

10th Commission*

Problèmes actuels du recours à la force en droit international

Sous-groupe : L'autorisation du recours à la force par les Nations Unies

Present Problems of the Use of Force in International Law

Sub-group : Authorization of the Use of Force by the United Nations

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Travaux préparatoires..... 233

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I. TRAVAUX PREPARATOIRES

Table of contents

I. PRELIMINARY REPORT (June 2009).....	234
I. General background on the use of force under the UN Charter.....	234
A. The Security Council and the use of force	234
B. The General Assembly and the use of force.....	237
C. Authorizations for the use of force and external controls	240
1. Possibility of a judicial control	240
2. Possibility of a political control	241
II. New developments on Security Council practice	241
A. Authorization of the use of force to Member States and to Multinational Forces	243
1. Authorizations in response to armed attacks against a State....	244
a. The case of Korea	244
b. The case of Iraq	245
1) The 1990 invasion of Kuwait (The Gulf War)	245
2) The aftermath of the Iraq's invasion	247
2. Authorizations of the use of force to fulfil specific objectives	253
a. Authorizations to use force in order to secure embargos....	253
b. The establishment of safe humanitarian zones	254
c. Restoration of a democratic government	255
B. Authorization of the use of force in favour of regional arrangements	255
1. General background	256
2. Implied powers to use force by regional arrangements and <i>ex</i> <i>post facto</i> . Security Council authorizations	258
a. The case of Liberia	258
b. The case of Sierra Leone	259
c. The case of the Ex Yugoslavia	260
1) Enforcement of No-Fly Zones in Bosnia.....	260
2) Enforcement of "Safe Areas" in Bosnia	260
3) Enforcement of the Dayton Peace Agreement for Bosnia (December 14, 1995).....	261

234	Institut de droit international - Session de Naples (2009)	
	4) The case of Kosovo	262
	C. Authorizations of the use of force to Peacekeeping Operations and Multinational Forces : Differences and interrelated developments	264
	D. Some observations on main trends.....	271
	E. Suggested Issues to be discussed	275
	II. COMMENTS OF THE MEMBERS	276
	Comments by Mr. Antonio Remiro Brotons (26.08.2009)	276
	Comments by M. Pinto (27.08.2009).....	294

I. PRELIMINARY REPORT (JUNE 2009)

I. General background on the use of force under the UN Charter¹

A. The Security Council and the use of force

UN Charter original scheme for the maintenance of peace and security was based on a centralized matrix of collective security under the primary responsibility and final control of the Security Council.² Member States unilateral and collective actions implying the use of force were only recognized under the UN Charter when the use of force could be justified on an inherent right of self-defence. UN collective security was a main depart from the League of Nations system strongly based on unilateralism. The UN proscription of the threat or use of force by Member States against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations³, admits two main explicit exceptions : authorizations by

¹ Frank, Th., *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002 ; Malone, D.M. (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Reinner, 2004 ; Sarooshi, D., *The United Nations and the Development of Collective Security*, Oxford Univ. Press, 1999 ; Grey, C., *International Law and the Use of Force*, Oxford University Press, 2000 ; Thomé, N., *Les Pouvoirs du Conseil de sécurité au regard de la pratique recente du Chapitre VII de la Charte des Nations Unies*, Presses Universitaires d'Aix-Marseille, 2005 ; Aja Agwu, F., *United Nations system, States and Jurisprudence of the Use of Force*, Malthouse Press Limited, 2005 ; Chesterman, S., *Just WAR and Just PEACE? Humanitarian Intervention and International Law*, Oxford University Press, 2001 ; Dinstein, Y., *War, Aggression and Self Defence*, Third Ed., Cambridge University Press, 2001 ; Ress, G., "article 53", in Simma, B. (ed.), *The Charter of the United Nations. A Commentary*, 1994, p. 722 et seq.

² UN Charter, article 24.1.

³ UN Charter, article 2.4.

the Security Council under Chapter VII, and Chapter VIII of the Charter and self-defence⁴.

From 1945 to the present substantial changes on the nature, character and intensity of armed conflicts have challenged the UN system credibility for the maintenance of peace and security. After the Cold War era, most conflicts under the agenda of the Security Council are basically internal armed conflicts with international implications. The concept of *threat to the peace* has been extended. It does not only relate to armed conflicts but it also embraces the protection of human security. New threats have emerged as a consequence of international terrorism, proliferation of weapons of mass destruction, the possession of those arms by non State entities, and the emergence of the so called failed States. Collective security conceived in 1945 to deal with classical armed conflicts, was forced to readjust to new realities.

Within Chapter VII, article 39 expresses the discretionary and none delegable power bestowed upon the Security Council to determine the existence of any threat to the peace, breach of the peace and act of aggression. Article 41 (coercive measures not involving the use of armed forces) and article 42 (measures involving the use of force) describe the different measures to be imposed by the Security Council in order to maintain or restore international peace and security.⁵

Article 39 remains as the legal back up for the exercise of Security Council powers under Chapter VII. Its content is a direct consequence of Security Council's primary responsibility for the use of force within the UN Charter collective security system. Member States expressly agreed to accept and carry out all Security Council decisions in performing its functions and powers. The determination of a situation under article 39 is binding upon all Member States in accordance with article 25 of the UN Charter. No Member State has the chance to challenge the validity of the Security Council findings under article 39.

The Security Council in the exercise of its powers under article 39 is not under the obligation to determine the existence of a threat to the peace or a breach of the peace or an act of aggression. It is a discretionary power that could or could not be performed.

Article 39 is the necessary starting point of any recommendation or decision to be taken by the Security Council under Chapter VII. Security

⁴ UN Charter, article 51.

⁵ The Security Council in assessing the existence of situations under article 39 has generally dealt with threats to international peace and security. In very few cases the Security Council has determined the existence of a breach of international peace and security (Korea (1950), Falkands/Malvinas (1982), Iraq (1990) ; Yugoslavia (1993).

236 Institut de droit international - Session de Naples (2009)

Council recommendations or decisions concerning measures that shall be adopted to maintain or restore international peace and security shall be in conformity to articles 41 and 42. The implementation or execution of such measures is also a discretionary function reserved to the Security Council, as well as determining who or whom might fulfil these measures. These functions have evolved over the years.⁶

The very essence of collective security within the UN has been entrusted to an organ in which its permanent members do have a veto power. The collective element of the concept of *collective security* was designed to be defined and controlled by the common consent of the permanent members of the Security Council. Unanimity among Permanent Members turned out to be a necessary precondition to activate Chapter VII functions and powers.

The interrelationship and concordance of articles 39, 41 and 42 are the legal basis for the Security Council powers to authorize the use of force to Member States. Article 42 *in fine* clearly refers to *Members of the United Nations* as the ones that could take such enforcement actions which may be necessary to maintain or restore international peace and security.

Article 48.1 provides that actions implementing decisions of the Security Council for the maintenance of international peace and security shall be taken by “*all Members of the United Nations or by some of them, as the Security Council may determine*”. The Security Council then, has a discretionary power under art. 48 to decide which members will be called upon to carry out decisions adopted by it.

Article 43 provides the conclusion of agreements between Member States and the Security Council with the object to make available to the Security Council armed forces, assistance and facilities as a contribution to the maintenance of peace and security. UN collective security structure was based on the presumption that the Security Council will have at its disposal armed forces to enforce its decisions under Chapter VII. The lack of special agreements prescribed by article 43 was the direct consequence of Cold War politics and veto power abuses.

The non fulfilment of article 43 has determined the Security Council to authorize Member States for the use of force under certain circumstances. Such authorizations implied a delegation of Security

⁶ For example the establishment of *ad-hoc* International Criminal Tribunals by Security Council resolutions adopted under Chapter VII ; International Criminal Tribunal for the Ex Yugoslavia, S/RES/808 (1993), 22 February, 1993 , International Criminal Tribunal for Rwanda, S/RES/ 995 (1994), 8 November 1994.

Council's own powers under article 42. Security Council's authorizations for the use of force were already expressly consented under Chapter VIII. Article 53.1 provides that the Security Council shall call upon regional arrangements or agencies for enforcement action under its authority. "*But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council....*". Articles 43 and 53 prescribe different alternatives to be used when dealing with recommendations and decisions taken by the Security Council in accordance to articles 41 and 42.

As the original UN plan for collective security enforcement was never implemented, other alternatives were developed to deal with international peace and security crisis; mainly, through the establishment of peacekeeping operations to maintain peace and through the proliferation of authorizations to Member States or multinational forces to use force to fulfil specific mandates or to restore international peace and security.

The Security Council power to determine the existence of a threat to the peace, breach to the peace, or act of aggression is an exclusive discretionary power not subject to external control. General Assembly functions concerning the maintenance of international peace and security are subordinated to the Security Council exercise of its own functions and powers.⁷

B. The General Assembly and the use of force.

It has been argued that the General Assembly has the power to take over the Security Council powers and functions including authorizations for the use of force.

The Institute Sub-group on Humanitarian Intervention (IDI, 10th Commission) held that "*The Uniting for Peace Resolution, Certain Expenses Opinion and more recently, the Wall Opinion, all recognize the responsibility of the United Nations General Assembly to exercise Chapter VII powers in circumstances which require such action but in which the Security Council proves to be paralysed*" (at pg 244)

On the other hand it has been argued that when the Security Council "*fails to carry out its mandate, no other UN organ can serve as its surrogate*".⁸ General Assembly recommendations to use force should be

⁷ UN Charter, articles 11, 12.

⁸ Dinstein, Yoram, *War, Aggression and Self Defence*, Cambridge, University Press, Third Edition, 2001, at 275.

238 Institut de droit international - Session de Naples (2009)

interpreted as an invitation to act under the inherent right of collective self defence.⁹

The Uniting for Peace Resolution of 1950 referred to General Assembly authorizations to recommend Member States the use of armed forces when necessary, to maintain or restore international peace and security in situations where there is a breach of the peace or an act of aggression. The Resolution expressly excluded the possibility to recommend to Member States the use of force in cases where it appears to be a threat to the peace.¹⁰

But is the General Assembly entitled to determine a situation as a breach of the peace or as an act of aggression? Could the General Assembly replace the Security Council in defining a situation as a breach of the peace or as an act of aggression? Under Chapter IV of the UN Charter, the General Assembly “...may discuss any questions relating to the maintenance of international peace and security brought before it ... and, except as provided by Article 12, may make recommendations to any such questions to the State or States concerned or to the Security Council or to both. Any such question, on which action is necessary, shall be referred to the Security Council by the General Assembly either before or after discussion.”¹¹

Article 12.1 prescribes that “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Chapter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

Since 1950 the *Uniting for Peace* Resolution was several times invoked but no other General Assembly resolution was adopted under its basis.

⁹ Disntein, Yoram, *idem ant.*

¹⁰ The General Assembly by Resolution Uniting for Peace of 1950 “... Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach to the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security...”. *Uniting for Peace Resolution, General Assembly Resolution 377 (V)R.G.A.10 (1950)*

¹¹ Article 11.2, UN Charter.

In our view, neither the ICJ Advisory Opinion on Certain Expenses¹², nor the Advisory Opinion on the Construction of the Wall¹³ have expressly or even by implication recognized that the General Assembly has the power to authorize the use of force when the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security.

The ICJ in its Advisory Opinion on Certain Expenses held that “... *although, generally speaking, the responsibility of the Security Council respecting the maintenance of international peace and security is “primary” rather than exclusive ... only the Council possesses the power to impose explicit obligations of compliance under Chapter VII...*”¹⁴

In its Advisory Opinion on the Construction of the Wall, the Court held that “*Finally, the Court is of the view that the United Nations and specially the General Assembly and the Security Council should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associate regime, taking due account of the present Advisory Opinion*”¹⁵

The Court expression “*What further action is required to bring to an end an illegal situation*” could not be interpreted as including specific functions and power reserved to the Security Council under Chapter VII. In our opinion, the Court did not intend to equate the power and functions of the Assembly and those of the Council¹⁶.

The ICJ continued holding that “*The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasise the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose an international threat to peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region*”¹⁷ In our

¹² *Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, ICJ Reports 1962, at 163.

¹³ *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, Para 160.

¹⁴ *Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, ICJ Reports 1962, at 163.

¹⁵ *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, Para 160.

¹⁶ On the contrary, see the Sub-Group B. Report on Humanitarian Intervention (10th Commission) at *Annuaire de l'Institut de Droit International*, at pg. 245.

¹⁷ *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, Para 161.

240 Institut de droit international - Session de Naples (2009)

opinion, the ICJ expression “*to redouble its efforts*” could not refer *per se* to authorizations for the use of force.

C. Authorizations for the use of force and external controls

1. Possibility of a judicial control

The functions and powers of the Security Council under Chapter VII are of a discretionary character. There is no pre determined judicial control to challenge the propriety or legality of decisions taken by the Security Council. The Security Council is a political organ and undertakes political decisions. Its primary responsibility is to ensure prompt and effective action to maintain and restore international peace and security. The Security Council is not empowered to deal with international responsibility issues.¹⁸

Although article 24.2 of the UN Charter provides that “*In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations...*”, it is difficult to foresee that the ICJ would consider itself with the power to test the compatibility of Security Council decisions with the purposes and principles of the UN. That affirmation does not imply that the ICJ would not have jurisdiction to entertain a case in which the legality of Security Council decisions are at stake. The ICJ is a legal organ and undertakes legal decisions for the settlement of disputes in conformity with international law. The ICJ and the Security Council have separate functions (judicial-political) but complementary with respect to same events.¹⁹ As Security Council authorizations for the use of force under Chapters VII and VIII are essentially of a political nature, there is no room left for their legal review by the ICJ.

From a strictly academic point of view, it seems feasible to affirm that the ICJ could determine in a particular case, provided that it has jurisdiction, that a Security Council authorization for the use of force is null and void. Such determination should be based on evidence that the Security Council decision constitutes an *ultra vires* act or it has been adopted against an *ius cogens* norm. Article 25 provides that “*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter*”. If a Security Council decision is not in accordance with the Charter it might be

¹⁸ Forteau, M., *DROIT DE LA SECURITE COLLECTIVE ET DROIT DE LA RESPONSABILITE INTERNATIONALE DE L'ETAT*, Pedone, 2006

¹⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction), 1984, ICJ Reports, 435 et s.

considered as an *ultra vires* act. On the same line of thought, a Security Council decision could be found to be in violation of an *ius cogens* norm in spite that article 103 proclaims the hierarchy of Member States obligations under the Charter over their obligations under any other international agreement. It might be presumed that article 103 could not be interpreted to overrule the supremacy of peremptory norms of general international law. But at present time it is difficult to conceive the existence of a dispute that could introduce such a challenge before the ICJ.

2. Possibility of a political control.

It could also be argued that political scrutiny of Security Council authorizations for the use of force might be performed by the General Assembly when considering Security Council annual reports. Article 24.3 provides that "*The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration*". But the General Assembly, when "*considering*" Security Council reports would not be entitled to approve or disapprove actions taken by the Security Council under its primary responsibility for the maintenance of peace and security. Article 24.1 expresses that "*In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.*"

It could be inferred *a contrario* of what the ICJ has decided in the Lockerbie case on Preliminary Objections that a Security Council resolution adopted before the filing of an Application to the Court, could form a legal impediment to the admissibility of such Application because it has binding effects and it is not a mere recommendation.²⁰

The ICJ presupposes that in the event of having to deal with questions related to Security Council binding decisions, would most certainly abstain from intervening.

II. New developments on Security Council practice

Since 1945 until 1990, lack of unanimity among Security Council Permanent Members affected the recourse to Chapter VII powers. After 1990 the Security Council acting under Chapters VII and VIII of the UN Charter has adopted several resolutions by which it has authorized

²⁰ Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Preliminary Objections), 1998 ICJ Reports, (at 605 of ILM 1998).

242 Institut de droit international - Session de Naples (2009)

Member States, to the so called coalitions of willing and able States ; and to regional organizations, the use all means at their disposal - including the use of force - necessary to restore international peace and security.

Security Council resolutions which delegate the use of force to Member States have been adopted on a case by case basis. Even if the Security Council has not used a pre determine formula to authorize enforcement actions in favour of Member States, there are certain common trends that could be inferred from practice.

When the Security Council has expressly authorized the use of force it always has made an express reference to Chapter VII or Chapter VIII without necessarily identifying the clause under which it is acting. That attitude has provoked all sorts of speculations concerning the legal basis of such authorizations.

