Secretary-General had proposed that the mandate of the operation should be adopted under Chapter VI of the Charter, Special report of the Secretary-General on the Sudan, UN Doc. S/2011/314 (2011), 8, para. 41.

might also explain and justify the adoption under Chapter VII by the Council despite the criticism of the South Sudanese government.

According to Paragraph 3, UNMISS shall support the South Sudanese government in a twofold manner to protect civilians. First of all, UNMISS is charged with the responsibility to advise and assist the Government, including the military and police at national and local levels, in order to protect civilians in compliance with international humanitarian, human rights, and refugee law. As such, the language used in the resolution resembles strongly “the responsibility to protect” concept.¹²⁶ Moreover, UNMISS is authorised to deter the conduct of violence including through proactive deployment and patrols “in areas at high risk of conflict, within its capabilities and in its areas of deployment, protecting civilians under imminent threat of physical violence.”¹²⁷ Paragraph 4 authorises UNMISS to “use all necessary means, within the limits of its capacity and in the areas where its units are deployed to carry out its protection mandate as set out in paragraphs 3(b) (iv), 3 (b) (v), and 3 (b) (vi).”¹²⁸ In the follow-up resolution 2057, the Security Council emphasised the importance of UNMISS’ mandated tasks for the protection of civilians.¹²⁹

2. The political level and the political process

The political process between South Sudan and Sudan is led by the African Union.¹³⁰ Under the auspices of the AUHIP, both governments signed a memorandum of understanding on non-aggression and cooperation.¹³¹ The AU cooperates in its political mediation activities regarding these two countries with the UN.¹³² According to the Report of the Chairperson of the AU Commission of 23 September 2013, a close working relationship has therefore been forged with then UN through

¹²⁶ Security Council Resolution 2057 supports such a view, Security Council Resolution 2057, UN Doc. S/RES/2057 (2012), 5, paras. 13, 16-17.

¹²⁷ Security Council Resolution 1996, *supra* note 123, 3-4, para. 3 (b) (iv), (v).

¹²⁸ The Security Council confirmed this authorisation its resolution 2057, Security Council Resolution 2057, *supra* note 126, 4, para.5. UNMISS is allowed to use all necessary to protect civilians under imminent threat or physical violence, irrespective the source of such violence which translates to an authorisation to act even against agents of the Government of South Sudan, Security Council Resolution 2109, UN Doc. S/RES/2109 (2013), 4, paras. 3-4; 5, para. 8.

¹²⁹ Security Council Resolution 2057, *ibid.*, 3-4, paras. 3-4.

¹³⁰ Peace and Security Council, 387th Meeting at Ministerial Level, 29 July 2013, Addis Ababa, Ethiopia, PSC/MIN/COMM.1(CCCLXXXVII), 1, para.4; 3, para. 14.

¹³¹ Annex, Letter dated 14 February 2002 from the Chairperson of the African Union Commission addressed to the Secretary-General, Letter dated 6 March 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/135 (2012), 2-3.

¹³² Statement by the President of the Security Council, UN Doc. S/PRST/2012/5 (2012), 3; Statement by the President of the Security Council, UN Doc. S/PRST/2012/12 (2012), 2. The Cooperation is based on the AU’s Roadmap and Security Council Resolution 2046, Statement by the President of the Security Council, UN Doc. S/PRST/2012/19 (2012), 1. See especially Statement by the President of the Security Council, UN Doc. S/PRST/2013/14 (2013), 1-2; Statements by various members of the Security Council during the 6583rd meeting, Security Council, 6583rd meeting, UN Doc. S/PV.6583 (2011).

the Secretary-General's Special Envoy.¹³³ Following the failure of both Governments to reach an agreement on all issues until the deadline of 2 August 2012, the AU PSC decided to grant an additional six weeks extension of the deadline, a decision which was endorsed by the Security Council subsequently.¹³⁴ UNMISS ensures strategic and operational coordination with other international partners, "in particular the African Union (...) the European Union and the World Bank", on a political level UNMISS is charged with "bringing together international actors to speak with one voice in helping the new Government to address its peace consolidation challenges."¹³⁵ Under its mandate UNMISS is also obliged to provide a summary of cooperation and to share information with UNAMID, MONUSCO and regional and international partners in addressing the threat posed by the Lord's Resistance Army (LRA).¹³⁶ In that context, one could ask as to whether the sharing of information which might be used to facilitate military attacks against the LRA could engage the responsibility of UNMISS.

3. Inter-mission cooperation

Under its mandate, UNMISS shall share information with UNAMID, MONUSCO and regional and international partners in support of addressing threats.¹³⁷ Following the escalation of combats in South Sudan, the Secretary-General decided to transfer troops to UNMISS from MONUSCO, UNAMID, UNISFA, UNOCI and UNMIL including five infantry battalions and three attack helicopters,¹³⁸ a decision which was approved by the Security Council in resolution 2132.¹³⁹

¹³³ Report of the Chairperson of the Commission, *supra* note 57, 3, para. 8.

¹³⁴ Report of the Secretary-General on the Sudan and South Sudan, UN Doc. S/2012/877 (2012), 6, para. 18.

¹³⁵ Special report of the Secretary-General on the Sudan, *supra* note 125, 8, para. 39. See e.g. Security Council Resolution 1996, *supra* note 123, 6-7, paras. 18, 20.

¹³⁶ Security Council Resolution 1996, *ibid.*, 6, para.15. In this context, the Secretary-General is explicitly authorised to take the necessary steps "In order to ensure inter-mission cooperation (...) [including] appropriate transfer of troops from other missions, subject to the agreement of the troop-contributing countries and without prejudice to the performance of the mandate of these United Nations missions", *ibid.*, 6, para.17; Security Council Resolution 2057, *supra* note 126, 1, Preamble. The Security Council confirmed these tasks given to the Secretary-General in Resolution 2057, Security Council Resolution 2109, *supra* note 128, 7, paras. 25-26. See also Security Council Resolution 2047, UN Doc. S/RES/2047 (2012), 4, para. 16; Security Council Resolution 2075, UN Doc. S/RES/2075 (2012), 5, para. 18.

¹³⁷ Budget for the United Nations Mission in South Sudan for the period from 1 July 2011 to 30 June 2012, Report of the Secretary-General, UN Doc. A/66/532 (2011), 7, para. 17.

¹³⁸ Letter dated 23 December 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/758 (2013), 1.

¹³⁹ Security Council Resolution 2132, UN Doc. S/RES/2132 (2013), 2, paras. 3, 5.

4. *Assessment*

Despite the scarcity of available documents regarding UNISFA and UNMISS one can draw several conclusions regarding the attribution of conduct. First of all, whereas the African Union is the leading political actor in South Sudan, its political influence on the peace process and on the peacekeeping operations, especially on UNISFA, is not mirrored in the strategic and operational control arrangements. In contrast, the division of labour between the UN and the AU is quite distinct. The lack of any “input” or “control” of the AU on the strategic or operational level of both operations is rather surprising. A possible explanation might be that the UN as the ultimate authority for maintaining international peace and security is unwilling, on the basis of its special position, to allow any external contribution by the AU towards the operations under its authority, outside of the political framework and the context for conflict resolution.

The following case-study of Mali will allow a verification as to whether this hypothesis is true or not. A particular feature of UNISFA and UNMISS is the emphasis on inter-mission cooperation. However, the lack of further information and the extent of inter-mission cooperation do not justify any suggestion that the AU could be jointly responsible with the UN for the conduct of AFISMA and/or UNMISS via the back-door of inter-mission cooperation with UNAMID. Nevertheless, it underlines that for future peacekeeping operations, the network of cooperation between the involved actors is enriched by another layer. Consequently, it proves that the main hypothesis of this present study, the need for a criterion of joint attribution is valid and warranted. Furthermore, it cannot be excluded that during the deployment of future peacekeeping operations, responsibility may also arise on the basis of inter-mission cooperation.¹⁴⁰

¹⁴⁰ It should, of course, be noted that inter-mission cooperation is not a new feature, one could, for example, refer to the Liberia crisis and cooperation between the parallel UN and ECOWAS operations. The difference is that inter-mission cooperation in South Sudan is an explicit mandate of the operations and it is executed in the form of a continuing, permanent, institutionalised mechanism and not in the form of ad hoc cooperation in the field.

4. Attribution of Conduct of AFISMA and MINUSMA

In Mali, the efforts by the two organizations [the AU and the UN] have focused both on the political and the peacekeeping aspects of the crisis

- Report of the Chairperson of the AU Commission, 23 September 2013¹⁴¹

1. Introduction

In January 2012, a Tuarag rebellion led by the National Movement for the Liberation of Azawad (NMLA) began in Northern Mali which quickly took over control of the Northern part of the country. Islamist groups saw their chance to take over control of a part of the country themselves and turned against the NMLA after having helped to defeat the Malian government and started to introduce the Sharia law in the territory under their control.

A coup d'état against the legitimate Malian government increased the anxiety of the international community that the situation in Mali would spin completely out of control and threaten international peace and security within the whole region. A major concern was the fact that the Sahel region extends over the Northern part of Mali which has been used for a longer period for "drug cartel operations, cross-border banditry, smuggling, human trafficking, kidnapping-for-ransoms and money-laundering"¹⁴² as well as a hide-out for Al-Qaida's Northern African branch which is active within the region. The prospects of increased terrorism, migration and destabilisation led the international community to adopt a harmonised approach from the very beginning to confront the political as well as the Security crisis in Mali: "advocat[ing] a double strategy based on two axes of action, one a political process and the other military action, if necessary."¹⁴³ In this context, it was emphasised that the UN and other international organisations operate, indeed, "in a new geopolitical context (...) fac[ing] threats that have not been encountered before in a peacekeeping context."¹⁴⁴ The Under-Secretary-General for Peacekeeping Operations spoke in a similar vein of "a peacekeeping operation

¹⁴¹ Report of the Chairperson of the Commission, *supra* note 57, 5, para. 15.

¹⁴² Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/189 (2013), 11, para. 61

¹⁴³ Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, UN Doc. S/PV.6952 (2013), 4.

¹⁴⁴ Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, UN Doc. S/PV.6944 (2013), 5.

in a geopolitical context characterized by asymmetrical threats not previously encountered in a United Nations peacekeeping environment.”¹⁴⁵

The response of the international community to the coup d'état in Mali and the wider security crisis was coordinated from the early hours, primarily between the UN, the AU and ECOWAS.¹⁴⁶ Following the gain of territory by the Islamist armed groups in Northern Mali; it was decided to curtail the mandate and the deployment of AFISMA in favour of the quickest possible deployment of MINUSMA. The analysis of the attribution of conduct starts with AFISMA, followed by an examination of MINUSMA.

2. AFISMA

1. Establishment and Elaboration of the Mandate

The occupation of the North of Mali by armed groups, “including terrorists, drug traffickers and criminals of every sort” led to a severe security crisis in Mali, prompting the Government to request help by ECOWAS as well as to request the adoption of a UN Security Council Resolution authorizing the intervention of an international military force under Chapter VII.¹⁴⁷

Originally, ECOWAS and the AU had requested a Security Council mandate authorising the deployment of an ECOWAS stabilization force and the Council expressed its readiness to further examine the request once additional information had been provided. This decision followed the positive response of the AU PSC to a request by ECOWAS to deploy elements of its Standby Brigade in Mali.¹⁴⁸ The Security Council then requested that the Secretary-General supports the Commissions

¹⁴⁵ Statement by Mr. Hervé Ladsous, Under-Secretary-General for Peacekeeping Operations, Security Council 6985th meeting, UN Doc. S/PV.6985 (2013), 7.

¹⁴⁶ Mediation efforts in the Mali crisis were made by the UN, the AU and ECOWAS, Annex to the letter dated 12 June 2012 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, Communiqué of the consultative meeting between members of the Security Council of the United Nations and the Peace and Security Council of the African Union, UN Doc. S/2012/444 (2012), 5, para. 22.

¹⁴⁷ Annex, Letter dated 18 September 2012 from the interim President and the Prime Minister of Mali addressed to the Secretary-General, Letter dated 28 September 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/727 (2012), 2.

¹⁴⁸ With a mandate that included the restoration of State authority over the northern part of the country and combating terrorist and criminal networks, Report of the Chairperson of the Commission on the Strategic Concept for the Resolution of the Crises in Mali and Other Related Aspects, PSC/PR/3.(CCCXXXIX) (2012), 1, para. 2. As pointed out by the representative of Côte d'Ivoire, speaking on behalf of ECOWAS in the Security Council:

“The ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security in the subregion enables the immediate deployment of the ECOWAS Standby Force

of ECOWAS and AU in “preparing such detailed options.”¹⁴⁹ The plans for the ECOWAS operation MICEMA, however, never went beyond the planning stage, due in particular to the absence of consensus within ECOWAS on the approach to be taken for resolving the crisis and particularly also with regard to financial and logistical constraints.¹⁵⁰

An initial planning conference was held in Abidjan from 11 to 15 June 2012 for which the UN provided advisory and planning support.¹⁵¹ The following technical assessment mission with representatives of ECOWAS and the AU – under ECOWAS leadership – included also a multidisciplinary UN team in advisory capacity as well.¹⁵² A further planning conference held from 9 to 13 August 2012 including representatives of the AU, the UN, and the EU further developed the concept of operations for the ECOWAS force which was envisaged to be deployed in Mali.¹⁵³

At yet another joint planning conference with participants of all the four organisations, a harmonised joint concept of operations was developed and subsequently endorsed by both ECOWAS and the AU.¹⁵⁴ Thus, the concept of operations for the envisaged operation, which would ultimately

in the case of crises, following a decision of the ECOWAS Mediation and Security Council, and above all with the consent of the legal authorities of the country concerned.

