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

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Chapter I: Cooperation in Peacekeeping and Peace Enforcement Activities under the United Nations Charter

> The architects of the United Nations Charter were visionary in foreseeing a world where the United Nations and regional organizations worked together to prevent, manage and resolve crises. However, it is hard to imagine that they could have anticipated the interconnected nature of the threats we face today or the range of cooperation between the United Nations [sic] regional and subregional organizations.
>
> - Secretary-General Ban Ki-moon[1]

The central research question of this study is the question if international organisations cooperating in peacekeeping operations can be jointly responsible under international law. The primary foundation for cooperation between the UN and regional organisations is Chapter VIII of the UN Charter. In practice, however, the Security Council increasingly resorts solely to Chapter VII to mandate peacekeeping operations by regional organisations. This first and introductory Chapter therefore traces several developments within the field of collective security as established under the United Nations Charter. First of all and to put it into perspective, it analyses the general evolution of the system of collective security from the League of Nations and the Dumbarton Oaks conference to developments after the end of the Cold War.

The second part introduces the concept of peacekeeping. It attempts to circumscribe peacekeeping and peace enforcement activities. In practice the distinction between both concepts has become increasingly blurred, although a distinction is essential as the following third part will illustrate. Depending on the qualification of an international military operation as a peacekeeping or peace enforcement operation, an authorisation of the Security Council for the deployment of such an operation may or may not be necessary. Consequently, the qualification of an international military operation as either a peacekeeping or peace enforcement operation may also have a direct bearing upon the question of international responsibility.

[1] During the debate on cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security, Security Council, 7015th meeting, UN Doc. S/PV.7015 (2013), 3.

An analysis of practice shows that a certain division of labour between the UN and regional organisations with regard to the deployment of military forces is emerging as will be also highlighted in the second part of this Chapter.

1.1. Cooperation under the United Nations Charter – between Universalism and Regionalism

1. The emergence of international organisations and the regulation of international peace and security

Throughout the history of mankind, peoples have cooperated for military purposes, such as, to defend their territory. Early incidences of these cooperation arrangements between peoples are evidenced by the Delian League, founded in 477 B.C., the Auld Alliance and the Catholic League in the Middle Ages, while more recent examples include the Triple Alliance or the Allied Powers in WWII.[2] The emergence of international organisations as independent legal entities indicates the next level of increased cooperation among states and it has fundamentally altered the system of international law.[3] Beginning as permanent secretariats, with a mandate to monitor the implementation of treaty regimes, they have developed into fully-fledged independent international organism. States were increasingly confronted with global and complex challenges that transcended national borders. As a result it is unsurprising that cooperation between international organisations[4] has been recognised as an important tool since the first modest steps were taken in this direction within the framework of the League of Nations.[5]

Mechanisms for the establishment of peace and justice have also been debated in other areas of social science, such as philosophy for example. Kant constructed an international system based on the ideas of justice and reason, in which peace is not a natural condition of humanity, but rather an

[2] In the 12th Century, P. Dubois, who was the advisor to the French King Philip the Fair suggested cooperation with other Christian states in matters of collective security, including the possibility of collective self-defence against external threats and collective enforcement measures against members of the coalition who violated the rules of the pact, J. P. Lorenz, *Peace, Power and the United Nations. A Security System for the Twenty-First Century* (1999), 9. See also N. Tsagourias, N. D. White, *Collective Security. Theory, Law and Practice* (2013), 3-5.

[3] A. A. Cançado Trindade, *International Law for Humankind : Towards a New* Jus Gentium. *General Course on Public International Law*, Collected courses of the Hague Academy of International Law, Volume 316 (2005), 12, 274-275.

[4] *Ibid.,* 220.