Security Council authorizations for the use of force could be restricted to the fulfilment of a very specific objective. That is the case of resolutions allowing Member States or regional arrangements to take enforcement action to secure previous resolutions imposing an embargo,²¹ humanitarian protection,²² restoration of a democratic government,²³ and even to assist domestic authorities in the maintenance of a security in a region²⁴.

Similar restrictions are expressed in resolutions granting to peacekeeping operations the possibility to use force in order to pursue a pre determined objective, for instance, to provide and secure humanitarian assistance²⁵ or to protect civilians in immediate physical danger.²⁶ That is a main depart from previous peacekeeping operations only authorized to use force in self defence. The Security Council has also authorized peacekeeping operations to use all means at their disposal – including military force – to obtain much broader objectives as to restore governmental powers to democratic authorities²⁷, the assurance of peaceful and secure environment within armed conflict areas, and the protection of civil populations against violence, among others.

²¹ S/RES/665 (1990) 25 August 1990, concerning Iraq.

²² S/RES/1794 (2007), 21 December 2007, concerning the Democratic Republic of the Congo

²³ S/RES/940 (1994), 31 July 1994, concerning Haiti.

²⁴ S/RES/1386 (2001) established the International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul..

²⁵ S/RES/733 (1992), 23 January 1992, concerning Somalia

²⁶ S/RES/1291 (2000) 24 February 2000, concerning the Democratic Republic of Congo.

²⁷ S/RES/1132 (1997), 8 October 1997, concerning Sierra Leone ; S/RES/1529 (2004) 29 February 2004 concerning Haiti.

Twice the Security Council has authorized the use of force against a State (Korea²⁸, Iraq²⁹) as a consequence of military attacks against another State. In other cases Security Council has authorized willing and able States as well as peace enforcing operations with the possibility to use force within the territory of a State where an internal armed conflict is taking place

The present Report deals with Security Council authorizations for the use of force taking into account different mandates to be performed by multinational forces, by regional arrangements or by a new generation of complex and multidimensional peacekeeping operations. Special attention will be given to recent Security Council authorization practices concerning probable validation of the use of force not previously authorized by the Security Council and situations in which implied powers have been claimed.

A. Authorization of the use of force to Member States and to Multinational Forces³⁰

Concerning the scope of mandates' authorizations for the use of force, Security Council resolutions expressing a restricted authorization may be distinguished from resolutions authorizing to fulfil an unrestricted and broad purpose as to restore international peace and security.

²⁸ S/RES/83 (1950), 27 June 1950.

²⁹ S/RES/678 (1990), 29 November 1990.

³⁰ Freudenschub, H., "Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council", *E.J.I.L.*, pp. 1994, pp. 492-531 ; Lobel, J. and Ratner, M., "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime", *A.J.I.L.*, 1999, pp. 124-154 ; Blokker, N., "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'", *E.J.I.L.*, 2000, pp. 541-568 ; Blokker, N., "The Security Council and the Use of Force, Legal Aspects of International Organizations", in Blokker N. and Schrijver N., N.(eds), *Theory and Reality- A Need for Change?* Martinus Nijhoff, 2005, pp. 1-30 ; Lagrange, Ph., "Sécurité collective et exercice par le Conseil de sécurité du système d'autorisation de la coercion", in *Les métamorphoses de la Sécurité Collective: Droit Pratique et enjeux stratégiques*, S.F.D.I., Journée franco-tunisienne, Paris, Pédone, 2005, pp. 55-94 ; Sicilianos, L. A., "L'Autorisation par le Conseil de Sécurité de Recourir à la Force: une Tentative d'évaluation", *R.G.D.I.P.* 2002-1, pp. 5-50 ; Christakis, Th. et Bannelier, K., "Acteur Vigilant ou Spectateur Impuissant? "Le Contrôle Exerce par le Conseil de Sécurité sur les États autorisés à Recourir à la Force", *Rev belge dr. Int.*, 2004-2, pp. 498-527 ; Corten, O. et Dubuisson, F., "L'hypothèse d'une règle émergente fondant une intervention militaire sur une 'autorisation implicite' du Conseil de sécurité" *R.G.D.I.P.*, 2000, pp. 873-910 ; Verhoeven, J., "Etats allies ou Nations Unies? L'O.N.U. face au conflit entre l'Irak et le Koweït", *A.F.D.I.*, 1990, pp.145-194 ; Picone, P. "Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale", *Riv. Ir. Int.*, 2005, pp. 5-75.

244 Institut de droit international - Session de Naples (2009)

In order to provide some examples of Security Council practices concerning authorizations, we will first refer to authorizations for the use of force in response to armed attacks against a Member State and then to authorizations of the use of force to fulfil specific objectives.

1. Authorizations in response to armed attacks against a State

Security Council resolutions under Chapter VII concerning the cases of Korea in 1950 and then in Iraq in 1990 did not expressly determine the existence of an act of aggression but a breach to international peace and security.

a. The case of Korea

In 1950 during the Korean crisis, the temporary absence of the Soviet Union delegation from the Security Council permitted, in the middle of the Cold War era, the adoption of decisions concerning the use of force. Security Council authorization for the use of force in Korea was the consequence of a previous determination that there was a breach of international peace by actions of North Korea amounting to an arm attack against South Korea.³¹ By Resolution 83 (1950)³² the Security Council recommended “*to the Members of the United Nations*” to furnish such assistance to South Korea as may be necessary to repel armed attacks and to restore international peace and security in the area. By Resolution 84 (1950)³³ it recommended Member States to make forces available under the unified command of the United States of America and under the UN flag.

As the Security Council did not mention in which Chapter VII clause it was basing its recommendations for the use of force, different doctrinaire positions speculated on their legal foundations. The ones opposing such authorization have interpreted article 42 as being interdependent from article 43. Others considered that article 42 could legally be implemented without recourse to article 43. As Resolutions 83 (1950) and 84 (1950) did not impose but recommended military actions to Member States, it could also be argued that a general reference to Chapter VII, as well as a specific reference to article 39, granted sufficient legal basis to Security Council recommendations under the implied powers doctrine.

³¹ S/RES/82 (1950), 25 June 1950 ; See also the Report of the UN Mission in Korea.

³² S/RES/83 (1950), 27 June 1950.

³³ S/RES/84 (1950), 7 July 1950.

b. The case of Iraq

1) The 1990 invasion of Kuwait (The Gulf War)

Iraq invasion of Kuwait in 1990 was the first challenge to be dealt with by the Security Council concerning the use of force in the post Cold War era.

The same day Iraq invaded Kuwait, the Security Council adopted Resolution 660³⁴ by which, invoking articles 39 and 40 of the UN Charter, determined the existence of a breach of international peace and security, condemned Iraq' invasion and claimed the immediate and unconditional withdrawal of all Iraqi forces. Four days later, by Resolution 661³⁵ the Security Council, acting under Chapter VII, imposed economic sanctions on Iraq. Almost three weeks later, by Resolution 665³⁶ the Council called upon Member States cooperating with the Government of Kuwait *“to use such measures as may be necessary under the authority of the Security Council”* to halt for inspection purposes all inward and outward maritime shipping to ensure due implementation of Resolution 661.

Resolution 678 (1990)³⁷ authorized Member States *“to use all necessary means”* in order to restore international peace and security. The main objective of Resolution 678 was to uphold and implement Resolution 660 and all subsequent relevant resolutions.

Such authorization was adopted as a recommendation addressed to UN Member States co-operating with the Government of Kuwait. Each Member State then, had the chance to decide if it was willing or able to cooperate. The adoption of the “authorization-recommendation” formula allowed Member States to abstain from implementing cooperation without legal consequences. Resolution 678 could not have been adopted if it imposed obligations affecting all Member States. The non compliance of a Security Council decision obliging Member States to cooperate, would amount to a violation of article 25 of the UN Charter. As the majority of UN Member States were not necessarily interested or able to cooperate with Kuwait, an authorization tied up to a binding obligation had no chances to survived.

Resolution 678 imposed no obligation on Member States but a right to co-operate. It presupposed due respect towards a sovereign determination of Member States to participate or not in achieving the purposes underlining the authorization. Member States acting in conformity with

³⁴ S/RES/660 (1990), 2 August 1990.

³⁵ S/RES/661(1990), 6 August 1990.

³⁶ S/RES/665 /1990), 25 August 1990.

³⁷ S/RES/678 (1990) 29 November, 1990.

246 Institut de droit international - Session de Naples (2009)

the terms of Resolution 678 will be considered as performing a legal activity endorsed by the UN. In that context, any State action or omission opposed or against Member States acting under the Resolution 678's mandate would amount to an illegal interference and would generate international responsibility *vis a vis* the State or States concerned. It might also be argued that any act or omission against a recommendation would imply a breach of a Security Council Resolution aiming to restore international peace and security. But all sorts of speculations might be advanced in considering if Member States are acting or not on behalf of the UN when using the force authorized through a recommendation adopted by the Security Council

Resolution 687 also requested "*all States*" to provide appropriate support for the actions undertaken in pursuance of main objectives. It also requested from "*States concerned*" to keep the Security Council regularly informed on the progress of actions undertaken.

When the Security Council decided to remain seized of the matter it should be presumed that it had reserved for itself the overall control of its own powers and functions under Chapter VII. But taking into account that the Security Council has not predetermined the precise temporal limits and the nature of measures to be taken, its adequate supervision remains rather illusory.

Authorizations might be perceived as a delegation of the use of force in favour of Member States willing and able to cooperate with Kuwait. The implementation of a Security Council's decision may finally be placed in the hands of interested Member States. Then, Member States would be tempted to assume that they have a discretionary margin to implement the mandate underlying Security Council authorizations. The only obligation that Member States seemed ready to assume was to report their own way they were implementing their task through their own interpretation of what "*all necessary means*" really meant.

The definition and scope of the mandate's purpose could not be delegated to Member States desires and should remain as a non delegable Security Council power. Resolution 678 was adopted within a broad framework and as an open mandate to restore international peace and security.³⁸ From that asseveration it could be inferred that there was no delegation of Security Council's discretionary powers but authorization to implement decisions already taken by it. The non-determination of "*how*" to operationally accomplish a mandate did not amount to a delegation of Security Council powers concerning "*why*" and "*when*" to use force.

³⁸ Adopted with the abstention of China and a negative vote by Yemen.

Resolution 678 did not determine a fix time limit in which specific purposes of the mandate should be accomplished. Time limits could be decided by the Security Council at any time. The problem would be if there were real chances to obtain consensus within the Security Council to adopt a new resolution limiting or modifying a previous authorization. Permanent Security Council Members may have different views on how to interpret the scope, the purpose and the duration of a previous authorization. Some would consider that the authorization objectives were already accomplished and so, enforcement actions should come to an end. Others would consider that there is a latent possibility that authorizations could be revived anytime when a new situation so demands.

As Resolution 678 only mentioned Chapter VII, it has been argued that authorization for the use of force was legitimised on the right of self-defence in accordance with article 51 of the Charter.³⁹ Others have argued that Security Council's authorization was based on article 42 or was the direct consequence of implied powers derived from the UN Charter. It was also suggested that, as there was no incompatibility between self-defence and collective measures, it was possible to legally base Council's authorization simply referring to Chapter VII.⁴⁰ Even more, it has also been maintained that Resolution 678 constitutes an accurate model for subsequent Security Council's authorizations.⁴¹

Resolution 678 was a pragmatic response to failures in implementing the UN collective security system as described in Chapter VII. Direct Security Council enforcement of its own recommendations was an impossible task due to the lack of agreements under article 43. Security Council's implementation was replaced by Member States' authorizations to cooperate with Kuwait. In practice, authorizations for the use of force combined elements of a centralized model of collective security with a decentralized implementation scheme.

2) The aftermath of the Iraq's invasion.

Resolution 687 (1991)⁴² established the conditions of a cease-fire including Iraq's obligation to destroy its weapons of mass destruction which was

³⁹ Distein, Yoram, *Op cit*, at pg. 260.

⁴⁰ *"The experience suggests that, subject to the Council's ultimate control, self-defence and collective measures are not regarded as wholly distinct and incompatible, specially in a case in which the Council has clearly stigmatized one state as the wrongdoer"* Berman, F., *Op. cit.*, p. 155.

⁴¹ Berman, F. "The Authorization Model: Resolution 678 and its effects", in Malone, D. (Ed) *the Security Council. From the Cold War to the 21st Century*, 2004, p. 153 et seq.

⁴² S/RES/687 (1991), 3 April 1991.

248 Institut de droit international - Session de Naples (2009)

controlled by verification teams (UNSCOM)⁴³. A peacekeeping operation was also established without Iraqi's consent. Alongside disarmament commitments undertaken by Iraq, the Resolution delimited the Iraqi-Kuwaiti territorial frontier and established a reparation scheme.

Two days later, Security Council Resolution 688 (1991)⁴⁴ condemned Iraq's repression of Kurds and Shiites and called upon Iraq to allow foreign humanitarian assistance. Resolution 688 was not adopted under Chapter VII. "Safe Heavens" in north and south Iraq (non-fly zones) were controlled by USA and UK. They considered themselves being authorized to use force by Resolution 687 (1991). That assumption was challenged by Russia and China on the grounds that the Security Council Resolution 687 on Iraq's cease fire⁴⁵ prescribed the end of the use of force authorized in 1990 and in consequence, a new authorization was needed. On the other hand, different justifications were advanced in order to legitimize UK and USA's use of force in north and south Iraq. Legal reasoning combined with political arguments was used in order to justify the use of force as a humanitarian intervention as well as on an implied Security Council authorization to fulfil Resolution 688 (1991).

Later on, problems concerning Iraqi's due compliance with cease-fire conditions turned into several inspection crises. Constant obstruction to control systems provoked the adoption by Security Council, acting under Chapter VII, of Resolution 1154 (1998)⁴⁶ alerting Iraq that any violation of access to control or verification of disarmament would provoke grave consequences for Iraq. Resolution 1205 (1998)⁴⁷ urged Iraq to desist from its attitude of non compliance of Resolution 687 (1991). USA and UK air strikes in Iraq's territory (Operation Desert Fox) took place in December 1998 following reports from UNSCOM on Iraq's non compliance with disarmament controls.

Once again, as part of the Security Council debate, the USA and UK tried to justify their military intervention on the basis that cease fire under Resolution 678 (1990) have only suspended authorizations. Russia expressed that the USA-UK military intervention in Iraq was illegal under international law and that Resolution 687 (1991) did not authorize unilateral actions of State Members without the adoption of a new resolution.⁴⁸

⁴³ UNSCOM was later on replaced by UNMOVIC.

⁴⁴ S/RES/688 (1991), 5 April 1991.

⁴⁵ S/RES/687 (1991), 3 April 1991.

⁴⁶ S/RES/1154 (1998), 2 March 1998.

⁴⁷ S/RES/1205 (1998), 5 November 1998.

⁴⁸ UN Press Release SC/6611, 16 December 1998.

Security Council Resolution 1441 (2002)⁴⁹ recalling previous resolutions on Iraq, including Resolution 678 (1990), decided to give a last chance to implement its weapons of mass destruction, nuclear chemical biological missile obligations and recalled that if Iraq continued with non compliance, it would be subject to grave consequences.

A USA, Spain, UK and Bulgaria draft resolution authorizing the use of force against Iraq based on Iraq's material breaches of Security Council resolutions concerning its disarmament was finally withdrawn because there was no chance to be adopted. This situation led to the U.S. and the UK to initiate a unilateral intervention in 2003 challenging the Security Council primary responsibility in dealing with collective security.⁵⁰

In spite of lacking a previous Security Council resolution authorizing the use of force the Security Council recognized in Resolution 1483 (2003)⁵¹ that the USA and UK have specific authorities, responsibilities and obligations under international law as occupying powers in Iraq under the Coalition Provisional Authority (the Authority) that has and continue exercising all governmental tasks in Iraq. The Security Council called upon the Authority to promote the welfare of the Iraqi people through the effective administration of the territory, working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.

The Resolution prescribed that the Authority will work in cooperation with a Special Representative for Iraq to be appointed by the Secretary-General. The Special Representative would have responsibilities to report to the Security Council on his activities coordinating United Nations' efforts in post-conflict process in Iraq. Special powers granted to the Authority were assumed as an implicit recognition of the *status quo* generated by a non authorized military presence in Iraq.

Among the tasks of the Special Representative was the formation, of the people of Iraq with the help of the Authority, of an Iraqi interim administration run by Iraqis until an internationally recognized representative government was established and took over the responsibilities displayed by the Authority.⁵²

⁴⁹ S/RES/1441 (2002), 8 November 2002.