Those two conditions were satisfied in the case of the Mali crisis. However, mindful of supporting its action in Mali on a robust international legitimate basis, ECOWAS requested the prior authorization of the African Union and the United Nations Security Council before any deployment took place. Resolution 2085 (2012), adopted by the Security Council on 20 December 2012 to authorize the deployment of the African-led International Support Mission in Mali (AFISMA), was obtained at the end of lengthy negotiations that reflected the full complexity of peacekeeping mandates.”, Statement by Mr. Bamba, speaking on behalf of ECOWAS, Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 51-52.

¹⁴⁹ Security Council Resolution 2056, UN Doc. S/RES/2056 (2012), 4, paras. 17-18; Security Council Resolution 2071, UN Doc. S/RES/2071 (2012), 2, Preamble; 3-4, para. 7.

¹⁵⁰ L.-A. Thérout-Bénoni, ‘The long path to MINUSMA: Assessing the international response to the crisis in Mali’, in M. Wyss, T. Tardy (eds.), *Peacekeeping in Africa: The evolving security architecture* (2014), 171, 172.

¹⁵¹ Report of the Secretary-General on the situation in Mali, UN Doc. S/2012/894 (2012), 11, para. 46. The UN also provided further support to ECOWAS and the AU “in developing the objectives, means and modalities of the envisaged deployment”, *ibid.*

¹⁵² *Ibid.*, 11, para. 47.

¹⁵³ *Ibid.*, 11, para. 48; Also Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 3, para.9.

¹⁵⁴ Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, paras. 50-51; 20, para. 85; See also Attachment 1, Overview of the situation in Mali and efforts of the international community to find lasting solutions to the crises, in Letter dated 8 November 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/825 (2012), 14, para. 15. It is too early to say whether the joint elaboration of the concept of operations will become standard practice between the UN and regional organisations on the African continent, but it has to be noted that the UN also deployed planners to the AU to support the operational planning meeting between the AU and ECCAS for the concept of operations of MISCA – France, the USA, the EU and the International Organization of la Francophonie also participated in the meeting, Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 22 of Security Council Resolution 2121 (2013), UN Doc. S/2013/677 (2013), 4, para. 16. The AU PSC itself, in its recent decision on the partnership between the AU and the UN called for “adequate, timeous, informal and formal consultations with the AU (...), as may be relevant, on the drafting of resolutions, presidential statements and

become AFISMA, was developed in cooperation between four international organisations: the AU, the UN, the EU and ECOWAS. The late reaction of the Security Council with regard to authorising the deployment of such an operation led to criticism from ECOWAS¹⁵⁵ and ultimately to the French intervention with “Operation Serval” for which France was applauded by the Secretary-General.¹⁵⁶

The concept of operations (CONOPS) was revised in mid-February 2013 upon a request of the AU PSC¹⁵⁷ following developments on the ground by military and civilian experts of the AU and ECOWAS Commissions, Mali and other bilateral and multilateral partners.¹⁵⁸

The troop strength of AFISMA was increased¹⁵⁹ and the leadership of AFISMA was entrusted to the AU which “had overall authority over the Mission.”¹⁶⁰ The UN was heavily involved by not only providing planning support through UN military planners, but also helping in establishing coordination mechanisms as well as supporting the development of key documents for AFISMA, including “operational directives, guidelines for the protection of civilians, rules of engagement and a code of conduct.”¹⁶¹ The Conclusions of the Meeting of the Follow-up and Support Group and an AU report suggest that the EU was also involved in the joint planning, in cooperation with the three other international organisations, Mali and other stakeholders, but in a subsidiary role to the three

statements to the press on matters relating to Africa”, which suggests that there is a common interest on behalf of both organisations to cooperate further in this activity, Peace and Security Council, 397th Meeting at the Level of the Heads of State and Government, New York 23 September 2013, PSC/AHG/COMM/1.(CCCXCVII), 3, para. 8 a. v.

¹⁵⁵ Letter dated 2 December 2010 from the President of the Commission of the Economic Community of West African States addressed to the Secretary-General, Transmission of the communiqué of the Council of Ministers of the Economic Community of West African States, Enclosure, Communiqué of the Council of Ministers on the report of the Secretary-General of the United Nations, UN Doc. S/2012/905 (2012), 3, para. 2. See also, *ibid.*, 3, para.7; 4, para. 9.

¹⁵⁶ Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6905th meeting, UN Doc. S/PV.6905 (2012), 2; Report of the Secretary-General on the situation in Mali, *supra* note 142, 1-2, para. 4.

¹⁵⁷ *ibid.*, 8, para. 45.

¹⁵⁸ Progress Report of the Chairperson of the Commission on the African-led International Support Mission in Mali, Peace and Security Council, 358th Meeting, 7 March 2013, PSC/PR/2(CCCLVIII), 3, para. 9; Solemn Declaration of the Assembly of the Union on the Situation in Mali, Addis Ababa, 27 and 28 January 2013, 3, para. 7 (a); Peace and Security Council, 358th Meeting, 7 March 2013, Addis Ababa, Ethiopia, PSC/PR/COMM.(CCCLVIII), Communiqué, 2, paras. 10-12.

¹⁵⁹ Report of the Secretary-General on the situation in Mali, *supra* note 142, 8, para. 45.

¹⁶⁰ 6th Ordinary Meeting of the Specialised Technical Committee on Defence, Safety and Security, Preparatory Meeting of Chiefs of Staff, Addis Ababa, Ethiopia, 29 – 30 April 2013, RPT/Exp/VI/STCDSS/(i-a)2013, 5, para. 20; 6, para. 23. Apparently, despite several planning meetings, ECOWAS didn’t succeed in preparing a strategic concept for the operation which was satisfactory for the UN Security Council, ECOWAS Peace and Security Report, Issue 1 October 2012, Mali: making peace while preparing for war, 5.

¹⁶¹ Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 4; Report of the Secretary-General on the situation in Mali, *supra* note 142, 9, para. 47. See also Security Council Resolution 2085, UN Doc. S/RES/2085 (2012), 5, para. 11.

other organisations.¹⁶² The previously existing concept of operations for the international military mission, which would become AFISMA, was transmitted to the Security Council “to seek the latter’s total support for its effective implementation.”¹⁶³

2. Mandate

AFISMA was endowed with a robust, coercive mandate involving an authorisation of offensive combat operations, together with the Malian Defence Forces, including simultaneously the strong protection of civilians.¹⁶⁴ According to the joint strategic concept of operations, the strategic objectives include, *inter alia*, the protection of “the population with respect to international human rights and international humanitarian and refugee law” as well as the reduction of threats posed by terrorist and transnational criminal groups and the establishment of a safe and secure environment in Mali.¹⁶⁵ The Security Council authorised AFISMA to “take all necessary measures, in compliance with applicable international humanitarian law and human rights law” to carry out, *inter alia*, the following tasks:

- (b) To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations,

¹⁶² The three organisations were requested to prepare a joint work plan for finalising the planning, Meeting of the Support and Follow-Up Group on the Situation in Mali, Bamako, Mali, 19 October 2012, Conclusions, 3, para. (iii); Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 1, para. 2; 3, para. 10. See also Assembly of the Union, Twentieth Ordinary Session, 27-28 January 2013, Addis Ababa, Ethiopia, Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa, Assembly/AU/3(XX), 35, 121.

¹⁶³ Enclosure 1, Communiqué on the situation in Mali, in Letter dated 8 November 2012, *supra* note 154, 4, para. 7. ECOWAS had requested the AU PSC to endorse the Concept and to ensure its transmission, together with the Strategic Concept to the United Nations Secretary-General within the deadline under SC Resolution 2071, Extraordinary Session of the Authority of ECOWAS Heads of State and Government, Abuja, Federal Republic of Nigeria, 11 November 2012, 3, para. 9; Annex, Letter dated 13 November 2012 from the Commissioner for Peace and Security of the African Union addressed to the Secretary-General, Letter dated 23 November 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/876 (2012), 2.

¹⁶⁴ Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Council Decision 2013/178/CFSP of 25 February 2013 on the signing and conclusion of the Agreement between the European Union and the Republic of Mali on the status in the Republic of Mali of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Council Decision 2013/87/CFSP of 18 February 2013 on the launch of a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Enclosure I, Joint Strategic Concept of Operations for the International Military Force and the Malian Defense and Security Forces to Restore the Authority of the State of Mali Over Its Entire National Territory, Letter dated 23 November 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/876 (2012), 11, para. b (Phase 2).

¹⁶⁵ Enclosure I, Revised joint strategic concept of operations for the African-led International Support Mission in Mali and the Malian Defence and Security Forces to restore the authority of the State of Mali over its entire national territory, Letter dated 15 March 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/163 (2013), 7, para. 11(d), (e), (f).

including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population;

- (c) To transition to stabilisation activities to support the Malian authorities in maintaining security and consolidate State authority through appropriate capacities;
- (d) To support the Malian authorities in their primary responsibility to protect the population; (...)
- (f) To protect its personnel, facilities, premises, equipment and mission and to ensure the security and movement of its personnel;¹⁶⁶

3. Political and Strategic Control of AFISMA

Cooperation on a strategic level is exercised through the established Mali Integrated Task Force (MITF) based at the AU Commission¹⁶⁷ in Addis Ababa which is composed of representatives of the AU, ECOWAS and the United Nations and is “responsible for coordination at the strategic level of AFISMA”¹⁶⁸ in the form of “strategic guidance and advice for AFISMA.”¹⁶⁹ It is furthermore responsible to “ensure coordinated strategic implementation of the relevant decisions of the three organizations on the situation in Mali.”¹⁷⁰ The Secretary-General also recommended that the Security Council plays an active role in ensuring that the African-led international military operation is “held fully accountable.”¹⁷¹ The Security Council encouraged the AU, ECOWAS, the EU and the UN to maintain coordination through the task force in its Resolution 2100 establishing MINUSMA,¹⁷² as well as through the Support and Follow-up Group and it stressed “the importance of continued coordination” between the UN, the AU and ECOWAS.¹⁷³

4. Operational Control

A joint coordination mechanism (JCM) for the implementation of Security Council Resolution 2085 was established in Bamako at the operational coordinational cell, under the leadership of the AU High Representative for Mali and the Sahel, President Pierre Buyoya who was appointed as the

¹⁶⁶ Security Council Resolution 2085, *supra* note 161, 4, para. 9. The Security Council also emphasised that all support provided by the UN, regional and subregional organisations and Member States “in the context of the military operation in Mali shall be consistent with international humanitarian and human rights law and refugee law” and mandated the Secretary-General accordingly to observe the adherence to IHL and human rights law through a to-be-established multidisciplinary UN presence in Mali, *ibid.*, 6, para. 18; 7, para. 23.

¹⁶⁷ Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para. 33.

¹⁶⁸ Progress Report of the Chairperson of the Commission, *supra* note 158, 2, para. 6; Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 4.

¹⁶⁹ Statement by His Excellency, Mr. Tété António, Permanent Observer of the African Union to the United Nations, Security Council, 6905th meeting, *supra* note 156, 8.

¹⁷⁰ Solemn Declaration of the Assembly of the Union, *supra* note 158, 3, para. 7 (c).

¹⁷¹ Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 21, para. 89.

¹⁷² Security Council Resolution 2100, UN Doc. S/RES/2100 (2013), 3, Preamble.

¹⁷³ *Ibid.*, 5, para.5.

Special Representative and Head of AFISMA,¹⁷⁴ following consultations with ECOWAS.¹⁷⁵ It is co-chaired by the AU and the UN.¹⁷⁶ Its tasks are to facilitate “regular consultations on political leadership, resource mobilization and accountability as well as the monitoring and assessment of expenditures”¹⁷⁷, thereby coordinating support to the mission.¹⁷⁸ The ECOWAS Special Representative in Mali, Ambassador Cheaka Touré of Togo was appointed to his Deputy position.¹⁷⁹ It includes representatives of the AU, ECOWAS and the United Nations as well as members from Mali and other partners.¹⁸⁰ One can only speculate as to why the early plans of an ECOWAS Mali force¹⁸¹ were changed to an AU-led international military force, but it is reasonable to presume that a wider range of capacities and resource acquirement by the AU were a determinative factor. Moreover, the Memorandum of Understanding between the AU and the RECs as part of the African Peace and Security Architecture might have triggered this development.

5. Chain of Command

The Chain of Command of AFISMA is headed by the Chairperson of the AU Commission who has delegated “overall responsibility” for all AU(-led) organisations to the Commissioner for Peace and Security. The AU exercises “operational authority” of AFISMA.¹⁸² The Special Representative as Head of the Mission exercises “overall AUC authority over civilian, police and military components of

¹⁷⁴ He was appointed after consultations between the AU and ECOWAS, Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, para.52; Peace and Security Council, 358th Meeting, Communiqué, *supra* note 158, 1, para. 3.

¹⁷⁵ Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para. 32.

¹⁷⁶ Report of the Secretary-General on the situation in Mali, *supra* note 142, 6, para. 29.

¹⁷⁷ Statement by Mr. Bamba (Côte d’Ivoire) speaking on behalf of ECOWAS, Security Council, 6905th meeting, *supra* note 156, 9.

¹⁷⁸ Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para.33. See also Security Council Resolution 2085, *supra* note 161, 5, paras. 13-14.

