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“UN-LED” OR “UN-AUTHORIZED” OPERATION?: DISCERNING AMONG THE UN SECURITY COUNCIL’S MANDATED OPERATIONS

Abstract:

The revival of the UN Security Council’s regulatory powers after the end of the Cold War as well as new challenges to international peace and security have led to the development and diversification of UN operational tools. In the absence of United Nations’ own material capacities to undertake necessary military action, due to the non-conclusion of agreements provided for in Article 43 of the UN Charter by which UN Member States would commit to provide the necessary force and other assistance to the Security Council upon its call, the latter developed other means. Today, there co-exist two mandated operations by the Security Council vested with the power to use force, each however within a different scope, limits and objective: UN-led “Blue Helmets” and UN-authorized military operations. This functional rapprochement causes nevertheless a great confusion, both in practice and recently in the judicial sphere. Hence, the clarification of the legal regime of each is essential.

While the UN-led Blue Helmets vested with the limited power to use force represent the new generation of peacekeeping operations, the UN-authorized operations constitute a decentralized execution of the Council’s enforcement measure. In the latter case the Security Council turns to UN Member States or regional organizations and delegates them its exclusive power to use force under Article 42 of the UN Charter to execute it under set conditions. The limitation of the use of force by the UN-led operation to the strict defence of its civilian mandate does not exempt it from the regime of coercion established under Chapter VII of the UN Charter either. This raises a question of the legal status of this UN-led operation and whether possibly such tool approaches the original concept of UN enforcement forces laid down in Article 43. Analysis of the converging and diverging elements of both operations shows the complexity of this operational domain, the clarification of which is proposed in this article via a legal perspective.

Keywords:

Coercion – consent – delegation of power – enforcement – hierarchy of norms – international law – international organization – international peace – international security – intervention – mandate – military operation – peacekeeping – sanction – Security Council – United Nations – use of force

INTRODUCTION

The multiplication and diversification of the United Nations’ activity in the domain of the maintenance and restoration of international peace and security after the end of the Cold War has opened up a great spectrum of possible means of intervention and other forms of settlement of disputes. At the same time such development gives rise to various challenges as to the precise legal qualification

of such operational tools, often crystallized empirically, and their legal justification.

One of the most delicate legal issues in this field is the distinction between the UN-led operations, so-called “Blue Helmets”, and the military operations carried out by a coalition of States “authorized” by the UN Security Council. The confusion as to the difference between these two – originally clearly distinct – operations springs above all from the diversification of the mandate of the former and the allegedly unclear legal basis of the latter. Coupled with the flourishing terminology applied especially to the Blue Helmets missions, reflecting in an incoherent manner their practical evolution, the current complex and unsystematic state leads to uncertainties and excesses both in practice and, recently, in judicial domain. The precise scope of the mandate and the legal limitations to the action are often questioned. This delicate issue is especially pertinent today before national and international courts as regards the distribution of international responsibility for wrongful acts committed during such operations mandated by the UN Security Council.

The clarification of the legal regime of both the UN-led Blue Helmets and the UN-authorized military operations and the clear distinction between them is the prerequisite of any assessment of particular legal questions in practice. In the first part of the article, the common origin of both operations is examined, vis-à-vis the founding idea of the UN Charter (I). This does not veil their diverging objectives and distinct mandates. Comparative analysis of the legal framework of these operations confirms both institutional and substantive differences that place them on clearly distinct poles of security activities (II). Further evolution of the UN-led operation and alteration of some of its constitutive elements has however introduced a certain convergence between the two operational modes. This raises the question of the legal status of such operation. The gist is to examine whether this particular current of UN-led operations represents possibly the return to the roots – the fulfilment of the original idea of the UN Charter (III). Finally, the purpose of this analysis is to elucidate the persisting confusion, both in legal theory and practice, which the interaction and complementarity of the two operations continue to nourish (IV). This article aims to shed light on the different legal frameworks of these operations and to point out to the repercussions of the persisting confusion. It highlights both their converging and diverging features and proposes guidelines identifying their basic legal pillars.

I. COMMON ROOTS OF “UN-LED” AND “UN-AUTHORIZED” OPERATIONS

The UN Charter expressly provides for neither the “Blue Helmets” concept, nor the “UN-authorized” operations carried out by States within the system of maintenance and restoration of international peace and security as laid down in the Chapter VII. The protection of international peace as the primary objective of the United Nations, anchored in Article 1 (1) of the UN Charter, was planned to be guaranteed on the military level by the UN Security Council via the use of the forces provided by the UN Member States upon its call. According to

Article 42, if the Security Council considers that the coercive¹⁾ measures not involving the use of force such as embargoes or targeted sanctions laid down in Article 41 would be inadequate or have proved to be inadequate, “it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”. Such action may include “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” On the practical level, Article 43 adds that UN Member States “undertake to make available to the Security Council, *on its call and in accordance with a special agreement or agreements*, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security” [emphasis added]. This mechanism based on the *ad hoc* provision of material assistance by States to the United Nations upon its call prevailed over other possible models of UN autarky in the operational sphere.

In fact, during the negotiations at the San Francisco Conference in 1945 the founding fathers envisaged three possible formats of the UN capacity in the sphere of enforcement involving the use of force:

“Theoretically, the international force can be conceived in several forms:

a permanent army of an international nature over and above the national armies, or even replacing them;

national contingents under international command, which presupposes control by a permanent international military staff;

national contingents at the disposal of an international body, but remaining under the command of their national army.”²⁾

It is the second option that was unanimously adopted, reconciling two antagonistic approaches: concern about developing the UN into a “super-State” while vesting it with its own and permanent international army³⁾, on one hand, and the respect for the need to establish a unified centralized command of an international force under the authority of the UN Security Council, on the other hand. The system provided for in Articles 42-43 was completed by a unified command structure laid down in Articles 46 and 47.

The Charter provides, in Article 47, for the establishment of a Military Staff

¹⁾ The terms coercion and enforcement are used invariably here, in compliance with the majority approach in the doctrine of Public International Law.

²⁾ See *Documents on the United Nations Conference on International Organization (UNCIO)*, San Francisco, 1945, United Nations Information Organizations, London, 1945-1955, vol. XII, Restricted, Doc. 134 (English), III/3/3, 9 May 1945, p. 589.

³⁾ France had suggested to create a permanent international police force already during the *travaux préparatoires* of the League of Nations’ Covenant. This force was supposed to comprise both international armed forces and national contingents and be subject to the international Military Staff Committee which would be responsible for the direction and command of such force. See SCHÜCKING, W.A., WEHBERG, H., *Die Satzung des Völkerbundes*, 2nd ed., Vahlen, Berlin, 1924, pp. 393-394. The interest to establish an international army reappeared in 1930’s and at the beginning of 1940’s, see WEHBERG, H., “La police internationale”, *RCADI*, vol. 48, 1934-II, pp. 117-127.

Committee, composed of the Chiefs of Staff of the Security Council permanent members, that “shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council” (§ 3). The Military Staff Committee shall, in general, “advise and assist the Security Council on all questions relating to the Security Council’s military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament” (§ 1).

The stumbling block of the realization of the system laid down in Articles 42-43 was the non-conclusion of the special agreements between UN Members and the Security Council provided for in Article 43. The latter presupposed that the agreements “shall be negotiated as soon as possible” and shall fix “the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided”. As such the agreements constitute *conditio sine qua non* for any obligatory supply of material assistance to the UN by the Member States. Such an obligation is not however imposed by a decision of the Security Council; it arises from an agreement, concluded beforehand, which can be activated by a simple “call” of the Council. The philosophy behind is well expressed by Virally: “Every Member is subject to decisions of the Security Council, but in the military domain only to the extent it has excepted beforehand. It does not therefore risk to be taken by surprise and dragged in a military operation beyond of what it determined itself in agreement with the Council”.⁴⁾ This emphasis laid on the national sovereignty culminated in the post-San Francisco years with the complete refusal to submit to the Security Council’s central authority. The rising political antagonism emphasized the break between the post-war idealism and the reflex of the State sovereignty protection. Despite the initiatives both of the Security Council and General Assembly since 1946 to consider the application of Article 43 as a matter of urgency, the UN report *General principles governing the organization of the armed forces made available to the Security Council by Member Nations of the United Nations*⁵⁾ adopted in 1947 only confirms the existence of insurmountable obstacles to the realization of the agreements.

United Nations has thus been deprived of its capacity to use force despite the exclusive power to resort to military enforcement granted to the Security Council by international community. This breach between legal prerogative and material capacity would have led to the destruction of the collective security system established under the Council’s authority. This impasse and the urgent

⁴⁾ VIRALLY, M., *L’organisation mondiale*, A. Colin, Paris, 1972, p. 463 [author’s translation].

⁵⁾ *General principles governing the organization of the armed forces made available to the Security Council by Member Nations of the United Nations*, Report of the Military Staff Committee, UN Doc. S/336, 30 April 1947.

need to act ventilated however alternative solutions to maintain and restore international peace.