⁵⁰ For the Canadian position see McWhinney, E., *Canada and the 2003 Invasion on Iraq: Prime Minister Chrétien's Gloss on the UN Charter Principles on the Use of Force*, in Notes and Comments, in Canadian Yearbook of International Law, 2007, p.271 et ss.

⁵¹ S/RES/1483 (2003), 22 May 2003.

⁵² The Security Council also requested to the Secretary-General, in coordination with the Authority, to continue with the exercise of his responsibilities under previous Security Council resolutions concerning "*oil for Food Program*" for a period of six month and

250 Institut de droit international - Session de Naples (2009)

United Nations Assistance Mission for Iraq (UNAMI) was established by Resolution 1500 (2003)⁵³ to support the Secretary-General in the fulfilment of his mandate under Resolution 1483 (2003). An Iraqi Governing Council was established on 13 July 2003.

The Security Council acting under Chapter VII of the Charter reaffirmed by Resolution 1511 (2003)⁵⁴ the sovereignty and territorial integrity of Iraq, and underscored the temporary nature of the exercise by the Coalition Provisional Authority of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003) which will cease when an international recognized representative government established by the people of Iraq assumes the responsibilities of the Authority.⁵⁵

The Security Council also authorized by Resolution 1511 (2003) a multinational force under a unified command, to take all necessary measures to contribute to the maintenance of security and stability in Iraq including for the purpose of ensuring necessary conditions for the implementation of the Resolution, to contribute to the security of the UNAMI, the governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.

The mandate of the multinational force shall be reviewed by the Security Council no later than one year from the date of its adoption. The mandate shall expire upon the completion of the political process. The Security Council expressed that on that occasion, it will consider the need for any future activity of the multinational force, taking into account the views of an international recognized, representative government of Iraq.

Resolution 1546 (2004)⁵⁶ recognized the importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and the close coordination between that force and the government. The Security Council welcomed that the occupation will end on 30 June 2004

to put an end to the Program. It also established the phase out of UNIKOM. The Security Council requested the Secretary-General to report to the Council on regular intervals on the work of the Special Representative in implementing the resolution. It also encouraged the United Kingdom and the United States to inform the Council at regular intervals of their efforts under Resolution 1483 (2003).

⁵³ S/RES/1500 (2003), 14 August 2003.

⁵⁴ S/RES/1511 (2003), 16 August 2003.

⁵⁵ The Security Council called upon the Authority to return governing responsibilities and authorities to the people of Iraq as soon as possible. It also requested the Authority in cooperation with the Governing Council and the Secretary-General, to report on the progress being made.

⁵⁶ S/RES/1546 (2004), 8 June 2004.

and the Coalition Provisional Authority will cease to exist and that Iraq will reassert its full sovereignty. The Resolution also adopted a new mandate for the Special Representative and UNAMI in conformity with Iraqi's requests.⁵⁷ It also reaffirmed the authorization for the multinational force under a unified command established under Resolution 1511 (2003). The multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to the Resolution expressing the Iraqi request for the continued presence of the multinational force and setting out its tasks.

The Security Council requested Member States and international and regional organizations to contribute assistance to the multinational force, including military force as agreed with the government of Iraq, to help the Iraqi people to have security and stability, humanitarian and reconstruction assistance and to support the efforts of UNAMI.

By Resolution 1637 (2005)⁵⁸ the Security Council confirmed that the situation in Iraq continued to constitute a threat to the international peace and security, and acting under Chapter VII of the Charter reaffirmed the authorization for the multinational force and in consequence, extended its mandate until 31 December 2006.

Resolution 1637 provided for the revision of its mandate either at the request of the government of Iraq or twelve months from the date of the Resolution. The mandate shall terminate upon the completion of the political process in Iraq or earlier under the request of the government of Iraq. The Secretary-General shall report to the Security Council within three months from the date of this resolution on UNAMI operation. United States shall report to the Council, on behalf of the multinational force on quarterly bases after a first report due three months after the date of the Resolution.

Resolution 1723 (2006)⁵⁹ reiterated that the presence of the multinational force in Iraq was at the request of the government of Iraq, reaffirmed its authorization and decided to extend its mandate until 31 December 2007. It also reiterated that the multinational force mandate shall be reviewed at the request of the government of Iraq, or not later than 15 June 2007, and declared that it will terminate earlier if requested by the government of

⁵⁷ There is no significant UN presence in Iraq after the bombing of the UN Headquarters in Baghdad in September 2003.

⁵⁸ S/RES/1637 (2005), 8 November 2005.

⁵⁹ S/RES/1723 (2006), 28 November 2006.

252 Institut de droit international - Session de Naples (2009)

Iraq. The UN should continue to play a leading role in assisting Iraqi people with further political and economic development.⁶⁰

By Resolution 1762 (2007)⁶¹ the Security Council acting under Chapter VII, but without mentioning that the situation in Iraq continued as a threat to international peace and security, acknowledged that a democratically elected and constitutionally based Government of Iraq was in place. In consequence, the Security Council decided to terminate the mandates of UNMOVIC and the IAEA, reaffirming Iraq's disarmament obligations under relevant resolutions and acknowledging Iraq's constitutional commitment to the non-proliferation of weapons of mass destruction.⁶²

Resolution 1770 (2007)⁶³ extended UNAMI mandate for another period of twelve months. It redefined the Special Representative and UNAMI mandates in conformity with the government of Iraq's requests. It included assistance and advice in governmental issues related mainly to reconciliation, border security, refugees, elections, energy, and provision of essential services for its people, economic reform and sustainable development among others. It also stressed the important role of the Multi-National Force Iraq (MNF-I) in supporting UNAMI, including security and logistical support.

Security Council recent developments in dealing with the use of force in Iraq has evidenced that renovation of multinational forces' authorizations strongly depends on the host State's will and not necessarily on any specific UN objective assessment. That fact implies the assimilation of multinational forces' authorizations for the use of force to traditional peacekeeping operations mandates requesting host State consent.

Security Council active participation in Iraq, without condemning previous non authorized use of force by Member States, might be perceived as a mere consequence of a *fait accompli*. That position departs from the USA and the United Kingdom particular interpretation concerning temporal effects of cease fire under Resolution 687.

⁶⁰ The UN played a substantial role in the organization of the elections for the Constituent Assembly which drafted a new constitution for Iraq.

⁶¹ S/RES/1762 (2007), 29 June 2007.

⁶² In Resolution 1483 (2003) the status and future role in Iraq of UNMOVIC and OIEA remains deliberately vague.

⁶³ S/RES/1770 (2007), 10 August 2007.

2. Authorizations of the use of force to fulfil specific objectives

a. Authorizations in order to secure embargos

The Security Council has frequently authorized Member States to use force necessary to implement measures already adopted in conformity with article 41 of the Charter.

During the 1966 crisis in Rhodesia, the Security Council by Resolution 221 (1966)⁶⁴ without mentioning Chapter VII, authorized the United Kingdom to use force if necessary to intercept oil tankers due to arrive at Beira and to detain and arrest the oil tanker known as Joanna V. By Resolution 232 (1966)⁶⁵ the Security Council decided to impose an economic and arms embargo on Rhodesia. By Resolution 253 (1968)⁶⁶ the Security Council, acting under Chapter VII, authorized all Member States, to ensure compliance with economic and arms embargos. Meanwhile resolution 314 (1972)⁶⁷ also concerning embargos to Southern Rhodesia, was directed to “*all States*”. Most resolutions will “call” upon Member States, when necessary, to use force to enforce an embargo.⁶⁸ That was the common pattern followed by later Security Council resolutions referring to economic measures against Member States.

By Resolution 1132 (1997)⁶⁹ The Security Council acting under Chapter VIII has also authorized regional arrangements as the Economic Community of West African States (ECOWAS) to ensure strict implementation of petroleum and arms embargos and to carry out naval interdictions against Sierra Leone.⁷⁰

In all these cases authorizations for the use of force were restricted to enforcement actions taken under the authority of the Security Council and necessary to secure embargos or other coercive measures not involving the use of force.⁷¹

⁶⁴ S/RES/221 (1966), 9 April 1966.

⁶⁵ S/RES/232 (1966), 16 December 1966.

⁶⁶ S/RES/253 (1968), 29 May 1968.

⁶⁷ S/RES/314 (1972), 28 February 1972.

⁶⁸ Similar scheme was used to enforce embargos against Iraq [S/RES/665(1990), 25 August 1990] and against Somalia [S/RES/794 (1992), 3 December 1992]. See also Resolution 418 (1977) [S/RES/418 (1977), 4 November 1977], where the Security Council acting under Chapter VII imposed a mandatory embargo against South Africa, without mentioning article 41.

⁶⁹ S/RES/1132 (1997), 8 October 1997.

⁷⁰ S/RES/1132 (1997), Para. 8.

⁷¹ By Resolution 787 (1992) [S/RES/787 (1992), 16 November 1992], Para. 12, concerning Former Yugoslavia the Security Council acting under Chapter VII and Chapter VIII called upon *States*, acting nationally or through regional agencies or arrangements, to use such measures commensurate with the specific circumstances as

254 Institut de droit international - Session de Naples (2009)

b. The establishment of safe humanitarian zones

The Security Council, taking into account the special situation in Somalia in 1992, after the collapse of its Central Authority in 1991, established a multinational force with the specific task to protect humanitarian corridors. Somalia was considered a failed State and therefore there was no chance to obtain governmental consent for the deployment of foreign military forces.

By Resolution 770 (1992)⁷² the Security Council acting under Chapter VII, called upon Member States acting unilaterally or through regional agencies or arrangements to take all measures necessary to facilitate in coordination with the UN the delivery by relevant UN humanitarian organizations and other humanitarian assistance to Sarajevo or to other parts of Bosnia Herzegovina.

In other case, a Member State had requested authorizations from the Security Council to establish a safe humanitarian zone within the territory of another Member State in order to secure humanitarian assistance. As an example, and taking in consideration the special interest of France, the Security Council adopted Resolution 929 (1994)⁷³ declaring that the humanitarian crisis in Rwanda constituted a threat to the peace and security and acting under Chapter VII authorized Member States to conduct a temporary operation under a national command using all necessary means to accomplish its humanitarian relief.

In similar situations concerning Albania⁷⁴ and the Central African Republic⁷⁵, the Security Council, acting under Chapter VII, has

may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping to ensure strict implementation of Resolutions 713 (1991) [S/RES/713 (1991), 25 September 1991] and 757 (1992) [S/RES/757 (1992), 30 May 1992]. Actions shall be taken in cooperation with the Secretary-General and reports should be submitted to the Security Council. By Resolution 820 (1993) [S/RES/820 (1993), 17 April 1993] other economic sanctions were imposed on the Federal Republic of Yugoslavia, reaffirming the authority of States acting under Para. 12 of Resolution 787 (1992). Resolution 820 (1993) was implemented by Member States acting within a NATA/WEU task force. In the case of Haiti, the Security Council by Resolution 875 (1993) [S/RES/875 (1993), 16 October 1993] stated that the Security Council "*Acting under Chapter VII and Chapter VIII of the United Nations Charter, calls upon Member States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the SC to ensure strict implementation of the provisions of Res. 841 (1993) and 873 (1993)...*".

⁷² S/RES/770 (1992), 13 August 1992.

⁷³ S/RES/929 (1994), 22 June 1994.

⁷⁴ S/RES/1101 (1997), 28 March 1997.

⁷⁵ S/RES/1125 (1997), 6 August 1997.

authorized interested States acting with neutrality and impartiality, to ensure the security and freedom of movement of their personnel without mentioning the possibility to use “*all necessary means*”. In all these cases, Member States were obliged to report on regular basis to the Security Council the way in which authorizations were performed.

c. Restoration of a democratic government

Concerning the internal crisis in Haiti, the Security Council by Resolution 940 (1994)⁷⁶, acting under Chapter VII, authorized Member States to create a multinational force to use all necessary means to facilitate restoration of the democratic government, to facilitate the implementation of Governors Island Agreement and to secure an adequate environment to maintain democracy. The multinational force was later on replaced by UNMIH in March 1995. The Haiti crisis was defined by the Security Council as a threat to international peace and security and that determination represented a clear manifestation of its own discretion under article 39.

B. Authorization of the use of force in favour of regional arrangements⁷⁷

⁷⁶ S/RES/940 (1994), 31 July 1994.

⁷⁷ Villani, U., “The Security Council’s Authorization of Enforcement Action by Regional Organizations”, *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 535-557 ; Villani, U., “Il ruolo delle organizzazioni regionali per il mantenimento della pace nel sistema dell’ONU”, in *Divenire sociali e adeguamento del diritto. Studi in onore di Francesco Capotorti*, Vol. I, Diritto Internazionale, 1999, p. 595 et seq. ; Verhoeven, J., “The Security Council’s Authorization of Enforcement Action by Regional Organizations”, *Max Planck Yearbook of United Nations Law*, 2002, pp. 535-557 ; Gaja, G., “Il Consiglio di Sicurezza di fronte all’occupazione del Kuwait: il significato di una autorizzazione”, *Riv. Dir. Int.*, 1990, pp. 696-697 ; Schreuer, C., “Regionalism v. Universalism” *E.J.I.L.* 6, 1995, p. 477 et seq. ; Montaz, D., “La delegation par le Conseil de Sécurité de la exécution de ses actions coercitives aux organisations régionales”, *AFDI* 43, 1997, p. 105 et seq. ; Walter, C., “Security Council Control over Regional Action”, *Max Planck Yearbook of United Nations Law*, Vol. 1, 1997, p. 129 et seq. ; Gioia, A. “The United Nations and Regional Organizations in the Maintenance of Peace and Security” in Bothe, M., Ronzitti, N. and Rosas, A.(eds), *The OSCE in the Maintenance of Peace and Security. Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes*, 1997, p. 191 et seq. ; Meeker, L.C., “Defensive Quarantine and the Law”, *A.J.I.L.* 57, 1963, p. 515 et seq. ; Simma, B., “NATO, the UN and the Use of Force: Legal Aspects”, *E.J.I.L.* 10, 1999, p. 1 et seq. ; Picone, P., “la ‘Guerra del Kosovo’ e il diritto internazionale generale”, *Riv. Dir. Int.* 83, 2000, p. 309 et seq. ; Dekker, I.F. and Myjer, E.P.J., “Air Strikes on Bosnian Positions: Is NATO also Legally the Proper Instrument of the UN?”, in *L.J.I.L.* 9, 1996, p. 411 et seq. ; Higgins, R., “Some thoughts on the evolving relationship between the Security Council and NATO”, in *Boutros-Ghali Amicorum Discip. Liber*, 1998, Vol. I, p. 511 et seq. ; Pellet, A. “La guerre du Kosovo – Le fait rattrapé par le droit”, *International Law*

256 Institut de droit international - Session de Naples (2009)

1. General background

Security Council power to authorize the use of force to regional arrangements or agencies expressly derived from Chapter VIII of the UN Charter. Such authorizations shall be previous to enforcement actions taken by regional organization. Once Security Council has authorized the use of force, it will retain control over enforcement operations and regional organizations are obliged to report to it.

Article 53 stresses the main objective of Security Council functions under Chapter VII by allowing it to authorize regional arrangements or agencies to collaborate with the Charter's aim of maintaining or restoring international peace and security. Actions taken by regional arrangements and agencies are subordinated to the authorization and control of the Security Council.⁷⁸ Enforcement action adopted by regional arrangements should be authorized by the Security Council only after the fulfilment of its power to determine the existence of a threat to the peace, a breach of the peace or an act of aggression.

Article 53, paragraph 1 refers to two different situations. The first part of the paragraph contemplates a situation in which the Security Council decides to call upon a regional agreement or agency to take, when appropriate, enforcement actions. The second part of same paragraph contemplates the situation by which the regional organization or agency is aiming at its own initiative to take an enforcement action. In the first case, problems would arise if the regional organization or agency is not interested or able to take such actions as required by the Security Council. In the second case, the regional organization or agency will be facing the need to require and obtain Security Council express authorization in order to take enforcement actions. Security Council authorizations are a precondition to regional arrangements decisions as well as

Forum 1, 1999, p. 160 et seq. ; Condorelli L. "La risoluzione 1244 (1999) del Consiglio di Sicurezza e l'intervento NATO contro la Repubblica Federale di Jugoslavia" in Ronzitti, N. (ed), *NATO, conflitto in Kosovo e Costituzione italiana*, 2000, p. 31 et seq. ; Berman, F., "The Authorization Model: Resolution 678 and its Effects", in Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, 2004, p. 153 et seq. ; Stern, B., "Nouveaux défis pour l'ONU", in Daudet, Y (dir.), *La crise d'Haiti (1991-1996)*, Cahiers du CEDIN, Montchrestien, Paris, 1996.