¹⁷⁹ Progress Report of the Chairperson of the Commission, *supra* note 158, 2, para. 6. Previously the Chairperson of the AU Commission received the request by the PSC to initiate consultations with ECOWAS on the command and control of AFISMA, Peace and security Council, 341st Meeting, Addis Ababa, Ethiopia, 13 November 2012, Communiqué, PSC/PR/COMM.2(CCCXLI), 3, para.10. The Joint Strategic Concept of Operations foresaw that ECOWAS would, in consultation with the AU, appoint a Special Representative as Head of the Mission, Enclosure I, Joint Strategic Concept of Operations, *supra* note 164, 13, para. 36.

¹⁸⁰ Progress Report of the Chairperson of the Commission, *ibid.*, 2, para. 6; Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 4; Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, 15, para. 64.

¹⁸¹ Annex, Letter dated 28 September 2012 from the President of the Commission of the Economic Community of West African States addressed to the Secretary-General, Letter dated 4 October 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/739 (2012), 3.

¹⁸² Enclosure I, Revised joint strategic concept, *supra* note 165, 14, para. 32.

AFISMA” whereas the Force Commander and the Police Commander have “operational control over assigned forces.”¹⁸³

6. Operational/Financial support

The Secretary-General emphasised in his report that the UN does not possess neither capability in providing logistical support to international military forces deployed in the context of offensive combat operations against hostile armed forces.¹⁸⁴ Logistical support based on three possible alternatives would be funded through UN assessed contributions and comprise the equipment and support services as they would be provided to a UN operation.¹⁸⁵ The UN Security Council did not authorise the financing of AFISMA itself through assessed contributions,¹⁸⁶ but requested the Secretary-General in Resolution 2085 to establish a Trust Fund for the operation.¹⁸⁷ A donor’s conference was convened by the AU in close consultation with ECOWAS in January 2013.¹⁸⁸

The EU committed 50 million Euros through the African Peace Facility for AFISMA¹⁸⁹ and promised further financial and logistical support in close coordination with the AU and ECOWAS¹⁹⁰ following the activation of the “Clearing House” mechanisms to support AFISMA,¹⁹¹ under the guidance of the

¹⁸³ *Ibid.*

¹⁸⁴ The AU had officially requested the authorisation of a support package funded by UN-assessed contributions, Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 1, para. 2.

¹⁸⁵ Letter dated 13 December 2012 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2012/926 (2012), 1, 2nd paragraph; 3, 1st paragraph. A usual support package includes “provision of rations, fuel, engineering works, communications and medical support (...) [and] funding would also provide for the strategic deployment of new forces, the rotation of existing forces, the movement of equipment and supplies and additional staff to manage the delivery of the support package”, *ibid.*, 3, 1st paragraph.

¹⁸⁶ The Security Council considered such an option in the Resolution and charged the Secretary-General to refine options within a report. Following the report and the development of events in Mali calling for the French intervention and a transfer from AFISMA to MINUSMA after 6 months, the Security-Council did not authorise the funding by assessed contributions, Security Council Resolution 2085, *supra* note 161, 6, paras. 21-22.

¹⁸⁷ See also Security Council Resolution 2100, *supra* note 172, 6, para. 10.

¹⁸⁸ Conclusions of the Donors’ Conference for the African-led International Support Mission in Mali and the Malian Defense and Security Forces (2013), 1, paras. 2-3.

¹⁸⁹ Background, Foreign Affairs Council, Monday, 18 February 2013, in Brussels; Security Council Resolution 2085, *supra* note 161, 6, para. 20.

¹⁹⁰ Statement by Mr. Mayr-Harting, Head of the Delegation of the EU to the UN, Security Council, 6905th meeting, *supra* note 156, 18.

¹⁹¹ EEAS provides a ‘Clearing House’ mechanism to support AFISMA mission in Mali, Brussels, 21 January 2013, A/30/13, 1-2.

AU High Representative for Mali and the Sahel.¹⁹² The AU decided to contribute 50 Million US Dollars to the budget of AFISMA which amounts to 460 Million US Dollars.¹⁹³

AFISMA also received logistical support from bilateral and multilateral donors “providing funding and reimbursement for operations, critical life support (rations, water and fuel), logistical support for strategic and in-theatre movements, direct materiel support and the training of enabling units.”¹⁹⁴

7. Training of Troops

EUTM Mali is supporting the training and reorganisation of the Malian Armed Forces.¹⁹⁵ The training includes sessions on gender and human rights.¹⁹⁶

8. Coordination and cooperation between the international organisations regarding the political process

The PSC of the AU established the Support and Follow-up Group at its meeting in Banako, on 20 March 2012, to facilitate the resolution of the crisis in the North of Mali.¹⁹⁷ Early meetings of the Support and Follow-up Group on the situation in Mali were hosted by the EU, co-chaired by the AU, ECOWAS and the UN.¹⁹⁸ Later meetings of the Support and Follow-up Group were convened by the AU. The Group brings together ECOWAS, its member states, the AU, the UN, the EU, the International Organisation of *La Francophonie* (OIF), the Organisation of the Islamic Conference (OIC), all neighbouring countries, countries of the region, all permanent members of the Security Council and other bilateral partners.¹⁹⁹

¹⁹² Council conclusions on Mali, 3222nd Foreign Affairs Council meeting, Brussels, 18 February 2013, 3, para. 8.

¹⁹³ Solemn Declaration of the Assembly of the Union, *supra* note 158, 5, para. (B) (i).

¹⁹⁴ Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/338 (2013), 14, para. 66.

¹⁹⁵ Statement by Under-Secretary-General for Political Affairs, Jeffrey Feltman, Security Council, 6905th meeting, *supra* note 156, 3. The Security Council took note of the (then) planned operation in its Resolution 2085, Security Council Resolution 2085, *supra* note 161, 4, para. 8.

¹⁹⁶ Statement by His Excellency, Mr. Ioannis Vrailas, Deputy Head of Delegation of the EU to the UN, Security Council, 6948th meeting, UN Doc. S/PV.6948 (2013), 33.

¹⁹⁷ Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 11, para. 28.

¹⁹⁸ Remarks to the press by High Representative Catherine Ashton following the meeting of the support and follow-up group on the situation in Mali, Brussels, 5th February 2013, 1; EU host a ministerial meeting of the Support and Follow-Up Group on the situation in Mali, European Union, Brussels, 5 February 2013, A/60/13, 1; Progress Report of the Chairperson of the Commission, *supra* note 158, 2, para. 8; 3183rd Council meeting, Foreign Affairs, Brussels, 23 July 2012, 15, para. 7. Some of the later meetings of the Support and Follow-up Group were under the joint chairmanship of the AU, the UN and ECOWAS, Meeting of the Support and Follow-Up Group on the Situation in Mali, *supra* note 162, 1, para. 1.

¹⁹⁹ Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 2, paras. 11, 28.

Whereas the group should remain “at the heart of international coordination on the situation in Mali”²⁰⁰, the international efforts are mainly coordinated by the triumvirate of ECOWAS, the AU and the UN,²⁰¹ also via the High/Special Representatives for the Region of the involved organisations.²⁰² The UN favoured this close interaction as it “allow[s] the United Nations to focus on its core responsibilities”, but it is also due to this close interaction and “the large numbers of actors involved, [that] the United Nations mission [MINUSMA] should provide a strong coordination mechanism.”²⁰³ Generally, there is a lot of coordination between the AU, ECOWAS, UN and the EU also through the exchange of documents²⁰⁴ and through meetings on various levels.²⁰⁵

The UN supported the mediation efforts of ECOWAS through the UN Office in Mali (UNOM) and the Office of the Special Representative of the Secretary-General for West Africa (UNOWA).²⁰⁶

9. Assessment

The unprecedented peacekeeping context and the complexity of the security crisis in Mali have not triggered, on their own, such a concerted approach by the involved international organisations. External constraints, in the form of a lack of financial and logistical resources particularly, were influential in the change of plans from an ECOWAS to an African-led operation.²⁰⁷ It is also plausible that the lack of time for long-term mission planning for Mali due to the land gain by the Islamist armed groups has forced the UN to interact so intensively with regional organisations which are better equipped to rapidly deploy troops than the UN. Generally speaking, one can conclude that the standard of cooperation of international organisations in the mandating, planning, deployment and supervision of AFISMA is, indeed, unprecedented.

²⁰⁰ *Ibid.*, 11, para. 29; See also Statement by the Secretary-General, Security Council, 6820th meeting, UN Doc. S/PV.6820 (2012), 3.

²⁰¹ Report of the Chairperson of the Commission on the Strategic Concept, *supra* note 148, 11-12, para. 29. The Strategic Concept foresees nevertheless also the establishment of a working level mechanism among the UN Secretariat, The AU and ECOWAS Commissions, the EU and the OIF, and other international stakeholders as required, *ibid.* The Security Council requested in Resolution 2056 the Secretary-General to support the efforts of international and regional actors, including the Follow-up and Support Group, Security Council Resolution 2056, *supra* note 149, 5, para. 25.

²⁰² Letter dated 25 October 2012 from the Chairperson of the African Union Commission addressed to the Secretary-General, Annex to Letter dated 8 November 2012, *supra* note 154, 2.

²⁰³ Report of the Secretary-General on the situation in Mali, *supra* note 142, 16, para. 84.

²⁰⁴ Peace and Security Council 316th Meeting, Addis Ababa, Ethiopia, 3 April 2012, Communiqué, PSC/PR/COMM.(CCCXVI), 1, para. 5; 4, para. 16; Security Council Resolution 2056, *supra* note 149, para. 1.

²⁰⁵ See e.g. Report of the Secretary-General on the situation in Mali (2012), *supra* note 151, 12, 8, paras. 32-33.

²⁰⁶ Statement by Mr. Jeffrey Feltman, Under-Secretary-General for Political Affairs, Security Council, 6944th meeting, *supra* note 144, 2.

²⁰⁷ Thérault-Bénoni, ‘The long path to MINUSMA’, *ibid.*, 171, 172, 175-177.

Surprisingly, the level of cooperation is actually even higher than for the deployment of UNAMID in Darfur. The analysis of the various elements of cooperation has demonstrated that one can speak nearly of a “monolithic” peacekeeping operation; excluding the chain of command which is directed by the AU, all other elements of the operation were determined on the basis of cooperation and coordination arrangements between the AU, ECOWAS and the UN. Regarding the attribution of conduct, there is consequently no doubt that conduct arising during the deployment of AFISMA, and in violation of international law, would have to be attributed to all three organisations.

As regards the EU, it is suggested that its contributions to the deployment are also more than substantial, resulting in responsibility for the EU in partnership with the three other organisations. The EU’s role in Mali has focused particularly on the purely political process of resolving the crisis in Mali, as well as on the political level of the peacekeeping operation, remaining true to its policy on the African continent. Then again, the EU has not only contributed a major part to the budget of AFISMA, but deployed a training mission (EUTM Mali) on the ground to train the Malian Armed Forces. It may be recalled that AFISMA, under its mandate, is acting also in support of the Malian Armed Forces. Furthermore, the EU has made a more than substantial contribution to the continuing operationalisation of the African Peace and Security Architecture of the AU who is the leading organisation, in terms of the chain of command of AFISMA. Therefore, it is submitted that these contributions of the EU remedy its more limited role in the other areas and, consequently, the EU has to be considered responsible for the conduct of AFISMA jointly with the AU, ECOWAS and the UN. However, it could be possible to retain a certain distinction between the EU and the AU, ECOWAS and the UN. The different input of the EU towards the command and control arrangements of AFISMA could be mirrored in the exercise of jurisdiction under human rights law. Whereas the three other organisations could possibly exercise jurisdiction on the basis of the spatial model of jurisdiction, the EU could be found to solely exercise jurisdiction on the basis of the personal model.

3. MINUSMA

1. Introduction

ECOWAS recommended the transformation of AFISMA in a UN stabilization operation, “with a robust mandate and a parallel rapid reaction force” based on one of two alternatives proposed by the Secretary-General.²⁰⁸ The AU similarly requested such a transition.²⁰⁹ According to a report by the

²⁰⁸ Mr. Bamba, Côte d’Ivoire speaking on behalf of ECOWAS, Security Council, 6944th meeting, *supra* note 144, 8.

²⁰⁹ Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, *supra* note 143, 4.

International Crisis Group, “the fear of sending an under-equipped African force into an extremely difficult environment requiring costly logistical support, because of the lack of reliable support”, led the Security Council to quickly transform AFISMA into MINUSMA.²¹⁰ The authors of the ECOWAS report assert that the transformation was “primarily driven by France’s concern”, and also faced the logistical and financial constraints encountered by AFISMA.²¹¹

2. (Elaboration of the) Mandate

It was desired by the AU and ECOWAS to transform AFISMA into a UN operation “with an appropriate mandate”; in other words, “it should be a peace enforcement mission based on Chapter VII of the United Nations Charter.”²¹²

The mandate of MINUSMA was developed in cooperation with the AU: “We welcome the fact that a number of our concerns with the draft resolution have been taken into account in the current text. We are encouraged by the statements made by several parties that our remaining concerns will be taken into account when it comes to implementing the resolution.”²¹³ Both organisations noted “that the content of the draft resolution broadly reflects the desire of both organizations, as contained in the relevant decisions” of the AU PSC and the ECOWAS Authority.²¹⁴ They emphasised that the anticipated resolution shall “fully incorporate[] the contributions that the two organizations will continue to make towards the definitive resolution of the security and institutional crisis facing Mali.”²¹⁵

²¹⁰ International Crisis Group, Mali: Security, Dialogue and Meaningful Reform, Africa Report N°201 – 11 April 2013, 38.