[5] It is important to underline that facing these problems, cooperation not only between states, but also between international organisations is the key to success: "It is, therefore, critical that regional organizations be encouraged and empowered to take actions to restore peace and security in conflicts and areas under their respective purview. These actions, however, cannot be viewed in isolation as many actors have a part to play in attaining overall global security", Report of the Secretary-General on the relationship between the United Nations and regional organizations, in particular the African Union, in the maintenance of international peace and security, UN Doc. S/2008/186 (2008), 5, para.3.

ideal that must be construed. Kant can be seen as an inspiration in the establishment of the League of Nations, writing that

> [t]here is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. (…) [T]hey must (…) form an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (…) the positive idea of a *world republic* cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.[6]

Woodrow Wilson, a pre-eminent figure in the promotion of idealism, was clearly influenced by these Kantian ideals when he called for the establishment of the League of Nations.[7] The Covenant of the League of Nations stipulates in Article 21 that "[n]othing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace." This article, although not introducing a framework for cooperation, nevertheless recognises the importance of regional arrangements, as they existed at that period, in the area of international peace and security. It is significant that, at the founding of the League of Nations, no such disposition on the legitimacy of regional arrangements was foreseen.

On the contrary, President Wilson was opposed to any recognition of regional organisations in the Covenant, declaring that "there can be no leagues or alliances or special covenants and understandings within the general and common family of the League of Nations."[8]This characterizes Wilson's general opposition to cooperation in the form of regional arrangements, and indeed it was a "Wilsonian tendency to identify regionalism with war-breeding competitive alliances".[9] Based on a centralist view of the international community, within and outside the League of Nations, this view

[6] I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795) in the edition of H.S. Reiss (ed.), *Kant: Political Writings* (1992), 105.

[7] Cf. C. Lemke, *Internationale Beziehungen. Grundkonzepte, Theorien und Problemfelder* (2008), 14; further, J. Kane, 'Democracy and world peace: the Kantian dilemma of United States foreign policy', (2012) 66 *Australian Journal of International Affairs*, 292, 296-7, 301-4, D.-E. Khan, 'Drafting History', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1, 2-3.

[8] President Wilson Five Needs of Permanent Peace (September 27, 1918), Address to Public Meeting in New York, Opening the Fourth Liberty Loan, in A. Bushnell Hart (ed.), *Selected Addresses and Public Papers of Woodrow Wilson* (2002), 275, 279; U. Villani, *Les Rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix*, Recueil des cours de l'Académie de La Haye, Volume 290 (2001), 225, 239 ; C. Walter, 'Chapter VIII Regional Arrangements. Article 52', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1429, 1435 mn. 4.

[9] I. Claude, *Swords into Plowshares: The Problems and Progress of International Organizations* (1965), 113.

excluded any form of regionalism.[10] In the end, it was President Wilson who gave up his opposition and who proposed the construction that became Article 21.[11] However, the Covenant failed to define any of these possibilities in Article 21 and the anti-regionalist tendency of the Covenant is furthermore illustrated by the fact that the scope of Article 21 is limited to establishing the compatibility of alliances with the Covenant.[12] Notwithstanding these difficulties underlying the opportunities for institutionalised cooperation, once incorporated into the Covenant, the League of Nations tolerated and supported the conclusion of regional assistance treaties.[13]

2. The creation of the United Nations – regionalism vs. universalism

The Dumbarton Oaks proposals for the United Nations Charter had already envisioned the framework of the Charter as it exists today.[14] They were concerned with the legitimacy of regional arrangements or organisations to deal with issues of international peace and security on an appropriate regional level, provided that they conformed to the legal obligations under the Charter.[15] The proposed principles further included the authorisation for the Security Council to use regional

[10] Another factor was the awareness that WW1 had also been provoked by the tension between two alliances of states, Villani, *supra* note 8, 225, 239 – 40. Generally on regionalism, cf. E. Griep, *Regionale Organisationen und die Weiterentwicklung der VN-Friedenssicherung seit dem Ende des Kalten Krieges* (2012), 40-44.

[11] Villani, *supra* note 8, 225, 240. This was however, also due to domestic opposition within the Senate which refused to ratify the Covenant of the Society of Nations without a clause preserving the autonomy of the so-called Monroe Doctrine, L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 160.