⁷⁸ The General Assembly Declaration on the Enhancement of Cooperation between the United Nations and Regional Agreements or Agencies in the Maintenance of International Peace and Security adopted the 9 December 1994 reaffirmed that it is a primary responsibility for the Security Council, under Article 24 of the Charter, the maintenance of international peace and security. The Declaration also confirmed the complementary nature of efforts made by regional arrangements or agencies when they cooperate, in their respective field of competence, with the United Nations.

recommendations to use force by them or by their Member States.⁷⁹ Authorizations by the Security Council will be required when enforcement action implies a use of force by the regional arrangement or agency otherwise not allowed under international law.⁸⁰

More recently, the Security Council has expressly authorized the use of force by regional arrangements or agencies under Chapter VIII⁸¹. In most previous cases, it has authorized the use of force to Member States acting nationally or through regional arrangements under Chapter VII retaining in all cases its control over enforcement operations through reports submitted to the Secretary-General. In several cases, enforcement action to maintain peace and security started through regional arrangements direct interventions.

Recent practice have also evidenced that regional arrangements have currently taken enforcement measures not involving the use of force without considering Security Council authorization.⁸² Article 2, paragraph 4 of the UN Charter does not prohibit Member States to take other enforcement measures as counter measures that do not imply a threat or use of force. Customary rules on State responsibility allow States, in certain circumstances, to take counter measures, with the exceptions of those countermeasures that presupposes a threat or use of force.⁸³

⁷⁹ The situation provoked by the OAS's recommendation to its Member States to take enforcement action, including the use force against Cuba during the missiles crises of 1962, seems difficult to be tolerated nowadays as an expression of a valid interpretation of Article 53 para 1. of the UN Charter. On the same line, the UN General Assembly (General Assembly Resolution A/49/57) deplored the intervention of the United States of America en Grenada as a fragrant violation of international law in spite that the US tried to justify its use of force on a resolution of the Organization of Eastern Caribbean States adopted the 21 of October 1983 ; Meeker, L.C., "Defensive Quarantine and the Law", *A.J.I.L.* 57, 1963, p. 515 et seq.

⁸⁰ Villani, U, "The Security Council's Authorization of Enforcement Action", *Max Planck Yearbook of United Nations Law*, vol. 6 (2000), p. 539: "... an authorization is only necessary to allow an action which, in the absence of such an authorization, would be prohibited: the purpose and function of the authorization are thus those of removing a prohibition, thereby making the authorized action lawful".

⁸¹ In the case of Bosnia authorization, to European Union in 2004 ; in the case of Sudan authorization to the African Union in 2006 and in 2007 ; in the case of Somalia, authorization to the African Union in 2007.

⁸² Walter, C. "Security Council Control over Regional Action", *Max Planck UNYB* 1 (1997), p. 127 et seq. ; Gioia, A. "The United Nations and Regional Organizations in the Maintenance of Peace and Security", in Bothe, M., Ronzitti, N., Rosas.A. (Eds), *The OECD in the Maintenance of Peace and Security. Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes*, 1997, p. 191 et seq. ; Schreuer, C. "Regionalism v. Universalism", *E.J.I.L.* 6 (1995), p. 477 et seq.

⁸³ International Law Commission, Report on Responsibility of States for Internationally Wrongful Acts (2001), see Chapter II. Countermeasures, article 50.

258 Institut de droit international - Session de Naples (2009)

The Secretary-General's optimism expressed in 1992 in its *Agenda for Peace*⁸⁴ Report about regional organization's role in maintaining peace and security as been later on minimized by lack of general credibility on the impartial and neutral accomplishment of their mandates. The Secretary-General in its 1995 *Supplement to an Agenda for Peace*⁸⁵ assumed a more conservative approach in foreseen future peacekeeping operations than on its original 1992 Report.

2. Implied powers to use force by regional arrangements and ex post facto. Security Council authorizations

In order to detect main controversial issues, it would be necessary to deal with a few emblematic examples of recent Security Council actions and reactions to the use of force by regional arrangements.

a. The case of Liberia

During the Liberian crisis, the Economic Community of West African States (ECOWAS) established in 1990 a peacekeeping force in Liberia (ECOMOG) empowered to use force against one of the factions on the internal conflict without a previous Security Council authorization.

The Security Council by Resolution 788 (1992)⁸⁶ endorsed all actions taken by ECOWAS without reference to the lack of an express authorization for the use of force and manifesting gratitude for ECOWAS actions in Liberia. By Resolution 866 (1993)⁸⁷ the Security Council established a United Nations Observer Mission in Liberia (UNOMIL) as a peacekeeping operation with the aim to coordinate with ECOMOG, but without participation in enforcement operations in the discharge of ECOMOG's separate responsibilities.

The Security Council assumed ECOMOG's legality as a peacekeeping operation established by a regional organization. ECOWAS did not request Security Council authorization for ECOMOG actions because it did not considered it was entitled to enforcement action. In spite of that, it seems that in practice, peace enforcement was not incompatible with peacekeeping. ECOWAS activities in Liberia were also justified as the result of an intervention by invitation.

It could be assumed that the Security Council was well aware that ECOWAS, as a regional arrangement, was performing enforcement

⁸⁴ A/47/277 - S/24111 17 June 1992

⁸⁵ A/50/60 - S/1995/1 3 January 1995

⁸⁶ S/RES/788 (1992), 19 November 1992.

⁸⁷ S/RES/866 (1993), 22 September 1993.

actions without previous Security Council authorization. The same situation was reproduced in 2006.

b. The case of Sierra Leone

In response to the 1997 crisis in Sierra Leone, ECOWAS empowered ECOMOG with peacekeeping functions under initial Security Council presumed acquiescence. The regional peacekeeping operation was acting with the consent of the democratically elected President Kabba.

Resolution 1132 (1997)⁸⁸ imposed unanimously sanctions on Sierra Leone and expressly legitimised previous enforcement actions taken by ECOWAS in Sierra Leone. Resolution 1132 (1997) invoked Chapter VII in order to empower ECOWAS as a regional organization to implement embargos.⁸⁹

By Resolution 1181 (1998)⁹⁰ the Security Council established UNOMSIL to supplement ECOMOG's mandate for Sierra Leone. It also commended the positive role of ECOWAS and ECOMOG in their efforts, at the request of the government of Sierra Leone, to restore peace, security and stability in the country. Later on Security Council, acting under Chapter VII, established UNAMSIL to replace UNOMSIL. UNAMSIL⁹¹ was authorized to use force to secure freedom of movement of its personnel and to provide protection to civilians under imminent threat of physical violence.

ECOWAS assumed that the use of force in Sierra Leone derived from its right of self-defence, from Security Council authorizations under Resolution 1132 (1997) and from rights derived from agreements among States concerned.

It is possible to argue that Resolution 1132 (1997) constitutes an *ex post facto* Security Council authorization in favour of a regional organization that has already used force without a previous authorization by the Security Council. On the other hand, it could be maintained that Resolution 1132 (1997) regularised actions taken by the regional

⁸⁸ S/RES/1132 (1997), 8 October 1997.

⁸⁹ S/RES/1132 (1997), Para. 8: The Security Council "*acting also under Chapter VII of the Charter of the United Nations, authorizes ECOWAS, cooperating with the democratically elected Government of Sierra Leone, to ensure strict implementation of petroleum, petroleum products and arms embargo*".

⁹⁰ S/RES/1181 (1998), 13 July 1998.

⁹¹ UNAMSIL was established by S/RES/1270 (1999). Acting under Chapter VII the Security Council "*...Decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG...*"

260 Institut de droit international - Session de Naples (2009)

organization which are considered to be satisfactory for the Security Council while the operation was in course.⁹²

c. The case of the Ex Yugoslavia

Concerning use of force by regional arrangements in the Ex Yugoslavia it is possible to distinguish actions taken for the enforcement of No-fly Zones in Bosnia ; enforcement of Safe Areas in Bosnia ; enforcement of the Dayton Peace Agreement ; and enforcement actions taken during the Kosovo crisis.

1) Enforcement of “*Non-Fly Zones*” in Bosnia

In 1992 by Resolution 770 (1992)⁹³, the Security Council called upon States or regional arrangements to cooperate with the UN to take all measures necessary to secure humanitarian assistance to Sarajevo and other sites in Bosnia. The Security Council established by Resolutions 781 (1992)⁹⁴ and 786 (1992)⁹⁵ “*No-fly Zones*” in the territory of Bosnia. In 1993 by Resolution 816 (1993)⁹⁶ the Security Council authorized Member States acting nationally or through regional arrangements “*to take all necessary measures in the airspace of the Republic of Bosnia and Herzegovina*” under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR which was created as a peacekeeping operation by Resolution 743 (1992)⁹⁷

In conformity with Resolution 816 (1993), UN Member States acting through NATO implemented the “*No Fly Zones*” in coordination with the General-Secretary. Member States were obliged to report any action taken to the Secretary-General and the Secretary-General has to report periodically to the Security Council.

2) Enforcement of “*Safe Areas*” in Bosnia

By Resolution 824 (1993)⁹⁸, the Security Council established *Safe Areas* in Bosnia and by Resolution 836 (1993)⁹⁹ authorized Member States to carry out air strikes in the Former Yugoslavia to protect declared UN “*safe areas*”. Security Council decided, acting under Chapter VII that “*... Member States, acting nationally or through regional arrangements,*

⁹² Sicilianos, L. *L'autorisation par le Conseil de Sécurité de Recourir à la Force: Un Tentative d'évaluation*, Revue Générale de Droit International Public, 2002-1, p. 39 et seq.

⁹³ S/RES/770 (1992), 13 August 1992.

⁹⁴ S/RES/781 (1992), 9 October 1992.

⁹⁵ S/RES/786 (1992), 10 November 1992.

⁹⁶ S/RES/816 (1993), 31 March 1993.

⁹⁷ S/RES/743 (1992), 21 February 1992.

⁹⁸ S/RES/824 (1993), 6 May 1993.

⁹⁹ S/RES/836 (1993), 4 June 1993.

may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate..."

The implementation of Resolution 836 (1993) by NATO generated some problems in reference to certain actions taken by it, such as an ultimatum in Sarajevo. The ultimatum implied the delegation of a power concerning the generation of an obligation under article 25 of the UN Charter and in consequence, all UN Member States may be bound to comply with such ultimatum. It was argued that the imposition of an ultimatum needed a further authorization by the Security Council. But NATO's ultimatum was fully supported by the Secretary-General and generally considered as authorized under Resolution 836 (1993).

Next problem was concerning *Operation Deliberate Force* by which NATO military aircrafts had commenced attacks on Bosnian-Serb military targets in Bosnia. Russia complained, but once again it was argued that the use of force was authorized by Resolution 836 (1993). That argument was backed up by the General-Secretary. The participation of the *Rapid Reaction Force* (RRF) as part of UNPROFOR was considered as an enforcement action derived from special Security Council authorizations in support of a peacekeeping operation. In practice, the overlap of enforcement actions to be performed by peacekeeping forces and by coalition of the willing, have provoked several coordination and safety operational difficulties.

3) Enforcement of the Dayton Peace Agreement for Bosnia
(December 14, 1995)

Article 1 (1) (a) of Annex 1-A of the Agreement on Military Aspects of the Peace Settlement (the Dayton Agreement) invited the Security Council to adopt a resolution by which it would authorize Member States or regional organizations and arrangements to establish a multinational military force (IFOR). The Parties understood and agreed that an implementation force may be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to Bosnia and Herzegovina to help ensure compliance with the provisions of the Agreement "... *The Parties understand and agree that IFOR will begin the implementation of the military aspects of this Annex upon the transfer of authority from UNPROFOR Commander to IFOR Commander...*"

The Parties agreed that INFOR will operate under the control of the North Atlantic Council through NATO chain of command. Non NATO members will be also subject to NATO's chain of command.

262 Institut de droit international - Session de Naples (2009)

The Security Council implemented the Dayton Agreement invitation through the adoption of Resolution 1031 (1995)¹⁰⁰ and acting under Chapter VII, decided to authorize Member States acting through or in cooperation with the organization referred in Annex 1-A of the Agreement to establish a multinational force (IFOR) under unified command and control to fulfil objectives specified in Annexes 1 and 2 of the Agreement. Security Council took note that the Parties to the Dayton Agreement have consented to the establishment and objectives of IFOR.

Security Council assumed its control over the Dayton Agreement enforcement through periodical reports submitted by NATO. Later on the *United Nations Stabilization Force* (SFOR) replaced IFOR.

The NATO use of force in Bosnia derived from a Security Council authorization prescribed by Resolution 1031 (1995). Without Security Council participation, it could be assumed that NATO's use of force could not be legally justified. Authorization of the use of force to Member States acting through a regional organization was foreseen to guarantee the Agreement's compliance by all Parties.

4) The case of Kosovo

Later on, NATO's intervention in Kosovo was also intended to be justified in previous Security Council resolutions dealing with the Kosovo crisis.¹⁰¹ None of these Security Council resolutions expressly authorized the use of force in Kosovo. Those in favour of NATO's intervention justified military actions in Kosovo on its implied powers under the UN Charter.

That assumption has been challenged on the fact of the strong opposition of China and Russia in the debates previous to the adoption of each resolution. On that line of reasoning, Security Council resolutions, previous to NATO military intervention, reflected its clear intention to retain its own powers and functions over the Kosovo crisis announcing the possibility of taken further actions, if necessary. Security Council

¹⁰⁰ S/RES/1031 (1995), 15 December 1995.

¹⁰¹ S/RES/1160 (1998), 31 March 1998 ; S/RES/1199 (1998), 23 September 1998 ; S/RES/1203 (1998), 24 October 1998. Resolution 1160 (1998) imposed an arms' embargo on Yugoslavia. It was adopted with the abstention of China and there is no express mention to the existence of a threat to international peace and security. Resolution 1199 (1998) determined that the situation in Kosovo constituted a threat to international peace and security and urged the authorities of Yugoslavia and to the Kosovo-Albanian leaders to reach a peaceful solution and not to repress the civil population and to allow humanitarian assistance (China abstained). Resolution 1203 (1998) (China and Russia abstained) called for the full implementation of agreements among Yugoslavia, NATO and OSCE related to compliance by Yugoslavia of Resolution 1199 (1998).

resolutions concerning Kosovo also affirmed due respect for the territorial integrity and sovereignty of Yugoslavia.

After the 1999 NATO military operations in Kosovo, the Security Council approved by unanimity Resolution 1244 (1999)¹⁰² in which, acting under Chapter VII, authorized Member States and relevant international organizations to establish an international security presence in Kosovo (KFOR) with all necessary means to fulfil its responsibilities under the resolution. A security presence in Kosovo included a safe environment for all people in Kosovo. Russia and China did not consider the wording of Resolution 1244 (1999) as an expressed or implied authorization for the use of force. The Military Technical Agreement between KFOR and the Yugoslavia authorities recognized KFOR authority to perform all necessary action to accomplish its mission. The Resolution also established a complex peacekeeping force (UNMIK) to administer the territory.

It has been argued that Resolution 1244 (1999) constituted a sort of subsequent approval of NATO's use of force within the territory of Yugoslavia. Considerations on a subsequent approval have been based on an implied *ex post facto* authorization.¹⁰³

It should be noted that during discussions within the Security Council previous to the adoption of Resolution 1244 (1999), Russia and China considered NATO's intervention in Kosovo as a flagrant violation of international law. In spite of their clear condemnation, neither Russia¹⁰⁴ nor China¹⁰⁵, vetoed the resolution.

The fact that on 26 March 1999 a resolution proposal to condemn NATO's intervention in Kosovo was not adopted by the Security Council, may be interpreted as an imply approval for the use of force by a regional arrangement without Security Council previous authorization.¹⁰⁶

On the other side, considering the positions assumed by China and Russia over the Kosovo crises and taking into account that both have a veto power, it is feasible to argue that a Security Council authorization under article 53.1 have no chances to be adopted. The lack of a Security Council resolution condemning NATO military intervention in Kosovo

¹⁰² S/RES/1244 (1999), 10 June 1999.

¹⁰³ Condorelli L., "La risoluzione 1244 (1999) del Consiglio di Sicurezza e l'intervento NATO contro la Repubblica Federale di Jugoslavia", in Ronzitti, N. (ed), *NATO, conflitto in Kosovo e Costituzione italiana*, 2000, p. 31 et seq.