²¹¹ ECOWAS Peace and Security Report, Issue 5 July 2013, A tenuous solution in Mali: between internal constraints and external pressures, 6.

²¹² Annex, Letter dated 26 March 2013 from the President of the Commission of the Economic Community of West African States addressed to the Secretary-General, Letter dated 16 April 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/231 (2013), 2; Progress Report of the Chairperson of the Commission, *supra* note 158, 3-4, paras. 12-13.

²¹³ Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, *supra* note 143, 4.

²¹⁴ Annex to the letter dated 3 May 2013 from the Secretary-General addressed to the President of the Security Council, Letter dated 3 May 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/265 (2013), 2. With regard to the envisaged transformation of the African-led Mission in the CAR into a UN operation, the AU stated that it “would welcome the co-authoring of the draft resolution with one of the African members of the UN Security Council” in line with a previously adopted AU communiqué and in the form of “the designation of African states as penholders/co-penholders of draft resolution [sic] that concern the continent”, Peace and Security Council, 422nd Meeting, 7 March 2014, Addis Ababa, Ethiopia, PSC/PR/2.(CDXXII), 6, para. 20 (v); Peace and Security Council, 397th Meeting, *supra* note 154, 3, para. 8 a. iv.

²¹⁵ *Ibid.* This includes that the Security Council undertakes “appropriate consultations” with the AU and ECOWAS, “including on the leadership and the composition of the envisaged mission in a spirit of continuity.”, Annex, Letter dated 7 March 2013 from the Commissioner for Peace and Security of the African Union to the

As also noted by the Support and Follow-up Group, the Security Council should “to ensure that the envisaged operation strengthen[s] Malian ownership, build[s] on the achievement made with ECOWAS and AU support, and foster[s] enhanced and coordinated African and international engagement in support of peace and security in Mali.”²¹⁶ However, following the adoption of the Resolution establishing MINUSMA, the AU criticised the lack of consultation by the UN Security Council and noted that its concerns were not taken into account.²¹⁷ The Security Council, in turn, noted that the AU, ECOWAS, the Secretary-General and other international partners did not report back to the Security Council every 60 days as requested in its previous Resolution 2085.²¹⁸ Some members of the Security Council felt that the AU has been slow on occasions to act on urgent matters. Indeed, the limited AU representation in NY and the lack of meetings of the AU PSC members in New York mean that the African countries in the Security Council and the Council itself may not always be informed and aware of the AU PSC’s decisions.²¹⁹

MINUSMA operates in a similar way to AFISMA under robust rules of engagement and most of the military and police forces of AFISMA have been absorbed.²²⁰ Under the mandate, MINUSMA troops will deploy from major cities in northern Mali, conducting patrols both alone and with the Malian

Secretary-General, Letter dated 15 March 2013 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2013/163 (2013), 2-3.

²¹⁶ Fourth Meeting of Support and Follow-up Group on the Situation in Mali, Bamako, Mali, 19 April 2013, Conclusions, 4, para. 14.

²¹⁷ The PSC “[n]otes with concern that Africa was not appropriately consulted in the drafting and consultation process that led to the adoption of the UN Security Council resolution authorizing the deployment of a UN Multidimensional Integrated Mission for Stabilization in Mali (MINUSMA) to take over AFISMA, and stresses that this situation is not in consonance with the spirit of partnership that the AU and the United Nations have been striving to promote for many years, on the basis of the provisions of Chapter VIII of the UN Charter. Council further notes that the resolution does not adequately take into account the foundation laid by the African stakeholders, which led to the launching of the process towards the return to constitutional order, the initiation of the ECOWAS-led mediation, the adoption of the transitional roadmap and the mobilization of the support of the international community through the Support and Follow-up Group on the situation in Mali. Council also notes that the resolution does not take into account the concerns formally expressed by the AU and ECOWAS and the proposals they constructively made to facilitate a coordinated international support for the ongoing efforts by the Malian stakeholders”, Peace and Security Council, 371st Meeting, Addis Ababa, Ethiopia, 25 April 2013, PSC/PR/COMM.(CCCLXXI), Communiqué, para. 10. Nevertheless, the AU also accepted that its actions were limited by its own constraints. The Commissioner for Peace and Security declared accordingly that “[a]s a result of our own constraints, we had to rely on the French Operation Serval (...) The Heads of State and Government, while appreciative of that timely support, felt, and rightly so, that Africa, through its continental Union and regional Mechanisms, should have played the leadership role”, 7th Meeting of the Specialized Technical Committee on Defense, Safety and Security, Addis Ababa, 14 January 2014, Opening Remarks by Ambassador Smaïl Chergui, AU Commission for Peace and Security, 2.

²¹⁸ Security Council Resolution 2100, *supra* note 172, 3, Preamble.

²¹⁹ P. D. Williams, A. Boutellis, ‘Partnership Peacekeeping: Challenges and Opportunities in The United Nations-African Union Relationship’, in (2014) 113 *African Affairs*, 254, 260-261, 278. Cf. Report of the Security Council mission to the Democratic Republic of the Congo, Rwanda, Uganda and Ethiopia (including the African Union), UN Doc. S/2014/341 (2014), 21-22, para. 11.

²²⁰ Statement by Mr. Hervé Ladsous, Under-Secretary-General for Peacekeeping Operations, Security Council 6985th meeting, *supra* note 145, 5.

defence and security forces whereby all MINUSMA operations “will take into account the need to minimize the risk to civilians.”²²¹

In this context,

MINUSMA has a mandate to use all necessary means to ensure the implementation of many elements of its mandate, including taking active steps to deter and prevent the return of armed elements to key population centres. *While that does not describe a peace-enforcement or counter-terrorism role, which will be undertaken by others who have capacities beyond the scope of and means of the United Nations mandate and capabilities, it will require the United Nations to be as robust as possible in implementing that mandate in an environment characterized by threats.*²²² [Emphasis added]

All AFISMA troops which are re-hatted under MINUSMA will undergo “predeployment training and vetting procedures, including in accordance with the requirements of the United Nations human rights screening policy, so as to ensure that they (...) have the necessary skills to implement the mandate.”²²³ The transfer of AFISMA personnel to MINUSMA shall be accomplished in close coordination with the AU and ECOWAS.²²⁴ Other UN operations in the region are required to share logistic and administrative support with MINUSMA to the extent possible.²²⁵

The mandate allows implicitly and expressly for the use of military force. First of all, the Resolution states that the mandate of MINUSMA shall be “to stabilize the key population centres, especially in the North of Mali, and, in this context, to deter threats and take active steps to prevent the return of armed elements to those areas.”²²⁶ In Paragraph 17 of the Resolution, however, the Security Council returns to the traditional formula explicitly authorising “MINUSMA to use all necessary means.”²²⁷ The mandate further specifically includes the protection of civilians and UN personnel:

- (i) To protect, without prejudice to the responsibility of the transitional authorities of Mali, civilians under imminent threat of physical violence, within its capacities and areas of deployment; (...)

²²¹ *Ibid.*, 6.

²²² *Ibid.*, 7. See also Report of the Secretary-General on the situation in Mali, *supra* note 142, 14, para. 75. These tasks include, e.g. maintaining checkpoints, conducting patrols and contributing to de-escalation of tensions, Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/582 (2013), 5, para. 24.

²²³ Statement by Ms. Leila Zerrougui, Special Representative of the Secretary-General for Children and Armed Conflict, Security Council, 6980th meeting, UN Doc. S/PV.6980 (2013), 6.

²²⁴ Security Council Resolution 2100, *supra* note 172, 5, para. 7.

²²⁵ *Ibid.*, 7, para. 15.

²²⁶ *Ibid.*, 7, para.16 (a), (i).

²²⁷ *Ibid.*, 9, para.17.

- (iii) To protect the United Nations personnel, installations and equipment and ensure the security and freedom of movement of United Nations and associated personnel;²²⁸

MINUSMA shall also “monitor, help investigate and report to the Council on any abuses or violations of human rights or violations of international humanitarian law committed throughout Mali and to contribute to efforts to prevent such violations and abuses.”²²⁹

3. Appointment of the Force Commander

ECOWAS and the AU also requested that the Special Representative leading MINUSMA is appointed after “appropriate consultations” with both organisations to contribute to the “African ownership of this effort and to optimize the efficiency of the Mission.”²³⁰ It could not be verified whether this request was approved by the UN.

4. Political Control

The AU emphasised strongly that the central political roles both of the AU and ECOWAS should be recognised “in full partnership with the United Nations Mission” and that these two organisations “would maintain a strong presence in Bamako to pursue their political commitment in Mali. Secondly, the practice of consultations that has characterized all our joint action on Mali to date should continue, especially with respect to major decisions, such as choosing contingents and selecting military and civilian leadership.”²³¹ Both organisations have, in pursuance of their political commitment, “engaged the United Nations on possible areas of support in terms of strategic and operational-level communication, in theatre movement, accommodation, medical care and security for their personnel.”²³² The AU accordingly established the AU Mission for Mali and the Sahel (MISAHEL) which was also mandated to promote regional security and cooperation.²³³ On 4

²²⁸ *Ibid.*, 8, para. 16 (c), (i), (iii).

²²⁹ *Ibid.*, 8, para.16(d)(i).

²³⁰ Progress Report of the Chairperson of the Commission, *supra* note 158, 4, para.16.

²³¹ Statement by Mr. António, Observer of the AU, for Mr. Pierre Buyoya, Special Representative of the AU and Head of AFISMA, Security Council, 6952nd meeting, *supra* note 143, 4.

²³² Report of the Secretary-General on the situation in Mali (2013), *supra* note 194, 16, para. 75.

²³³ Sixth Meeting of the Support and Follow-up Group on the Situation in Mali, Bamako, 2 November 2013, Opening remarks by H.E. Dr. Nikosazana Diamini Zuma, Chairperson of the Commission of the African Union, 3-4. The priority areas of action of MISAHEL include the promotion of good governance, security cooperation and development issues. In order to enhance the effective contribution of MISAHEL to the peace process, a draft AU strategy for the Sahel Region has been developed, as well as a Plan of Action, 3rd Ministerial Meeting on the Enhancement of Security Cooperation and the Operationalisation of the African Peace and Security Architecture in the Sahelo-Saharan Region, Niamey, Niger, 19 February 2014, Second Progress Report of the Commission on the Implementation of the Conclusions of the Ministerial Meeting Held on 17 March 2013 and Prospects for the Enhancement of the Nouakchott Process, 1, para.5; 3, para. 9.

November, the AU affirmed at the ministerial meeting held in Bamako “its readiness to work for the establishment of a joint secretariat” on the basis of the UN integrated strategy for the Sahel.²³⁴ This “flexible technical Secretariat” will serve to support coordination efforts within the region, co-chaired by the UN and the AU and also comprising the Arab Maghreb Union (AMU), ECOWAS, ECCAS, the Community of Sahelo-Saharan States (CENSAD), the World Bank Group, the African Development Bank (ADB), the Islamic Development Bank (IDB), the EU and the OIC.²³⁵ The Security Council sent a mission to Mali from 31 January to 3 February 2014 which was not only an expression of the full support of the Council for the peace process, but also a way of gathering information in order to exercise political control.²³⁶ The AU and the EU have developed own strategies for the Sahel aimed at increasing the cooperation with the other international actors; similar efforts have been undertaken by ECOWAS.²³⁷ In its resolution renewing the mandate of MINUSMA, the Security Council also called upon the AU, ECOWAS, the EU and other key actors to coordinate their efforts for the promotion of lasting peace with the Special Representative of the Secretary-General and MINUSMA.²³⁸

5. Strategic and Operational Level

The UN Secretariat deepened its cooperation with the AU and ECOWAS regarding the transition from AFISMA to MINUSMA through meetings of multidisciplinary teams including “the conduct of a joint planning session and the subsequent establishment of a joint AFISMA-MINUSMA mechanism in Bamako.”²³⁹ Cooperation and coordination is also continued through the Mali Integrated Task Force which was established for AFISMA.²⁴⁰

6. Cooperation with the EU/EUTM Mali

Regarding EUTM, the Security Council called upon the EU, notably its Special Representative for the Sahel, “to coordinate closely with MINUSMA (...) to assist the transitional authorities of Mali in the Security Sector Reform.”²⁴¹

²³⁴ Statement by Ambassador Mr. Tête António, Permanent Observer of the African Union to the United Nations, Security Council, 7081st meeting, UN Doc. S/PV.7081 (2013), 7.

²³⁵ Statement by the President of the Security Council, UN Doc. S/PRST/2013/20 (2013), 2.

²³⁶ Letter dated 30 January 2013 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2014/72 (2014), Annex, Security Council mission to Mali: terms of reference, 2, para. 5; 3, para. 9.

²³⁷ 3rd Ministerial Meeting on the Enhancement of Security Cooperation, *supra* note 233, 3, paras. 9-10.

²³⁸ Security Council Resolution 2161, UN Doc. S/RES/2164 (2014), 5, para. 10.

²³⁹ Report of the Secretary-General on the situation in Mali (2013), *supra* note 194, 14, para.67.

²⁴⁰ Security Council Resolution 2100, *supra* note 172, 3, Preamble, 3rd Paragraph.

²⁴¹ *Ibid.*, 9, para.22.