II. DIFFERENT MANDATES AND OBJECTIVES

In order to fulfil one of the Purposes of the United Nations, the maintenance of international peace and security, the United Nations developed new operational tools based on empiricism. Progressively adapted to the real needs and new challenges and conditioned by a general recognition, these measures have gradually rooted in the UN policy. While the recourse to military force has fully anchored on international scene with some delay (A), the consensual peacekeeping has soon marked an important rise (B).

A. Authorization as a new technique

Facing a situation threatening or breaching the international peace and security in terms of Article 39 of the UN Charter that requires an intervention with the use of force, the armless UN Security Council has developed a practice to turn to other actors having at their disposal the necessary operational means, especially UN Member States. Via the delegation of its exclusive power to use force, laid down in Article 42, under their own operational command and control, the Council authorizes such external actors to act as its delegates while exercising the mandate it grants to them.

Despite some embryonic features of this tool noticeable in the Korean War in 1950 as an uncertain precedent⁶⁾, its further development was paralyzed during the Cold War. The authorization technique reappeared in the Gulf War in 1990-1991⁷⁾ and has since gained a recognized position as a generally accepted UN measure and its legal framework has solidified. Since the beginning of 1990's it is a common practice for the Security Council to authorize UN Member States and regional organizations to use force for various objectives, as shown in more than 30 cases.

Facing the break of the civil war and the humanitarian crisis in Somalia in 1992, the Security Council authorizes States to “establish as soon as possible a secure environment for humanitarian relief operations”⁸⁾. Similarly, the internal conflict in some regions of Congo, the fighting and atrocities as well as the gravity of the humanitarian situation, induced the Security Council to authorize States to use force, *inter alia*, to “contribute to the stabilization of the security conditions and the improvement of the humanitarian situation in Bunia, to ensure the protection of the airport, the internally displaced persons in the camps in Bunia and, if the situation requires it, to contribute to the safety of the

⁶⁾ UN Doc. S/RES/83, 27 June 1950, UN Doc. S/RES/84, 7 July 1950.

⁷⁾ UN Doc. S/RES/678, 29 November 1990.

⁸⁾ UN Doc. S/RES/794, 3 December 1992, § 10.

civilian population”⁹). Likewise the Security Council qualified the situation in Afghanistan in 2001 a threat to international peace and security, and decided to authorize States participating in the International Security Assistance Force to resort to force “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas”¹⁰). The Security Council turned to States or regional organizations to use force under its authority also with the objective to repulse an armed attack and to liberate a State from a foreign occupation¹¹), to assure the implementation of a peace agreement¹²), to impose a naval blockade¹³) or to repress acts of piracy and armed robbery at sea¹⁴). The crises in Côte d’Ivoire, East Timor, Rwanda, Chad and the Central African Republic, Soudan, the war in Bosnia and Herzegovina, Croatia or Kosovo have all seen the intervention of the UN via the authorization given under Chapter VII. The most recently the Security Council authorized the recourse to force in the case of Libya in 2011, “to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”, “to enforce compliance with the ban on flights” in the airspace of Libya in order to help protect civilians, and to enforce the arms embargo.¹⁵)

Despite its common use, this new coercive measure raises a whole range of legal uncertainties in practice, often with substantial consequences. They spring from the absence of a general and express definition, or rather an unawareness of the unified legal framework of this tool, product of empirical evolution. Are the troops of the multinational force in Libya, operating under the mandate of the UN Security Council given in resolution 1973 (2011), allowed to go beyond the scope of the mandate in order to safeguard the peace in Libya? Under what conditions could the units of the operation “Enduring Freedom” operating in Afghanistan, under the right of collective self-defence, be possibly integrated within the authorized multinational force International Security Assistance Force (ISAF), deployed in parallel, and thus extend the UN Security Council’s mandate without its express consent? Is it lawful for a State participating in a UN-authorized operation to withdraw arbitrarily and at any moment its con-

⁹) UN Doc. S/RES/1484, 30 May 2003, § 1.

¹⁰) UN Doc. S/RES/1386, 20 December 2001, § 1.

¹¹) Gulf War, UN Doc. S/RES/678, 29 November 1990.

¹²) For example in the case of Haiti, UN Doc. S/RES/940, 2 August 1994, or Liberia, S/RES/1497, 1 August 2003.

¹³) For example against Iraq, UN Doc. S/RES/665, 25 August 1990; Federal Republic of Yugoslavia, UN Doc. S/RES/787, 16 November 1992; Haiti, UN Doc. S/RES/875, 16 October 1993, and UN Doc. S/RES/917, 6 May 1994; Sierra Leone, UN Doc. S/RES/1132, 8 October 1997; and recently in the case of Libya, UN Doc. S/RES/1973, 17 March 2011.

¹⁴) Gulf of Aden, UN Doc. S/RES/1816, 2 June 2008, and subsequent resolutions.

¹⁵) UN Doc. S/RES/1973, 17 March 2011, §§ 4, 8, 13.

tingents and to end unilaterally its part, a phenomenon observed for example in the war in Iraq since the withdrawal of Spain in 2004? These and a whole range of other questions converge to the basics: What is the legal basis and the legal regime of the authorization technique? What are its limits?

The tandem based on a centralized decision and a decentralized implementation is legally justifiable on different levels: first, the authorization technique can be claimed to constitute a new institutional customary norm amending the UN Charter, taking into account its empirical development and gradual recognition by all UN Members; secondly, it can be argued that the power of the Security Council to authorize States to use force is an implied power based on Chapter VII (or its particular provision) which is “necessary” and “essential” for the performance of the Council’s duties expressly laid down. In the author’s view it is not necessary to proceed either to the theory of implied powers as the last resort of internationalists, or to give up in favour of the non-Charter sources. It is enough to read the UN Charter under a new perspective, reflecting the *usus longevus* developed by the UN.

Article 42 provides expressly for the power of the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”. This first phrase of Article 42 does not specify anyhow the way such action shall be carried out. It only lays down the prerogative of the Security Council to use force. The second phrase of the article, which is however often overlooked, develops the first one as it stipulates: “Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” If this addition has traditionally been regarded as a simple reminder of the origin of the troops contributed by the UN Members to the Security Council under Article 43 agreements, nothing prevents to read it today, in conformity with the established practice, as a determination of the general mode of carrying out the Security Council’s “action”: with the help of the forces of the UN Member States. There is no mention of the modality of the participation of such forces and of their role: they can either be used as a passive means put at the full disposal of the Security Council for its action under its own operational command and control, or act as an active agent that carries out the Security Council’s action with the Council’s mandate but in a decentralized manner, under its own operational command and control. In both cases it is the Security Council’s action, it means an operation decided and established by the Council, carried out in the framework and in accordance with rules it defines, under its general authority and control. It assures the implementation of its will. Besides, such two modes exist also in the domain of coercion not involving the use of force. The Council resorts in most cases to economic or financial coercive measures executed via Member States.

This interpretation is corroborated by Article 48 of the UN Charter that qualifies UN Member States as principal actors to carry out decisions of the Security Council for the maintenance of international peace and security and

which is not limited to coercive measures not involving the use of force.¹⁶⁾ Moreover, Article 53, § 1, grants expressly to the Security Council the power to authorize regional arrangements or agencies to use force for the maintenance of international peace and security. Laying down that “[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority”, it stipulates that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”. This confirms the existence of the authorization technique expressly provided for in the UN Charter. It would be a legal paradox and a substantial inconsistency if the Security Council was entitled to delegate its powers under Chapter VII to Member States assembled in an institutional body and not when they act collectively within an open alliance or individually. In reality, the contemporary practice confirms there exists no substantive difference between the two currents of delegation of power to States and regional organizations. The authorization of regional organizations has been activated since 1990’s rather as a complement to the authorization of States. The Security Council has developed a practice to leave the choice of the State to “act nationally or through their regional organizations or arrangements”.

Finally, the new interpretation of Article 42 reflects the whole context of Chapter VII while rejecting the exclusiveness of some of its links, precisely the connection between Articles 42 and 43-45, and the intangibility of the command system laid down in Articles 46 and 47. Due to the ineffective functioning of the Military Staff Committee, the command center had to be placed elsewhere and to a more adapted level, as a result of which the delegation of Article 42 power is, in principle, accompanied by the delegation of power of operational command and control over the force.¹⁷⁾

¹⁶⁾ The combination of Articles 42 and 48 as the legal basis for the authorization technique is suggested also by Jochen A. Frowein and Nico Krisch, who believe that “both Art. 42 cl. 2 and Art. 48 indicate that not all action has to be performed by forces at the disposal of the SC, but that there is room for action by other forces of the Member states”, FROWEIN, J. A., KRISCH, N., “Article 42”, in SIMMA, B. (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, p. 756. See also FREUDENSCHUß, H., “Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council”, *EJIL*, vol. 5, n° 4, 1994, p. 525; GILL, T.D., “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter”, *NYIL*, vol. 26, 1995, p. 59.

