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UNITED NATIONS PEACEKEEPING OPERATIONS UNDER CHAPTER VII: EXCEPTION OR WIDESPREAD PRACTICE ?

In the last two decades, United Nations peace operations have become one of the most common mechanisms used by the Security Council in humanitarian emergencies in armed conflict. Data and practical analysis confirm the increasing number of missions based on Chapter VII of the United Nations Charter, which, far from being exceptional cases, require a far more explicit legal framework than the one we have today, which is still conditioned by the institution's traditional set-up.

Peacekeeping operations, Chapter VII, United Nations

UNITED NATIONS PEACEKEEPING OPERATIONS UNDER CHAPTER VII: EXCEPTION OR WIDESPREAD PRACTICE ?

I. The humanitarian dimension of peacekeeping and the use of Chapter VII of the Charter for the purpose of protection

The post cold war period is characterized by an increase and transformation of armed conflict and the reactivation of a system of collective security, with the Security Council taking on a new role in managing crises. Many of the conflicts that have occurred from 1991 to the present day¹, have prioritized humanitarian issues (take, for example, the conflicts of Rwanda, the former Yugoslavia, the Democratic Republic of the Congo, Libya or Syria) on account of the heightened vulnerability of the civil population who have been targeted by the military action of government and non-government armed militias, and used as a direct objective². Frequently too, humanitarian aid can be deliberately obstructed thus impeding access to victims with attacks on humanitarian aid-workers and convoys.

Furthermore in many armed conflicts of recent times violence against civilians has reached untold levels of cruelty. Ethnic cleansing, genocide, the rape of women and children, forced displacement, the use of banned weapons, and the crisis of refugees and the displaced have been widespread³. In these circumstances it is unquestionable that the humanitarian element has been prominent. Although one cannot say that the

1 KALDOR, M., *New and Old Wars: organized violence in a global era*, Cambridge, Polity Press, 1999, pp. 1-256; Amérigo Cuervo-Arango, F. & Peñaranda Algar, J., *Dos Décadas de Posguerra Fría. Actas de las I Jornadas de Estudios de Seguridad de la Comunidad de Estudios de Seguridad "General Gutiérrez Mellado"*, Volume I, Madrid, 2009, pp. 1-591.

2 ZAHAR, M.; "Protégés, clients, cannon fodder: Civilians in the calculus of militias", *International Peacekeeping*, Vol. 7, nº 4, 2000, pp. 107 – 128.

3 AZAM, J.P., "Violence Against Civilians in Civil Wars: Looting or Terror?", *Journal of Peace Research*, Vol. 39, nº 4, 2002, pp. 461-485.

phenomenon is new⁴, nevertheless since the nineties it has emerged as an important protagonist in the realm of peacekeeping and in the international arena⁵. This has led to the nineties being defined as the humanitarian decade⁶, a label that could be extended up to the present day.

In this context the Security Council's involvement can be explained; not only in the management and resolution of conflicts but also in the protection of human rights and international humanitarian law. Some authors have written about the humanitarian dimension to peacekeeping and the body responsible for its implementation⁷. And indeed there have been numerous measures adopted by the Council for the protection of civilians.

Practice in relation to humanitarian mandates and their enforced protection⁸ has been preceded by an extension of the notion of a threat to peace, which is no longer considered as such when there is an absence of armed conflict, and takes on a social dimension, in which civilians occupy a fundamental place. The idea of human security⁹

4 FERRY, F., "Humanitarian action: victims of its own success", VV.AA., *The humanitarian decade. Challenges for Humanitarian Assistance in the last decade and into the future*, Vol. I – II, Office for the coordination of humanitarian affairs, New York, 2004, pp. 42-45.

5 Roberts maintains that in the 1990s humanitarian issues played a central role that is reflected in the rapid succession of humanitarian crises stretching from Kurdish zones in 1991 to Kosovo in 1998. ROBERTS, A., "The role of humanitarian questions in international politics in the 1990s", *ICRC*, nº 833, 1999, pp. 19-42.

6 Various authors, *The humanitarian decade. Challenges for Humanitarian Assistance in the last decade and into the future*, Vol. I – II, Office for the coordination of humanitarian affairs, New York, 2004; Kent, R.C., "International humanitarian crises: two decades before and two decades beyond", *International Affairs*, Vol. 80, nº 5, 2004, pp. 851-869; SLIM, H., "Military intervention to protect human rights: The Humanitarian Agency Perspective", *Journal of Humanitarian Assistance*, 2001, pp. 1-17.

7 MARQUEZ CARRASCO, C., "La nueva dimensión humanitaria del mantenimiento de la paz: La práctica reciente del Consejo de Seguridad", in *La asistencia humanitaria en derecho internacional contemporáneo*, Seville, Secretariat of Publications at Seville University, Spanish Red Cross, 1997, pp. 81-125

8 CORTEN, O. & KLEIN, P., "Action humanitaire et Chapitre VII: La redéfinition du mandat et des moyens d'action des forces des Nations Unies", *AFDI*, XXXIX, 1993, pp. 105-130 y de los mismos autores "L'autorisation de recourir à la force à des fins humanitaires: droit d'ingérence ou retour aux sources?", *EJIL*, Vol. 4, 1993, pp. 506-533 y "Action humanitaire et Chapitre VII: la redéfinition du mandat et des moyens d'action des forces des Nations Unies", *AFDI*, Vol. XXXIX, 1993, pp.105-130.

9 KALDOR, M., "Nuevos conceptos de seguridad", en GARCÍA, C. & RODRIGO, A. (eds.), *La seguridad comprometida. Nuevos desafíos, amenazas y conflictos armados*, Madrid, Ed. Tecnos, 2008, pp. 151-167; RAMON CHORNET, C., "Nuevos conflictos, nuevos riesgos para la seguridad humana", in *El derecho internacional humanitario ante los nuevos conflictos armados*, Valencia, Ed. Tirant lo Blanch, 2002, pp. 355-370; PÉREZ DE ARMIÑO, K., "El concepto y el uso de la seguridad humana: análisis crítico de sus potencialidades y riesgos", en *Seguridad humana: conceptos, experiencias y propuestas*,

is contemplated in this broad perspective of what constitutes a threat to peace and explains genocide or any other crime against humanity being qualified as threats to peace and triggering Security Council authorization for the use of force for protection purposes.