[12] Villani, *supra* note 8, 225, 241. These difficulties, which already existed during the establishment of the Society of Nations were an initial precursor of a difficult relationship between the Society of Nations and regional alliances, as rightly observed by Boisson de Chazournes: "D'un côté, en se présentant comme la solution exclusive pour la sécurité internationale dans l'ordre mondial, la SDN ne laissait pas d'espace à d'autres initiatives en matière de maintien de la paix et de la sécurité internationales. D'un autre côté, l'échec du système de sécurité collective de la Société (inefficacité du système de garanties de sécurité et d'imposition de sanctions, impossibilité d'attendre l'objectif du universalité) ne laissait qu'une option : la décentralisation du système de la sécurité collective", Boisson de Chazournes, *ibid.*, 79, 161. This limitation to a mere compliance clause of regional alliances with the Covenant also explains the variety of regional initiatives launched, cf. also Boisson de Chaournes, *ibid.*, 162.

[13] Villani, *supra* note 8, 225, 242. Thus, for example, the special Security Committee created by the Conference on Disarmament recommended the conclusion of regional agreements of mutual assistance and a European pact of security. Nevertheless, a veritably efficient cooperation could never be formed as the Covenant only recognised regional alliances in an exemplary manner which prevented it from using these alliances for the maintenance of international peace and security, *ibid.,* 242-43. Article 21 was also only one way in which to remedy at least party the lack of universality of the League of Nations due to its limited circle of members, and there were a series of specific agreements of assistance concluded that existed – autonomously and outside of the League of Nations, cf. Boisson de Chazournes, *supra* note 11, 79, 241.

[14] For a comprehensive review of the drafting history of the United Nations, see, Khan, 'Drafting History', *supra* note 7, 1 – 23.

[15] As a conclusion from the history of the Society of Nations, one can record that "une conception trop rigide de l'universalisme, couplée avec une attitude de mépris à l'égard du phénomène régional, n'a pas renforcé l'autorité de l'organisation universelle", Boisson de Chazournes, *supra* note 11, 79, 163. Consequently, "les rédacteurs de la Charte n'ont jamais eu pour ambition d'anéantir le phénomène des ententes particulières/régionales", *ibid*.

arrangements and organisations for coercive measures, and the obligation for the latter to inform the Security Council of enforcement measures taken. [16]

One of the most significant aspects of these propositions, which were only altered slightly before they became part of the United Nations Charter in Chapter VIII, is that cooperation with regional organisations, as well as the integration of these organisations into universal organisations, became legitimate;[17] and therefore this integration became the norm rather than the exception. Nevertheless, regionalism was placed at a disadvantage by the imposed supremacy of the Security Council and its primary responsibility for maintaining international peace and security. The Charter also established that the Security Council should act in the name of all members of the organisation while exercising its duties, so that it consequently confirms and reasserts the universalist approach favoured by the great powers.[18] Regionalist efforts include the conclusion of the Australian-New Zealand Agreement 1944, which stipulated the following:

> Pending the re-establishment of law and order and the inauguration of a system of general security, the two Governments hereby declare (…) that it would be proper for Australia and New Zealand to assume full responsibility for policing or sharing in policing such areas in the South West and South Pacific as may from time to time be agreed upon.[19]

Reacting to and rebutting of the proposals of Dumbarton Oaks, Australia proposed an amendment to the proposals, anticipating the propositions made approximately 5 years later in the *Uniting for Peace* Resolution. It said the following:

> Si le Conseil de sécurité ne prend pas de mesures lui-même et ne permet pas que des mesures soient prises en vertu d'un arrangement ou d'un mécanisme régional en vue de maintenir ou rétablir la paix internationale, aucune disposition de la présente Charte ne sera considérée comme abrogeant le droit des parties à contacter tout arrangement compatible avec la présente Charte ou d'adopter toutes

[16] United Nations, Documents de la Conférence des Nations Unies sur l'Organisation Internationale, San Francisco, 1945, Tome IV, Propositions de Dumbarton Oaks, Commentaires et Projets d'Amendements (1945), pp. 17 – 18.

[17] Villani, *supra* note 8, 225, 244. Churchill and some other realists remained unsuccessful with their idea of independent regional agencies for the preservation of peace, Khan, 'Drafting History', *supra* note 7, 1, 15, marginal number (henceforth : nm), 40.

[18] Villani, *supra* note 8, 225, 244. This preference was clearly visible in the conclusions drawn in a debate of the U.S. Senate, according to which the UN could have judged an organisation as dangerous and it could have prohibited the constitution of the concerned organisation as "illegal". Furthermore, the Security Council could have established if the areas in which a regional organisation operates merited or did not deserve regional action, *ibid*., 246; cf. also P.-M. Dupuy, 'Les grands secteurs d'intérêt des organisations internationales', in R.-J. Dupuy (ed.), *Manuel sur les organisations internationals – A Handbook on International Organizations* (1998), 563, 598-9.