¹⁷⁾ Kelsen, for example, notes: “[T]he wording of Articles 39, 42, 47 and 48 does not exclude the possibility of a decision of the Security Council to the effect that Members which have not concluded special agreements shall provide armed forces in excess of those which they have placed at the disposal of the Council in their special agreements. The wording of Articles 39

While authorizing States under Chapter VII to use force, the Security Council has developed practice to resort to the following terms: “Authorizes Member States ... to take all necessary measures to ...” The words, including the euphemistic expression, can be subject to possible minor language variations.

The authorization technique by the Security Council leaves the States the choice to act. According to the Salmon’s *Dictionnaire of Public International Law*, the authorization resides in the “power given or granted by an authority or a superior organ or an organ holding this power to another person, representative or an organ, in order to empower it to carry out an action or adopt a legal act”¹⁸). The Security Council thus only *allows* in law the States to act and delegates them to this end the necessary power. While the acceptance of the authorization by States is fully voluntary, the moment they accept and exercise the delegated power the States become legally bound by the mandate granted by the Council. As delegates, they are obliged to exercise the power within the limits, for the objective and in conformity with the manner determined by the delegator.¹⁹) The States submit to obligation of conduct which requires the use of means specifically determined within the fixed frame-

and 42 does not even exclude the possibility of the establishment of an armed force of the Organisation different from and independent of the armed forces placed at the disposal of the Security Council by the Members. Article 42 refers to ‘air, sea, or land forces’ without providing that these forces must be armed forces placed at the disposal of the Security Council by the Members”, KELSEN, H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, Stevens & Sons, London, 1951, p. 756. As regards the command system provided for in Articles 46-47, it suffices to say that the power of strategic direction of the Military Staff Committee concerns the forces provided by States at the disposal of the Security Council under Article 43 agreements, as Article 47, § 3, phrase 1, suggests. Any new model of recourse to force justifies its own system of command and control adapted to its needs, especially if the original one does not function effectively and, even more, if the new system is founded on voluntary participation. August Reinisch and Brun-Otto Bryde note in this respect: “[The] reliance on consensus would be in compatible with any automatism concerning the command structure”, BRYDE, B. O., REINISCH, A., “Article 47”, in SIMMA, B. (ed.), *supra* note 16, p. 774. The delegation of the strategic command and control by the Security Council to States, as a complementary current of the delegation of power to use force, does not collide with any inviolable link between Articles 42 and 46-47.

¹⁸) SALMON, J. (dir.), *Dictionnaire de droit international public*, Bruylant, Bruxelles, 2001, p. 113 [author’s translation].

¹⁹) For a detailed analysis of the principles of delegation of power by the UN Security Council in general, see SAROOSHI, D., *The United Nations and the Development of Collective Security*, Oxford University Press, Oxford, 1999, XXII + 311 p.

work.²⁰) Despite the voluntary acceptance of the mandate, all UN Member States, including the target State, are under an obligation to respect the Council's decision to authorize the use of force and not to hinder its execution, in compliance with Article 25 of the UN Charter.

The key issue of the legal regime based on authorization is that the operation is carried out "under the authority of the Security Council". As a consequence of principles of delegation²¹) and the exclusive nature of the power to use force, the Security Council, as a holder of this prerogative due to its particular features and function, cannot arbitrarily cede or yield it without preserving an overall authority and control over its exercise. It derives from the general principle of law *nemo dat quod non habet* that limitations on powers of delegating organ should be maintained in all the delegation process. The rule that delegation cannot be presumed requires an express authorization given by the Security

²⁰) The imperative of voluntary contribution of troops by States for an enforcement operation under Chapter VII is commonly underlined as the cornerstone of the Security Council's recourse to force in view of the non-conclusion of Article 43 agreements. This opinion is well represented by Rosalyn Higgins who believes that "the consequence of the failure to conclude agreements under Article 43 was that UN members *could not be compelled* to provide forces and assistance under Article 42. But I could see no reason of legal analysis which proscribed any member or members from *volunteering forces* and the Security Council being able to use them under Article 42", HIGGINS, R., *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 265 [emphasis added]. This issue needs to be nuanced: the obligation aimed at in Article 43 concerns the contribution of troops for an action carried out by the Security Council under its own operational command and control (in liaison with Article 47), not for an external action where States act as independent agents executing the mandate granted by the Council under their own operational command and control. Accordingly the author, together with Pierre Michel Eisemann from the Sorbonne University (Paris 1), consider the recourse to the authorization technique as a political choice, not a legal imperative. If the Security Council decides that the execution of its military action in compliance with the second phrase of Article 42 will be ensured by States, or some of them, they are obliged to respect such a decision and to implement it in conformity with Article 25 of the UN Charter. This scenario could be pertinent for example in a situation where armed forces of a State are already stationed in a foreign country, on the basis of the latter's own invitation, in order to exercise some limited function of the State police. If some internal crisis then breaks in the host State, causing terrible atrocities provoking death of thousands of people and requiring an urgent intervention, it could be seen legitimate if the Security Council orders, under Chapter VII, the State, the forces of which are already deployed on that territory, to resort to force in order to end such human catastrophe. This legal option is however dependent on its legitimacy and subject to acceptance by UN Member States, the signatories of the UN Charter, and for the moment remains rather utopian.

²¹) See the landmark case on this issue, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, Judgment of 13 June 1958, ECJ, Case 9-56, ECR 1958, p.133; and international institutional rules in SCHERMERS, H.G., BLOKKER, N.M., *International Institutional Law: Unity within Diversity*, 4th ed., Nijhoff, Leiden, 2003, § 229 *et seq.*, and *supra* note 19.

Council, which challenges occasional attempts to justify an “implicit” authorization. In order not to stray from the will of the Security Council, the mandate shall be clear and precise. As concerns the level of execution, the States as delegates exercising the Council’s prerogative in a foreign territory are strictly limited by the mandate, the excess of which would amount to *ultra vires* acts. The decentralized execution requires a reporting by the States to the Council since the latter remains the holder of the powers and can alter at any time the acts adopted by the States.

These main law axes delimit the legal framework of the authorization technique. As an organ of the United Nations, the Security Council is restricted in the exercise of this power by the limits posed by the UN Charter and the general international law.

B. Temporary victory of consensualism

With the rise of antagonism shortly after the birth of the United Nations and the freeze of coercive interventionist policy it clearly appeared that any way through requires a mild, non-conflicting format acceptable by all parties. The consensual alternative to the system of collective security established in Chapter VII was to be the so-called peacekeeping operations, or Blue Helmets. This new tool developed by the United Nations filled up partially the gap in the UN operational capacity during the Cold War, nevertheless owing to its adaptability and diversification it has raised beyond its own purpose and constituted an important UN instrument until today.

Unlike the authorization technique, peacekeeping is based on clearly opposite elements, defined in 1958 by the Secretary-General Dag Hammarskjöld²²) and reiterated in 2000 in the *Brahimi Report*²³): consent of local parties, impartiality of the peacekeepers and the limitation of the use of force to self-defence. Moreover, peacekeeping operation is a United Nations operation carried out under its operational command and control. This unit is legally established under Article 7 as a subsidiary organ of the United Nations. Materially, it consists of civil, police and military personnel placed voluntarily at the disposal of the UN by its Member States. It is important to emphasize that the consensual basis concerns all participating parties, not only the target of the operation but also the troop-contributing States – in the absence of Article 43 special agreements, there exists no legal basis in the UN Charter obliging the UN Members to provide forces to the United Nations for an operation under its operational command and control.

²²) *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, UN Doc. A/3943, 9 October 1958.

²³) *Report of the Panel on United Nations Peace Operations* (hereafter “*Brahimi Report*”), UN Doc. A/55/305-S/2000/809, 21 August 2000, § 48.

Legally, the triad of peacekeeping operations can get by without any special legal regimes, unlike the recourse to coercion. Due to consensualism it does not compromise the State sovereignty in terms of Article 2 (4) of the UN Charter and the scope of the use of force does not go beyond the right to self-defence inherent to each individual. Variably, “Chapter VI 1/2”²⁴), international institutional custom or a practice “*praeter legem*”²⁵) are suggested as legal bases.