7. Assessment

The analysis of the structure of MINUSMA, from the point of view of control via and by other international organisations than the UN, reaffirms the assessment made regarding the UN operations in South Sudan. Indeed, it appears that the influence, control and input of other international organisations in UN mandated peacekeeping operations is more limited than the respective control and influence exercised by the United Nations over authorised operations.

In comparison to AFISMA, the inter-institutional control and cooperation arrangements are by far more constricted. The complaints raised by the AU about the lack of inclusion in the elaboration and formulation of the mandate and the reply by the Security Council relating to the non-submission of reports, indicates that there are inter-institutional tensions which might derive from the AU and ECOWAS not being willing to limit their engagement immediately after the transfer of authority from AFISMA to MINUSMA. Despite these problems, Mali may represent the beginning of a new era in peacekeeping operations in which the political process for conflict resolution and the deployment of a peacekeeping operation are included within a wide concerted approach by two or more international organisations. The political process and political consultation serve thereby as the “focus point” for the development of the strategy for the to-be-deployed peacekeeping operation.

It is also noticeable that the EU has been completely marginalised in the debate on and in the documents relating to MINUSMA. Bearing in mind the general concept of division of labour as it has emerged between the AU, the EU and the UN on the African continent, it corresponds to the limited engagement the EU plays in peacekeeping operations on the African continent when it comes to direct (military) involvement in peacekeeping operations.

The overwhelming control exercised by the UN over MINUSMA prevents any contribution by and any cooperation with other international organisations from reaching the degree of “more than substantial” for the purposes of the law of international responsibility such that it is submitted that there is no joint, immediate responsibility of the UN in union with other organisations for the conduct of MINUSMA. This does not touch upon the question whether the AU and ECOWAS could not be responsible as accessories.

4. The attempt of a typology of intra-mission relationships, its implications on international responsibility and a clarification of the normative control criteria

The inquiry into the six different peacekeeping operations allowed defining further the contours of the suggested criterion of attribution in the context of cooperation in peacekeeping operations. The

analysis also showed that the cooperation arrangements existing in each peacekeeping operation are unique – for a variety of reasons including political and security interests of the involved actors, the availability and lack of resources and institutional cooperation agreements.

Nevertheless, this part of Chapter V will now attempt to establish a typology of possible relationships in intra-mission cooperation based on the different levels of control and cooperation as part of the operational framework of a peacekeeping operation. Naturally, such an exercise would be more probative where an analysis of all peacekeeping operations of the organisations which include a cooperative element, was conducted, but such an exercise would go beyond the scope of the present study.

The examination of the six operations showed that the mandate of the operations was developed on the basis of cooperation in all operations, aside from UNMISS and UNISFA.²⁴² Regarding the political level, five operations, excluding UNMISS, included cooperation arrangements on the political level, partially stretching over to the strategic level.

Once again, the degree of cooperation in this particular field varies, from limited support by the AU and ECOWAS to MINUSMA over equal participation of both the AU and the UN on the political level, exclusive strategic control of the UN to joint strategic planning of the UN and KFOR or even the exercise of a high amount of strategic control directly by the peacekeeping operation, as in the case of UNAMID. Regardless of these differences, this comparison confirms the particular relevance of cooperation and control on a political level for the attribution of conduct.

On the operational level, UNMISS and UNISFA are under the exclusive control of the UN and KFOR is under the exclusive control of NATO. Operational control over AFISMA was effectively executed by all four organisations, whereas MINUSMA is under UN control, but supported by the AU and ECOWAS. Bearing in mind the debate surrounding the adoption of MINUSMA's mandate, when the AU ultimately complained of the lack of consultation in the adoption of the mandate, one could *prima facie* reason that this debate has diminished the involvement of both organisations on the operational level.

However, the analysis showed that the AU and the ECOWAS were eager to contribute to MINUSMA on an operational level and this fact rather points towards a general distinction between UN and UN-mandated operations. It appears that the UN is less willing to incorporate the contribution of other actors in its own operations than it is willing to participate itself in UN-authorized operations. This particular behaviour is, of course, conditioned also by the role of the United Nations in maintaining

²⁴² In addition to Security Council Resolution 1244, KFOR's powers are also derived from the MTA concluded.

international peace and security and its long experience, but nevertheless, it could also be an expression of a certain *chasse gardée* the UN maintains, in practice.

Consequently one can formulate a first clarification to identify a case of normative control triggering the joint responsibility of international organisations. If the peacekeeping operation is a UN operation, the amount and level of intra-mission cooperation is likely to be more limited than in the case of a non-UN operation so that it is consequently also less likely that the required threshold of cooperation will be surpassed to justify an application of the normative control criteria. Furthermore, one can formulate a general presumption that a partially competitive relationship between two international organisations will translate into political cooperation in a peacekeeping operation and less operational cooperation. This nexus between political control and control on other operational levels is required to trigger and justify the application of the criterion of normative control. In this regard, one can formulate another general presumption. If the deployment of the peacekeeping operation and the political process is based on a comprehensive approach steered by the same institutional actors, it reinforces the control and oversight executed over the operation by all these institutional actors, increasing thereby the likelihood of a case of joint responsibility. The findings of the previous Chapters as in this Chapter further allow writing out in full a possible definition of the normative control criterion as developed throughout this study:

- (1) Internationally wrongful acts committed during the deployment of a peacekeeping operation may be jointly attributed to two or several international organisations if:
 - a) the international organisation(s), other than the international organisation(s) under whose auspices the peacekeeping operation is deployed, effectively exercise the same degree of control over the conduct of the peacekeeping operation as the deploying organisation(s) on the basis of:
 - (i) existing cooperation arrangements and mechanisms on an inter-institutional level between the external organisation(s) and the deploying operation(s) with regard to peacekeeping operations and;
 - (ii) existing cooperation arrangements and mechanisms on the mission level between the external organisation(s) and the deploying organisation(s) and;
 - (iii) a direct and immediate link between these cooperation arrangements and mechanisms on a political level and those cooperation arrangements and mechanisms on a tactical and strategic level in existence between the external organisation(s) and the deploying organisation(s) so that command and control over the operation is effectively shared (normative control).

- (2) That article is without prejudice to the question if one or several member states of the international organisation(s) under whose auspices the peacekeeping operation is deployed may be also responsible for internationally wrongful acts occurring during the deployment of the operation on the basis of the relevant dispositions of the Articles on the Responsibility of International Organisations.

In this context, a direct and immediate link has to be interpreted in the sense that the exercise of political control is in fact indivisible from the exercise of control on both strategic and tactical levels of command and control.

To return to Virally's classification of relations between international organisations (*infra*, Chapter II), all the peacekeeping operations, which were used as case-studies, show that the relations between these organisations are based on coordination and cooperation, rather than confrontation. A variety of reasons were established throughout this study for this development which is even more evident on the institutional level. The lack of resources in various areas is one main reason and it also explains why the relations between the organisations are not completely free of competition. However, one can even go so far to ask as to whether regional organisations are not even obliged to carry out the decisions of the Security Council with regard to the deployment of a peacekeeping operation.

Chapter I traced the mechanisms for cooperation with regional organisations under the UN Charter, but *en passant* the basic fact was mentioned that regional organisations *per se* as non-members of the UN are not directly bound by the Charter. In the analysis presented in this study, we have seen the development of institutionalised relations between the UN and regional organisations, both on the institutional level, as well as in the operational context so that it does not "[seem] to be sufficient" to limit a legal duty under the UN Charter to member states, contrary to what is asserted in the Commentary to Article 48 (2) of the UN Charter.²⁴³

Therefore, on the basis of an analysis of the potential legal foundations, it might also be possible to shed even more light upon the application of the normative control criterion to peacekeeping operations because if regional organisations were obliged to cooperate or even to implement decisions of the Security Council, it would raise questions with regard to direction and control in the context of cooperation in peacekeeping operations. Could the UN be responsible on the basis of the

²⁴³ A. Reinisch, G. Novak, 'Article 48', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1376, 1381, mn. 10

fact that regional organisations were obliged to carry out its decision regarding the deployment of a peacekeeping operation and how would that impair the responsibility of these regional organisations?

5. Chapter VIII revisited – regional organisations as being bound by the system of collective security

Regarding the question whether the UN Charter and particularly decisions of the Security Council are binding upon entities which are non-members of the UN, Article 2(6) of the Charter comes to mind. According to that disposition, the organisation “shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.” In addition, Article 48 (2) of the UN Charter stipulates that decisions of the Security Council for maintaining international peace and security shall be carried out by the Members of the UN “directly and through their action in the appropriate international agencies of which they are members.”

The wording and the context of Article 2 (6) do not suggest that the obligations therein do extend to other international organisations.²⁴⁴ However, in the Commentary it is argued that the limited scope of Article 2(6) does not allow the organisation to adequately address external threats to international peace and security and accordingly it has been “superseded by a universal system of collective security which is based upon the relevant Charter provisions but does not derive its legal force from the Charter as a treaty (...) [i]t subjects all relevant international actors to the authority of the UN, and in particular the SC, with regard to measures necessary for the maintenance of international peace and security.”²⁴⁵ They are all “under an obligation to give the UN every assistance in any action it takes in accordance with the Charter; and in particular to accept and carry out the decisions of the SC.”²⁴⁶ The practice of the UN, and States and non-member States confirms that the UN is competent to create obligations for members and non-members alike.

In 1953, the Security had already expressed the view that it can create obligations for non-members; in Resolution 101 the Council recalled “to the Governments of Israel and Jordan”, non-members at that time, their obligations under Security Council Resolutions and reaffirmed “that it is essential (...)

²⁴⁴ S. Talmon, ‘Article 2(6)’, in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 252, 262, mn. 32.

²⁴⁵ *Ibid.*, 252, 265, mn. 39-41.

²⁴⁶ *Ibid.*, 252, 265, mn.40.

that the parties abide by their obligations under (...) the resolutions of the Security Council.”²⁴⁷ Since the adoption of Resolution 418 in 1977, the Security Council has addressed all resolutions containing binding obligations regarding sanctions to all states, although at that time, there were still more than 10 States which were not members of the organisation.²⁴⁸ The Security Council made clear in that resolution that it is binding upon all states.²⁴⁹

The reference to non-members of the organisation has been continuously replaced over the years with references to all international and regional organisations, starting in 1991. Organisations such as the EU “have consistently implemented economic and other sanctions decisions of the SC, indicating an intention to be bound.”²⁵⁰ Talmon argues that, although the EU is not bound by the UN Charter *per se*, it is “subject to the universal system of collective security and thus bound to comply with the decisions of the SC”,²⁵¹ a view which seemed to be confirmed in Declaration 13 annexed to the Treaty of Lisbon, according to which the EU *per se*, as well as its Member States remain bound by the provisions of the Charter of the United Nations, including the primary responsibility of the Security Council for the maintenance of international peace and security.²⁵²

Member-States of the UN have expressed repeatedly over the years the opinion that the powers of the UN with respect to maintaining international peace and security apply also to non-members.²⁵³ The ICJ in the *Namibia* advisory opinion held that non-members of the UN were not bound by Art. 24 and 25 of the Charter, but that certain decisions of the SC are “opposable to all States (...) [and] that it is for non-member States to act in accordance with those decisions.”²⁵⁴ Although the Court’s advisory opinion was given within the specific circumstances of the *Namibia* case, the termination of

²⁴⁷ Security Council Resolution 101, UN Doc. S/RES/101 (1953), paras. B2, C1. Cf also SC Resolutions 50 and 54 which were also addressed at Israel and Jordan when they were non-members of the organisation, Security Council Resolution 50, UN Doc. S/RES/50 (1948), Security Council Resolution 54, UN Doc. S/RES/54 (1948).

²⁴⁸ Talmon, ‘Article 2(6)’, *supra* note 244, 252, 268, mn.46. There have been some later resolutions when the SC referred expressly to “States non members” and “States”, but the large majority of resolutions has been simply addressed to all States and the occasional distinction does not seem to have any significance regarding the binding effect of the resolutions, *ibid.*, 268-269, mn. 47-48.

²⁴⁹ C. Tomuschat, *Obligations Arising for States Without or Against Their Will*, Recueil des cours de l’Académie de La Haye, Volume 241(1993), 195, 245.

²⁵⁰ Talmon, ‘Article 2(6)’, *supra* note 244, 252, 269, mn 49; See also D. Bethlehem, ‘The European Union’, in V. Gowlland-Debbas, *National Implementation of United Nations Sanctions. A Comparative Study* (2004), 123 – 165.

²⁵¹ Talmon, ‘Article 2(6)’, *supra* note 244, 252, 269 mn. 50.

²⁵² 13. Declaration concerning the common foreign and security policy, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, 30.3.2010, Official Journal of the European Union, C 83/343, 9.

²⁵³ Several members e.g. expressed the view that Indonesia would remain “amenable to the jurisdiction of the Security Council”, when the country decided to withdraw from the UN. Also for further references, Talmon, ‘Article 2(6)’, *supra* note 244, 275, mn. 64-64.

²⁵⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (21 June 1971), paras. 126, 133.

the mandate, it nevertheless shows that non-member States are supposed to assist actions taken by the UN.

In the *Kosovo* advisory opinion, the ICJ had another opportunity to express its views on the issue and the judges declared that “it has not been uncommon for the Security Council to make demands *on actors other than* United Nations Member States and *inter-governmental organizations*”²⁵⁵ [Emphasis added]. So it appears, the ICJ considered it to be existing practice that the Security Council would adopt resolutions binding also upon international organisations.