[19] Australian-New Zealand Agreement of 21 January 1944, available at: http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/7E1F98EB7E415F0ECA256B7E001E5C8B , para. 15.

> mesures paraissant justes et nécessaires pour maintenir au rétablir la paix et la sécurité internationales en vertu de cet arrangement.[20]

The Latin-American countries, relying heavily on their tradition of Pan-Americanism, went a step further and adopted a Resolution containing the Act on Reciprocal Assistance and American Solidarity.[21] The treaty stipulated not only the authorisation for the use of coercive measures and even military measures in order to defend an American state, but also to prevent an attack, contravening consequently Article 51 of the United Nations Charter.[22] The supporters of the universalist approach, *inter alia*, the Netherlands, argued that "rien ne semble plus dangereux pour la paix mondiale que des groupements régionaux qui, si bonnes que soient les intentions qui les ont suscités, pourraient à tout moment se dresser l'un contre l'autre ou contre un Etat donné, faute d'une coordination appropriée."[23]

The results of the San Francisco conference can be seen either as a compromise between the universalist, centralist approach favoured by the great powers and the regionalist, decentralised approach,[24] or as a clash between two opposing doctrines, the wartime Churchillian view calling for

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[20] The documents of the conference are published in either French or English, the latter version of this particular volume is not available online. United Nations, Tome IV, *supra* note 16, Amendements aux Propositions de Dumbarton Oaks présentés par l'Australie, 773, 783.

[21] Further opposition came, *inter alia,* from France and the Arab States, Villani, *supra* note 8, 225, 252. In a similar fashion, the Arab States created the Arab League, *ibid.*, whose Pact stipulates in Article 6 that "In case of aggression or threat of aggression by a State against a member State, the State attacked or threatened with attack may request an immediate meeting of the Council. The Council shall determine the necessary measures to repel this aggression." See also for further details, Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1437 mn. 10 – 1438 mn. 14.

[22] The Act says the following: "That during the war, and until the treaty recommended in Part II hereof is concluded, the signatories of this Act recognize that such threats and acts of aggression, as indicated in paragraphs Third and Fourth above, constitute an interference with the war effort of the United Nations, calling for such procedures, within the scope of their constitutional powers of a general nature and for war, as may be found necessary, including: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; breaking of postal, telegraphic, telephonic, radio-telephonic relations; interruption of economic, commercial and financial relations; use of armed force to prevent or repel aggression.", Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), 06 March 1945, available at: http://avalon.law.yale.edu/20th_century/chapul.aspThere has been a debate especially since the attacks of 11 September 2001 whether self-defense can include "preventive measures", the traditional understanding, which is based on the wording of the article, is that self-defence presupposes the existence and occurrence of an armed attack. The High-Level Panel accepted self-defence if "the threatened attack is *imminent*, no other means would deflect it and the action is proportionate." This notion seems, in the understanding of the Panel, also to include self-defence against a proximate threat. The Panel did not take a stance on anticipatory self-defence, but recommended that in such a case, the Security Council should be informed and could authorise "such action if it chooses to", Report of the High-Level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565 (2004), 54-55, paras. 188-191; T. M. Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible', in (2005-2006) 6 *Chicago Journal of International Law*, 597, 605-608.

[23] United Nations, Tome IV, Suggestions du Gouvernement des Pays-Bas sur les Propositions de Dumbarton Oaks, *supra* note 16, 448, 461.