If the peacekeeping operations were originally conceived to maintain peace after the suspension of hostilities and to assist with the implementation of accords, they clearly differed in mission and mandate from the forces authorized under Chapter VII to intervene militarily into a conflict, *inter alia*, to repulse an armed attack. This conservation function has however gradually seen a great disruption and functional enrichment. Notably with the fall of the Iron Curtain and the renaissance of cooperation of the great powers, peacekeeping operations have undergone a rapid growth and diversification. Peacekeeping missions undertake various tasks, from interposition as a buffer between rival factions in internal crises, and not only in inter-State disputes, to verification and monitoring of human rights situation, electoral assistance, management of humanitarian crises, and confidence-building in internal and international conflicts, up to the restoration and extension of State authority, security sector reform and other rule of law-related activities, territorial administration, disarmament, demobilization and reintegration of combatants and the coordination of economic recovery and reconstruction. The civil and police elements have thus joint the original military units. Besides the function to maintain the peace (*peacekeeping*), that comes into play to preserve the peace after the suspension of hostilities, the UN peacekeeping operations exercise today other various functions: a preventive function (*conflict prevention*), that resides in a preventive deployment of force before the outbreak of conflict in order to treat its structural causes and to lay down foundations for peace; a function to restore peace (*peacemaking*), the objective of which is to address conflicts in progress by means of diplomatic action and mediation; and peace consolidation function (*peacebuilding*) aimed at reconstruction and strengthening national capacities after the conclusion of peace agreement or other political settlement of dispute. In this light, as regards Blue Helmets, it is semantically more adequate to speak of “UN-led operations” than, traditionally, of peacekeeping missions.

²⁴) Expression used by the UN Secretary-General Dag Hammarskjöld aimed to accentuate the fact that the peacekeeping operations stand somewhere between the traditional methods of peaceful settlement of disputes (Chapter VI) and the more robust actions authorized under Chapter VII (considering however the definition based on three elements proposed by the Secretary-General, the concept Chapter VI ½ is not clear).

²⁵) BEN ACHOUR, R., “Les opérations de maintien de la paix”, in COT, J.P., PELLET, A. (dir.), *La Charte des Nations Unies: Commentaire article par article*, 3ème éd., Economica, Paris, 2005, p. 265.

This multiplication and complexification of functions and mandates, applied in various contexts, leads to the fact that Blue Helmets lose their homogeneity and clear system. Today's situation of UN peacekeeping missions is considered "complicated [...] very complex and ambiguous"²⁶). Confusion with another UN tool for the maintenance and restoration of international peace and security, the UN-authorized operations, suggests itself and the differentiation between their legal regimes and limits is not the rule. The conceptual and legal confusion is buttressed notably by efforts to adopt a thematic classification of UN peacekeeping missions based on their function, tasks and structure, a difficult job to take on.

From the perspective of international law, another approach seems to be essential: it is of prime importance to distinguish the legal and substantive levels as concerns the UN peacekeeping operations. From the legal perspective, three pillars can be identified: firstly, it is important to note that the mission is traditionally deployed in the territory of a State upon its consent, or in general with the consent of the effective governmental authority (be it represented by an institutionalized government or representatives of political parties in a rogue State); secondly, peacekeeping mission forms a subsidiary organ of the UN acting under its operational command and control; and thirdly, peacekeeping mission is created upon voluntary contributions of UN Member States. Other qualifications concern the substance of the mandate, the function and the objective, which change and diversify during the evolution of this UN tool. As long as these features don't touch the legal pillars, they don't influence the legal regime of these UN-led operations and don't reveal their metamorphosis in international law.

The first two pillars distinguish clearly the UN-led from the UN-authorized operations established by the Security Council under Chapter VII and they constitute the prototype of a "peaceful means of intervention".

III. RETURN TO THE ROOTS?: "UN-LED" OPERATIONS APPROACHING THE "UN-AUTHORIZED" OPERATIONS

The continuing diversification of UN-led operations and the corresponding new challenges have brought great demands on this UN tool and its traditional legal framework turned to be, in some circumstances, insufficient. Have new legal elements been introduced in order to adapt and strengthen the efficiency of the UN-led operations? What is the impact of the functional diversification on the legal qualification? Is the distinction between the UN-led and UN-authorized still viable?

The metamorphosis of the peacekeeping operations will be examined both from the perspective of its legal substance (A) and its classification within the

²⁶) BEN ACHOUR, R., *ibid.*, pp. 282-283. [author's translation].

legal system (B). Finally, a comparative analysis of the two contemporary UN tools to maintain the international peace and security will complete the framework (C).

A. From the consensual to the authoritative modification of legality

In view of the rising challenges and the need to preserve effectiveness, the purely consensual concept of UN operations turned out to be in certain aspects unsustainable or, better, modifiable. The end of the Cold War and bipolarity has incited the revival of the UN Security Council's regulatory powers. Although the traditional consensual peacekeeping operations continue to exist, since 1999 the majority of the UN-led operations are established under the coercive framework of Chapter VII and their legal basis is thus authoritatively strengthened (1). This marked shift in the UN policy has been accompanied by the introduction of an element of the use of force, originally strange to peacekeeping missions (2). With the aim to reinforce the legal basis of the operations and to guarantee a sufficient mandate and operational scope to achieve the defined objective, two essential elements of the UN-led operations have thus been targeted: its consensual foundation and the limited use of force only in self-defence.

1. Consensual foundation

While the UN confirms that "United Nations peacekeeping operations are deployed with the consent of the main parties to the conflict" and reminds that "[i]n the implementation of its mandate, a United Nations peacekeeping operation must work continuously to ensure that it does not lose the consent of the main parties, while ensuring that the peace process moves forward", it admits in the handbook *United Nations Peacekeeping Operations: Principles and Guidelines* from 2008 the following:

"The absence of trust between the parties in a post-conflict environment can, at times, make consent uncertain and unreliable. Consent, particularly if given grudgingly under international pressure, may be withdrawn in a variety of ways when a party is not fully committed to the peace process. For instance, a party that has given its consent to the deployment of a United Nations peacekeeping operation may subsequently seek to restrict the operation's freedom of action, resulting in a *de facto* withdrawal of consent. The complete withdrawal of consent by one or more of the main parties challenges the rationale for the United Nations peacekeeping operation and will likely alter the core assumptions and parameters underpinning the international community's strategy to support the peace process."²⁷⁾

²⁷⁾ *United Nations Peacekeeping Operations: Principles and Guidelines*, United Nations, Department of Peacekeeping Operations/Department of Field Support, New York, 2008, pp. 21-22.

Sometimes the Security Council even faces the problem of an absence of public authority competent to negotiate the conditions and circumstances of the deployment of the UN mission.²⁸⁾

Since 1990's the Security Council proceeds to establish the peacekeeping operations under Chapter VII, an act changing totally the legal basis of the operations. If traditionally the deployment and the activity of the Blue Helmets were legally conditioned by the consent of the State, on the territory of which the mission operates, its today's creation upon the decision of the Security Council transforms it into a coercive measure imposed upon the target State, regardless the effectiveness or legal force of the given consent. By adopting a decision under Chapter VII the Security Council modifies unilaterally the existing legality. It superimposes on the underlying consensual reality which remains an important political element legitimizing the UN presence. In compliance with Articles 25 and 103 of the UN Charter, the target State is obliged to respect the decision adopted by the Security Council under Chapter VII. The Council imposes an obligation *pacti* on this State to tolerate upon its territory the deployment of the UN operation and the exercise of its mandate. The Security Council pierces the traditional, purely consensual domain of peacekeeping operations in order to impose its will. It has introduced into this sphere the authoritative intervention which it judges indispensable in order to guarantee the optimal conditions for an efficient settlement of crisis endangering international peace.

The persisting emphasis laid on the consensual element both by politicians and professional public shall however not neglect the legal basis. With respect to UN peacekeeping operations, it is often stressed: "The essential principle of conflict resolution by consensus [...] remains."²⁹⁾ The consent always represents the emblematic sign of peacekeeping operations both from the political perspective and for the reasons of efficiency. It constitutes the key to success. This peaceful approach based on cooperation forms the United Nations' strength in the field of settlement of conflicts. It is important to make every effort to preserve it anytime it is possible. In compliance with the hierarchy of norms laid down in the UN Charter, however, the authoritative legality supersedes the consensual legality. In fact, if the consent is withdrawn, the legal nature and validity of the operation are not affected, although, obviously, its legitimacy may be undermined. It is possible to conclude that although the consent of parties remains the principal feature of the UN peacekeeping operations, it has been transformed from a legal to a political element, in the most recent operational model.

²⁸⁾ See for example the *Letter dated 29 November 1992 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/24868, 30 November 1992.

²⁹⁾ BOTHE, M., "Peace-keeping", in SIMMA, B. (ed.), *supra* note 16, p. 663.

The imposition of UN-led operation on the sovereign State, regardless the source of threat or breach of the peace, suggests the need to vest it simultaneously with means to face the possible opposition against its deployment and exercise of its mandate. In fact, there exist only two UN peacekeeping operations established under Chapter VII without being simultaneously authorized to use force, United Nations Iraq-Kuwait Observation Mission (UNIKOM)³⁰⁾ and United Nations Mission in Liberia (UNMIL)³¹⁾. Other missions imposed by the Security Council upon Chapter VII, such as United Nations Confidence Restoration Operation in Croatia (UNCRO), United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) or UN Interim Administration Mission in Kosovo (UNMIK) were backed by a parallel deployment of a multinational force authorized by the Council to ensure, via the use of “all necessary measures”, their protection.