¹⁰⁴ UN Doc. S/PV.4011.7.

¹⁰⁵ The express consent by Yugoslavia to a peace plan for Kosovo motivated China's abstention. UN Doc. S/PV.4011, 8.

¹⁰⁶ The proposal was rejected by twelve votes to three (in favour, Russia, China, and Namibia).

264 Institut de droit international - Session de Naples (2009)

might be neutralized by the lack of express Security Council authorization of such intervention. Even though, an *ex post facto* recognition of the effects of NATO use of force in Kosovo, has to be interpreted as a political compromise. An implied Security Council recognition of NATO's intervention in Kosovo did not constitute by itself a solid precedent for future military interventions without Security Council authorization. The primary role concerning the use of force seems to remain within the domains of the Security Council.

C. Authorizations of the use of force to Peacekeeping Operations and Multinational Forces : differences and interrelated developments¹⁰⁷

Peacekeeping operations were the consequence of Security Council's necessity to perform at least some of its powers concerning international peace and security. They were not part of the UN original plan and in practice, peacekeeping operations were foreseen as an alternative to the lack of implementation of article 43. They were considered as a Security Council development in performing its functions and powers under UN Chapters VI and VII.

On that same line of thought, the ICJ in its Advisory Opinion on *Certain Expenses* justified the establishment of peacekeeping operations in Middle East and Congo expressing that "*It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under art. 43 have not been concluded*".¹⁰⁸

Traditional peacekeeping operations were not entitled to use force except in self-defence.¹⁰⁹ They were perceived as impartial and neutral forces.

¹⁰⁷ Malone, D.M. (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Reinner, 2004 ; Sarooshi, D. *The United Nations and the Development of Collective Security*, Oxford Univ. Press, 1999 ; Grey, C., *International Law and the Use of Force*, Oxford University Press, 2000 ; Thomé, N., *Les Pouvoirs du Conseil de sécurité au regard de la pratique récente du Chapitre VII de la Charte des Nations Unies*, Presses Universitaires d'Aix-Marseille, 2005 ; Boutros-Ghali, B., *An Agenda for Peace*, 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, 1992 ; Boutros-Ghali, B., *Supplement to an Agenda for Peace*, Position Paper of the Secretary General on the Occasion of the Didtieth Anniversary of the United Nations, UN Doc A/50/60-S/1995/1 (1995) ; Report of the Panel on United Nations Peace Operations (The Brahimi Report), UN Doc. a/55/305 – S/2000/809 (2000).

¹⁰⁸ Advisory Opinion on *Certain Expenses*, *ICJ Reports 1962*, p. 151, at p. 167.

¹⁰⁹ Many resolutions establishing peacekeeping operations did not expressly mention the possibility to use force in self defence. In some resolutions there is an express authorization [S/RES/776 (1992), 14 September 1992, on UNPROFOR] ; in others self

Their mandates were clearly defined and restricted to the maintenance of peace.¹¹⁰ First operations were created as observation forces of a pre determined *status quo* (to secure and supervise a cease fire, to maintain peaceful environment in areas subject to an armed conflict, etc). They could not impose peace or re-establish peace by the use of military force. In that sense, they differ from multinational coalitions that are expressly authorized to use force, including offensive force to fulfil their objectives.

The euphoria after Resolution 678 (1990) on Iraq, motivated further Security Council authorizations for the use force to multinational forces or coalitions of States in situations not directly related to responses to traditional breaches of peace or acts of aggression, but to domestic situations with international effects (the so called mixed conflicts) considered as a threat to the peace. Humanitarian emergencies, civil war crisis, massive human rights violations, violent challenges to democratically elected governments, protection of a stable political environment, are just a few of new causes to be taken into account in determining the existence of a threat to the peace. Authorizations for the use force to multinational coalitions were conditioned to obtain the consent of the host State in which military forces will be deployed.

Multinational forces authorizations imply an invitation to all Member States willing and able to participate in executing their task as defined by

defence has been recognized as a right [S/RES/918 (1994), 17 May 1994, on UNAMIR]. There is a general consensus that lack of express reference to self defence does not alter the imply nature of self defence as a recognized peacekeeping operation's right.

¹¹⁰ ONUC was created by the Secretary General and authorized by the Security Council in 1960 to help the Congo government to settle a peaceful environment after independence, including technical and military assistance. Resolution 161 (1961) [S/RES/161 (1961), 21 February 1961], without referring to Chapter VII, expressed the Security Council concern that danger of a civil war was a threat to international peace and security. The Resolution urged the UN to "*take immediately all appropriate measures to prevent the occurrence of civil war in the Congo including arrangements for cease-fire, the halting of all military operations, the prevention of clashes, and the use of force, if necessary as a last resort*". Resolution 169 (1961) [S/RES/169 (1961), 24 November 1969] authorized ONUC to safeguard the territorial integrity of Congo from secession attempts of Katanga. See, Virally, *Les Nations Unies et L'affaire du Congo*, 1960, *A.F.D.I.*, p. 557.

UNTAG was established by Resolution 435 (1978) [S/RES/435 (1978), 29 September 1978] with mandate to create conditions for free and fair elections in Namibia plus cease fire and boundary military monitory functions which implied an authorization for the use of force. Same structure of complex peacekeeping operations was established for Angola, Mozambique, and Cambodia (UNTAC) Central American States (ONUCA) El Salvador (ONUSAL): The General Secretary in its 1992 *Agenda for Peace* considered all this operations as peacekeeping as well as peace building. See *Agenda for Peace*, 31 *I.L.M.* (1992).

266 Institut de droit international - Session de Naples (2009)

the Security Council's special mandate. In every multinational force there are one or two States ready to take the lead in commanding operations and in inviting other States to take an active part.¹¹¹

In practice, multinational forces do not have a universal composition. Only few Member States with a particular interest will take part in a multinational force. There is no real universal involvement on UN collective enforcement actions. Although there is an open invitation to every Member State to take part on them, responses continued to be limited. Economic as well as political and even military factors are a deterrent for large State participation in multinational coalitions. Multinational coalitions are financed by participating States. On the other hand, lack of State's will in getting involved in certain complex situations not directly affecting their own interests, might end up in Security Council authorizations with no chance to be established. Once Security Council has authorized a multinational coalition to use force, its effective control over enforcement operations is generally reduced in practice to a request for information through more or less periodical reports.

The failure of Somalia UN mission has provoked certain precaution in granting further indiscriminate enforcement powers to multinational forces. Meanwhile, peacekeeping operations started to be empowered with mandates that imply enforcement actions for specific tasks under Chapter VII.

Traditional peacekeeping operations also differ from multinational forces in reference to Member States commitments to provide personnel and equipment to the UN. The UN will participate on the operational command of the forces placed under a peacekeeping operation and would be responsible for actions or omissions performed by them. Peacekeeping operations were traditionally financed through the UN budget. Although, nowadays that situation has been reversed. Some times Member States participating in peacekeeping operations with a complex mandate including the use of force will be contributing directly to finance part of the operation. That fact presupposes Member States' direct interest when they decide to participate in a peacekeeping operation.¹¹² On the other hand, each Member State part of a multinational force is responsible to finance its own participation on the coalition. Member States taking part

¹¹¹ Australia in East Timor ; France and USA in Haiti ; UK in Afghanistan.

¹¹² Lagrange, Ph., Sécurité collective et exercice par le Conseil de sécurité du system d'autorisation de la coercition, in *Le métamorphoses de la sécurité collective – Droit, pratique et enjeux stratégiques*, S.F.D.I., Journée franco-tunisienne, Paris, Pédone, 2005, p. 85.

on a multinational coalition are the ones to decide who will be entitled to command it.

Peacekeeping forces are perceived as international forces under the UN. They generally have a large geographical representation. Their integration depends on Member States commitments to contribute with their own forces. They have been traditionally deployed in the territory of a Member State with its consent. Some times, in cases of internal warfare, consent was required from all military factions taking part in hostilities.¹¹³

Initially, Security Council permanent members did not take an active part on peacekeeping operations. Traditional peacekeeping operations would exclude forces belonging to permanent Security Council members or forces controlled by States with geographical or historical ties with the concerned host State. The main objective was to secure their neutrality and impartiality. Recent cases have reversed previous tendency. The USA played a fundamental role in Haiti, France in Rwanda and Central African Republic as well as Italy in Albania. In all these cases duration of operations were restricted on time and the consensus of host States was implied.

After 1990, UN peacekeeping operations have increased in number and its objectives have been diversified. Internal conflicts, civil strives, the assurance of a safe environment for civilian population, restoration of democratic institutions, humanitarian assistance, consolidation of decolonization processes¹¹⁴ and nation building¹¹⁵, have been part of complex mandates purposes for a new generation of peacekeeping operations.¹¹⁶

¹¹³ See the situation in Angola where the consent of the Government of Angola and the rebel group (UNITA) was requested in order to deploy the UN peacekeeping forces.

¹¹⁴ S/RES/691 (1991) 29 April 1991 concerning Western Sahara.

¹¹⁵ S/RES/1272 (1999) 25 October 1999 concerning East Timor.

¹¹⁶ As an example of that trend UNPROFOR was established for Yugoslavia in 1991 as a traditional peacekeeping operation that evolved into a complex mandate scheme which included Ch. VII powers to use force. Resolution 776 (1992) implied an authorization to UNPROFOR to use force to ensure the delivery of humanitarian assistance. Resolution 807 (1993) [S/RES/807 (1993), 19 February 1993] expressly referred to Chapter VII. Resolution 836 (1993) [S/RES/836 (1993), 4 June 1993] extended UNPROFOR mandate to secure safe heavens. The Security Council, acting under Chapter VII established in Resolution 981 (1995) [S/RES/981 (1995), 31 March 1995] UNCRO for Croatia. UNCRO was then replaced by UNTAES. Security Council attitudes provoked different permanent member's reactions. China opposed to authorize the use of force by peacekeeping operations acting within Yugoslavia and abstained to vote Resolutions mentioning Chapter VII. France claimed that the use of force was limited to secure

268 Institut de droit international - Session de Naples (2009)

Nowadays, there is a proliferation of peacekeeping operations with mixed mandates to maintain peace as well as to impose peace through the use of force : from cease-fire observation tasks to peace making, peace building and nation building objectives.

peacekeeping specific mandates to protect civilians and safe haven zones or to secure humanitarian assistance, excluding direct involvement on the armed conflict.

In Somalia Security Council established a peacekeeping operation with a mandate to secure humanitarian assistance to the civil population (UNOSOM I). The Security Council authorized member states to deploy forces in a multinational operation under the USA command [S/RES/794 (1992), UNITAF, 3 December 1992] to use all necessary means to establish a secure environment for humanitarian assistance. That was the first Security Council authorization under Chapter VII to use force to secure humanitarian relief in a civil war. Later on, Security Council Resolution 814 (1993) [S/RES/814 (1993), 26 March 1993], another UN operation was established (UNOSOM II) that replaced UNOSOM I and UNITAF.

Resolution 814 (1993) established a combined mandate of peacekeeping and peace making acting under Chapter VII. Resolution 837 (1993) [S/RES/837 (1993), 6 June 1993] extended UNOSOM II mandate and its implementation derived in hostilities with one of the internal fighting factions. After USA withdrawal of forces from UNOSOM II, Security Council redefined its mandate in accordance to traditional peacekeeping operation [S/RES/897 (1994), 4 February 1994]. The operation was withdrawn in 1995 by the Security Council without accomplishing its mandate. But in Kosovo UNMIK was created under Chapter VII. Resolution 1244 (1999) [S/RES/1244 (1999), 10 June 1999] authorized member states to use force as well as it authorized Secretary General to establish an international civilian administration (UNMIK). In East Timor same scheme was followed by the Security Council Resolution 1264 (1999) [S/RES/1264 (1999), 15 September 1999] that established UNTAET acting under Chapter VII. Resolution 1264 (1999) authorized a multinational force to restore peace and security (with powers to take all necessary measures) and then it was prescribed that it will be replaced by a peacekeeping operation. Resolution 1272 (1999) [S/RES/1272 (1999), 25 October 1999] expressed that the Security Council acted under Chapter VII in establishing UNTAET with responsibilities to administrate East Timor with legislative and executive powers. The resolution did not mention the need of Indonesia's consent for the creation of UNTAET as required in Resolution 1264 (1999). UNTAET was designed to take over the enforcement powers of the multinational forces. In February 2000 the military command of the multinational force over the territory of East Timor was finally transferred to UNTAET.

In Sierra Leone Security Council Resolution 1270 (1999) [S/RES/1270 (1999), 22 October 1999] empowered UNAMSIL to take necessary action to protect its personnel as well as, within its capabilities and areas of deployment, to protect civilians under imminent threat of physical violence. Security Council Resolution 1270 (1999) expressly referred to Chapter VII as well as Resolution 1289 (2000) [S/RES/1289 (2000), 7 February 2000]. But the reference to Chapter VII did not authorize *per se* an unrestricted use of force because it has been expressed that it was not an enforcement operation but a peacekeeping one.

Democratic Republic of Congo, Resolution 1291 (2000) [S/RES/1291 (2000), 24 February 2000] extending mandate of MONUC, mentioning Ch. VII for the security of personnel and civilians.

There is also a superposition of competences between multinational coalitions and peacekeeping operation interacting on the same territory with different mandates.¹¹⁷ New developments in Security Council renewal of peacekeeping operations would consider the termination of multinational forces tasks reverting their mandates to peacekeeping operations. The evolution of peacekeeping operations towards broader commitments and objectives has produced some difficulty in differentiating their mandates from the multinational coalitions' mandates.

Security Council experiences in Somalia and Yugoslavia demonstrated that it was a difficult task to accomplish specific mandates through traditional as well as through new peacekeeping operations acting under Chapter VII. Even more, these experiences also evidenced that the replacement or reinforcement of peacekeeping operations for coalitions of the willing and able may not be always considered as a viable alternative to deal with complex internal situations.

It has been argued that "*Peace-keeping and enforcement forces may not be compatible...it is not possible gradually to increase the functions of peacekeeping forces to include elements of enforcement without endangering the impartiality of the force*"¹¹⁸ Recent practices Sudan tend to demonstrate the opposite.¹¹⁹

¹¹⁷ See the situation of Democratic Republic of Congo in 2004.

¹¹⁸ Gray, C., *International Law and the Use of Force*, Oxford Univ. Press, 2000, p. 174 et seq.

¹¹⁹ The African Union Mission in the Sudan (AMIS) was organized by the African Union to monitor compliance with the 2004 Humanitarian Ceasefire Agreement concerning the Sudan/Darfur crisis. AMIS mandate included the protection of civilians under imminent threat and the control of a secure environment for the delivery of humanitarian relief and for the return of *Internally Displaced Persons* and refugees to their homes. AMIS was not expressly authorized by the Security Council for the use of force to accomplish its mandate. Under the Darfur Peace Agreement, AMIS mandate was extended to monitor and verify activities of all parties ; to maintain areas where a secure environment has been established ; to protect observer patrols ; provide visible Military presence by patrolling and by the establishment of temporary outpost in order to deter uncontrolled armed groups from committing hostile acts against the population ; provide road security patrols along major lines of communication ; carry out preventive deployments as necessary to reduce the incidence of inter party and inter tribal attacks. By Resolution 1679 (2006) the Security Council recognized the efforts of the African Union for the successful deployment AMIS. The Security Council, by Resolution 1590 (2005), decided to establish a United Nations Mission in the Sudan (UNMIS) to support implementation of the Comprehensive Peace Agreement signed by the Government of Sudan and the Sudan People's Liberation Movement/Army on 9 January 2005. Its mandate included an authorization to perform humanitarian assistance relief and the protection and promotion of human rights. Acting under Chapter VII of the UN Charter, the Security Council also decided that UNMIS was authorized to take all necessary action as it deems necessary within its capabilities to create a secure environment, without prejudice to the Sudan Government's responsibilities to protect

270 Institut de droit international - Session de Naples (2009)

Cease fire was the pre condition for deployment of peacekeeping operations. Cease fire in hostile situations involving several parties has contributed to reinforce peacekeeping operations with the necessary authorization to use force. Deployment of multinational forces could easily be perceived as a military objective for more than one faction involved in an internal armed conflict. Peacekeeping forces have a better chance to be considered as neutral and impartial than multinational forces.