This prominence accorded to humanitarian questions and their relationship with the use of force is not a new phenomenon in the ambit of contemporary international law, as to a certain extent it goes back to the origins of modern international law, which generally reflects the demands for humanity and the notion of aid and intervention¹⁰. In fact, interventions for the protection of civilians, whose lives were endangered through armed conflicts¹¹ are, one might say, the forerunner to so-called humanitarian interventions, and this includes their evolution, culminating in the *Responsibility to Protect* report¹². Having said that: while it may not be a new idea, it is nevertheless true that the transfer of humanitarian concerns to the realm of the Security Council has involved a peacekeeping strategy less frontier-oriented and more focused on people.

The measures adopted by the Security Council are many and varied: from sanctions and the setting up of *ad hoc* penal tribunals, to, among others, the incorporation of humanitarian mandates under United Nations peacekeeping operations, which have been authorized on many occasions to use force under the auspices of Chapter VII of the Charter.

2. United Nations peacekeeping operations

United Nations peacekeeping operations are not expressly contemplated under the Charter, despite their internationally recognized practice which has been on the increase especially since the nineties. This formal absence of regulation has nevertheless been one of its main advantages, given that it has permitted its deployment in many and varied circumstances. However at the same time this very atypical situation has also been one of its main defects, and on closer analysis is seen to be characterized by a certain insecurity both legally and conceptually.

Revue d'Affaires Internationales, December 2006 - January 2007, CIDOB, pp. 59-77.

¹⁰ PETIT DE GABRIEL, E., *Las exigencias de humanidad en el derecho internacional tradicional (1789 – 1939). El marco normativo y doctrinal de la intervención de humanidad y de la asistencia humanitaria*, Madrid, Ed. Tecnos, 2003, pp. 1-261.

¹¹ These refer to humanitarian intervention; for a synthetic vision of this evolution, see BETTATI, M., “Un droit d’ingérence?”, *RGDIIP*, Volume 95, nº 3, 1991, p. 641 y ss.

¹² Report on *The Responsibility to Protect*, International Commission on Intervention and State Sovereignty (ICISS), 2001, pp. I-III.

An analysis of the institution has for decades been determined by the traditional framework, in which military personnel were lightly armed and acted in accordance with the principles of consent, impartiality and the non-use of force, except in legitimate defense. It was Hammarskjöld who, as Secretary General, was the architect of the theoretical and legal guidelines for peacekeeping operations. Building on previous contributions from within the United Nations Secretariat, such as those of Bunche y Pearson, he used the term “peacekeeping operation” (PO) to refer to it as belonging to “Chapter VI and a half” of the Charter, halfway between the methods of resolving disputes peacefully and more forceful action¹³. Thus the historic and judicial context of United Nations peacekeeping operations is situated in the period of the cold war, characterized by the search for alternative methods given the breakdown of collective security, and hence the fact that such missions were frequently devised as an alternative method, an original form of action that escaped the formal provisions of the United Nations Charter¹⁴

In the wake of these first operations, peacekeeping missions¹⁵ have been constantly

13 Question considered by the Security Council at its 749th and 750th meetings held on 30 October 1956: 2nd and final report of the Secretary-General on the plan for an emergency international United Nations force requested in the resolution adopted by the General Assembly on 4 November 1956, A/3302, 1956.

14 .DIEZ DE VELASCO, M. & OTHERS, *Las Organizaciones Internacionales*, Madrid, Ed. Tecnos, 16th edición, 2010

15 For theoretical and doctrinal analyses on United Nations peace operations, see, among others, BOWETT, D.W., *United Nations Forces: a legal study*, London, The Lawbook Exchange Limited, originally published in 1964, reedited in 2008, pp.1-579; HALDERMAN, J.W., “Legal Basis for United Nations Armed Forces”, *ASIL*, Vol. 56, n° 4, 1962, pp. 971-996; BELLAMY, A.J. & WILLIAMS, P. & GRIFIN, S., *Understanding Peacekeeping*, Cambridge, Polity Press, 2004, pp. 1-325; BERDAL, M., “Ten Years of International Peacekeeping”, *International Peacekeeping*, Vol. 10, n° 4, 2003, pp. 5-11 and by the same author, “The Security Council and Peacekeeping”, in LOWE, V. & ROBERTS, A. & WELSH, J. (eds), *The United Nations Security Council and War*, Oxford, Oxford University Press, 2007, pp. 175-205; VV.AA., *Peacekeeping Peacebuilding: Preparing for the Future*, Finnish Institute of International Affairs (FIIA), Helsinki, 2006, pp. 1-55; MACKINLAY, J., *The Development of Peacekeeping Forces*, Centre for Defence Studies, King’s College London, 2001, pp. 1-20; LIU, F.T., United Nations peace-keeping operations: their importance and their limitations in a polarized world, *Recueil de Cours*, Academie de Droit International, Vol. 201, I, 1987, pp. 385 – 400. For reference works in Spain see in particular: IGLESIAS VELASCO, A.J., *Las operaciones de mantenimiento de la paz: Concepto, evolución histórica y características* (1948 – 2002), Madrid, Ed. Madrid Autonomous University, 2003, pp. 1-357 and by the same author *Los problemas del mantenimiento internacional de la paz*, Ministry of Defense, Madrid, 2003, pp. 1-419 y “El marco jurídico de las operaciones de mantenimiento de la paz de Naciones Unidas”, *Forum: Revista de ciencias jurídicas y sociales*, n° 1, 2005, pp. 127-177.; CARDONA LLORENS, J., Las operaciones de mantenimiento de la paz de las Naciones Unidas: ¿hacia una revisión de sus principios fundamentales?, *Cursos euromediterráneos Bancaja de Derecho Internacional*, 2003, pp. 759-891; FERNÁNDEZ SANCHEZ, P.A., *Operaciones de las Naciones Unidas para el mantenimiento de la paz*, Huelva, Servicio de Publicaciones: Huelva University, Ministry of Education and Culture. General Directorate of Scientific y Technical Investigación, 1998, Vol. 1 y 2; DÍAZ BARRADO, C.M. & others, *Misiones internacionales de paz: Operaciones de Naciones*

on the increase, reinforcing the understanding of this viewpoint, which currently must be regarded, not only in terms of a practice that has become widespread, but also from the perspective of numerous doctrinal contributions¹⁶ and significant