[24] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1434; Griep, *supra* note 10, 60.

regional councils and the centralist Wilsonian view.[25] The concessions made to the regionalist proponents concern primarily the peaceful settlement of disputes,[26] but whereas the Dumbarton Oaks proposals did not contain any disposition regarding a right of (collective) self-defense, the conference of San Francisco led to the adoption of Article 51.[27] The procedure under the Charter for the adoption of decisions by certain organs is another element that prompted an effort towards regionalism. In order for states to achieve the necessary majority vote to adopt a decision in a UN organ, a certain number of votes have to be mobilised by states, which is easier within a group containing common ties.[28]

The Cold War and the opposition of the two blocs in the Security Council and on the international stage were partly beneficial and partly detrimental for regional organisations and cooperation. Whereas the block construction led to the establishment of new regional organisations with the objective to secure the sphere of interest, as well as the creation of possible defence mechanisms such as NATO, the opposing veto powers in the Security Council also prevented all efforts for cooperation, including on a regional basis. Consequently, the end of the Cold War also constituted a veritable break for international cooperation between organisations,[29] but the Cold War itself – somewhat ironically – allowed regional organisations to emancipate themselves "from any

[25] Claude, *supra* note 9, 113.

[26] Either by the parties under Article 33 or by regional organisations under Article 52 (2).

[27] Under the Dumbarton Oaks proposals, the Security Council had, consequently, absolute authority in the area of the maintenance of international peace and security. The risks included that the Security Council could be blocked due to a veto or that it would interfere in certain geographic areas, not to mention taking too long to react in cases requiring urgent action, Villani, *supra* note 8, 225, 254. As underlined by the Turkish government, the immediate reaction triggered by the automatic mechanisms of regional arrangements is important as procedural hurdles would be disastrous for the attacked country, United Nations, Tome IV, Suggestions du Gouvernement Turc relativement aux propositions adoptees à la Conférence des quatres Puissances de Dumbarton Oaks, en vue de maintenir la Paix et la Sécurité, *supra* note 16, 670, 674.The insertion of Article 51 is due to the insistence of the Latin-American and the Arab States, C. Schreuer, 'Regionalism v. Universalism', (1995) 6 *European Journal of International Law*, 477, 478. These states also pushed heavily for the distinction in the Charter between regional arrangements and organisations of collective defence leading to the inclusion of Chapter VIII, D. L. Tehindrazanarivelo, 'The African Union's Relationship with the United Nations in the Maintenance of Peace and Security', in A. A. Yusuf, F. Ouguergouz (eds.), *The African Union: Legal and Institutional Framework* (2012), 375, 375; See also Claude, *supra* note 9, 106; C. Walter, 'Hybrid Peacekeeping: Is UNAMID a new Model for Cooperation between the United Nations and Regional Organizations?', in H. Hestermeyer, D. König, N. Matz-Lück et al (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), 1327, 1328; A. Abass, 'Extraterritorial Collective Security: The European Union and Operation ARTEMIS', in M. Trybus, N. D. White, *European Security Law* (2007), 134, 148-49.

[28] M. Virally, *L'Organisation Mondiale* (1972), 281. The general practice of the UN has moved to achieving common position within a certain regional group, e.g. the EU is already based on a compromise between members of this group and thus, more likely, to find support in the wider round of the GA. Consensus in an organ of the UN – if it incorporates elements of opinion making on a regional level, can therefore be seen as a compromise between universalism and regionalism as well.

[29] It is also suggested that the "failure of imperfect implementation of the security system set up by the United Nations was prompting some regional organizations to fill the vacuum" by changing their original aims, International Law Commission, Summary record of the 2755h meeting, UN Doc. A/CN.4/SR.2755 (2003) (Mr. Kateka referring to a previous remark of Mr. Brownlie), para. 59; See also, Griep, *supra* note 10, 30.

unwelcome assertion of controlling authority by the Security Council."[30] Notwithstanding the identification of a need for greater regional cooperation in the maintenance of peace and security its usefulness persisted throughout the Cold War, and particularly in the latter years of this conflict. In 1988, the General Assembly adopted a Declaration in which it recommended that states who were members of regional arrangements or agencies use these mechanisms for the settlement of local disputes. Furthermore, significant recommendations were introduced which suggested that the Security Council, the General Assembly and the Secretary-General should encourage and endorse efforts at the regional level to prevent or remove a conflict or situation.[31]

3. The end of the Cold War and the rebirth of the Security Council - what role for regional organisations?

After the end of the Cold War[32] and the apparent rejuvenation the Security Council,[33] concerns arose on the hand that the Security Council was becoming too active, and on the other hand that it was being sidelined by its inability to take enforcement action on its own and, therefore having to rely on