Nevertheless, it raises questions about the legal basis of such a binding regime of collective security which transcends the boundaries of the UN Charter. One possibility would be to rely on the dictum in the *Reparations* judgment (*infra*, Chapter III) regarding “the objective international personality” with which the UN was created and to argue that the majority of the international community could create an “objective” and universal system of collective security. However, as rightly pointed out by Talmon, it is very unlikely that the ICJ intended to attribute general-law making power to the UN in its advisory opinion.²⁵⁶ Moreover, such an interpretation does not provide an answer regarding a valid source of international law for such a system. The lack of a recognised basis in international law is the same problem encountered by arguments of constitutionalism which perceive the Charter as the constitution of the international community. Under this theory, the rules of the Charter supersede ordinary rules and are binding on all members of the international community.²⁵⁷ The problem with this theory is also that its legal source is the preconceived idea on which it is based, so that in the end it is a circular argument.

The only realistic and legally sound argument is that on the basis of practice of the UN and the SC, the opinions expressed by member states and the practice of non-member States and regional organisations, “at least since the 1990s, the provisions of the Charter dealing with international peace and security have acquired the status of customary international law that are binding on non-members, both States and non-State actors alike, independently of the Charter.”²⁵⁸

²⁵⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 116.

²⁵⁶ Talmon, ‘Article 2(6)’, *supra* note 244, 252, 277, mn. 70.

²⁵⁷ *Ibid.*, 252, 278, mn. 72-73.

²⁵⁸ *Ibid.*, 252, 279 mn. 75. See also A. Tzanakopoulos, *Disobeying the Security Council. Countermeasure against Wrongful Sanctions* (2011), 78; T. M. Franck, ‘Is the U.N. Charter a Constitution?’, in J.A. Frowein, K. Scharioth, I. Winkelmann et al. (eds.), *Verhandeln für den Frieden – Negotiating for Peace. Liber Amicorum Tono Eitel* (2003), 95, 97. Klein, writing in 1992, held that “it is unanimously held today that the United Nations may direct sanctions against non-members as well as against members”, E. Klein, ‘Sanctions by International Organizations and Economic Communities’, in (1992) 30 *Archiv des Völkerrechts*, 101, 104.

The present study has demonstrated that there is an abundance of interaction, practice and cooperation between the UN and regional organisations. In this context, the primary responsibility for maintaining international peace and security of the Security Council has been emphasised by all regional organisations which are part of this study in official documents, as well as in practice. The clear trend of regional organisations to seek the authorisation for the deployment of peacekeeping operations also suggests that regional organisations consider themselves to be bound by the provisions of the UN Charter, on a customary law basis.²⁵⁹ One could therefore say that regional organisations have voluntarily submitted themselves to the legal obligations which exist under the collective system for maintaining international peace and security.

Are there any implications for the distribution of responsibility between international organisations for the purpose of the present study?

Firstly, in the context of resolutions of the Security Council, it is necessary to distinguish between non-binding provisions and provisions which – by the language and the context of the resolution – are binding upon regional organisations. Mere recommendations do not create legal obligations and they could therefore also not hold the SC responsible if they are acted upon by a regional organisation.²⁶⁰ However, the question is, whether specific obligations in mandates of peacekeeping operations would legally bind the regional organisations which are mandated. It is now standard practice of the Security Council to include dispositions regarding the protection of civilians in the mandates as well as dispositions such as “during the deployment of operation X, organisation Y shall ensure the respect of the applicable human rights, international humanitarian and refugee law.”

The Security Council emphasised again the importance of the protection of civilians in the context of peacekeeping operations, in a Presidential Statement accompanied by a 78 pages long *aide-memoire* in February 2014.²⁶¹ Thus, the question arises as to what the implications regarding the law of responsibility would be if a binding obligation by the Security Council addressed to a regional organisation is either not executed or violated in practice. This question has to be seen in the wider context of a breach of an international obligation which will be analysed in the following part of the thesis. First of all, one has to distinguish between the different kinds of obligations; the conditions for

²⁵⁹ Cf. Article 38 of the 1986 VCLT between States and International Organizations or Between International Organizations.

²⁶⁰ Authorisations addressed to Member States or organisations by an international organisation to commit an act that would be internationally wrongful if committed by the latter lead to the authorising organisation being responsible under Article 17 ARIO.

²⁶¹ Statement by the President of the Security Council, UN Doc. S/PRST/2014/3 (2014). See also Human Rights due diligence policy on United Nations support to non-United Nations security forces, Annex to Identical letters dated 25 February 2013 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, UN Doc. A/67/777-S/2013/110 (2013).

a breach of a due diligence or an obligation of means by a regional organisation are different from the conditions for a breach of an obligation of result. Moreover, if one accepts the view that regional organisations are bound by the system of collective security of the UN Charter on the basis of customary international law, would the breach of an obligation owed to the Security Council on the basis of a mandate amount automatically to a breach of international law or would it be a breach of UN internal law only?

5.2. Breach of an international obligation

1. Breach of an international obligation in the form of a mandate of a peacekeeping operation

Article 10 (2) ARIO stipulates that a breach of an international obligation by an international organisation “includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.” The Commentary of the ILC to Article 10 explains that Paragraph 2 of the disposition includes generally – contrary to that which its wording might suggest – all rules of the organisation which may form part of international law.²⁶² Consequently Article 10 (2) has to be interpreted as covering also cases of breaches of an international obligation by an organisation under its own rules towards other legal entities than than its members.

Resolutions of organs of an organisation are considered to be part of the rules of the organisation according to Article 2 b) ARIO.²⁶³ Thus, it can be questioned whether the breach of a mandate in the form of a Security Council Resolution by a peacekeeping operation would amount to a breach of an international obligation. According to the Commentary of the ILC, it is disputed which or whether rules of international organisations are part of international law or can only be seen as part of the “internal” law of the organisation.²⁶⁴

The ICJ observed in the *Kosovo* advisory opinion that “[t]he Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law” and concluded that “Security Council resolution 1244 (1999) and the Constitutional Framework form

²⁶² Report of the International Law Commission, Sixty-third session, *supra* 2, 98, para.8.

²⁶³ The UN itself in its comments to the ILC stated that decisions and resolutions of the principal organs of the UN may fall under the rules of the organisation as well as the establishment and conduct of peacekeeping operations which has developed almost entirely through practice, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637/Add.1 (2011), 7, para.5.

²⁶⁴ Report of the International Law Commission, Sixty-third session, *supra* 2, 97-98, para.5.

part of (...) international law.”²⁶⁵ Mandates of the Security Council, in the form of a resolution, are nowadays rather lengthy documents containing various, specific obligations. Therefore, it appears first of all that it would be necessary to determine not whether the resolution is part of international law, but rather whether one or several specific dispositions are part of international law.

Regarding the specific context of peacekeeping operations, recent mandates, in particular, contain dispositions for the protection of civilians, based on ideas derived from human rights and humanitarian law. Article 10 (1) stipulates that the breach of an international obligation exists “regardless of the origin or character of the obligation concerned.” Therefore, any breach of a rule of international law as enshrined in the mandate of a peacekeeping operation would be a breach of an international obligation, without prejudice to the question as to whether the potentially corresponding human rights obligation of the international organisation was also breached.²⁶⁶

Thus, if a United Nations mandated peacekeeping operation breaches an obligation owed to the Security Council, which is also part of international law, there are two consequences. Firstly, it establishes responsibility under international law for these entities and the conduct could be attributed to them. In this context, the question arises as to whether the fact that the obligation was also owed to the United Nations and the Security Council impairs upon the attribution of conduct. If one were to argue that the Security Council, binding the peacekeeping operation to adopt a certain specific conduct was bound itself to monitor the implementation of that resolution, it would, indeed influence the attribution of conduct and responsibility, by distinguishing the positive obligations of the SC to monitor the conduct and the negative obligation of the peacekeeping operation to abstain from certain conduct.²⁶⁷

²⁶⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, 42-43, paras. 88-89, 93.

²⁶⁶ It is therefore not necessary to construe the violation of a Security Council Resolution as a violation of an international obligation through a piggybacking approach; considering the mandate of the Resolution to contain implicit or explicit obligations under human rights law, IHL or any other particular body of law. The same argument is also presented by Verdirame without, however, referring to the *Kosovo* advisory opinion, Verdirame, *supra* note 3, 98. In contrast the UN emphasised that it would be necessary for the UN to make clear in its definition of rules that not a violation of the rules as such – entails the responsibility of the organisation, but the violation of the international law obligations it might contain, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 263, 7, para. 6. The District Court in The Hague likewise considered UNPROFOR’s mandate as having “a powers-creating character” but not as “calling to life” enforceable obligations under international law, District Court in The Hague, *Stichting Mothers of Srebrenica and Others v. The Netherlands*, Judgment, Case No. C/09/295247 / HA ZA 07-2973, 16 July 2014, para. 4149. But as argued, one has to look at each specific mandate in order to determine whether it contains obligations derived, for instance, from human rights law or from IHL.

²⁶⁷ In the context of human rights law, a regional organisation owes in any case obligations also to the UN as at least some human rights norms are considered to be obligations *erga omnes* and *vice versa*.

Returning to the distinction between an obligation under the mandate of a peacekeeping operation and an independently existing obligation under human rights law, a derogation from human rights law by the peacekeeping operation would *per se* not constitute a violation of human rights law as it contains a separate obligation under international law.

This particular issue became, however, relevant in the case of *Al-Jedda* before the ECtHR and in the form of Article 103 of the UN Charter. The Court concluded that there was no contradiction between human rights law and Security Council Resolution 1546 and did not, accordingly, pronounce itself on the potential effect of Article 103 of the Charter.²⁶⁸

However, in the present context of cooperation between the UN and regional organisations, Article 103 is generally not relevant.²⁶⁹ First of all, it applies to the member states of the UN and to agreements concluded by them which are contradictory to their obligations under the UN Charter. Moreover, at least the most fundamental human rights norms are considered to be part of *jus cogens* and they would prevail over Article 103 at least, arguably, on their customary law basis. Nevertheless, if one takes the view that Article 103 applies equally to the UN itself, it would allow the organisation to invoke that disposition to justify non-compliance with an international obligation, also with regard to Article 32 ARIO which stipulates that “[t]he responsible international organization may not rely on its rules as justifications for failure to comply with its obligations under this Part.”²⁷⁰

The most interesting aspect is that such an application of Article 103 could even have an impact upon the distribution of responsibility between the UN and regional organisations in the context of peacekeeping operations. If conduct arising during the deployment of a UN mandated operation were to be attributed jointly to the UN and a regional organisation and the Security Council would have explicitly derogated in the resolution from a specific human right,²⁷¹ the subsequent analysis of the breach of an international obligation would lead to the paradoxical situation that the UN could

²⁶⁸ The European Court of Human Rights was seized of the question in *Al-Jedda*, but concluding that there was no contradiction between human rights law and Security Council Resolution 1546, the Court did not have to pronounce itself on the potential effect of Article 103, *Case of Al-Jedda v. The United Kingdom*, Grand Chamber, Judgment, 7 July 2011, 56-60, paras. 101-109; Cf. A. Conte, ‘Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?’, in (2013) 18 *Journal of Conflict & Security Law*, 233, 253.

²⁶⁹ Unless one were to take the view that on the basis of customary law obligations of regional organisations towards the UN, as it was just argued, regional organisations could also be entitled to invoke Article 103 regarding obligations under international law which would be contravening their obligations towards the UN.

²⁷⁰ The UN commented upon this particular point in its submissions to the ILC, Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 263, 36 para. 3.

²⁷¹ Presupposing that IHL would not be applicable as otherwise the UN might be nevertheless bound by the corresponding or even *lex specialis* rule of IHL.

rely on Article 103 as a derogation in breach of any violation, whereas the regional organisation would, potentially, be responsible on its own,²⁷² despite the fact that the conduct was attributed to both of them.

It is not likely to arise in practice as the mandates given out by the Security Council do not generally contain obligations which would derogate from human rights law – rather the opposite – nor be so concise and specific to correspond to a particular human rights.²⁷³ Although the mandate of recent peacekeeping operations are more precise regarding the competences and powers granted to the peacekeeping forces, the Security Council continues to rely likewise on the formula of “all necessary means”.²⁷⁴

But this theoretical argument nevertheless underlines not only the complexity of the whole issue, but also the importance of the internal law of international organisations in applying the law of responsibility. In summary, if regional organisations are considered to be bound by the system of collective security as established by the United Nations, specific obligations handed out to these organisations by the UN Security Council could also impair the distribution of responsibility between the organisations.

2. Breach of an international obligation in the form of the obligations arising under the Internal Law of the organisations

Breaches of international obligations of international organisations in the context of peacekeeping operations may also arise in the form of violations of the internal law of these organisations if these rules are also part of international law. The following part contains a brief analysis of the internal law of the AU, the UN and the EU on the basis of their particular relevance and involvement in all examined case studies.

²⁷² It is harder to assess whether the result would be the same in the case of a UN-authorized operation. If one considers the SC Resolution establishing the operation as a mere authorisation and not of a delegation of powers of the Council, it would be difficult to argue that Article 103 would be applicable which could leave room for an application of Article 17 ARIO.

²⁷³ Conte, *supra* note 268, 233, 260.