Unidas y de la Unión Europea, General Gutiérrez Mellado University Institute of Research into Peace, Security and Defense, Madrid, 2006, pp. 1-264; DÍAZ BARRADO, C.M. MIGUEL Y VACAS FERNÁNDEZ, F., “Fundamentos jurídicos y condiciones para el ejercicio de las operaciones de mantenimiento de la paz de Naciones Unidas”, *ADI*, nº 21, 2005, pp. 273-316; VACAS FERNÁNDEZ, F., *Las operaciones de mantenimiento de la paz de Naciones Unidas y el principio de no intervención: un estudio sobre el consentimiento del estado anfitrión*, Valencia, Ed. Tirant lo Blanch, pp. 1-430 and by the same author, *El régimen jurídico del uso de la fuerza por parte de las operaciones de mantenimiento de la paz de Naciones Unidas*, Madrid, Marcial Pons, 2005, pp. 1-328; ESCOBAR HERNÁNDEZ, C., *Las operaciones de mantenimiento de la paz de concepto integrado: un estudio de la práctica*, Santander, 1995; MARIÑO MENÉNDEZ, F., “Perspectivas de las operaciones de mantenimiento de la paz de Naciones Unidas”, *Tiempo de Paz*, nº 43, Winter 1996-1997, pp. 41-53; FUENTE COBO, I., “Operaciones de paz para el siglo XXI: de la prevención a la intervención”, *Seguridad y Defensa*, General Gutiérrez Mellado University Institute of Research into Peace, Security and Defense, Madrid, 2000, pp. 87-105.

16 For theoretic and doctrinal analyses on UN peacekeeping operations, see, among others, BOWETT, D.W., *United Nations Forces: a legal study*, London, The Lawbook Exchange Limited, originally published in 1964, reedited in 2008, pp.1-579; HALDERMAN, J.W., “Legal Basis for United Nations Armed Forces”, *AJIL*, Vol. 56, nº 4, 1962, pp. 971-996; BELLAMY, A.J. & WILLIAMS, P. & GRIFIN, S., *Understanding Peacekeeping*, Cambridge, Polity Press, 2004, pp. 1-325; BERDAL, M., “Ten Years of International Peacekeeping”, *International Peacekeeping*, Vol. 10, nº 4, 2003, pp. 5-11 and by the same author, “The Security Council and Peacekeeping”, in Lowe, V. & Roberts, A. & Welsh, J. (eds), *The United Nations Security Council and War*, Oxford, Oxford University Press, 2007, pp. 175-205; VV.AA., *Peacekeeping, Peace-building: Preparing for the Future*, Finnish Institute of International Affairs (FIIA), Helsinki, 2006, pp. 1-55; MACKINLAY, J., *The Development of Peacekeeping Forces*, Centre for Defence Studies, King’s College London, 2001, pp. 1-20; LIU, F.T., United Nations peace-keeping operations: their importance and their limitations in a polarized world, *Recueil de Cours*, Academie de Droit International, Vol. 201, I, 1987, pp. 385 – 400.

In the context of reference work in Spain: IGLESIAS VELASCO, A.J., *Las operaciones de mantenimiento de la paz: Concepto, evolución histórica y características* (1948 – 2002), Madrid, Ed. Autonomous University of Madrid, 2003, pp. 1-357 and by the same author *Los problemas del mantenimiento internacional de la paz*, Ministry of Defense, Madrid, 2003, pp. 1-419 y “El marco jurídico de las operaciones de mantenimiento de la paz de Naciones Unidas”, Foro: *Revista de ciencias jurídicas y sociales*, nº 1, 2005, pp. 127-177.; CARDONA LLORENS, J., Las operaciones de mantenimiento de la paz de las Naciones Unidas: ¿hacia una revisión de sus principios fundamentales?, *Cursos euromediterráneos Bancaja de Derecho Internacional*, 2003, pp. 759-891; FERNÁNDEZ SANCHEZ, P.A., *Operaciones de las Naciones Unidas para el mantenimiento de la paz*, Huelva, Servicio de Publicaciones: Huelva University, Ministry of Culture and Education. General Directorate for Scientific and Technical Research, 1998, Vol. 1 and 2; DÍAZ BARRADO, C.M. & others, *Misiones internacionales de paz: Operaciones de Naciones Unidas y de la Unión Europea*, General Gutiérrez Mellado University Institute of Research into Peace, Security and Defense, Madrid, 2006, pp. 1-264; DÍAZ BARRADO, C.M. MIGUEL AND VACAS FERNÁNDEZ, F., “Fundamentos jurídicos y condiciones para el ejercicio de las operaciones de mantenimiento de la paz de Naciones Unidas”, *ADI*, nº 21, 2005, pp. 273-316; VACAS FERNÁNDEZ, F., *Las operaciones de mantenimiento de la paz de Naciones Unidas y el principio de no intervención: un estudio sobre el consentimiento del estado anfitrión*, Valencia, Ed. Tirant lo Blanch, pp. 1-430 and by the same author, *El régimen jurídico del uso de la fuerza por parte de*

efforts at defining them schematically - carried out by numerous bodies under the umbrella of the United Nations- which have laid down their conceptual, legal and operative guidelines. In this sense, the concept, evolution and normative framework of UN peacekeeping operations can be closely examined in various reference texts, the most notable being the Reports of General Secretary Boutros Ghali *An Agenda for Peace* 1992¹⁷ and the *Supplement to an Agenda for Peace* 1995¹⁸, and more recently the Brahimi Report¹⁹, the Capstone doctrine²⁰ and other documents such as the so-called New Horizon, July 2009²¹, published by the Department of Peacekeeping Operations (hereafter DPKO).