More frequently, however, the deployment of the UN peacekeeping operations under Chapter VII is completed by an authorization to use force beyond the limit of self-defence in order to protect the exercise of the mandate. By this approach the Security Council solves the long-lasting dilemma between preserving the peaceful nature of the peacekeeping operations and the need to arm the troops against possible attacks that would paralyze the implementation of the mandate.

2. Use of force

The limitation of the use of force by peacekeepers to self-defence, another essential element of the traditional UN peacekeeping operations – and by many still considered their principal feature – has undergone a great evolution. In the interest to preserve the consensual framework of the operation, any attempt to extend its scope remained stuck for a long time within the legal limits of self-defence which underwent more or less excessive and sometimes abusive interpretations.

The *General Guidelines for Peace-keeping Operations* from 1995 for example stipulate: “The peacekeeper’s right to self-defence does not end with the defence of his/her own life. It includes defending one’s comrades and any persons entrusted in one’s care, as well as defending one’s post, convoy, vehicle or rifle.”³²⁾ Some internationalists developed theories of “broader interpretation of self-defence”³³⁾ or “a an extended right to resort to force – via the extension

³⁰⁾ UN Doc. S/RES/689, 9 April 1991, and UN Doc. S/RES/806, 5 February 1993.

³¹⁾ UN Doc. S/RES/1509, 19 September 2003.

³²⁾ *General Guidelines for Peace-keeping Operations*, UN Department of Peacekeeping Operations, UN Doc. UN/210/TC/GG95 (1995), <http://www.un.org/Depts/dpko/training/tes_publications/books/peacekeeping_Training/genguide_en.pdf>, 6 June 2012.

³³⁾ ZACKLIN, R., “The Use of Force in Peacekeeping Operations”, in BLOKKER, N., SCHRIJVER, N. (eds.), *The Security Council and the Use of Force: Theory and Reality: A Need for Change?*, Nijhoff, Leiden, 2005, pp. 92-93.

of the notion of self-defence which includes for the Blue Helmets both the defence of their life and the defence of their mission (functional self-defence)³⁴). Besides, the Security Council exceptionally corroborated some elements of such approach in resolutions 918 (1994) and 925 (1994) concerning the United Nations Assistance Mission for Rwanda (UNAMIR)³⁵). Moreover, the Secretary-General Boutros Boutros-Ghali once noted: “[P]eace-keeping operations use weapons only in self-defence, which is defined to include defence of their mandate as well as of their personnel and property.”³⁶)

Finally, rising demands on UN peacekeeping operations and their efficiency as well as the revived potential of the Security Council led to the revolutionary move to divest the UN missions with a limited power to use force. Such a decision of the Security Council, which first appeared in relation to UNPROFOR and ONUSOM II in 1993 and has been revived since 1999, has completely changed the nature of UN peacekeeping missions. United Nations Transitional Administration in East Timor (UNTAET), United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), UN Operation in Côte d’Ivoire (UNOCI), United Nations Operation in Burundi (ONUB) or United Nations Mission in the Republic of South Sudan (UNMISS) were all deployed on the basis of the Security Council’s decision under Chapter VII, and authorized to “take all necessary measures” to “carry out [their] mandate”.³⁷) The mandates contain a great variety of objectives: observation and supervision of cease-fire, monitoring of the movements of armed groups and of the illegal flow of arms, disarmament, demobilization, reintegration, repatriation and resettlement, support for humanitarian assistance, support for the implementation of the peace process, electoral assistance and assistance in the field of human rights, restoration of public order, establishment of an effective administration, assistance in the development of civil and social services and in the establishment of conditions for sustainable development, and last but not least the protection of United Nations personnel, facilities, installations and equipment, and of the security and freedom of movement of the UN personnel as well as the protection of civilians under imminent threat of physical violence.

One difference with the UN-authorized military operations therefore remains: with the aim to preserve the peaceful nature of the UN-led operations and to diminish any interventionist aspect, the Security Council limits the authorized use force to the “defence of the mandate”. This new concept confirms the

³⁴) THIELEN, O., “50 ans d’opérations de maintien de la paix: bilan critique”, *L’Observateur des Nations Unies*, n° 20-21, 2006, pp. 44-45 [author’s translation].

³⁵) UN Doc. S/RES/918, 17 May 1994, § 4; UN Doc. S/RES/925, 8 June 1994, § 5.

³⁶) BOUTROS-GHALLI, B., “Introduction” in *The United Nations and Somalia 1992-1996*, Department of Public Information, United Nations, New York, 1996, section 1, p. 24.

³⁷) with minor language variations.

attachment to the peaceful mandate of the UN-led operations, the effective exercise of which however sometimes necessitates the recourse to force. While placing the “extended” dimensions of the right to self-defence and the new concept “defence of the mandate” under its authority, the Security Council puts firmly an end to the confusion. Granting these forms of use of force a legal title, the Council authoritatively legalizes them under Chapter VII. It is important to remind that the Council does not touch the right of self-defence of an individual in terms of national law. It simply delegates to the UN-led mission the power to use force beyond the scope of the right of self-defence that derives from the national law.

In this light, it is interesting to note the interpretation, still not unified and rather confusing, adopted by the United Nations with respect to this turning point in the Security Council’s policy. In the handbook *United Nations Peacekeeping Operations: Principles and Guidelines* from 2008, the UN modifies adequately the three “Basic Principles of United Nations Peacekeeping”: consent of the parties, impartiality, and non-use of force except in self-defence and defence of the mandate³⁸). On one hand, such an adaptation is welcomed, together with the precision proposed in the handbook that the UN peacekeeping operations “may use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate”³⁹). On the other hand, this statement gives rise to various questions. First of all, why is the self-defence also subject to the authority of the Security Council – right which is nowise conditioned by any authorization? If the term refers, on the contrary, to the right of self-defence *lato sensu*, a political concept actually requiring (for the majority of States) an authorization of the Security Council, such dimension should have been distinguished from its legal core that resides in the independent right of an individual provided for by national law. This holds true especially as the right to self-defence of an individual constituted the original concept of “self-defence” in the classic triad defining the UN peacekeeping operations. Secondly, the circumscription of the sphere exceeding the framework of self-defence to the simple “defence of the mandate” is unnecessarily limited. The contours of this sphere depend in reality on the will of the Security Council. The Council can actually authorize the peacekeeping missions to use force for other objectives than the defence of the mandate. It is however the political choice of the United Nations to remain within such a restricted frame. Thirdly, the purpose to place the categories “self-defence” and “defence of the mandate” in opposition to the “enforcement” or “coercion” seems often perplexing and not exact, considering the overlap between these

³⁸) *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 27, p. 31, concept reiterated on the internet site of the UN peacekeeping operations today, <<http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml>>, 18 June 2012.

³⁹) *Ibid.*, p. 34.

domains: for example, the protection of civilians is sometimes justified by the right to self-defence *lato sensu*⁴⁰⁾, sometimes it is qualified as the “defence of the mandate”⁴¹⁾ and it is listed at the same time among the tasks involving the use of force authorized by the Security Council.⁴²⁾

What does the “defence of the mandate” actually signify? Does it refer to the use of force aimed to repel attacks and opposition hampering the exercise of the mandate? This is anyway the purpose of numerous mandates of enforcement operations, too – the use of force does not always constitute necessarily the only element of the mandate but can be accompanied by other tasks. Besides, the use of force is never the end *per se*, but simply a means to achieve the end. For example, ONUB and the Multinational Force in Liberia are vested with very similar mandates: both are authorized “to use all necessary means to carry out the following mandate”⁴³⁾/ “to take all necessary measures to fulfil its mandate”⁴⁴⁾, respectively, while the mandate of both consists in the support for the implementation of the ceasefire agreement, assistance with disarmament and demobilization and contribution to the creation of the necessary security conditions for the provision of humanitarian assistance (plus other objectives which are then individual to each operation). In the case of mandates of double nature, ie involving and not involving the use of force, besides other tasks, the force can be authorized to defend the exercise of the non-military tasks or for other specific objectives, or both.

Today’s difference between the UN-led and UN-authorized operations from the perspective of the use of force could admittedly reside in the fact that the UN-led operations use the force exclusively to ensure the exercise of the civilian tasks. The authorization to use force could, in this light, be conceived as an integral part of the civilian mandate, the effectiveness of which it secures. As the above mentioned cases show, however, this fact is not evaluated correctly, since it does not put this type of UN-led operations in opposition to the enforcement action. At most it is possible to conclude that the UN-led operations use force partially in the same manner as the UN-authorized operations.

⁴⁰⁾ See for example THIELEN, O., *supra* note 34, p. 45. This concept seems to be exceptionally adopted by the Security Council in paragraph 4 of resolution S/RES/918 of 17th May 1994.