²⁷⁴ Member states are very aware of the problems associated with such vague mandates. As pointed out by Gowlland-Debbas: “It is understandable, therefore, that member states have treated such a delegation of the Council’s powers to individual actors with extreme caution and that they have made numerous efforts to circumscribe Council authorisations, consistently insisting that the Council retain a degree of authority and control over such operations and avoid providing ‘a blank cheque for excessive and indiscriminate use of force.’”, V. Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, (2000) 11 *European Journal of International Law*, 361, 369.

1. African Union

Since 2009, the African Union has prioritised the development of a protection of civilians approach for AU-mandate peacekeeping operations²⁷⁵ leading in 2010 to the adoption of the Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations. According to the guidelines, the protection of civilians includes “to ensure the full respect for the rights of (...) the individual recognised under regional instruments including the African Charter of Human and Peoples’ Rights (...), international law, including humanitarian, human rights and refugee law.”²⁷⁶ In the same year, the Commission decided to mainstream the draft Guidelines for the Protection of Civilians in Peace Support Missions.²⁷⁷ For the further elaboration of the Guidelines, the AU has consulted on a regular basis with the UN “to ensure that the development of the Guidelines (...) is aligned to the UN approach as closely as possible.”²⁷⁸ Regarding the specific case of detentions in peacekeeping operations, one official document suggests that the ASF policy documents do not contain any official AU detention policy.²⁷⁹

Regarding specifically the application of IHL, the status of mission agreement of the African Union for the Ceasefire Commission in the Darfur region states that the African Union shall ensure that the operation is conducted with full respect of the principles and rules of the Geneva Conventions and Additional Protocols.²⁸⁰ The same disposition is inserted in the SOMA for AMISOM²⁸¹ so that one can probably conclude that it is the current practice of the AU now to demand respect for the principles and rules of the Geneva Conventions. In short, the internal documents of the AU confirm the application of human rights law and international humanitarian law without containing further specific rules regarding the application of these two areas of international law.

²⁷⁵ Progress Report of the Chairperson of the commission on the Development of Guidelines for the Protection of Civilians in African Union Peace Support Operations, PSC/PR/2(CCLXXIX) (2011), 1, para.5.

²⁷⁶ Proposed Guidelines for the Protection of Civilians in African Union Peace Support Operations For Considerations By African Union (2010), 2, para.1.

²⁷⁷ Report of the Chairperson of the Commission on the Situation in Somalia, PSC/MIN/1(CCLXLV) (2010), 8, para. 33; Report of the Chairperson of the Commission on the Situation in Somalia, PSC/MIN/1(CCLXV) (2010), 9, para. 33; 22, para.83 (iii).

²⁷⁸ Progress Report of the Chairperson of the commission, *supra* note 275, 3, para.12.

²⁷⁹ AMANI Africa, Implementation Plan, Draft, African Union Peace Support Operations Division, 11.

²⁸⁰ Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC) (2004), para. 8 a), available online at: <http://www.african-union.org/Darfur/Agreements/soma.pdf>

²⁸¹ Status of Mission Agreement (SOMA) between the Transnational Federal Government of the Somali Republic and The African Union on The African Union Mission in Somalia (AMISOM), 5, paras.9-10.

2. United Nations

Specifically regarding the United Nations, it is suggested that this organisation is bound by human rights on the basis of its internal law. The Charter of the United Nations contains several references to the promotion and promulgation of human rights. These references are however, very generic and do not contain specific substantive obligations for the United Nations.²⁸² On the contrary, the human rights provisions in the United Nations Charter are rather “scattered, terse, even cryptic”²⁸³, so that one cannot read in the Charter what is not there.²⁸⁴ But it is uncontroversial that international organisations “may be bound by obligations arising under its constituent instrument.”²⁸⁵ So it is beyond doubt that without the activities of the United Nations, human rights would not have become a “subject of international interest” and it seems difficult to imagine if not illogical or immoral to consider the United Nations not to be bound at least by the most fundamental human rights and obligations it is promoting.²⁸⁶ The Capstone document, defines international human rights as an integral part of the normative framework of peacekeeping operations, but emphasises simultaneously that peacekeeping operations “should be conducted/should act in accordance with (...) international human rights law.”²⁸⁷

As confirmed by the Secretary-General in his report of 2011, the Bulletin on Observance by United Nations forces of international humanitarian law is “binding upon all members of United Nations peace operations (...) [and] signal[s] formal recognition of the applicability of International Humanitarian Law to United Nations peace operations.”²⁸⁸ The bulletin covers the quintessential dispositions of international humanitarian law, including some which might not yet be deemed of

²⁸² Cf. also Kolb, Porretto, Vité, *supra* note 25, 258-259.

²⁸³ H. Steiner, P. Alston, R. Goodman, *International Human Rights in Context: Law, politics, morals* (2008), 135.

²⁸⁴ A. Tzanakopoulos, ‘Hierarchy in International Law: The Place of Human rights’, in E. De Wet, J. Widmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012), 42, 61. It appears, that, indeed the UN is rather called upon promoting the human rights obligations in the Charter, N. Quéniwet, ‘Human Rights Law and Peacekeeping Operations’, in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 99, 118-19.

²⁸⁵ Verdirame, *supra* note 3, 73.

²⁸⁶ Cf. Kolb, Porretto, Vité, *supra* note 25, 259-260 ; see also F. Mégret, F. Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’, in (2003) 25 *Human Rights Quarterly*, 314, 317-20. Verdirame suggests also that the direct and express references in the UN Charter “are sufficient to establish a legal basis for their general applicability to the activities of the UN”, Verdirame, *ibid.*, 74. In his view, a general obligation of the UN to respect human rights arises from a combination of Article 1 and Article 2, *ibid.*

²⁸⁷ United Nations Peacekeeping Operations, Principles and Guidelines (2008), the so-called “Capstone Doctrine”, 14, para. 1.2.; Note of Guidance on Integrated Missions, *supra* note 26, para. 3, para.16.

²⁸⁸ Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc. A/56/326 (2001), 9, para. 19. But see also Verdirame, *ibid.*, 205-206; Zwanenburg, *supra* note 24, 176. See generally, K. Grenfall, ‘Perspective on the applicability and application of international humanitarian law: the UN context’, in (2013) 95 *International Review of the Red Cross*, 645-652.

enjoying a customary law character.²⁸⁹ But it is not applicable to UN authorised operations, and the responsibility “to protect and ensure the respect” for international humanitarian law in the latter case rests with the state or regional organizations conducting the operation.²⁹⁰ The Bulletin is applicable in peacekeeping operations when the use of force is permitted in self-defence.²⁹¹ It provides particularly that the UN force shall “make a clear distinction at all times between civilians and combatants (...) Attacks on civilians (...) are prohibited.”²⁹² It is binding only on an internal level, but does not possess a binding effect on the external sphere.²⁹³

3. European Union

Article 6(1) TEU states that EU is founded on the principle of liberty, democracy, respect for fundamental rights and fundamental freedoms, and thereby it lays the ground for the incorporation of IHL into the European legal order, it would be a misnomer if principles “so fundamental to the respect of the human person” would not fall under this formula.²⁹⁴ Regarding the particular field of the CFSP, Article 21 TEU stipulates that “the Union’s action on the international scene shall be guided by the principles which have inspired its own creation (...) the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity.”²⁹⁵

²⁸⁹ D. Shrager, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’, in (2005) 94 *American Journal of International Law*, 406, 408.

²⁹⁰ *Ibid.*, 406, 408; Secretary-General’s Bulletin, Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 (1999), 1, para.1.1. In this regard, in Resolution 2085, the Security Council decided that AFISMA “shall take all necessary measures, in compliance with applicable international humanitarian law and human rights law”, *supra* note 161, 4, para. 9. Thus, although the Council did not oblige AFISMA to respect the bulletin, it nevertheless obliged the peacekeeping operation to respect the applicable legal framework.

²⁹¹ Secretary-General’s Bulletin, Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 (1999), para.1.1. It has to be pointed out that the Bulletin codifies some of the fundamental principles of IHL, but that it is not always in accordance with the respective dispositions of IHL. In Para. 1.1 it is stated that “The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.” Combatants can normally be always attacked under IHL whereas civilians can only be attacked during the time of their direct participation in hostilities, thus the Bulletin considers peacekeeping forces to be falling in-between the two categories.

²⁹² *Ibid.*, para.5.1.

²⁹³ B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen* (2006), 71-72.

²⁹⁴ V. Falco, ‘The Internal Legal Order of the European Union as a Complementary Framework for Its Obligations under IHL’, in (2009) 42 *Israel Law Review*, 168, 191; O. De Schutter, ‘Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51, 106-107.

²⁹⁵ D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 660; Council of the European Union, EU Strategic Framework and Action Plan on Human Rights on Democracy, Luxembourg, 25 June 2012, 1-2; EU

Further human rights obligations of the EU derive from the EU's Charter of Fundamental Rights²⁹⁶ which has the same legal value as the EU Treaties. Naert argues that the EU is already bound by the ECHR in substance on the basis of an operation of Article 6 TEU.²⁹⁷ In contrast, Gaja argues that the status of the ECHR under EU law is not completely clear. Article 6 (3) speaks of fundamental rights as guaranteed by the ECHR which points towards a binding effect within EU law, and suggests a status of the ECHR under EU law equivalent to other provisions in the treaties.²⁹⁸

Guidelines, Human Rights and International Humanitarian Law (2009), 3, 12-13; Cf. also Council of the European Union, Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment – An up-date of the Guidelines, Brussels, 15 March 2012, 2; EU Guidelines on Children and Armed Conflict, 2, para.7; Mainstreaming Human Rights and gender into European Security and Defence Policy (2008), 11-12.

²⁹⁶ The Status of the European Union Charter of Fundamental Rights and Freedoms was left open, not only for formal but also for political reasons as the integration of human rights in any given political system cannot only unite but as well divide the Community, especially concerning sensitive issues, D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 237; A. Clapham, 'A Human Rights Policy for the European Community', in (1990) 10 *Yearbook of European Law*, 309, 311. The Court of Justice started referring to it as a source of fundamental rights following the failure of the Constitutional Treaty, but it has always been relied upon as an alternative source and it was then proclaimed with slight institutional modifications following the signing of the Lisbon Treaty, D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 238, for the case-law of the Court, see, i.e., C-540/03, *European Parliament v. Council of the European Union*, Judgment of the Court (Grand Chamber of 27 June 2006, p. I - 5822 – I - 5823, para. 38-39; I - 5841, para. 107; C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, Judgment of the Court (Grand Chamber) of 29 January 2008, paras. 1, 61-70; Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Papierfabrik August Koehler AG (C-322/07 P), Bollore SA (C-327/07 P) and Distribuidora Vizcaína de Papeles SL (C-338/07 P) v. Commission of the European Communities*, Judgment of the Court (Third Chamber) of 3 September 2009), especially para. 80. Therefore, Article 52 (3) of the Charter prescribes that any right contained in the Charter corresponding to a right contained in the ECHR shall be the same in its meaning and scope as the right in the ECHR, see e.g. C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, Judgment of the Court of 23 September 2003, paras. 58-60; C-540/03, *European Parliament v. Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 June 2006, especially para. 38, but see also paras. 52-59.

²⁹⁷ F. Naert, 'Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 45, 47-48. See also D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 230.

²⁹⁸ G. Gaja, 'Accession to the ECHR', in A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon* (2012), 180, 194. It has to be pointed out that, although the ECHR will acquire – *per se* - a lower status under EU law than treaty provisions as an EU agreement because of the accession of the EU, its status will not be modified due to the continuing effect of Article 6 (3) TEU. Chalmers takes an intermediate position and submits that the application of Article 6 (1) TEU results in "formal autonomy and substantive dependence", D. Chalmers, G. Davies, G. Monti, *European Union Law* (2010), 230; See, i.e. C-415/05 P, *Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Opinion of Advocate General Poiares Maduro, 23 January 2008, para. 44; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, paras. 283-85; C-11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970, para.3. In *Nold*, the Court held that international human rights treaties are a source of fundamental rights under EU law, providing guidelines "which should be followed within the framework of Community law, C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, Judgment of the Court of 14 May 1974, p. 507, para. 13. The ECHR was recognized as a source of fundamental rights under EU law in *Rutili*, C-36/75, *Roland Rutili v. Ministre de L'intérieur*, Judgment of the Court of 28 October 1975, p. 1232, para. 32; The ECHR has a particular status in this regard, C-299/95,

Regarding the application of IHL under the EU's internal law, it is submitted that the updated EU Guidelines on promoting compliance with international humanitarian law (IHL) cannot be considered as binding the EU, by a unilateral act, to comply with IHL.²⁹⁹ But it can be argued that, indirectly, although on a policy-level, they induce a behavior of compliance of the EU *per se* with IHL. EU Heads of Mission as well as Commanders of EU civilian and military operations are obliged to include an assessment of the IHL situation in their reports about a given State or conflict. Furthermore, the importance of preventing and suppressing violations of IHL by third parties shall be considered, where appropriate in the drafting of mandates of EU crisis management operations.³⁰⁰ Therefore, this strict policy, which may also include sharing information for the purposes of criminal prosecution by the ICC,³⁰¹ also puts pressure on EU staff to comply with IHL. Furthermore, the EU should cooperate, where appropriate, with the United Nations and relevant regional organisations for the promotion of compliance with IHL.³⁰² As the United Nations and other international organisations have adopted a similar policy, monitoring and ensuring the compliance of IHL by third parties, there is an overlapping network of policy mechanisms to ensure compliance with IHL, also ensuring respect of IHL by the staff of international organisations.³⁰³

In summary, the protection of human rights and humanitarian law has been incorporated in the internal law of the majority of the examined international organisations. By this fact, it may give rise to international responsibility, potentially independent of other violations of human rights or humanitarian law, and purely on the basis of international law.