The work carried out by the Special Committee on Peacekeeping Operations is worthy of mention. It was created in 1995 as a subsidiary of the General Assembly to monitor and review all aspects of peacekeeping operations²². In addition to the

las operaciones de mantenimiento de la paz de Naciones Unidas, Madrid, Marcial Pons, 2005, pp. 1-328; ESCOBAR HERNÁNDEZ, C., *Las operaciones de mantenimiento de la paz de concepto integrado: un estudio de la práctica*, Santander, 1995; MARIÑO MENÉNDEZ, F., "Perspectivas de las operaciones de mantenimiento de la paz de Naciones Unidas", *Tiempo de Paz*, nº 43, Winter 1996-1997, pp. 41-53; FUENTE COBO, I., "Operaciones de paz para el siglo XXI: de la prevención a la intervención", *Seguridad y Defensa*, General Gutiérrez Mellado University Institute of Research into Peace, Security and Defense, Madrid, 2000, pp. 87-105.

17 *General Secretary's Report: -An Agenda for Peace: preventive diplomacy, peacemaking and peace-keeping*, A/47/277 - S/24111, 1992 (henceforth *An Agenda for Peace*).

18 *General Secretary's Report Supplement to An Agenda for Peace*, A/50/601 - S/1995/1, 1995 (henceforth *Supplement to An Agenda for Peace*).

19 *A wide-reaching examination of all aspects of the question of peacekeeping operations* BRAHIMI, L & others, A/55/305 - S/2000/809, 2000. This report responds to the call by the Secretary General for the need to probe into and reform peacekeeping operations, and to that effect the creation of an expert group, also known as the Panel on United Nations Peacekeeping Operations, presided over by Ambassador Lakhdar Brahimi of Algeria. This high-level group was set up with a mandate to examine all aspects relating to peacekeeping operations, and to formulate a set of specific, practical recommendations to assist and bring about improvements within the organization. (Henceforth *Brahimi Report*).

20 *United Nations Peacekeeping Operations: Principles and Guidelines*, Capstone Doctrine, 2008, DOMP (henceforth *Capstone Doctrine*).

21 *A new partnership agenda: charting a new horizon for UN peacekeeping*, DPKO - DSF, July 2009 (henceforth *New Horizon*).

22 The Committee currently consists of 114 States and 12 observers (in spite of being still known as C-34); of the subjects frequently up for discussion, budgetary questions occupy a prominent place. Nevertheless the Committee has become involved in the process of the definition and the improvement of peace operations so as to make them more effective, and has similarly taken on a whole range of other issues, such as legal principles, free time, the role of regional agencies and improving their capabilities as well as lessons learnt, among many other issues dealt with in meetings and annual reports. HANRAHAN, M., "The United Nations Special Committee on Peacekeeping Operations", *International Peacekeeping: The yearbook of International peace operations*, Vol. 11, 2007, pp. 29-45.

considerable number of documents emanating from within the UN's official system, one should also highlight other contributions from institutions and initiatives that have developed and theorized on the presence of UN peacekeeping operations, including those periods when the work of the United Nations itself on the subject was modest²³.

There is widespread consensus concerning the internationalist doctrine of situating UN peacekeeping operations within the framework of article 24 of the Charter as a necessary measure from the Security Council in achieving its aim and objectives. Similarly, it is largely accepted that the UN peacekeeping operations have generated customary law through repeated practice and an *opinio iuris* of the Member States through the organs of the United Nations, which have clearly accepted the establishment of these missions; defining them through the entire cold war period as being in accordance with three principles: consent, impartiality and non-use of force except in legitimate defence²⁴. It is generally accepted that these three principles provide their corresponding customary legal framework, and their consideration under Chapter VI of the Charter, based on the premise that they always require the consent of the receiver state and comply with the principle of non-use of force beyond that of legitimate defense.

Nevertheless, from the nineties to the present day there have been difficulties in

23 So, for example, the International Peace Academy, now known as the International Peace Institute, founded in New York in 1970 has been one of the few institutions which over many years has carried out rigorous analyses of the issue. The *Peacekeeper's Handbook*, first published in 1984, established in its day a coherent framework in relation to UN *peace operations* on the basis of practical experience in a decade of silence and lethargy. International Peace Academy, *Peacekeeper's Handbook*, Pergamon Press, New York, 1984. Some recent publications of a general nature from the same institute stand out, such as: "*Peace Operations*" IPI Blue Paper, nº 9, IPI Task Forces on Strengthening Multilateral Capacity, New York, 2009. More recently one has to consider the Challenges Project, initiated in Stockholm in 1997 with Sweden at the helm, consisting in the systemization of various and many contributions from experts on their respective countries and others of a more independent nature. It is similar in some aspects to the Brahimi Report, above all, in its objective: to offer and reinforce the capacity to plan, carry out and evaluate peacekeeping operations in a context of challenge and change. The results were published in two stages, the first in April 2002, after the Brahimi Report, in another document entitled "*Challenges of Peace Operations: Into the 21st Century*", and the second in 2006, in a report entitled "*Meeting the Challenges of Peace Operations: Cooperation and Coordination*". Continuity for the initiative was assured with the setting-up, since 2006, of the International Forum for the Challenges of Peace Operations which aims to hold an annual forum of debate on contemporary issues facing peacekeeping operations. See THE CHALLENGES PROJECT, *Challenges of Peace Operations: Into the 21st Century-Concluding Report 1997-2002*, Elanders Gotab, Stockholm, 2002, pp. 1-295 and THE CHALLENGES PROJECT, *Meeting the Challenges of Peace Operations: Cooperation and Coordination*, Elanders Gotab, Stockholm, 2002, pp. 1-170. Both reports can be downloaded from the website: www.challengesproject.net

24 TSAGOURIAS, N., "Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension", *Journal of Conflict and Security Law*, Vol. 11, nº 3, 2006, pp. 465-482.

complying with the original theoretical guidelines. An expanded understanding of what constitutes a threat to peace as defined in article 39 has been reflected in concrete measures introduced by the Security Council to protect humanitarian assistance operations, the civil population and human rights. Of all these measures, the mechanism authorizing the use of force on humanitarian grounds has become the most widely implemented; and, in a special way, in the context of UN peacekeeping operations. In effect, the number of UN peacekeeping operations under Chapter VII of the Charter is steadily on the increase and, in some cases, these are authorized to employ armed force²⁵.

2.1 The growing practice of peacekeeping operations under Chapter VII

Empirical analysis confirms the importance of the humanitarian element and the authorization of the use of force in UN peacekeeping operations. Looked at globally, of the 68 deployed to date²⁶, half of these incorporate some humanitarian function in their mandates; in a further 22, the Security Council has adopted enforcement measures, in consideration of the provisions in Chapter VII of the Charter.