⁴¹⁾ See for example CARDONA LLORENS, J., “Le maintien de la paix et le recours à la force: entre l’autorisation des opérations de maintien de la paix et l’externalisation”, in BEN ACHOUR, R., LAGHMANI, S. (dir.), *Le droit international à la croisée des chemins: force du droit et droit de la force: VIe Rencontre internationale de la Faculté des Sciences juridiques, politiques et sociales de Tunis: 14, 15 et 16 avril*, Pedone, Paris, 2004, p. 90.

⁴²⁾ See for example resolutions UN Doc. S/RES/1778, 25 September 2007, § 6 (European Union operation in Chad and the Central African Republic), UN Doc. S/RES/1671, 25 April 2006, § 8 (Eufor R.D.Congo) or UN Doc. S/RES/1464, 4 February 2003, § 9 (operations of ECOWAS and French forces in Côte d’Ivoire).

⁴³⁾ UN Doc. S/RES/1545, 21 May 2004, § 5.

⁴⁴⁾ UN Doc. S/RES/1497, 1 August 2003, § 1.

The new model of the UN-led operations continues to be covered by perplexity. The *Brahimi Report*, for example, stresses the difference between the use of force by peacekeeping operations and the use of force under the authorization given by the Security Council under Chapter VII: while recognizing that “United Nations military units must be capable of defending themselves, other mission components and the mission’s mandate” and that “mandates should specify an operation’s authority to use force”, it does not expressly determine the legal basis.⁴⁵⁾ The Report underlines, on the contrary, that “the United Nations does not wage war. Where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council, acting under Chapter VII of the Charter”.⁴⁶⁾ Ralph Zacklin, on the other hand, expressing the then mainstream opinion, notes: “While the primary reason for the use of force remains that of self-defence – which today is broadly interpreted – the Security Council has come to recognize that the success of its peacekeeping operations depends on mandates which, if necessary, authorize *the use of force to implement certain mandated tasks*.”⁴⁷⁾ This position however links the authority of Chapter VII only to the defence of the mandate, exempting the concept of the extended self-defence from the power of the Security Council and recognizing thus its independent existence.

From a legalistic perspective, it suffice to say that any use of force exceeding the scope of the right of self-defence granted by national law to soldier and/or physical person must be legally justified by a decision of the Security Council that delegates such power to the particular UN-led mission. The gist is to cover legally the sphere beyond the State jurisdiction. In this light, the correct definition of the recourse to force by the peacekeeping mission is the following: non-use of force except in self-defence or force authorized by the UN Security Council. Or alternatively, in order to preserve the limited scope of the use of force in conformity with the UN peacekeeping philosophy: non-use of force except in defence of the mandate authorized by the UN Security Council or in self-defence. This holds unless it is accepted that there exist some grey zone between these two legal regimes deriving from a customary law developed by United Nations which catalyses such rights – assumption not corroborated however by current practice of the Security Council.⁴⁸⁾

⁴⁵⁾ *Brahimi Report*, *supra* note 23, §§ 49 and 51.

⁴⁶⁾ *Ibid.*, § 53.

⁴⁷⁾ ZACKLIN, R., *supra* note 33, p. 106 [emphasis added].

⁴⁸⁾ The protection of the UN personnel and other international personnel and of the facilities and equipment of the mission – elements often placed under the term “extended self-defence” – have constituted, since 1999, the object of the Security Council’s authorization in the majority of peacekeeping missions, the year that marks the turning point in the authorization of peacekeeping missions to use force.

The abandonment of the two essential elements of the UN peacekeeping operations⁴⁹⁾ brings this type of UN-led operations closer to – if not even in some angles makes it identical to – the UN-authorized military operations carried out under Chapter VII by multinational forces or regional organizations. This raises a question whether this UN tool possibly returns in one of its currents of evolution in the bosom of the UN Charter, or even fulfils its original legal concept of a centralized use of force. Is the idea of the founding fathers accomplished and the circle is closing?

B. Revival of the original UN Charter legal concept?

The peacekeeping operations established under Chapter VII and imposed upon the State, on the territory of which the mission is deployed, enter *de jure* the Charter's legal framework of coercion. Those operations which are moreover authorized by the Security Council to use force beyond the scope of self-defence approach the enforcement measures involving use of force. Are we witnessing the revival of the original UN Charter concept laid down in Articles 42 and 43, in other words the use of force by the Security Council via the national contingents provided by UN Members? Does this UN tool of new generation erase the difference between UN peacekeeping missions and enforcement measures involving use of force in a sense that their convergence leads to the revival of the original concept of *UN enforcement units*?

Although this ultimate evolutive stage has not yet been reached, the present model of UN peacekeeping operations constitutes already an embryo of the original centralized concept provided for in the Charter. The gist of the original idea was to provide the Security Council with autonomy and independence as regards the execution of military coercion. When a threat or breach of international peace occurs the elimination of which requires, according to the Security Council, the recourse to armed force, the Council shall be able to intervene upon its will and decision and by means it has at its disposal. The latter would be obligatorily provided by States upon its call, in conformity with Article 43. The force would take the form of a subsidiary organ of the Council that acts in its name and on its account.

The peacekeeping forces also constitute a subsidiary organ and they are formed by troops and other resources provided by Member States to the United

⁴⁹⁾ The authoritative modification of legality, besides the destruction of the principle of consensualism as a legal basis of UN peacekeeping operations and the change regarding the use of force, carries along also the transformation of the third essential element of the UN peacekeeping missions, impartiality. In this respect, the UN handbook on peacekeeping operations from 2008 adapts the concept of impartiality: "Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate", *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 27, p. 33.

Nations. Such participation is however fully voluntary and concerns *ad hoc* each particular mission. When the Security Council adopts an act of authorization, the Secretary-General calls upon UN Member States to provide the military and police units and other personnel necessary for the UN mission. The deployment of the mission as well as the time necessary for its preparation depends thus on the good will of the States and their diligence. The cooperation between the UN and the troop-contributing States is regulated by an agreement which, *grosso modo*, “affirms the international nature of [the United Nations peace-keeping operation] as a subsidiary organ of the United Nations and defines the privileges and immunities, rights and facilities as well as the duties of [the United Nations peace-keeping operation] and its members”, including the “type and number of personnel [and] general description of equipment”.⁵⁰⁾ The *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations* adopted by the Secretary-General is in force since 1991⁵¹⁾, nevertheless “[i]t can be assumed that informal written or even oral agreements which refer to the established practice of the UN exist” as well as “various written agreements or exchange of letters with participating States which do not follow a uniform pattern”⁵²⁾.

The element of discretion of potential troop-contributing States was not foreseen originally in the Charter. It introduces some uncertainty and logically undermines the authority and effectiveness of the Security Council’s action. The operational capacity of the Council via its subsidiary body is thus each time today dependent on the will of the UN Member States to ensure its substantive basis. The palliatives to this shortcoming, like the preliminary consultations with troop-contributing countries proposed in *Brahimi Report*⁵³⁾, creation of UN standby arrangements system⁵⁴⁾ or the pioneering idea of the Secretary-General to establish peace-enforcement units⁵⁵⁾ don’t erase the element of will.

The UN-led operations established under Chapter VII and vested with the power to use force thus approach the model laid down originally in Arti-

⁵⁰⁾ See *Model Agreement*, *infra* note 51, §§ 3 and 4.

⁵¹⁾ *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary-General*, UN Doc. A/46/185, 23 May 1991, Annex (Draft Model Agreement).

⁵²⁾ BOTHE, M., *supra* note 29, pp. 690-691.

⁵³⁾ *Brahimi Report*, *supra* note 23, § 60.

⁵⁴⁾ “When specific needs arise, standby resources are requested by the Secretary-General and, if approved by participating Member States, are rapidly deployed to set up new peacekeeping missions or to reinforce existing ones”, Rapid Deployment of Peacekeeping Operations, <<http://www.un.org/Depts/dpko/dpko/rapid/sba.htm>>, 20 June 2012. This system is however founded on preliminary accords signed by UN Member States (“Memorandum of Understanding”) and therefore does not exclude the element of will.

⁵⁵⁾ *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit meeting of the Security Council on 31 January 1992, UN Doc. A/47/277-S/24111, 17 June 1992, § 44.

cles 42-43 in the sense that they are founded on special agreements although concluded *for each operation individually*. It is the element of *ad hoc* discretion that distinguishes them from the original concept, hence this model can be viewed as model of centralized coercion *in statu nascendi*. Actually, there exists only a little step to return to roots: to pass from agreements *ad hoc* concluded by troop-contributing countries for each single operation to general agreements concerning the placement of the means at the disposal of the Security Council. The limitation of the function to “maintain the peace” and not to “restore the peace” as well as the level of force authorized by the Security Council beyond self-defence are, in this respect, secondary. These elements relate to the political concept of UN peacekeeping operations – from the legal point of view, they all are comprised within the proposed legal framework. To go even further, to entrust the operational command and control over the force, which is today ensured under the direction of the Secretary-General, to the Military Staff Committee in compliance with Article 47, § 3, would perfectly accomplish the idea of the founding fathers.