That could be one of the reasons why the Security Council has developed a tendency to reallocate authorizations to use force already bestowed upon multinational coalitions to peacekeeping operations. In

civilians under imminent threat of physical violence. By resolution 1706 (2006) the Security Council, acting under Chapter VII, extended UNMIS mandate authorizing the use of all necessary means, in the areas of deployment of its forces and as it deems within its capabilities, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups. In 2007 a joint African Union/United Nations Hybrid operation in Darfur (UNAMID) was established by Security Council Resolution 1769 (2007). The Security Council, acting under Chapter VII, authorized UNAMID to take necessary action to support the implementation of the Darfur Peace Agreement, as well as to protect its personnel and civilians, without "*prejudice to the responsibility of the Government of Sudan*". Following the deployment of UNAMID, UNMIS returned to its original mandate under Resolution 1590. By Resolution 1828 (2008), the Security Council decided to extend the mandate of UNAMID till 31 July 2009. On 25 September 2007, the Security Council, by Resolution 1778, approved the establishment in Chad and the Central African Republic, in concert with the European Union, of a multidimensional presence to help to create security conditions conducive to a voluntary, secure and sustainable return of refugees and displaced persons. The Security Council decided that a multidimensional presence shall include a United Nations Mission in the Central African Republic and Chad (MINURCAT) with a mandate to select, train, advise and facilitate support to elements of the *Police Tchadienne pour la Protection Humanitaire*; to liaise with the national army, the gendarmerie and police forces, the Nomad National Guard, the judicial authorities and prison officials in Chad and the Central African Republic to contribute to the creation of a more secure environment and to contribute to the monitoring and to the promotion and protection of human rights. Acting under Chapter VII, the Security Council also authorized the European Union to take all necessary measures, within its capabilities and its area of operation in Eastern Chad and the north-eastern Central African Republic, in accordance with the arrangement to be concluded between the European Union and the United Nations, in liaison with the Governments of Chad and the Central African Republic: to contribute to protecting civilians in danger, particularly refugees and displaced persons; to facilitate the delivery of humanitarian aid and the free movement of humanitarian personnel by helping to improve security in the area of operations, to facilitate the delivery of humanitarian aid. The European Union Operation was also authorized to take all appropriate measures to achieve an orderly disengagement through the fulfillment of its mandate. By Resolution 1861 (2009) the Security Council authorized the deployment of a military component of MINURCAT to follow up EUFOR in both Chad and the Central African Republic at the end of its mandate, and decided that the transfer of authority between EUFOR and the military component of MINURCAT will take place on 15 March 2009.

consequence, the duration of multinational coalitions has been drastically reduced by the Security Council and in practically all cases multinational forces mandates include specific commitments to reverse them to peacekeeping operations.

Still a main problem remains for the Security Council when establishing peacekeeping or enforcement operations in situations where there is no cease-fire and warfare continues with certain intensity. Security Council experiences call for caution when establishing peacekeeping operations that most probably would fail due to problems in implementing their mandate in a territory where hostilities are taking place. Other reasons to be taken into consideration are the reluctance of troop contributing States to abide to the rules of engagement and even lack of support from all parties involved in the internal conflict.¹²⁰ There is also a growing concern with lack of immediate Security Council response to situations affecting the life and safety of civilian population.

D. Some observations on main trends

The Security Council has managed to deal with different alternatives as to exercise its powers and functions under Chapter VII. The alternatives included authorizations to use force to Member States acting unilaterally or as part of regional arrangements ; authorizations for the establishment of multinational forces ; and authorizations for the use of force by peacekeeping operations.

Once the Security Council has assessed under article 39 the existence of a threat to the peace, a breach of the peace or an act of aggression it might then determine what kind of action would be recommended or decided in order to restore or maintain international peace and security. The initiative in determining what measures shall be taken rests as a discretionary function of the Security Council. But the Security Council, not having its own forces or Member State forces at its disposal, strongly depends upon the interests and will of Member States that might take part in implementing any enforcement action.

The willing and able Member States acting under the blessing of the Security Council unilaterally or through a regional arrangements or

¹²⁰ In Rwanda UNAMIR was established in 1993 as a traditional peacekeeping force at the request of both parties to the internal conflict (government and rebel forces). There was certain State reluctance to commit their forces in peacekeeping in Africa. There was lack of credibility on the UN operations ability in stopping genocide and cleansing policies. In 1995 the new government of Rwanda decided that UNAMIR was not necessary under its national security policy and protection of civilians and humanitarian relief was part of Rwanda authorities' functions.

272 Institut de droit international - Session de Naples (2009)

multinational forces will be the ones assuming their own responsibility in the implementation of recommendations or decisions taken by the Security Council under Chapter VII. Interested Member States will be offering cooperation for the regional or multinational force composition and they will also decide on the operational structure of their own military command. In that sense, the UN's collective security purposes bestowed by the UN Charter upon the Security Council will be finally executed in a decentralized form through the direct intervention of interested Member States.

Security Council authorizations are not *per se* binding on Member States. Member States have always a chance to cooperate or not with resolutions, calling for the use of force. If Security Council authorizations to use force were meant to be compulsory, non compliance by Member States would result in their international responsibility under article 25 of the Charter.

Nowadays, Chapter VII authorizations to use force are conditioned to specific requirements imposed and controlled by the Security Council. Authorizations are planned to have a pre-established duration, a specific mandate, and subject to submit reports to the Security Council or to the Secretary General.

The lack of time limits for authorizations would imply that the Security Council might need to decide on its termination through a resolution that could be barred by the veto of a permanent member particularly interested in continuing the use of force already authorized. On the other hand, if a resolution does have a time limit for the termination of an authorization, a new resolution would be needed in order to authorize the continuation of armed operations. Permanent Security Council members might oppose to its extension on time. Veto powers do control authorizations as well as renewals of previous authorizations.

Two types of limitations have been devised concerning Security Council control over the duration of authorized operations. One set of restrictions ties the duration of the operation to a date in which the effective fulfilment of the mandate should be obtained. In that case the duration of the operation will depend from a Security Council discretionary appreciation.¹²¹ The second set of restrictions concerns the determination of a fix date to the mandate irrespective of the fact that its objective has or has not been accomplished.¹²²

¹²¹ S/RES/940 (1994), concerning Haiti, Para. 8.

¹²² S/RES/929 (1994), Para. 4 ; S/RES/1031 (1995), Para. 13.

Concerning recent Security Council practices, most of multinational forces as well as peacekeeping operations¹²³, have been authorized to perform their mandates during a very short period of time. Security Council has since recently reserved the power to renew authorizations in order to retain an effective supervision. The real control is actually placed on decisions concerning mandate's renewals.

Authorizations have been perceived as providing political cover to certain enforcement actions.¹²⁴ There is a generalized suspicious that Member States willing to implement Security Council resolutions authorizing the use force would be motivated in accomplishing their own national goals.

It could be argued that Security Council authorizations to use force in favour of Member States through regional or multinational forces have not reached the legal status of a consolidated collective security system as foreseen by the UN Charter. The problem remains in identifying Security Council real chances to proceed under a different system. A further question refers to the existence of a general consensus concerning Security Council recent *ad-hoc* practice when acting under Chapter VII.

A collective Security system as the one developed by recent Security Council practice concerning authorizations, departs from the one described by the Charter's founders but not necessary opposed its main purposes and objectives.

There are all sorts of difficulties in defining on legal terms Security Council actions derived from discretionary political activities not subject to external control. Security Council internal controls are only based on majorities required to adopt a binding resolution as well as on threats of potential vetoes.

It remains as an unresolved question to determine if an authorization implies a delegation of responsibilities or not. To "authorize" is to allow implementation of decisions already taken by the Security Council. To "delegate" implies the possibility to display a discretionary power in the way decisions are going to be implemented. In that sense the answer will depend on the nature and intrinsic characteristics of Security Council authorizations.

The same dilemma applies to Security Council's authorizations given to regional arrangements. Delegation to regional arrangements would amount to place collective security on the hands of a restricted number of

¹²³ For exceptions see Resolution S/RES/1769 (2007) 31 July 2007 concerning the case of Sudan

¹²⁴ Freudenschub, H, "Between Unilateralism and Collective Security", *E.J.I.L.* (1994), p. 492 et seq.

274 Institut de droit international - Session de Naples (2009)

States. When permanent Security Council Members are part of a regional organization and are in favour of authorizations to use force, conflict of interest may arise. It is feasible to take for granted that a regional organization such as NATO would have the operational means as to implement an effective enforcement action. Resolution 1031 (1995) allowed non-Member States of NATO to participate under a coordination scheme with that regional agency. That formula intended no more than to reinforce the notion that the authorization was the result of a pluralist collective security decision.

It has been argued that practice has shown that an implicit authorization by the Security Council could be considered as valid as an expressed Security Council authorization for the use of force to a regional organization. Lack of Security Council reaction or condemnation to the use of force by regional organizations not previously authorized does not necessary amounts to an implicit authorization. There is a temptation to distinguish between a Security Council's implicit authorizations during the process of the actual use of force, and an implicit authorization once enforcement actions have come to an end. In the later situation, Security Council would not have a chance to control or supervise the use of force and so, it has been argued that there is no chance to infer an *ex post facto* authorization.¹²⁵

But it is evident that the Security Council has the power to perform its primary functions to maintain peace and security under Chapter VII at its own discretion with no possibility to be controlled by any other UN organ. In the exercise of its own discretionary powers under Chapter VII, the Security Council may consider to validate *ex post facto* actions implying the use of force by regional organizations not previously authorized. A veto could bar a Security Council decision to grant an authorization required by article 53.1 of the Charter. But a veto could also bar a Security Council decision to condemn a violation of article 53.1 based on lack of authorization. This is an awkward situation by which a proposal of a draft resolution authorizing the use of force under article 53.1 might not be adopted because of a veto, whereas a proposal resolution condemning a use of force not duly authorized might also be subject to a veto.

The direct consequence of a system that seems to preserve the consolidation of situations based on facts rather than on law, has provoked serious speculations on the future of collective security *vis a vis* a decentralized system. UN main concern with collective security seems

¹²⁵ Sicilianos, L., *Op. cit.*

more accurate to be tackled from a more universal perspective than the one implemented through authorizations to regional organizations.

The main challenge to be faced by the Security Council in order to implement successful peace operations based on authorizations refers to the establishment of a clear and accomplishable mandate, an effective chain of command to implement the orders of the force commander, adequate financing resources, an exit strategy and sufficient political will particularly by Permanent Members.¹²⁶ It is also relevant to have a wide international support for the operation plus a strong commitment of parties involved in cooperating to solve the conflict.

Recent Security Council practice shows that peacekeeping operations and multinational forces have complementary mandates. That tendency seems to assess a more effective Security Council control over the use of force for the maintenance of international peace and security. At the same time, it evidences a step further in consolidating a more realistic perception of Security Council's collective security powers *vis a vis* unilateral Member States actions pretending to be justified on implied powers, *ex post facto* validations or even in dubious derivations of the inherent right of self-defence.

Being the Security Council a political organ we might presume that it will continue to profit from its discretionary powers, not submitted to any external control. From a strict legal stand the reform of the UN Charter concerning the use of force seems to be a must.

E. Suggested issues to be discussed

Taking into account recent Security Council experiences in dealing with authorizations for the use of force, we may address the following issues in order to organize an outline of probable principles to be recommended,

- if there is any room for arguing in favour of the theory of implied powers of Member States or regional arrangements to use force without previous Security Council authorization ;
- if Security Council *ex post facto* validations of the use of force by Member States or regional arrangements may be considered as a recognition of an implied powers doctrine under the UN Charter ;
- if the effects of *ex post facto* recognitions imply the consolidation of unilateral and decentralized use of force by Member States under the doctrine of a "*fait accompli*" ;

¹²⁶ A/55/305 - S/2000/809 21 August 2000 "The Report of the Panel on UN Peace Operations"

276 Institut de droit international - Session de Naples (2009)

- if there is a need for a more detailed legal structure concerning Security Council authorizations for the use of force ;
- if Security Council authorizations for the use of force prejudices over issues concerning international responsibility claims.

We might also inquire where the borderline lies between Security Council authorizations for multinational forces and military actions argued to be justified under self-defence.

Another relevant issue that may be addressed refers to the rule of law regulating jurisdiction over detention of civilians, belligerents or insurgents as a consequence of enforcement actions taken by peacekeeping or multinational operations. Gaps on the applicable law and issues on convergence of human rights and humanitarian law, might inspired the drafting of general guidelines to be followed by enforcement operations authorized by the Security Council.

II. COMMENTS OF THE MEMBERS

Comments by Mr. Antonio Remiro Brotons (26.08.2009)

Dear *Confrère*,

[...] Fundamentally, I coincide with the majority of developments and affirmations in the report and my comments do not necessarily imply discrepancies, but rather they often contribute to and back up the *Rapporteur's* approach.

a) Overall, I am in agreement with the plan adopted, however, keeping in mind the main role of the Security Council and the basic consideration that is made on its practice, especially in the last twenty years, I would move points I.B and C to a new point III, centred on the eventual political (GA) and judicial (ICJ) control of the Council's resolutions.

As for point II, I would segregate section D (Some observations on main trends) and because of its undoubted importance, make a new point IV from it.

As regards the other three sections of point II that cover the Council's practice in relation to the authorisations of the use of force, I would firstly make reference to the peacekeeping operations, then to regional arrangements or agencies, and finally, to the authorisations given to Member States and the so-called "multinational forces", that is to say,

coalitions of Member States for a specific case. Thereafter, the connections between these distinct authorisations of use could be considered (the Report does this in point II.C). Likewise a separate treatment of the attitude of the Security Council should be considered in cases in which Member States and regional arrangements or agencies have resorted to force without the Council's authorisation.

Finally, I would make the heading "Suggested Issues to be Discussed" into point V.

b) Looking into the substance of the Report, the *Rapporteur* (p. 5) observes that: "The Security Council in the exercise of its powers under Article 39 is not under the obligation to determine the existence of a threat to the peace or a breach of peace or an act of aggression. It is a discretionary power that could or could not be performed". Then the Report goes on affirming that: "Article 39 is the necessary starting point of any recommendation or decision to be taken by the Security Council under Chapter VII".

I basically agree with these affirmations but I think an additional explanation is recommended to avoid consequences that would go further their literal meaning, consequences which are noted when the Report states (p.7) that this "exclusive" discretionary power is "not subject to external control", adding that "General Assembly functions concerning the maintenance of international peace and security are subordinated to the Security Council exercise of its own functions and powers".

The Security Council frequently cites Chapter VII of the Charter to lay the legal foundations for its resolutions without classifying the situation that it is intending to confront; when it does, it tends to resort to the most moderate generic type of the three described in Article 39, the "threat to the peace", only on rare occasions have "breaches of the peace" been referred to and "aggression", never. The reason for this behaviour derives from the fact that there is no a hierarchy of measures adapted to the gravity of the types mentioned in Article 39. Any of the measures contemplated in Chapter VII can be applied to any of the mentioned types. Acting discretionally, as a political organ, the Council seeks the necessary majority to adopt a resolution, avoiding describing situations when this operation could make the formation of organic will difficult.

The Security Council may be criticised doctrinally or politically because it does not wish to call aggression an "aggression", or on the other hand it

278 Institut de droit international - Session de Naples (2009)

sees “threats to the international peace” each time the permanent members of the Council agree to take action in situations that, objectively speaking, are outside Chapter VII of the Charter; but the non-existence of an external control of the Council's Resolutions on this point must be recognised, if as such we understand a control whose exercise produces some form of legal effects. It cannot be inferred, however, from what is stated, that in general terms: “General Assembly functions concerning the maintenance of international peace and security are *subordinated* (emphasis added) to the Security Council exercise of its functions and powers”.

The Charter offers the General Assembly some competences in relation to the maintenance of international peace, the exercise of which is not subordinated to the Council. It could be argued that one of them is to meet the Security Council's paralysis provoked by the use of veto by one of its permanent members, affirmed in the *Uniting for Peace* Resolution of 1950, but I do not believe that the consultative opinions of the International Court of Justice that are mentioned in the Report (pp. 9-10) are pertinent to decline the powers of the General Assembly in the terms envisaged in this resolution. The first of these opinions, on *Certain Expenses*, considers that: “only the Council possesses the power to *impose* (emphasis added) explicit obligations of compliance under Chapter VII...”. However, nobody has maintained that the power of the Assembly be anything other than a recommendation. As for the second opinion, on the *Construction of the Wall*, the Court expressly affirms that it is “of the view that the United Nations and *specially the General Assembly and the Security Council* (emphasis added) should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall...”

c) The Report states (p.10) that “the Security Council is not empowered to deal with international responsibility issues”. Perhaps the affirmation is too forceful if we keep in mind the Council's practice; however I personally agree with this statement. This is one of the points that could enrich our debate if we wish to specify the limits of competence of the Council, which has tremendous powers for the maintenance and re-establishment of peace but not for imposing obligations on States in fields outside this ambit. The primary objective of the Council within the framework of Chapter VII of the Charter is to maintain or re-establish

peace, not to do justice, and to solve once and for all a dispute or adopt *sanctions* against the offenders.