One should point out here that the various authorizations do not contemplate the use of armed force as such; however this is understood and deduced from the expression “all the necessary measures”²⁷ that contains a generalized acceptance as a valid expression of the element of enforcement. The practice of granting authorization to adopt the necessary measures, in the context of UN peacekeeping operations, has its own particular characteristics²⁸. To begin with, not all operations have received any express

25 LAGRANGE, E., *Les opérations de maintien de la paix et le Chapitre VII de la Carte des Nations Unies*, Paris, Ed. Montchrestien, 1999, pp. 1-181; SEMB, A.J., “The New Practice of UN-Authorized Interventions: A Slippery Slope of Forcible Interference?”, *Journal of Peace Research*, Vol. 37, n° 4, 2000, pp. 469-488; FINDLAY, T., *The use of force in UN Peace Operations*, Oxford, SIPRI, 2002, pp. 1-486; FINK, J., *From Peacekeeping to Peace Enforcement: The blurring of the mandate for the use of force in maintaining international peace and security*, Defense Technical Information Center, Washington, 1994, pp.1-80; Frulli, M., “Le operazioni di peacekeeping delle Nazioni Unie e l’uso della forza”, *Rivista di Diritto Internazionale*, Vol. LXXXIV, n° 2, 2001, pp. 347-392.

26 Official data available on the DPKO website (<http://www.un.org/es/peacekeeping/about/dpko/>) last viewed on September 1st 2013.

27 Despite this consensus, nevertheless some authors have criticised its ambiguity as they consider that the notion of “necessary” allows states a wide margin of interpretation for deciding how necessary are the measures of the use of force. See CHRISTAKIS, T. & BANNELIER, K., “Acteur vigilant ou spectateur impuissant ? Le contrôle exercé par le Conseil de sécurité sur les Etats autorisés à recourir à la force”, *Revue Belge de Droit International*, Vol. 37, n° 2, 2004, p. 510.

28 PICONE, P., “Le autorización all’uso Della forza tra sistema delle Nazioni Unite e diritto internazionale generale”, *Rivista di diritto internazionale*, n° 1, 2005, pp. 5-75; SICILIANOS, L., Entre multilateralisme et unilatéralisme: l’autorisation par le Conseil de Sécurité de recourir à la force, *Recueil de Cours*, Academie de Droit International, Vol. 339, 2008, pp. 9-436.

mandate. Secondly, in almost all of them support operations from other agencies has been fundamental. Finally, because these mandates target the protection of very concrete goals and terms of reference.

Moreover, the fact that all the operations fall under Chapter VII does not mean that the use of force is authorized. One has to differentiate those operations that are not covered by any direct mandate from those that are expressly authorized: in other words, the Security Council's rulings on given situations under Chapter VII, and the rationale for the deployment of UN peacekeeping operations in this chapter do not imply the existence of any form of authorization for the adoption of the necessary measures, nor can they be interpreted as an implicit authorization.

Therefore, those UN peacekeeping operations that have been directly and expressly granted authorization by the Security Council should be identified as distinct from those that have not received any mandate but clearly belong under Chapter VII of the Charter, in view of the fact that the prevailing situation has been qualified as a threat to peace.

2.1.1 Authorization for the use of force

Of the 22 UN peacekeeping operations under the auspices of Chapter VII, 13 have –or have had– express authorization to adopt the measures required to fulfill their mandate; including the necessary humanitarian measures. Of the others, nine do not have any express authorization, but they do however have the support of either a regional body or of a coalition of states authorized to use force.

Of the 13 operations that have been given explicit authorization, there are two that stand out: MUNUSCO in the Democratic Republic of the Congo and MINUSMA in Mali. So, for example, by adopting resolution 2100 (2013), of 25 April 2013, the Council authorized an operation in Mali, (under Chapter VII) with a wide-reaching mandate for the re-establishment of order and security for the protection of civilians. In so doing, it

“17. *Authorizes* MINUSMA to use all necessary means, within the limits of its capacities and areas of deployment, to carry out its mandate as set out in paragraphs 16 (a) (i) and (ii), 16 (c) (i) and (iii), 16 (e), 16 (f) and 16 (g) and *requests* MINUSMA's civilian and military components to coordinate their work with the aim of supporting the tasks outlined in paragraph 16 above;

“18. *Authorizes* French troops, within the limits of their capacities and areas of deployment, to use all necessary means, from the commencement of the activities of MINUSMA until the end of MINUSMA's mandate as authorized in this resolution, to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General, *further requests* France to report to the Council on the implementation of this mandate in Mali and to coordinate

its reporting with the reporting by the Secretary-General referred to in paragraph 34 below and *decides* to review this mandate within six months after its commencement;”

On the other hand, there are UN peacekeeping operations that have not received any mandate of this nature, but are also under Chapter VII of the Charter and have received the support of peacekeeping operations from a regional body or a coalition of states. Take for example the UNMIL (Liberia), an operation created under Chapter VII of the Charter, as reflected in resolution 1509 (2003) in which the Council

“*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* to establish the United Nations Mission in Liberia (UNMIL), the stabilization force called for in resolution 1497 (2003), for a period of 12 months, and *requests* the Secretary-General to transfer authority from the ECOWAS-led ECOMIL forces to UNMIL on 1 October 2003, and *further decides* that UNMIL will consist of up to 15,000 United Nations military personnel, including up to 250 military observers and 160 staff officers, and up to 1,115 civilian police officers, including formed units to assist in the maintenance of law and order throughout Liberia, and the appropriate civilian component;

With a humanitarian mandate

“j) to protect United Nations personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel and, without prejudice to the efforts of the government, to protect civilians under imminent threat of physical violence, within its capabilities; and

k) to facilitate the provision of humanitarian assistance, including by helping to establish the necessary security conditions;”

The operation is not, however, authorized to make use of force, but here the coercive element of protection is assumed by the previous intervention of a regional body, the ECOWAS (Economic Community of West African States) through the so-called ECOMIL authorized by the Security Council some months previously. Thus, in resolution 1497 (2003) the Security Council :