This model of UN-led operations stays thus half-way to the original concept but is fully anchored within the framework of Chapter VII. The legal regime is based on Articles 42 and 43, corroborated by Articles 29, 98, 46 and 47.

The model fits normally the scope of Article 42. As shown above, the power of the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” (phrase 1) encompasses clearly the option to resort to force via its subsidiary organ. The second phrase which specifies that such action may include various operations “by air, sea, or land forces of Members of the United Nations” does not exclude the option that such forces are put at the disposal of the Security Council within the institutionalized framework of UN. This latter option is further elaborated in Article 43. The objective of this provision – besides the fact to ensure the availability and durability of means – is to shield the States from a general obligation to subject to the power of binding decision of the Security Council laid down in Article 25 in the case of supply of national forces to the disposal of the Council. Such cooperation in the domain of maintenance and restoration of international peace and security cannot therefore be set up unless the agreements are concluded with the States – rule which the lesser form of agreements or consent, ie the form *ad hoc*, does not contradict.

The centralized nature inherent to UN-led operations derives from Articles 7 and 29 laying down the principles relating to subsidiary organs of UN. It is moreover the Secretary-General who is charged by the Security Council, in terms of Article 98 of the Charter, to establish the peacekeeping mission and ensure its operational command and control. The latter function is corroborated by the intra-systemic delegation of power laid down in Articles 46 and 47.⁵⁶⁾

⁵⁶⁾ For a detailed study of the internal UN process of delegation of power by the Security Council to the Secretary-General, see SAROOSHI, D., *supra* note 19.

C. Persisting difference

The return to roots and the rapprochement of originally almost antagonistic concepts does not evade the legal difference between the UN-led and UN-authorized operations. Although both types of operations converge in similar mandates, their legal framework is distinct and, accordingly, the limits of their action and the consequences of possible violation of law.

While both operations are created by a decision of the UN Security Council that defines the mandate and delegates the necessary powers, only in case of UN-led operations the Council ensures the execution of the mandate, too. The UN-led mission as a subsidiary organ of the Council is part of the institutional system of the UN and operates on the basis of the internal legal mechanisms of delegation and cooperation. The Security Council remains the author and the responsible organ of the mission to which the activities of all elements executing the mandate are subordinate.

On the contrary, in the UN-authorized operations the execution of the mandate is ensured by external actors linked to the Security Council only by the granted authorization. The Security Council guarantees the overall authority and control over the operation which is, on the strategic level, carried out by States or regional organizations.

The national contingents participating in this type of UN-led operations differ both from their counterparts acting in traditional consensual UN peacekeeping missions and external actors executing the Council's mandate in a decentralized military operation. Firstly, this UN-led mission acts under the mandate that modifies authoritatively the existing legality and grants new rights and obligations. The mandate includes, moreover, the power to use force. Secondly, unlike the UN-authorized operations, the interpretation and application of the mandate belongs to the UN command and not exclusively to national commanders.⁵⁷⁾

Since the decision-making in both operations belongs to the Security Council and rests on the same premises of Chapter VII, it is subject to identic limitations: the Security Council must first determine the existence of any threat to the peace, breach of the peace, or act of aggression in conformity with Article 39 of the UN Charter; the non-military measures provided for in Article 41 must be considered inadequate or have proved to be inadequate; and the recourse to the force shall be necessary for the maintenance and restoration of international peace and security. Moreover, the mandate to use force must comply with international law and cannot elude the peremptory norms of international law. The scope of recourse to force must be proportional to the objective and necessary for its achievement.

⁵⁷⁾ The use of force is delimited by the UN Rules of Engagement the legal force of which is ensured, by majority of States, via their incorporation in national system. The Rules are then implemented on a tactical level in conformity with national laws of each contingent.

Similarly, the same general restrictions on the use of force apply on the level of execution. It is particularly important to underline the application of international humanitarian law of which the peacekeeping forces acting under the centralized *chapeau* of United Nations are not released.⁵⁸⁾ Actors in both operations are under an obligation to act strictly within the mandate granted by the Security Council – their participation is conditioned by the obligation of conduct. In this light, the particular link between the two operations is the voluntary participation of States that diminishes to a certain aspect the authoritative element of the Council’s role and weakens the exercise of its primary responsibility. As regards the UN-led operations it may lead to the disintegration and weakening of the UN subsidiary organ, and more generally of the Council’s material capacities. In case of UN-authorized operations the uncertainty concerns the action of UN external partners. Although such States’s discretion activates at different levels, in both cases, however, the execution of the Council’s mandate towards the target is affected. While in the first case the UN Charter expressly prohibits the Council to oblige States and provides for a certain imperfect obligation (conditioned by an initial free expression of will), as concerns the authorization of external actors this option is open. The choice to proceed via voluntary participation constitutes only the lesser form which is voluntarily adopted. Although the absence of a legal obligation leads to the fact that States can withdraw their national elements from both operations at any time, be it for the State’s own reasons or after the possible modification of the mandate,⁵⁹⁾ maintaining the participation in the agreed framework can be considered as a political commitment, at least as regards the UN-led operations.

From the perspective of States⁶⁰⁾, the difference between the two operations

⁵⁸⁾ If at once the (in)applicability of international humanitarian law to UN peacekeeping was subject of debate – while arguing that the UN is not Party to the Geneva Conventions and/or its action on behalf of international community and its impartiality prevents it from being qualified as a “party” to conflict or “power” within their terms – today, at most, it is suggested that “the precise scope of its application and resulting obligation is unclear” (ZACKLIN, R., *supra* note 33, p. 104.). As concerns, however, the UN peacekeeping missions vested, under Chapter VII, with the limited power to use, there is no doubt. As confirms the UN Secretary-General in the bulletin *Observance by United Nations forces of international humanitarian law*, international humanitarian law applies “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” (UN Doc. ST/SGB/1999/13, 6 August 1999, art. 1.1). UN is subject to those norms via international customary law. The introductory note of the bulletin speaks expressly of “United Nations forces conducting operations under United Nations command and control”.

⁵⁹⁾ The UN handbook on peacekeeping operations expressly notes: “Member States may withdraw their contributed personnel from the mission through advice to United Nations Headquarters”, *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 27, p. 68.

⁶⁰⁾ or even regional organizations, in case they contribute troops and other assistance to UN peacekeeping operations.

resides only in the fact that, in one case, the national troops operate under a strategic command and control of the United Nations while in the other case they act under their own operational command and control, power they (or their allies) received from the Security Council. Together with the different institutional link to the United Nations this element constitutes the gist of the difference between the legal pillars of each operation.

The *prima facie* main material difference between this type of UN-led operations and UN-authorized operations is the limitation to use force not exceeding the scope of the defence of the mandate. The express attachment of the use of force by peacekeepers to the exercise of their non-military tasks reflects the important political orientation of the United Nations. Together with the consent of the parties this concept forms the characteristic features of this UN-led operation but not the legal limits.

Despite the important convergence between the two operations mandated by the Security Council to maintain international peace, their legal frameworks remain distinct, fact continuously confused in practice.

IV. TODAY'S CONFUSION

The metamorphosis of the traditional UN peacekeeping operations and the corresponding *bouleversement* of two originally clearly distinct Security Council's mandated operations have caused a marked confusion both in legal theory and international politics, that results in serious challenges in practice. The recognition of the penetration of elements of coercion into the peacekeeping missions, originally reserved only for the UN-authorized operations, and the rising interaction between the two concepts have been accompanied by stumbles, tension and lessons learnt from failures. It has been a struggle between the conservative and liberal approach, idea and real needs. The formal recognition often limps along behind the factual modifications. Various positions have been adopted, as time goes by, on this interaction.

In 1992 the Secretary-General defines the peacekeeping operations in the *Agenda for Peace* as "a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well".⁶¹⁾ At the same time, however, he puts forward innovative ideas such as, for example, the use of force beyond the limits of self-defence⁶²⁾ or the deployment of an operation without the consent of all parties⁶³⁾, or "peace-enforcement units"⁶⁴⁾.

⁶¹⁾ *An Agenda for Peace*, *supra* note 55, § 20.

⁶²⁾ *Ibid.*, §§ 66 and 68 (concerning the protection of the UN personnel).

⁶³⁾ *Ibid.*, § 32.

⁶⁴⁾ *Ibid.*, § 44.

On the contrary, in the *Supplement to an Agenda for Peace* from 1995, the UN returns to the doctrine of a strict distinction of the two operational modes:

“The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.”⁶⁵)

This approach is based on the following criticism:

“[Recent] peace-keeping operations were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties, impartiality and the non-use of force. It was also not possible for them to be executed without much stronger military capabilities than had been made available, as is the case in the former Yugoslavia. In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so.”⁶⁶)

The *Brahimi Report* in 1999, as shown above, still rejects any concept of peacekeeping operation using force within the framework of Chapter VII.