[30] Claude, *supra* note 9, 116. However, this was often due to one of the two great powers, thus the US has consistently resisted the submission of the OAS under the United Nations Charter within the Security Council, *ibid.*

[31] General Assembly, Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, UN Doc. A/RES/43/51 (1988) Annex, paras. 4, 13, 17 and 24. Interestingly, the Declaration stipulates that "States party to regional arrangements or members of agencies (…) should make every effort to prevent or remove local disputes *or situations* through such arrangements and agencies" (para.4). Thus, on the first look, this Declaration seems to enlarge the competences of regional arrangements and agencies as existing under Chapter VIII where the Charter only mentions "local disputes", by borrowing the language of Chapter VI, but that regional arrangements and agencies can act in other circumstances than in local disputes can be inferred from Article 52 which states simply that the existence of such arrangements and agencies "dealing with such matters relating to international peace and security" is not precluded: T. Rensmann, 'Reform', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 25, 34, mn. 30-31; 50, nm. 87 – p. 51 mn. 90.

[32] The end of the Cold War was a turning-point in international relations, the break-up of the Soviet Union and the dissolution of the Warsaw Pact led to the creation of new states, decentralisation in an increasingly globalised world with other entities gaining influence and powers, such as MNCs and even NGOs. The US was left as the hegemonic super-power. Ethnic conflicts which were oppressed in the time of the Cold War erupted and the thrive for (regional) power and influence and economic prosperity by states also required ad called for new framework conditions for security policy on a global level, Griep, *supra* note 10, 26, 68-70; W. Hummer, M. Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2002), 807, 831.

[33] Of the 477 Chapter VII Resolutions adopted until 2009, 456 have been adopted since the end of the Cold War, P. Johansson, 'The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions', in (2009) 78 *Nordic Journal of International Law*, 309, 327. As noted by the Secretary-General in 2008, "[u]ntil 1990, there were no references in Security Council resolutions to regional organizations", Report of the Secretary-General on the relationship, *supra* note 5, 6, para. 4; A study of resolutions of the Security Council of 1988 stated that references to regional organisations were, indeed, rare and it only cites two examples in the entire period since the foundation of the UN, R. Sonnenfeld, *Resolutions of the United Nations Security Council* (1988), 103-4. See also Rensmann, 'Reform', *supra* note 31, 25, 52, mn. 92.

the so-called "coalition of the willing".[34] The form of a coalition serves two main purposes: the sharing of costs and the provision of some form of legitimisation.[35] The early 1990s were a period in which the United Nations struggled to find its identity, being as it was inhibited by the compromise in its Charter.

Thus, in his *Agenda for Peace*, Secretary-General Boutros-Ghali declared that "[t]he adversarial decades of the cold war made the original promise of the Organization impossible to fulfill", continuing that

> [i]n these past months a conviction has grown among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter – a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom'. This opportunity must not be squandered. The Organization must never again be crippled as it was in the era that has now passed.[36]

In his view, there was the necessary time frame to recommend and to push for the conclusion of the agreements under Article 43 of the Charter and for the provision of armed forces, assistance and

[34] C. Gray, 'The Charter Limitations on the Use of Force: Theory and Practice', in V. Lowe, A. Roberts, J. Welsh (eds.), *The United Nations Security Council and War* (2008), 86, 90. The SC increased its control over those authorised organizations after operation Desert Storm, now requesting regular reports as well as including time limits for operations, *ibid*. The High-Level Panel recommended in its report five criteria as guidelines regarding the use of force; seriousness of threat, proper purpose, last resort, proportional means and balance of consequences which were supported by the Secretary-General in his note, Report of the High-Level Panel, *supra* note 22, 13, 85-86 Recommendation 56; Secretary-General, Note by the Secretary-General, UN Doc. A/59/565 (2004), 2, para. 10. However, this effort was in vain, when the states at the UN World Summit in 2005 were not willing to adopt these criteria. Gray, *ibid.*, 86, 90. The General Assembly declared in the World Summit Outcome Resolution "[w]e reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security", General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), para. 79; cf. G. Abi-Saab, 'The Security Council *Legibus Solutus?* On the Legislative Forays of the Council', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowlland-Debbas* (2010), 23, 26. In this context, the concepts of peacekeeping and authorisations given to coalitions of the able and willing were not always fully distinguishable, N. Blokker, 'The Security Council and the Use of Force: On Recent Practice', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality. A Need for Change?* (2005), 1, 15.