“*Acting* under Chapter VII of the Charter of the United Nations,

1. *Authorizes* Member States to establish a Multinational Force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement, including establishing conditions for initial stages of disarmament, demobilization and reintegration activities, to help establish and maintain security in the period after the departure of the current President and the installation of a successor authority, taking into account the agreements to be reached by the Liberian parties, and to secure the environment for the delivery of humanitarian assistance, and to prepare for the introduction of a longer-term United Nations stabilization force to relieve the Multinational Force;

and

“5. *Authorizes* the Member States participating in the Multinational Force in Liberia to take all necessary measures to fulfill its mandate;”

Following this criterion, the United Nations peacekeeping operations can be presented schematically according to whether they do or not have express authorization, and according to the support received from regional organizations or state coalitions:

1. **UN peacekeeping operations with express authorization to adopt** “necessary measures” on humanitarian grounds :

Individually

- ONUB (AU: AMIB: not authorized) in Burundi
- UNAMSIL (ECOMOG-ECOWAS not authorized) in Sierra Leone
- UNMIS (AU: AMIS II not formally authorized²⁹) in Sudan
- MUNUSCO in DR Congo
- UNISFA in Abyei, Sudan

With the support of a peacekeeping operation from a regional or sub regional organization, also authorized

- UNPROFOR (NATO) in the former Yugoslavia
- MONUC (EU: Operation Artemis and EUFOR) in DR Congo
- MINURCAT (EUFOR EU) in Chad –Central African Republic

With the support of a coalition of states, also authorized

- UNSOM II (UNITAF) in Somalia
- UNTAET (INTERFET) in East Timor
- MINUSMA in Mali

With the support of a peacekeeping operation from a regional or sub regional organization, as well as a state or coalition of states, also authorized

- UNOCI (Operation Licorne and ECOMICI) in Ivory Coast

Hybrid peacekeeping operation of the United Nations and a regional organization

- UNAMID (ON and AU) in Darfur, Sudan

2. UN peacekeeping operations without express authorization to adopt the “necessary

²⁹ However one becomes clearly aware on close reading of the follow-up reports by the Secretary General, that this operation used armed force on the ground and acted as a mission of enforcement.

measures”, under Chapter VII but with the support of operations from regional and sub-regional organizations or from states or coalitions of states which have been expressly authorized.

Operations that receive the support of peacekeeping operations by authorized regional or sub regional organizations

- UNOMIL – UNMIL (ECOMOG) in Liberia
- UNRC (IFOR NATO) in Croatia
- UNTAES (IFOR-SFOR NATO) in Eastern Slovenia
- UNMIK (KFOR NATO) in Kosovo

Operations that receive support from an authorized state or coalitions of states

- UNSOM I (UNITAF) in Somalia
- UNAMET (INTERFET) in East Timor
- MINUSTAH (Operation Secure Tomorrow) in Haiti
- UNAMIR (Operation Turquoise) in Rwanda

3. **Coalitions of states or regional organizations** that have the express authorization to adopt “necessary measures” outside the context of UN peacekeeping operations

- o ISAF (NATO)– UNAMA (UN political mission)³⁰ in Afghanistan
- o Coalition of states led by the United States – UNAMI³¹ in Irak
- o Operation Alba, led by the United States in Albania.
- o AMISOM (AU) in Somalia
- o Coalition of states led by the United States and France, and later by NATO, in Libya

In this schematic presentation we see that recent practice points to a considerable number of UN peacekeeping operations falling under Chapter VII of the Charter from the outset. For example, Operation Artemis and EUFOR in DR Congo, ONUB in Burundi, AMIS II and UNMIS in Sudan, UNAMID in Darfur, MINURCAT and EUFOR Chad/Central African Republic, Operation Licorne, ECOMICI and UNCI in Ivory Coast, ECOMIL and UNMIL in Liberia, AMISOM in Somalia, UNAMSIL in Sierra Leone, INTERFET and UNTAET in East Timor, and MINUSTAH in

³⁰ Managed, exceptionally, by the DPKO and not by the department of Political Affairs.

³¹ Aid mission for the provisional administration of Irak.

Haiti, among others. From their inception all of these have been under Chapter VII of the Charter, with the situation qualified as a threat to peace. To these one must add the ensemble of operations situated originally under Chapter VI of the Charter and moved over to Chapter VII, which are: MONUC, missions deployed in the former Yugoslavia (UNPROFOR), in Somalia (ONOSUM I – UNITAF- UNSOM II) and in Rwanda (UNAMIR – Operation Turquoise).

2.1.2 Operations of support from regional agencies and coalitions of states

In the context of authorizations, the importance of support operations on behalf of regional organizations and coalitions of states is significant. In effect, the Security Council has authorized but few UN peacekeeping operations to use force in an isolated manner, and in the majority of cases it has tended to attribute this enforcement capacity to UN peacekeeping operations in conjunction with regional organizations and coalitions.

The different conflicts involving UN operations can be structured according to whether they are:

1. Conflicts in which UN peacekeeping operations have been deployed, together with operations from regional or sub-regional organizations:

- DR Congo
- Burundi
- Sudan and its extension to Chad- Central African Republic
- Liberia
- Ex Yugoslavia

2. Conflicts in which UN peacekeeping operations have been deployed, together with coalitions of states

- Rwanda
- Haiti
- East Timor
- Mali

Conflicts in which UN peacekeeping operations have been deployed, with operations from regional or sub-regional agencies as well as coalitions of states

- Somalia
- Ivory Coast

- Sierra Leone

Of the 13 UN expressly authorized peacekeeping operations, only five do not have the support of other operations carried out by similarly authorized agencies or coalitions. The remainder (seven) act together with authorized regional operations or coalitions; the other is the exceptional case of the hybrid operation, agreed between the United Nations and the AU. On the other hand, the nine UN peacekeeping operations, which have not been granted express authorization, act with the support of operations by regional agencies or coalitions which assume enforcement action in their joint mandate or coordinated with the UN mission, but always within the framework of Chapter VII of the Charter. It transpires, therefore, that the 22 UN peacekeeping operations analyzed have required the participation of regional agencies or coalitions, that is: not one has acted alone in the armed conflict in question, but all have had the previous, simultaneous or subsequent presence of operations by regional agencies or coalitions.