After 1999, in the period of boom of the diversification of the UN peace-keeping operations and of the regularization of the practice within each operational current, such positions will no longer be conclusive, although they still persist, in particular in the legal doctrine. While announcing in 2006 the reform strategy launched by the UN Department of Peacekeeping operations entitled “Peace operations 2010“, the objective of which is to set out the policies and procedures of this tool for the next decade, the Secretary-General stresses: “[T]he expansion of peacekeeping mandates has made it more important than ever to clearly define and articulate what peacekeeping can do, and, equally importantly, what it cannot do”⁶⁷). The continuing debate concentrates on the political aspects of the divergence between the two operational tools, especially the presence of the consent and the scope of the use of force, paying no attention to the legal perspective. The UN handbook from 2008 notes:

“Although on the ground they may sometimes appear similar, robust peace-keeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. Robust peacekeeping involves the use of force at the

⁶⁵) *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the 50th Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1, 25 January 1995, § 35.

⁶⁶) *Ibid.*

⁶⁷) *Overview of the financing of the United Nations peacekeeping operations: Budget performance for the period from 1 July 2004 to 30 June 2005 and budget for the period from 1 July 2006 to 30 June 2007: Report of the Secretary-General*, UN Doc. A/60/696, 24 February 2006, § 11.

tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level, which is normally prohibited for Member States under Article 2(4) of the Charter, unless authorized by the Security Council.”⁶⁸⁾

The persisting confusion is interlinked with a useless semantic misunderstanding (A) as well as with serious practical problems (B).

A. Semantic aspect

When is it possible today to speak about peacekeeping mission and when is it more appropriate to refer to a coercive measure?

The clarification of the semantic confusion between the UN peacekeeping operations and coercive measures depends on which of the perspectives – legal or political – prevails. From the legal point of view, if a UN operation is deployed on the territory of a State under Chapter VII, in other words the operation is legally imposed on that State, it constitutes a coercive measure of the Security Council under the Chapter VII regime, regardless a possible authorization to use force. In other situations, the UN operation is legally founded on the consent of the State which constitutes a sufficient and valid legal basis as long as all attributes of a lawful expression of a will are provided. In this case the operation remains faithful to the original consensual concept. Whether the action is framed by Chapter VI, VI and ½ or is qualified an institutional custom is irrelevant.

If, on the other hand, the political tendency prevails and the UN carries on its current policy consisting of placing all UN-led operations under the heading “peacekeeping operations”, this term requires hence a redefinition which would reflect the great diversification this operational ensemble has undergone. In order to determine the common denominator of all forms and elements of such various and multiple operations, the common definition of UN peacekeeping operations would be the following: operation carried out by the United Nations for the maintenance (or restoration) of peace under its own operational command and control.⁶⁹⁾ In other words, the basic legal division among the operations acting under the UN Security Council’s mandate, central element of the resulting legal regime, is whether they are “UN-led” or “UN-authorized”.

⁶⁸⁾ *United Nations Peacekeeping Operations: Principles and Guidelines*, supra note 27, pp. 34-35. For other contemporary initiatives in the framework of “Peace Operations 2010”, see for example the project “New Horizon” of the UN Department of Peacekeeping Operations (DPKO) and the UN Department of Field Support (DFS).

⁶⁹⁾ The supplement “or restoration” reflects at least the potential of this UN operational tool.

B. Repercussions in the field of international responsibility

Uncertainty relating to the legal qualification of the newest model of UN peacekeeping operations and the resulting problems encountered during the exercise of the mandate, such as the legal limits of action, the applicable law, or the adequacy of material capacities during the modification of the mandate, are not the only challenges that persist. It is especially the differentiation between the legal frameworks of this type of UN-led operations and of UN-authorized operations that play an important role today with respect to the consolidation of rules of international responsibility. Assessment of responsibility for the commission of a wrongful act reflects the legal regime of the particular operation. Hence the precise distinction among the complex legal frameworks of UN mandated operations is indispensable. Its nescience or negligence further sows the seeds of confusion.

Although the International Law Commission finished last summer, in 2011, the *Draft articles on the responsibility of international organizations* and the rules serve as an important guideline in practice, their full acceptance and consolidated application remain to be attained. The principal international precedent *Behrami* and *Saramati* of ECHR induced, it's true, a strong criticism as to the application of criteria of attribution of responsibility, but it very clearly and precisely distinguished the two types of operations under the UN mandate: while in case of KFOR “[t]he UNSC was [...] delegating to willing organisations and member states [...] the power to establish an international security presence as well as its operational command”, “UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC”.⁷⁰⁾ The Court thus rejected the argument of the respondent and third party States that “it made no difference whether it was KFOR or UNMIK [...] since both were international structures established by, and answerable to, the UNSC”.⁷¹⁾ The following case law and commentators, referring to *Behrami* and *Saramati* decision, be it from the perspective of criticism or a confirmation, quite often don't perceive the difference anymore and let it blur. The most recent article on this subject in *EJIL: Talk!*, analysing the Hague Court of Appeal decisions regarding the wrongdoing of Dutchbat in the UN peacekeeping mission at Srebrenica⁷²⁾, could be taken as an example. The author notes: “[D]eparting from both the District Court and *Behrami* and *Saramati*, the Court of Appeal identified the international law standard of attribution to be ‘effective control.’

⁷⁰⁾ *Behrami and Behrami v. France, Saramati v. France et al.*, 2 May 2007, ECHR, No. 71412/01 and N° 78166/01, §§ 129 and 142, <<http://www.echr.coe.int>>, 10 March 2012.

⁷¹⁾ *Ibid.*, § 123. The applicants maintained that the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

⁷²⁾ Hague Court of Appeal, cases *Nuhanović v. The Netherlands*, 200.020.174/01, 5 July 2011, and *Mustafić-Mujić et al v. The Netherlands*, 200.020.173/01, 5 July 2011.

Two days later, the Grand Chamber [of ECHR] granted the ‘effective control’ rule further jurisprudential authority in *Al-Jedda*. In several respects, the Court of Appeal’s analysis is more satisfying in this regard.”⁷³) The distinction between the different types of operations acting under the UN mandate and the corresponding distinct application of criteria of attribution is somewhat omitted in the article: while the Hague courts ruled on the distribution of responsibility within a subsidiary organ of the UN, *Al-Jedda*⁷⁴) judgment and the referred part of *Behrami* and *Saramati* decision concerned multinational forces operating under the UN Security Council’s authorization. The effective control criterion might assume a different trace within a UN-led mission and a UN-authorized operation.

The current dispersion in international and national case law would be markedly reduced if, primarily, the legal regimes and their particular components of transfer and delegation of power would be clarified and taken into account.

CONCLUSION

In the past two decades, the UN Security Council has developed or diversified important tools to accomplish its primary responsibility to maintain and restore international peace and security. The new generation of UN peacekeeping operations vested with the limited use of force and the UN-authorized operations are among the most important and at the same time the most challenging. These new tools adapt to real security needs and react flexibly to new threats to peace. At the same time however their empiric origin and political sensitivity on the international scene constitute a challenge for the definition of their legal frameworks.

As shown in the article, if one follows the legal links, the discernment between the two operations and their legal regimes is more elucidated. If it suppresses to a certain measure the material aspects of the operations, it is essential for the determination of legal competence and the consequences of violation of law. Although both operations converge in the recourse to force and the voluntary participation by States and regional organizations, they diverge in their legal status: while the UN-led operation constitutes a subsidiary organ of UN, the UN-authorized operation is led by external actors, the most often by a “coalition of able and willing”. This redirects the delegation of the Council’s prerogative to use force to different entities and relocates the operational com-

⁷³) DANNENBAUM, T., “The Hague Court of Appeal on Dutchbat at Srebrenica Part 2: Attribution, Effective Control, and the Power to Prevent”, EJIL: *Talk!*, 10 November 2011, <<http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-2-attribution-effective-control-and-the-power-to-prevent-2/>>, 20 June 2012.

⁷⁴) *Al-Jedda v. The United Kingdom*, 7 July 2011, ECHR (GC), No. 27021/08, <<http://www.echr.coe.int>>, 10 January 2012.

mand and control. These legal currents constitute important vectors in the legal regime and as such they represent significant indicators of its legal effects. As a result the article confirms the different legal frameworks of the UN-led and UN-authorized operations and the potential for development.

This evolution in the United Nations policy gives rise to a question whether this stage is final in practice. Are the UN-led and UN-authorized operations the most convenient measure for the UN Security Council to accomplish its primary responsibility? The Achilles' heel and sign of their common empiric origin, the voluntary contribution of forces by States – is it really the Achilles' heel? Maybe both operations, thanks to their adaptability and complementarity as well as the voluntary basis represent the firmest concept of international cooperation in the field of international peace and security.