The fact that the types that trigger an action within the framework of Chapter VII are normally based on violations of international norms that may be very grave, gives rise to the international responsibility of the State in question, as well as – where appropriate – the criminal responsibility of its agents implicated in international crimes. This creates problems in the determination of the competencies of the organs and institutions concerned and in the relations which must be kept amongst them.

The action to maintain or to re-establish the peace is, of course, the realm of the Security Council and, eventually, of the General Assembly. But the competence of the Security Council to decide the consequences of the illicit action on the level of the international responsibility is, at least, doubtful and in any case, concurrent with that of other organs, in particular the judicial ones, once its jurisdiction have been established. As regards the judgement of State agents, this mission can never correspond to political organs, but only to judges and courts (possibly created by such organs). The question is in the determining if, when the judges intervene, be this at a level of international responsibility of the State or the individual criminal one of its agents, they are, and up to what point, conditioned by the Security Council qualifications.

Being a theme in debate, it would be unwise to uphold that the pronouncements of the Security Council are compulsory and binding for other organs, especially the judicial ones. There are measures, such as the requirement of cessation and non-reiteration of the illicit action, or even, the *restitutio in integrum*, that form part, simultaneously, of the peace and security hemisphere and of the hemisphere of the international responsibility; however, there are measures, such as the other forms of reparation (compensation, satisfaction) or the nullity and non-recognition of the advantages gained by the offender as a result of the illicit action, that are characteristic of the responsibility and into which the Security Council has had no qualms about entering when it was considered convenient. Beyond the maintenance or the re-establishment of peace, the Council has ascribed the commission of illicit acts, it has determined their legal consequences, it has established mechanisms to make these effective. It may even be said that on ruling on the effects of the illicit

280 Institut de droit international - Session de Naples (2009)

action in terms of responsibility, the Council has taken into account the types that it has kept “hidden” in its resolutions.

The suitability of the judicial and arbitral organs and, in particular, of the ICJ to rule on international responsibility derived from the use of force in interstate relations is undeniable, provided that they can count on grounds on which to base their jurisdiction in a given case. The ICJ has not accepted a *domaine réservé* of the Security Council ; on the contrary, it has considered possible to develop its role – to decide in a legal dispute – parallel to the political role of the Council in the maintenance of the peace. Moreover, the Court has considered that its intervention could have an added beneficial effect in dissolving threats to the peace or overcoming harmful consequences in its breach and, in that respect, it has even ordered as a provisional measure, by *ex parte* application, the suspension of hostilities and armed acts.

Practically the only limitation recognised by the Court in exercising its role has been circumscribed to the adoption of provisional measures requested by one party when the measures requested could enter into conflict with orders arising from Security Council resolutions. When this is the case, it may be conjectured that the Council, as was clearly obvious in the *Lockerbie case*, has assumed functions of a *judicial* nature incompatible with its condition as a political organ. Naturally it is outside the Court's reach to impede the Council's continuing to interpret its competences entirely freely and trampling on judicial territory.

d) The question of judicial control of the Security Council resolutions authorising the use of force has been revived in the last years because of doubts that some of such Resolutions have awakened about its conformity with the Charter. One has the impression that the Council, when its Permanent Members are in agreement, operates as an absolute power with a dangerous tendency towards arbitrariness and unequal treatment of identical or similar situations and, when they are not, what is absolute is the impunity of the Permanent Member who has the veto right and its clients.

Even though the Council is a political organ, it should not act arbitrarily. United Nations Members “agree to accept and carry out the decisions of the Security Council”, whenever these are taken “in accordance with the present Charter” (art. 25). This specification, together with the precaution that in the carrying out of its functions the Council “shall act in

accordance with the Purposes and Principles of the United Nations” (art. 24.2) limits the wide discretionary nature of the Council in exercising its powers, within and outside Chapter VII of the Charter (*ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971) and offers, eventually, a grip, volatile as it may be, to those who challenge it (be they Member States *obliged* to carry out the *binding* resolutions of the Council or else international judicial or arbitral organs called to decide their application within the framework of a dispute submitted to them). The political character of the organ, as the ICJ specified more than seventy years ago, does not mean Security Council may avoid the observance of the provisions that regulate its action, given that these constitute the limits of its power (*Conditions of Admission of a United Nations Member State – art. 4 of the Charter*, 1947).

Although the possibility of *ultra vires* actions is open, the Charter contains no provision establishing a control of conformity with it (and with the peremptory norms of the general international law) of the Security Council resolutions. Therefore, in the United Nations system there is no way to apply directly in terms of legality against the resolutions of the Council. The considerations in the Report to this effect (pp-10-11) are sustainable, but should be clarified.

Obviously, it would not be possible to bring an action before the Court requesting the nullity of a Security Council resolution in a contentious case, even if this were only because international organisations cannot be part of this type of procedures before the Court. Nevertheless, in an interstate dispute in which the Court has jurisdiction, it could be envisaged that one of the parties impugns, not the validity, but the application of a Council resolution over and above other international obligations of the parties involved, considering that said resolution is not in accordance with the Charter or is incompatible with an imperative norm of international law. This supposition is not so implausible. It has already happened.

The Report mentions the *Lockerbie case* although probably because of an editing error includes it in the section on the political control of the Council's resolutions authorising force (pp. 11-12). Be that as it may, I do not share the affirmation that: “It could be inferred *a contrario* of what the ICJ has decided in the *Lockerbie case* on preliminary objections that a Security Council resolution adopted before the filing of an application to

282 Institut de droit international - Session de Naples (2009)

the Court, could form a legal impediment to the admissibility of such application because it has binding effects and it is not a mere recommendation". The Court reserved to the merits phase the consideration of the defendant's preliminary exception according to it the binding resolutions of the Security Council deprived the application of its object. The latter waiver of the parties to go on the case impeded that the Court rule. It is possible to speculate on what it could have done, should it have passed judgement; but inferences *a contrario* should not be drawn. Moreover, this is a case that suggests that the problems of judicial control of the Council's resolutions bear no relation, normally, to the authorisations of the use of force as such, but rather to how the force is used, how the responsibility is attributed, the assumption of functions – such as the judicial ones – that clearly exceed the field of competence delimited by an object – the maintenance and re-establishment of the peace – cannot be the springboard from which to jump, with all the accoutrements of Chapter VII, to other objects, suited to organs of a different nature.

Nevertheless, although there is no way that allows a Member State to act directly on the *constitutionality* – conformity with the Charter – of the Council's resolutions to provoke a declaration of nullity, it does seem possible that a judicial organ may rule on its applicability to the extent of its relevance to a decision-making process. Not to mention the path open to the advisory jurisdiction of the Court, especially if the General Assembly raises a "legal question" with these arguments.

This is one of the points for which a legal clarification would be most beneficial, although some may suggest that to insist on it seems extraterrestrial. Nevertheless, the indisputable authority of the Council is not imposed as a matter of faith and in one way or another there are jurisdictions that are putting the Council resolutions under a certain scrutiny, albeit indirectly, sometimes assuming dualistic positions and censuring the Council in the effigy of the normative acts adopted when the institutions of other systems proceed to its execution (e.g. TJCE, *Kadi*, 2008).

e) I fundamentally share the presentation that is made in the Report on the Security Council's practice relating to the authorisations of the use of force by Member States and multinational forces (pp.14-27). Dealing with the subject of Iraq however, I would like to make some

considerations that, perhaps, may be useful for subsequent discussion, firstly, in relation to the Gulf War (pp.15-19) and afterwards, with what the Report denominates "The Aftermath of Iraq's Invasion" (pp. 19-24).

The main virtue of the resolutions adopted by the Security Council after the 2nd August 1991 as a reaction to the invasion and occupation of Kuwait by Iraq which was considered a *breach of the peace* was the *breath of resurrection* that was injected into the collective security system acting within the strict framework of international legality. But the continuity in the time of the application or the invocation of these resolutions sowed uncertainty as to their conformity with the premises of the collective security system.

Thus, it must be accepted that Resolution 678-1990 that authorised Member States to have recourse to all means, including the use of force, to re-establish Kuwaiti sovereignty and peace in the area, was adapted to the spirit of Chapter VII of the Charter up to a point, however not completely, insofar as the Council delegated the control over *macro* aspects to Member States (fulfilment of objectives set by the United Nations, that is to say, the moment when peace was considered re-established in the area) and *micro* aspects (management of the armed operation) of the recourse to force. That is why the Secretary-General would speak of the Gulf War as a *legal war*, but not as a war of the United Nations.

Finally the *war* ended with another contribution by the Security Council to these new times: Resolution 687 (1991), the long-winded contents of which cause surprise in the light of the Council's powers. In it : 1) the demarcation of the border between Iraq and Kuwait is dealt with; 2) a demilitarised zone is established on both sides of the border and a United Nations observation mission (UNIKOM) is placed in charge of its vigilance, of carrying out operations of mine-sweeping and recall of arms and even helping the Commission in charge of the demarcation of the border; 3) multiple and complex obligations relating to the disarmament of Iraq are brought into force; 4) the coercive measures adopted previously by the Security Council against Iraq are maintained, albeit with another purpose : the conformity of Iraqi conduct with Resolution 687 (1991) itself; and finally 5) institutional mechanisms are established to determine reparations due from Iraq, linking the payment of these to

284 Institut de droit international - Session de Naples (2009)

the establishment of a Reparations Fund that is nourished, amongst other sources, by the sale of petroleum authorised by the Security Council.

Thereby, Resolution 687 (1991) implied an overflow of the functions traditionally assigned to the Council within the framework of the collective security system. Adopted by virtue of chapter VII, it finds doubtful basis in its articles and more resembles a peace *diktat*; in it abounds the fact that Iraqi consent was required for the ceasefire to be effective and the rest of its provisions applied.

The deprivations of the civil population after the defeat of the Iraqi armed forces led the Security Council, acting outside the framework of Chapter VII, to establish a protection zone, destined to back up humanitarian aid to the Kurdish population; but it was the United States, France and Great Britain, acting of their own accord, who established non-fly zones to the North of Parallel 36 (April 1991) and South of Parallel 32 (August 1992) and later on from Parallel 33 which were followed by the shooting down of planes and bombardment of anti-aircraft batteries, radar installations and even civil installations.

Let us go to 2003. On the 20th March, the United States with Great Britain and a coalition of “willing nations” resorted unilaterally and massively to the use of force against Iraq with serious violations of IL norms applicable to armed conflicts and the humanitarian IL that was prolonged afterwards. For the sake of brevity, I shall forego setting out the arguments that back up these affirmations and that I explained in a course given that same year (A. Remiro Brotons, “Guerras del Nuevo Orden. Iraq y la agresión de los democráticos señores” (“Wars of the New Order : Iraq and the Aggression of the Democratic Gentlemen”), *Cursos de Derecho Internacional y RRII*, Vitoria-Gasteiz, 2003, pp. 17-53).

The Security Council had its day of glory as it took a firm stance on warmongering plans and defended the principles of the Charter. Up until 22nd of May, when the Security Council approved Res. 1483, Iraq was a no man’s land under illegal foreign occupation. The occupying Powers had obligations derived from the situation, but the fulfilling of these did not legitimise the situation itself and impeded the recognition of the persons designated by the Powers as Iraqi representatives. (V. ILC, Draft Articles on Responsibility of States for International Wrongful Acts, 2001, Arts. 40 and 41).

But once the invasion and occupation of Iraq by the United States and the coalition of “willing nations” had taken place, the majority of members of the Council considered that enough had been done and opted to support the plans of the United States, namely, that the Council recognise the *Authority* established by the occupying forces and back up the measures adopted, transferring to it the control of all the Iraqi resources both within and outside the country, admitting a secondary role for the UN (although there was no problem in labelling this “vital” or “crucial”).

Resolution 1483 (2003), of 22nd May, assumes the *Authority* established by the occupying Powers, with all its consequences, and the Security Council renounces the instruments that it still had in its hands, such as the *Petroleum for Food* programme; Resolution 1500 (2003), of 14th August, welcomes the establishment of the “broadly representative” Governing Council of Iraq in spite of the fact that the Iraqi members had been designated by the occupying Authority and lacked a really autonomous field of competence; Resolution 1511 (2003), of 16th October, affirms that Iraqi sovereignty is provisionally invested in the afore-mentioned Council of Government and authorises a multinational force under the unified leadership (of the United States) to take the necessary measures to contribute to the maintenance of security and stability in Iraq; Resolution 1518 (2003), of 24th November, recreates a Security Council committee to transfer all the financial resources of Saddam Hussein's regime, as well as those of his beneficiaries, to the Fund established to reconstruct Iraq, under the ultimate control of the United States. Everything responds to plans presented by the United States and Great Britain. Obviously, not a word was said about the rights to resistance to the occupiers nor was there a precise reference to the obligations arising from the occupation. There was nothing on denunciation of war crimes and violation of the Geneva Conventions with regard to prisoners and the civilian population.

Finally, Resolution 1546 (2004), of 8th of June, formally terminated the *occupation* and the competences of the *Authority* (Anglo-American) and proposed an increasing role for the United Nations in the political process of the Iraqi transition. One could ask if Resolution 1546 (2004) is not the most perverse of all the Resolutions. The administrators of the occupation have become ambassadors of remote countries heading the most motley diplomatic missions ever known. The security remained in the hands of the United States and its associates, but now on request of a Provisional

286 Institut de droit international - Session de Naples (2009)

Government hatched from members of the Governing Council designated beforehand by the *Authority*; so, responsibility for any possible illicit acts by the multinational force could be transferred to the Iraqi authorities themselves. Although none of the Resolutions adopted supports an endorsement of the invasion and occupation of Iraq, the Security Council ended up involved in the illicit acts of some United Nations members.

Within this context, the following statement made in the Report (p. 24) should be reconsidered: "Security Council recent developments in dealing with the use of force in Iraq have evidenced that renovation of multilateral forces' authorisations strongly depends on the host State's will and not necessarily on any specific United Nations objective assessment. That fact implies the assimilation of multinational forces' authorisations for the use of force to traditional peacekeeping operations mandates requesting host State consent".

However, on the other hand, the affirmation that follows may be maintained: "Security Council active participation in Iraq, without condemning previous non-authorized use of force by Member States, might be perceived as a mere consequence of a *fait accompli*." The system of collective security, regulated as it is by the Charter, admits as a consequence the impunity of the Permanent Members of the Council and, possibly, of its clients and rallying organisations when they resort to force prohibited by the Charter. The fact that their acts are not condemned and the *fait accompli* is the inevitable point of departure to try to place the deeds within the framework of the United Nations, cannot be interpreted as an endorsement of illicit acts either. The Report reiterates this position correctly when, further on, it deals with supposed authorisations *ex post facto* for uses of force by regional arrangements or agencies.

The Report does well to underline that the authorisations of the use of force by Member States and multinational forces must be the object of serious control, not just superficial control, by the Security Council. It must impose temporary limits, strictly define the mandate to which the authorisation is linked and verify the execution of operations over and above the routine reception of reports in such a way as to respect the norms of humanitarian international law, human rights and any other relevant imperative norms. Criticisms for not having done this are more than justified.

f) In relation to the authorisation of the use of force in favour of regional arrangements or agencies (pp. 27-36), although I agree in general with the presentation, I would like to make the following comments:

The end of the *Cold War* and the emergence of numerous civil and border conflicts in all latitudes of the globe facilitated the translation into practice of the conceptual laxity of the *regional arrangements or agencies*, a practice backed up by *A Programme for Peace* (1992) that, faced with the inevitable variety of regions and situations, recommended to tackle the co-operation and division of work, case by case, with a spirit of *creativity* and always under the primordial responsibility of the Security Council.