In cases involving the incorporation of agents other than those of its own UN operations, the Council extends an invitation to the states concerned for them to adopt the measures necessary, thus opening the door to the possibility of their doing so, either at national level through coalitions, or conducted by regional agencies or agreements. As a result it has only been on rare occasions that the latter have been explicitly named in a Security Council resolution, one such rare case being that of CEDEAO in Ivory Coast. Similarly, the Security Council never bases the actions or the intervention of regional organizations under Chapter VIII, but almost always Chapter VII constitutes the legal framework for their activity, as it is the states that decide on the most appropriate conduct.

The present analysis demonstrates the need to formulate a new theoretical and regulatory framework that corresponds to the operations deployed; in other words, the denomination and legal regime governing peacekeeping operations cannot be solely conditioned or limited to their traditional conception.

2.2. Need for conceptual and legal clarity

While it is certain that a very large sector of literature still broaches this concept from its original perspective, based on the three principles of consent, impartiality and the non-use of force except in legitimate defense, there is another school of thought that adopts a very different position³².

32 On the various doctrinal positions see IGLESIAS VELASCO, A., *Los problemas del mantenimiento internacional de la paz*, Ministry of Defense, Madrid, 2003, pp. 53-61 and GIFRA DURALL, J., *La protección humanitaria y el uso de la fuerza en las Operaciones de Paz de las Naciones Unidas. Las operaciones desplegadas en el conflicto de la República Democrática del Congo (1999 -): caso de estudio*, doctoral thesis 2011, Pompeu Fabra University, pp. 80-91.

On the one hand, there is a collection of authors who understand that the UN peace operations (which they generically refer to as peacekeeping operations) are those that respond to the institution's original premise. These authors consider that the three principles of consent, impartiality and the non-use of force except in legitimate defense, are those that define their nature as preventive measures. In the main they ascribe the UN peacekeeping operations to Chapter VI ("and a half") solely and exclusively, on the grounds that in no case does Chapter VII respond to the nature of the premise, given that in its application enforcement action and penalty measures are adopted that do not require the consent of the states.

There also exists another less widely held view that considers that the challenges facing the UN peacekeeping operations has brought about an evolution of its legal principles, which have to adapt to new realities, and widen or reduce the framework for their application according to the prevailing circumstances. This viewpoint recognizes the existence of various types of peace operations, not all following traditional peacekeeping lines, that can be complex and involve enforcement. They adopt an intermediate position, in which they do not ascribe UN peacekeeping operations to any specific chapter (neither to VI or to VII). There is a certain sense of pragmatism in this approach, which seeks to adapt this concept to the varied situations in which they are required to act.

The official position of the United Nations can be analyzed in recent reports but without losing sight of fundamental contributions such as the conceptual clarifications in the previously mentioned Agenda for Peace, which defined peacekeeping³³, peacemaking³⁴, preventive diplomacy³⁵ and peace-building³⁶.

The initial momentum of the Brahimi Report, published in 2001, has been consolidated with other documents such as the Capstone Doctrine in 2008, which rounds off a long cycle of contributions and efforts with a general doctrine outlining the principles and modalities of the UN peace missions and their adaptation to the circumstances and challenges of the present day³⁷.

33 "the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving civilians as well", *Un Programa de Paz*, par. 20.

34 "Measures destined to try to bring hostile parties to an agreement, fundamentally by peaceful means as set forth in Chapter VI of the Charter Carta of the United Nations", *Ibid.*

35 "Measures destined to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur", *Ibid.*

36 "Efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people", *Ibid.*

37 On present-day challenges, consult Peou, S., "The UN, Peacekeeping, and Collective Human Security: From An Agenda for Peace to the Brahimi Report", *International Peacekeeping*, Vol. 9, nº 2, 2002, pp. 51 – 68; JONES, B. & CHERIF, F., *Evolving models of peacekeeping policy implications &*

The proposals on mandates and authorization put forward in the Brahimi Report are clear: wide-ranging and robust mandates. Nevertheless, such recommendations are broached with greater prudence in the documents that followed and, in fact, some authors have criticised precisely the secrecy surrounding its recommendations in its subsequent interpretation. In this context, Kofi Annan's clarification is significant in a later report in which he points out that the recommendation of the use of force and robust mandates should not be interpreted as a tendency "to turn the United Nations into a war-fighting machine or fundamentally alter the principles according to which peacekeepers use force" and concludes that the "use of force must always be seen as a measure of last resort"³⁸.

For its part, Capstone Doctrine comes up with a more practical than legal evaluation of the principle of the use of force and the UN peacekeeping operations of Chapter VII. It broaches the question from the perspective of the consequences in terms of political and practical order on the peace process. The criteria employed in judging the use or non-use of armed force are practical and strategic rather than legal and this is demonstrated when the doctrine establishes that a combination of factors have to be considered including mission capability, humanitarian impact, the safety and security of personnel, the effect of their activities on the consent of the main parties and the effect that such action will have on the local consent for the mission.

The Special Committee's work in updating and publishing documents on peacekeeping operations from 2004 right up to the most recent reports has maintained a prudent, conservative stance concerning peace operations. The Committee stresses the importance of the principles of sovereignty, territorial integrity, the political Independence of states, non-intervention, consent of the main parties, impartiality and the non-use of force except in legitimate defense,³⁹ without referring to enforcement. This caution is in response to the fact that not all states participating in the Committee are prepared to take on board a theory of UN peacekeeping under Chapter VII of the Charter, although in practice neither do they oppose its establishment and deployment.

In spite of their growing importance in contemporary international practice, it is true to say that, especially from a legal perspective, the Chapter VII peacekeeping

responses, Center of International Cooperation, New York, External study commissioned by the Best Practice Unit, DPKO, 2003, pp. 1-34; BOULDEN, J., "UN Peacekeeping Operations in the Cold War Era :Trends and Challenges", *International Forum* 187, XLVII, n° 1, 2007, pp. 36-52.; INTERNATIONAL PEACE INSTITUTE, "Peace Operations, Task Forces on Strengthening Multilateral Security Capacity", *IPI Blue Paper*, n° 9, New York, 2009, pp. 1-72; AGUIRRE, M., *Presente y futuro de las Operaciones de Paz*, FRIDE, June 2007, pp. 1-73.