Friedrich Kremzow v. Republic Österreich, Judgment of Court (Fifth Chamber) of 29 May 1997, p. I – 2646, para. 19. The ICCPR has been considered as a source in the case of *Orkem*, C-374/87 *Orkem v. Commission of the European Communities*, Judgment of the Court of 18 October 1989, p. 3351, para. 31.

²⁹⁹ They rather correspond to the 2nd obligation of states under the Geneva Conventions, not only to respect, but also *to ensure respect of* international humanitarian law. See generally F. Naert, 'Observance of international humanitarian law by forces under the command of the European Union', in (2013) 95 *International Review of the Red Cross*, 637-643.

³⁰⁰ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), (2009/C 303/06), paras.15 (b), 16 (f).

³⁰¹ *Ibid.*, para.16 (f).

³⁰² *Ibid.*, para. 16(e).

³⁰³ See, e.g. Security Council Resolution 1502, UN Doc. S/RES/1502 (2003), Preamble, Statement by the President of the Security Council with Annex, Protection of Civilians in Armed conflict, Aide memoire, UN Doc. S/PRST/2009/1 (2009); Statement by Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs at 30th Annual Seminar for Diplomats on International Humanitarian Law, 20 March 2013; Secretary-General's Bulletin, supra note 291, ; ICRC, Customary IHL, Rule 139. Respect for International Humanitarian Law, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule139

5.3. Circumstances precluding wrongfulness

The Articles on the Responsibility of International Organisations contain a set of provisions, entitled circumstances precluding wrongfulness, which similarly to dispositions in criminal law justify internationally wrongful acts or simply preclude their wrongfulness. Regarding the subject of this study, two articles are particularly relevant: consent and self-defence.

1. Consent – Article 20 ARIO

As the commentary to the ARIO states: “What is generally relevant is consent by the State on whose territory the organization’s conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct.”³⁰⁴

In all recent peacekeeping operations, consent of the host-state is a requirement for the deployment of the operation, notwithstanding the possibility that the Security Council could authorise the deployment of an operation under a Chapter VII mandate with the consent of the host-state.

The UN observed in its comments that

the consent of the host State is not necessary a circumstance precluding the wrongfulness of conduct, but rather a condition for that conduct, as it is, in fact, a condition for the deployment of any United Nations presence in a State’s territory (i.e., a United Nations conference, a United Nations Office, a peacekeeping operation (other than a Chapter VII non-judicial accountability mechanism). A State’s consent for the presence of the United Nations or for the conduct of its operational activities in its territory is thus the legal basis for the United Nations deployment, without which the conduct would not take place.³⁰⁵

Consequently, consent under the ARIO is not a circumstance precluding wrongfulness, which *ex-post facto* remedies the wrongfulness of a certain act, but it prevents the act from being wrongful in the first place. The UN also therefore further pointed out in its comments that “in the practice of the

³⁰⁴ Report of the International Law Commission, Sixty-third session, *supra* 2, 1110, para.1.

³⁰⁵ Responsibility of international organizations, Comments and observations received from international organizations, *supra* note 263, 23-24, para.2

United Nations there are no instances of an unlawful act or conduct of the Organization consented by, or remedied by consent of, the “injured” entity.”³⁰⁶

Consent of the host state on whose territory the peacekeeping-operation is deployed cannot be invoked as an excuse for human rights or any other violations of international law committed by the peacekeeping operation. The consent of the host state is given *bona fide* towards the deployment of the peacekeeping operation and not as a form of *carte blanche* regarding all potential violations of international law by the operation.³⁰⁷ In fact, the Status of Forces Agreement (SOFA) or the Status of Mission Agreement (SOMA) which are normally concluded between the peacekeeping operation and the host-state regulate the questions of compensation and complaint procedures for violations which might arise during the deployment of the operation. In summary, consent of the host state prevents the deployment of the peacekeeping operation on the territory from being unlawful, but it does not touch upon any potential violation of human rights or humanitarian law as it might arise during the deployment of the troops.

2. Self-Defence – Article 21 ARIO

From a conceptual point of view, self-defence like consent should be seen as a primary, permissive, rule rather than as a secondary rule or as a circumstance precluding wrongfulness, a fact which was also recognised by the ILC. The Commission nevertheless decided to include a specific disposition in order to state that “the principle that the use of force in self-defence precludes the wrongfulness of the acts in which force is so used.”³⁰⁸

³⁰⁶ *Ibid.*, para.4. As observed by Kolb, Porretto and Vité, consent by a state cannot remedy a violation of IHL by another entity as the customary and treaty norm which prescribes the international community to respect IHL at all times prohibits any other interpretation, Kolb, Porretto, Vité, *supra* note 25, 342.

³⁰⁷ See also G. Simm, *Sex in Peace Operations* (2013), 68. The Report and Commentary of the ILC state nevertheless that “with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct”, International Law Commission, Report on the work of its sixty-first session, *supra* note 2, 94, para.2 of the commentary; Report of the International Law Commission, Sixty-third session, *supra* 2, 110, para.1 of the commentary.

³⁰⁸ Yearbook of the International Law Commission (1980), Volume II Part Two, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (1980), 60, para.23. See also International Law Commission, Report on the work of its sixty-first session, *supra* note 2, 96, para. 2 of the commentary; International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), General Assembly Official Records, Sixty-first Session, Supplement No. 10 (A/61/10) (2006), 266, para. 2; Cf. General Assembly, Sixty-first session, Official Records, Sixth Committee, Summary Record of the 15th meeting, UN Doc. A/C.6/61/SR.15 (2006) (Ms. Williams, United Kingdom), 5, para. 26; International Law Commission, Provisional Summary Record of the 2876th meeting, UN Doc. A/CN.4/SR.2876 (2006) (Mr. Mansfield), 7; .E. David, ‘Primary and Secondary Rules’, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 27, 30-31; J.-M. Thouvenin, ‘Circumstances precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence’ in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 455, 459-61.

Article 21 of the Articles of the ILC stipulates that “[t]he wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.” This article therefore relegates to the primary rules of international law.³⁰⁹ The commentary to the corresponding article on self-defence in the articles on state responsibility further explains that

the term ‘lawful’ implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.³¹⁰

Special Rapporteur Gaja therefore also proposed the deletion of such a specific disposition in his seventh report.³¹¹ As this proposal was not accepted by the majority of the commission³¹², Mr. Gaja abstained from reiterating it in the 8th report.³¹³

Self-defence under Article 21 has to be distinguished from “self-defence” as it is used in the context of peacekeeping operations. The Commentary of the ILC explicitly acknowledges that, in the practice of UN forces, self-defence “has often been used in a different sense” and it stipulates that it covers those cases other than when an international organisation responds to an armed attack by a state.³¹⁴

³⁰⁹ Report of the International Law Commission, Sixty-third session, *supra* 2, 113, paras. 1-2; 114, paras.3-5.

³¹⁰ International Law Commission, Report on the work of its sixty-first session, *supra* note 2, para.1 of the commentary; International Law Commission, Report of the International Law Commission, Sixty-third session, *ibid.*, 111, para. 1 of the commentary.

³¹¹ G. Gaja, Seventh report on responsibility of international organizations, UN Doc. A/CN.4/610 (2009), 21, para.59. A good overview of the problems associated with the notion of self-defence in the context of the ARIO was provided by Ms. Williams, the Representative of the UK in the 6th Committee: “Much of the discussion in the commentary was based on the use of self-defence in peacekeeping operations, but the right of self-defence arose in many cases from the terms of the mandate of a peacekeeping force. It was difficult to extrapolate from those specific mandates to a wider right that would exist in different circumstances. The considerations that applied to self-defence in the context of international organizations were different from those that applied to the exercise of the right of self-defence by a State. Moreover, as a practical matter, only certain international organizations would ever be in a position to exercise the right of self-defence”, General Assembly, Sixty-first session, Official Records, *supra* note 308, Ms. Williams, United Kingdom, 5, para. 26.

³¹² See, e.g. International Law Commission, Provisional Summary Record of the 3000th meeting, UN Doc. A/CN.4/SR.3000 (2009) and International Law Commission, Provisional Summary Record of the 3001st meeting, UN Doc. A/CN.4/SR.3001 (2009); A summary of the debate within the ILC is contained in the statement of the chairman of the International Law Commission before the 6th committee, General Assembly, Sixty-fourth session, Official Records, Sixth Committee, Summary Record of the 15th meeting, UN Doc. A/C.6/64/SR.15 (2009) (Mr. Petric), 4, para. 13.

³¹³ G. Gaja, Eighth report on responsibility of international organizations, UN Doc. A/CN.4/640 (2011), 22, para.62.

³¹⁴ Report of the International Law Commission, Sixty-third session, *supra* 2, 114, para.3. As Special Rapporteur Gaja wrote in his fourth report: “While the mandates of peacekeeping and peace-enforcement forces vary, references to self-defence confirm that self-defence constitutes a circumstance precluding wrongfulness. This

First of all, it appears correct to observe that self-defence by international organisations in peacekeeping operations is closer to “self-defence” as defined in national law, governing principally “interindividual relations.”³¹⁵ Secondly, in the practice of the UN, references to self-defence “have been made also in relation to the ‘defence of the mission’”³¹⁶ or to “the defence of the safe areas and the civilian population in those areas.”³¹⁷ So, in these references, “the term is given a meaning that encompasses cases other than those in which (...) an international organization responds to an armed attack by a State” and they do therefore not fall under Article 21; “the question of the extent [and the conditions] to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission.”³¹⁸

Thus, Article 21 is not applicable to the conduct of peacekeeping operations, unless the peacekeeping forces respond to an armed attack in the sense of Article 21. Otherwise, their mandate as well as the applicable provisions of international human rights and humanitarian law provide the conditions under which they may resort to military force in “self-defence”.

5.4. Assessment of Chapter V

Starting with the different case-studies with regard to the attribution of conduct, followed by an analysis of breach of an international obligation and an examination of relevant circumstances precluding wrongfulness, this Chapter highlighted the complexity of the topic of the present study, as well as the legal uncertainties associated with many aspects, e.g. the question if and under which conditions regional organisations are directly bound by the UN Charter.

The case-studies confirmed the previously formulated view that any appraisal of the attribution of conduct hinges on the specific circumstances of the case. In this context, in order to attribute the conduct of a peacekeeping operation to organisation(s) that are not part of the chain of command,

conclusion is not affected by the fact that the provisions in question appear to envisage a reaction against attacks that are directed against United Nations forces mainly by entities other than States and international organizations. No distinction is made according to the source of the attack”, G. Gaja, Fourth report on responsibility of international organisations, UN Doc. A/CN.4/564 (2006), 6, para.17. See also Peacekeeping, The Right of Self-Defence of United Nations Peacekeeping Forces and the Exercise of that Right – Article 51 of the Charter of the United Nations, Memorandum to the Senior Political Adviser to the Secretary-General, (1993) *United Nations Juridical Yearbook*, 371-372.

³¹⁵ Kolb, Porretto, Vité, *supra* note 25, 341. See also International Law Commission, Provisional Summary Record of the 2876th meeting, UN Doc. A/CN.4/SR.2876 (2006) (Mrs. Escameia), 4.

³¹⁶ Report of the International Law Commission, Sixty-third session, *supra* 2, 111, para. 3.

International Law Commission, Report on the work of its sixty-first session, *supra* note 2, 96, para. 3 of the commentary; Report of the International Law Commission, Sixty-third session, *supra* 2, 111-112, para. 3 of the commentary.

³¹⁸ Report of the International Law Commission, Sixty-third session, *ibid.*, 111-112, paras. 3-4.

an intimate link in the form of a strong nexus between the political control they exercise and control over the operational conduct of the operation is necessary. The existence of such a link could also serve as a main sign that the required threshold for an application of the criterion of normative control is reached and that one of the involved organisations would assume the responsibility on behalf of the other involved organisations in any possibly existing case in court.³¹⁹

The case-studies confirmed furthermore that there is, indeed, a division of labour emerging between the different organisations regarding the deployment of peacekeeping operations, particularly with regard to the African continent. Depending on the specific situation, the involvement of each organisation varies in conformity with its defined “niche” within the established division of labour. The EU, which is deploying a training mission in Mali, has announced the deployment of a civilian mission in Mali in mid-February 2014.³²⁰ In Somalia, the EU deployed a training mission, whereas in the Central African Republic, it will deploy a limited military operation.

With regard in particular to AFISMA, the question is also raised if the traditional distinction between not only peacekeeping and peace enforcement operations, but also UN and UN-authorized operations is still valid or already out of date.³²¹ The cooperation mechanisms in AFISMA illustrated an involvement of the UN, and also other organisations, on various levels of command and control.

³¹⁹ Unless the Court would have jurisdiction over all involved organisations.

³²⁰ Address by EU High Representative Catherine Ashton at the UN Security Council on the cooperation between the EU and the UN on international peace and security, New York 14 February 2014, 140214/02. The mandate of the training mission was extended until 18 May 2016, Council of the European Union, Luxembourg 15 April 2014, EU training mission in Mali extended, Doc. 8775/14, 1.

³²¹ Cf. N. Blokker, ‘The Security Council and the Use of Force: On Recent Practice’, in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality. A Need for Change?* (2005), 1, 15-17, 28.