In agreement with the guidelines of the Secretary-General, supported by the General Assembly (Res. 49/57 of 1994), the description of regional arrangements or agencies has been extraordinarily pragmatic. Neither the generic label of an agreement, nor its composition, nor its formal juridical condition, nor its main material or territorial sphere of action, nor its *ad hoc* creation to handle a certain conflict has prevented it from enclosing its relations with the United Nations within Chapter VIII of the Charter and seeking agreements of convenient collaboration. Such an approach has allowed United Nations synergies, not just with traditional regional organisms, but also with many others of very heterogeneous nature, vocation and scope. This policy continues to be very active. Proof of this is in the Report of the *High Level Group* (December 2004) that considers, in fact, that the United Nations should encourage the establishment of regional and sub-regional arrangements, especially in those extremely vulnerable parts of the world where at present there are no efficient security organisations. It also recommends a broadening of consultation and co-operation between the United Nations and regional organisations, especially with the African Union – recommendations that the Secretary-General took for his own, virtually completely, as did the 2005 World Summit (Final Doc., Res. 60/1 December 2005) in more generic terms.

Nevertheless, considering the practice of the last years, one could wonder if perhaps the *primordial* responsibility of the Security Council has in fact been translated into a somewhat rash handover of a considerable number of operations of maintenance and imposition of the peace to regional arrangements or agencies *lato sensu*. The sub-contracting of military alliances such as NATO, ready to co-ordinate with rather than be

288 Institut de droit international - Session de Naples (2009)

subordinate to, and then to later get rid of, the UNO, highlights the risk of a weak authority with no structure of its own ending up in the hands of its *condottieros*.

The so-called “Non-Article 5 Crisis Response Operations” should be noted among the multiple aspects of NATO's *New Strategic Concept* (April 1999). These armed operations may occur wherever the Members of the Alliance feel their interests of common security are affected, particularly in the *Euro-Atlantic area*, but also outside this zone. The missions are varied and numerous and the Alliance must be able to count on the political will and military capacity necessary to attend to its very broad spectrum, being guided by the principles of *allied solidarity* and *strategic unity*. The *New Concept* rhetorically admits the primordial responsibility of the Security Council in the maintenance of the peace and international security, but claims the central role for itself, omitting all clarifications on the relations (and even less the subordination) of the Alliance with the Security Council in the management of crises that clearly exceed the sphere of collective self-defence, the original basis of the Treaty of Washington. The only control explicit in the management of a crisis or any use of force by NATO is that of the political authorities of the Alliance (the Council and Secretary-General) who are required to closely control all phases of an operation.

With reference to NATO operations outside “the regions of its competence” the Report of the *High Level Group* affirms that these seem to be a good idea “while operations are organised by the Security Council and reports on these are made to the Council”. When this is not the case, it seems that the purpose would be to make use of the UNO, as a tool of Big Power policy, eventually shared by others, or to make the UNO fail to justify the entrance, free of hindrance, of regional organisations, military alliances and chance coalitions. Thus, the UNO may end up *occupied* by a *particular(ist)* project or hounded by false factional *regionalisms*, in confrontation and very far from those other regionalisms, which being applied to the principle of *subsidiarity*, are the best complement to a world Organisation.

The tendency to *regionalise* operations is positive in itself, on condition that does not hide an evasion of collective responsibility when faced with an intolerable situation. The idea would be to entrust missions to representative regional Organisations wherever the conflict occurs (OAS,

CARICOM, UA, CEDEAO, IGAD...) while the United Nations offers diplomatic and political support and the co-ordination of humanitarian aid and to request logistical support, air transport and communications, sophisticated equipment, training and financing from the more developed countries or their organisations (such as NATO and the EU). But the situation in Darfur, in the west of Sudan, shows today, better than any other, the possibilities and limits of this *regionalisation*.

In practical terms, it would be satisfactory enough if the provisions of Chapter VIII of the Charter were, firstly, respected and later, applied properly, taking advantage of all their potential with adequate insertion of regional organisations in the United Nations peace operations, under the control of the Security Council and the human training and material endowment of these organisations in the developing world, especially in Africa, where such operations must often take place.

g) On the subject of the United Nations peacekeeping operations, it may be noted that as from the *Programme for Peace* (1992) a considerable increase in number and complexity have occurred. In 2000 an examination in depth of the Organisation's activities by a *high level group*, favoured by the Secretary General, Kofi Annan, resulted in a series of recommendations, both concrete and practical (*Brahimi Report*) that have been applied, when possible.

However, the existence of newly-coined operations has not modified some *common requisites* of all of them: 1) the consent of the parties involved in the conflict; 2) the neutrality of the United Nations in carrying out its functions; and 3) the non-use of force, except in the case of self-defence. Unfortunate experiences have reinforced the advisability of these requisites being respected.

These considerations tie in with the consideration the Report makes on the differences and interrelated developments of the use of force to Peacekeeping Operations and Multinational Forces (pp. 37-43).

The evolution of the operations in Bosnia and Herzegovina offered a good example. Before the Dayton-Paris Peace Agreement (1995), the intervention of NATO's air force, backed up by SC Resolutions, depended on an authorisation from the Commander-in-Chief of the United Nations Forces (UNPROFOR), by delegation of the Secretary-General. Later, UNPROFOR was substituted, on a military level, by the multinational military Force to carry out the Agreement (IFOR). The

290 Institut de droit international - Session de Naples (2009)

Dayton Agreement itself determined that the parties (Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia) would address the Security Council to authorise their deployment – which the Council did (Res. 1031, of 1995) – leaving the responsibility for the observance of the IFOR's mandate in NATO's hands. This included the authorisation of the use of force when necessary to ensure the observance of the Agreement.

According to the doctrine that seems can be deduced from the negative of the United States and other Permanent Members of the Security Council to submit their forces to leadership and controls that are not their own, once *peace has been imposed* by a State or group of States in operations that have merely been authorised by the Council, the latter could, when the territory has been pacified, entrust its maintenance to a classical mission of *blue berets* and proceed, where appropriate, with complex and multidisciplinary tasks of *consolidation of the peace*, counting on the collaboration of regional organisms for this, if warranted.

h) A global consideration of Security Council practice leads to the conclusion that the United Nations has not been able to apply the model for peace operations when this has to be applied to situations where peace must *be imposed* on the parties, and in this sense, the Security Council has opted to authorise use of force by the Member States (under the usual formula from Resolution 678-1990, authorising “all necessary means” to achieve a certain end). Thus *multinational forces* under the leadership of one or two countries, alliances or regional organisations have been formed ... On the other hand, too many members offer, individually or as a group, to participate, only on the condition that the Council limits itself to authorising their action, leaving their hands free later on. It has been argued, for and against, the consistency with the Charter of the Council delegation of its functions in Member States, individually or as a group, by means of an authorisation given without control on the execution of the measures taken by all those enlisted in the operation. In any case, it seems unwise for the Council to authorise the use of force in such a generic way.

It is interesting the fact –already underlined- that when the United States and/or NATO and its Member States resort unilaterally to armed force (Kosovo, Afghanistan, Iraq), they do so in the security that the United Nations organs are incapable of reacting in defence of international

legality. Once armed actions have been carried out, those responsible have had no qualms about approaching the Council to get cover for their policies based on *faits accomplis*, to obtain or broaden coercive measures that prolong their effects, in such a way that third countries are obliged to carry them out or endorse agreements reached *extra muros*, be that in Kumanovo (for Kosovo, Resolution 1244, of 1999) or in Bonn (for Afghanistan, Resolution 1383 of 2001), including the deployment of *international* forces. The Council would therefore not be the main one responsible for collective security but only an alternative instrument that could be approached again to widen coercive measures at the service of a hegemonic policy.

The recourse to a *disproportionate* force in relation to the declared object and the eventual perpetration of war crimes and violations of the humanitarian international law by units acting under the cover of Security Council resolutions has posed awkward problems of responsibility, not to mention damage to the Organisation's image. The Secretary General has been obliged to remind Member States of their obligation to bring to trial those members of their national contingents accused of the commission of crimes (Report on a *Broader Concept of Liberty*, March 2005).

The productivity of the Council in the last fifteen years does not impede us making a critical evaluation of its practice. The Council has renounced centrality in institutional recourse to armed force; it has left in the hands of Member States operations of *imposition* of the peace, ignoring these or limiting itself to a most formal authorisation; it has nourished arbitrariness by applying different yardsticks to situations that are materially similar; it has not protected the rights of Member States in confrontation with Permanent Members of the Council; it has sought to compensate its evasion of the task for which it was primordially conceived taking on others (regulatory, judicial, financial and budgetary) that the Charter maintains in the sphere of relations between the States concerned or directs towards other organs of the United Nations (General Assembly, International Court of Justice...). The Council has done all this by stretching its competences, in an abusive fashion, using a too large interpretation of one of the types – the *threat to peace* – which unleash the formidable powers of Chapter VII of the Charter. The Council, then, *does not always act when and how it should* but rather, on the contrary, *it sometimes acts when and how it should not*.

292 Institut de droit international - Session de Naples (2009)

The labour of the Security Council continues to be effective wherever it is begun with the co-operation of the parties in the conflict and the consent of the Permanent Members of the Council, operations for maintenance and consolidation of the peace that respond to clear and realistic mandates and count on the human and material resources necessary to be satisfactory. Yet it is not always like this.

We are not facing a total change of the system, but rather a vacuity and the manipulation of the norms and institutions in force by practices that make the limits of the Charter particularly perverse when it comes to trying to impose the law on Permanent Members of the Council and which politicise its Resolutions to the maximum, beyond the framework of the Charter, leaving the *damned* State unarmed.

i) The Observations on the main trends (pp.43-48) constitute the nucleus of the Report,

the decantation of the elements that have been presented in it. Except in what is relative to his disbelief in the external control of the Council, I more than share the *Rapporteur's* conclusions.

The collective security system developed by recent Security Council practice has, in fact, become separate from what was foreseen by the Charter but is not necessarily opposed to its purposes and objectives (p-46). However the *Rapporteur* insists, quite rightly, that although “the United Nations collective security purposes bestowed by the United Nations Charter upon the Security Council will finally be executed in a decentralised form through direct intervention of interested Member States..., Chapter VII authorisations to use force are conditioned to specific requirements imposed and controlled by the Security Council”. To be precise: “authorisations are planned to have a pre-established duration, a specific mandate and are subject to report to the Security Council or to the Secretary-General” (p. 44).

Nevertheless, on the point of control of the duration of operations, I would like to stress that the only set of restrictions that is efficient in preventing that the veto of a Permanent Member of the Council impose the continuity of an authorisation bestowed for an indefinite period, is the one that authorises the use of force for a pre-established time, after which the authorisation will expire unless it is renewed expressly. Temporary restriction, linked to the observance of the mandate, always implicit in any authorisation, remains at the expense of the veto by any Permanent

Member, as it is not produced automatically but rather, “will depend on a Security Council discretionary appreciation”.

It is more than advisable to emphasise rigour in the control of the Council and the temporary limitations of authorisations, as the Report outlines, because of the “generalised suspicions”, as the *Rapporteur* has noted, “that Member States willing to implement Security Council resolutions authorising the use of force would be motivated in accomplishing their own national goals” (p. 45).

In this same vein, another of the correct points of the Report derives from the distinction proposed between the use of force and the delegation of responsibilities (p.46). That authorisation implies delegation is a question, the Report states, whose answer “will depend on the nature and intrinsic characteristics of Security Council authorisation”. The practice of the Council has been justly criticised for having *delegated* its responsibilities in the executors of its Resolutions. It would be advisable to draw a line that prevents such a thing happening in the future. Delegating the Council's responsibilities is incompatible with the nature of the system of collective security that conforms with the Charter. This applies whether those taking advantage of the Council's authorisation are Member States, *chance* coalitions or regional arrangements or agencies, and more so if one keeps in mind, the broad sense of these and the leadership that Permanent Members of the Council may exercise in these.

That is why another of the correct points of the Report is to reject authorisations of the use of force implicit and *a posteriori*, even by regional arrangements or agencies (pp. 46-47). “Lack of Security Council reaction or condemnation to the use of force by regional organisations not previously authorised does not necessarily amount to an implicit authorisation”. The *Rapporteur* concludes correctly that: “The direct consequence of a system that seems to preserve the consolidation of situations based on facts rather than on law, has provoked serious speculations on the future of collective security *vis-à-vis* a decentralised system. The United Nations main concern with collective security seems be tackled from a more universal perspective than the one implemented through authorisations to regional organisations”.

Inspired by the recommendations of the High Level Group on *Threats, Challenges and Change* (December, 2004) the Secretary-General recommended that the Security Council approve a resolution stating the

294 Institut de droit international - Session de Naples (2009)

guidelines of an authorisation or a mandate for the use of force, to wit, 1) the gravity of the threat; 2) the correct purpose; 3) to be a last resort; 4) proportionality (by scale, duration and intensity) of the means to confront the threat; and 5) reasonable possibility of success, so that the consequences are not worse than taking no action at all. By trying to justify its decisions in this way, the Council would gain in transparency, credibility and respect (Report on *A Broader Concept of Liberty*, March 2005).

j) The Report concludes with an open list of points for proposed discussion. I have anticipated my point of view on most of these in previous pages. No doubt they will be an object of useful debate together with other questions that will arise as the members of the Sub-group express their comments. The only two matters on the list on which I have not given my opinion, at least directly, are the last two.

One refers to the “borderline” between Security Council authorisations for multinational forces and military actions argued to be justified under self-defence. The Institute already approved a Resolution on self-defence in its session in Santiago (2007). Being an exception to the system of collective security, the consideration of its relations do not have to be excluded *a priori*, although it should be taken into account that it was the Institute itself that underlined its autonomy when it created sub-groups for the discussion of specific points.

The other refers to “the rule of law regulating jurisdiction over detention of civilians, belligerents or insurgents as a consequence of enforcement actions taken by peacekeeping or multinational operations”. The matter is of great importance and undoubted relevance at the present time. The Institute should deal with this, however I wonder if it may be considered within the framework of the Sub-group's current mandate.

Comments by M. Pinto (27.08.2009)

[...]

I agree with the structure of the Preliminary Report, with its taxonomy of mandates, as well as with its description and analysis of the various instances of action which may be interpreted as authorized by the Security Council in the discharge of its responsibilities under the Charter. In particular, I agree with the assumption that seems central to his thesis, namely:

“The Security Council’s power to determine the existence of a threat to the peace, breach of the peace, or act of aggression is an exclusive discretionary power not subject to external control. General Assembly functions concerning the maintenance of international peace and security are subordinated to the Security Council’s exercise of its functions and powers” (page 7) ;

“... As Security Council authorizations for the use of force under Chapters VII and VIII are essentially of a political nature, there is no room for their legal review by the ICJ” (page 11).

While the Rapporteur sees the “authorization” mechanism as a consequence of the difficulty of implementing “the original United Nations plan for collective security enforcement”, that alternative mechanism too must draw its prescriptive power from Chapter VII, which is the foundation of the Security Council’s authority. It is the one key, provided by the Charter in Article 2 paragraph 7, to the prohibition of intervention in matters of domestic jurisdiction, and it is only the Security Council that may use it. The Security Council, exclusively empowered by the law of the Charter itself to “determine the existence of any threat to the peace, breach of the peace or act of aggression...”, and decide on measures to be taken, is compelled by the alignment of political forces within it to act with circumspection, when asked to unlock that door, and impugn the sovereignty of a State by intervening in matters within its domestic jurisdiction. Accordingly, the Council has been slow to yield to pressure from those who, perhaps with the best intentions but unaware of the facts and influenced by plausible falsehoods, would have the Council intervene in complex domestic situations, treating them as no longer “essentially within the jurisdiction” of the State concerned.

Even if juridical review of action by the Security Council were made procedurally feasible e.g. through issues raised before a court in a particular case, or a request for an advisory opinion, it is far from clear what consequences could flow from a finding that the Council had, for example, acted *ultra vires*; how damage could be assessed, and who would be responsible to make recompense.

Issues for discussion

All of the issues suggested by the Rapporteur are relevant, and worthy of detailed discussion. Any theory of “implied powers” needs to be addressed with extreme caution, and any apparent precedents are likely to

296 Institut de droit international - Session de Naples (2009)

be so rooted in particular circumstances as to be unreliable. As to *ex post facto* validations of the use of force by Member States or regional arrangements, such action could well be evidence that there had been no implied powers, rather than recognition that such powers existed. To elevate “fait accompli” to the level of a doctrine would be to consolidate further the ratification of actions by the powerful at the expense of those with no recourse-situations that have haunted international law for centuries. It seems clear from the Rapporteur’s Preliminary Report that there is a need for a more detailed legal structure concerning Security Council authorizations of the use of force. Also worthy of study are rules or guidelines for regulating detention of civilians, belligerents or insurgents, provided the focus is exclusively on enforcement action under Chapter VII and VIII.