38 *Report of the Secretary-General on the implementation of the report of the Panel on United Nations peace operations*, A/55/502, par. 7.e

39 *Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2004 substantive session*, New York, 29 March – 16 April, A/58/19, par. 35-36.

operations have not received sufficient scientific doctrinal analysis from the states or from the United Nations itself. This deficit is also acknowledged in major projects that study the principal challenges facing UN peacekeeping operations today, such as, for example, the so-called *Challenges Project*⁴⁰. It can also be said that the practice of authorizations in the particular realm of UN peacekeeping operations has not been conducive towards such an analysis, as it is not characterized either by its clarity or uniformity. On the contrary, its very particular aspects have turned these operations into an atypical legal concept.

All this has meant that the definition and normative regime in relation to these operations is riddled with confusion and contradiction concerning their understanding and definition of origin.

To begin with, there is an issue of semantics. Generally speaking, and for many decades in accordance with their original denomination, the expression peacekeeping operations (PKO) has served as a generic term with which one associates: on the one hand, the first generation operations deployed during the cold war, formed by military observers; and on the other, the second generation operations identified with those operations operating under more wide-reaching mandates that demand a more complex structure and composition. The term peacekeeping operations (PKO) has thus served to define their nature and legal regime, i.e. principle of consent, impartiality, and the use of force only in legitimate defense.

Nevertheless, the operations authorized to use force give rise to a significant lack of precision, both in terms of their terminology and legal status. On the one hand, because to describe missions that are authorized to use force as peacekeeping operations (PKO) is at odds with their original regulatory framework. There is also a degree of confusion because almost all authorized operations, with the exception of UNSOM II in Somalia, have the consent of the state, which is why many authors continue to refer to them as peacekeeping operations, but analyze them as examples of isolated or exceptional cases.

Perhaps the introduction of a more comprehensive term that would involve the different types of peace operations would be a good idea. The Brahimi Report goes a considerable way towards promoting this change, as throughout the text it uses the expression peace operations in a more generic sense. On the one hand the report speaks of peacekeeping operations when referring to traditional missions, in which consent and legitimate defense constitute the structural axes, and on the other, it refers to complex peace-building operations which do not necessarily respond to the initial guidelines⁴¹ and that come under the terms of Chapter VII. In this way it recognizes

⁴⁰ THE CHALLENGES PROJECT, *Challenges of ...*, *Op.cit.*, Chapter 3 on the legal dimension of peacekeeping operations. See executive summary in <http://www.challengesforum.org>

⁴¹ The executive summary of the report uses the expression peace operations and distinguishes the

the existence of different types of operations depending on the corresponding legal framework.

Even so, and despite the recommendations of the expert groups, confusion still persists, given that officially the United Nations continues to refer to them as peacekeeping operations and that is also the name of the department in charge of them.

In our view, the expression United Nations peace operations is an accurate one, as it allows for the integration of the combination of operations deployed under the authority of the organization and at the same time allows for the identification of different types of operations depending on the mandate and legal framework attributed by the Security Council in each case. From this perspective the United Nations peace operations can be viewed as *missions deployed in the place of conflict, under the mandate and control of the United Nations, with military and civil personnel, as well as support equipment from the States, to implement the established mandates, acting insofar as possible, with the consent of the parties, with impartiality and with the capability of using force either in legitimate defense or in other instances authorized by the Security Council.*

This definition incorporates not only peacekeeping operations in accordance with the original theoretical guidelines, but also other peace-building operations within the framework of Chapter VII which, depending on the circumstances, can be authorized to use armed force.

In short, the expression UN peace operations attempts to bring together under one denomination a number of missions established by the organization under the authority of the Security Council, as a subsidiary body, formed by contingents from several countries. This broad notion does not however in any case imply that the legal regime concerning them is the same, for while the regulations for peacekeeping operations is based on practice and a consolidated *opinio iuris*; other peace operations, essentially those under Chapter VII, demand in each case the consideration of their regime (consent, type of authorization). From this perspective, the determination of the legal regime relating to UN peace operations cannot rely solely on the presence of consent nor should the legal basis be identified *a priori* and, as has been the case for decades, considering all UN peace operations as preventive measures within the framework of Chapter VI of the Charter (or an alleged Chapter VI and a half).

In our view, *the legal basis for peace operations should be established in each case in a different and isolated manner, identifying the combination of applicable norms.* This implies recognizing that not all of them respond to the same regulatory scheme.

expression peacekeeping from other types of complex operations, *Brahimi Report*, par. 17, 18 y 19.

3. Final considerations

Over the last two decades United Nations peace operations have been one of the mechanisms most frequently used by the Security Council in situations of humanitarian emergency in armed conflicts. In effect, the establishment of operations under a Chapter VII mandate, and with the authorization to use force for the protection of civilians, is becoming increasingly commonplace.

Empirical analysis demonstrates that operations under Chapter VII are not isolated or exceptional. They must be considered as constituting a new form of practice by the organization which is still being developed and is characterized by particular features pertaining to each case in terms of authorization and arrangements with regional organizations and coalitions of states, among others. While the practice is extensive, it is still neither uniform or orderly.

On the other hand, the states and the organization of the United Nations itself hold contradictory positions with regard to the phenomenon of Chapter VII UN peace operations, given that, generally speaking, they are not opposed to their establishment; however, when it comes to debating and prescribing the concepts and arguing whether it is a case of the use of force in legitimate defense or coercive enforcement, discrepancies tend to come to the fore and point to a lack of consensus.

Thus we find ourselves facing an increasing and developing practice that raises the question of new types of operations, different from those deployed in the period of the cold war and different also in terms of their legal basis and regime. This transformation motivates the need to find a clearer conceptual and regulatory framework than the one we have today. Hence the proposal of this article, consisting in limiting the label peacekeeping operations to those under Chapter VI of the Charter as a preventive measure. A systematic approach according to whether they fall under Chapter VI or VII, seems both fitting and appropriate, as only in this way is it possible to establish the norms applicable in each case.

Ultimately it is not a question of proposing a highly ambitious or groundbreaking formula, but a theoretical and legal approach that responds to the action and practice of present-day peace operations.

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