[35] A. J. Bellamy, P.D. Williams, 'Who's Keeping the Peace? Regionalization and Contemporary Peace Operations', in (2005) 29 *International Security*, 157

[36] Secretary-General, An Agenda for Peace, UN Doc. A/47/277 & S/24111 (1992), paras. 2-3; cf. also Thematic evaluation of cooperation between the Department of Peacekeeping Operations/Department of Field Support and regional organizations, Report of the Office of Internal Oversight Services, UN Doc. A/65/762 (2011), 6-7, para. 15. The General Assembly, in its response to the report presented by the Secretary-General also emphasised the importance of cooperation between the United Nations and regional arrangements and agencies, but limited rather to the field of preventive diplomacy, the peaceful settlement of disputes, early-warning and confidence-building measures, General Assembly, An Agenda for Peace: preventive diplomacy and related matters, UN Doc. A/RES/47/120 (1993), Preamble, I. para.4, II. para. 1, IV. Preamble.

facilities to the United Nations and "not only on an ad hoc but on a permanent basis."[37] This latter proposition did not bear fruit, but the United Nations managed to conclude "stand-by arrangements with member states simplifying the provision of troops to the UN."[38] But his agenda had a broader aim than simply to boost the capacities of the UN. Part of the vision for the maintenance of international peace and security in this new era was the promotion of the role of regional organisations. He wrote in the Agenda that "regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs."[39] The Secretary-General consequently took a middle course between a universal – a strong United Nations with its own troops at its disposal – and a regional approach – cooperation with regional organisations – for maintaining international peace and security. This approach can be seen as holistic and comprehensive, addressing the issue through various actors, but it also reflects the limitations of the Charter by which the United Nations is bound.

His successor in office, Kofi Annan, took a more accentuated approach. He argued for an increased involvement of regional organisations, saying that

> [a] considerable number of regional and subregional organizations are now active around the world, making important contributions to the stability and prosperity of their members, as well as of the broader international system. The United Nations and regional organizations should play complementary roles in facing the challenges to international peace and security.[40]

[37] Secretary-General, An Agenda for Peace, *supra* note 36, 12, para. 43.

[38] A. Roberts, 'Proposals for UN Standing Forces: A Critical History', in V. Lowe, A. Roberts, J. Welsh et al (eds.), *The United Nations Security Council and War* (2008), 99, especially 100-105, 114; Standby-Arrangements for Peace-keeping, Report of the Secretary-General, UN Doc. S/1994/777 (1994).

[39] Secretary-General, An Agenda for Peace, *supra* note 36, 18, para. 64. The Security Council itself issued a presidential statement in early 1993 acknowledging the role regional organisations can play, Note by the President of the Security Council, UN Doc. S/25184 (1993); See also, Report of the Secretary-General on the Work of the Organization, Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Improving preparedness for conflict prevention and peace-keeping in Africa, UN Doc. A/50/711 – S/1995/911 (1995), 2, para. 4. Another important feature of Boutros-Ghali's Agenda was that he questioned the necessity of consent (of the government of the host state) for peacekeeping operations with "potentially huge implications regarding what peacekeepers might be asked to do.", K. Annan (with N. Mousavizadeh), *Interventions. A Life in War and Peace* (2012), 35.

[40] Secretary-General, In larger freedom: towards development, security and human rights for all, UN Doc. A/59/2005 (2005), 52, para. 213. The very same idea is put forward also in Security Council Resolution 1809, UN Doc. S/RES/1809 (2008), para. 9. A similar view was expressed by the Security Council in its resolution 1631, Security Council Resolution 1631, UN Doc. S/RES/1631 (2005), preamble. Cf also General Assembly, Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security", UN Doc. A/RES/49/57 (1994) Annex. The advantages of cooperating with regional organisations were further stressed by the report of the Secretary-General on the relationship between the UN and regional organisations: "There are compelling underlying reasons to encourage and support the role of regional organizations in peacekeeping. These include their proximity to the crisis and their familiarity with the actors and issues involved in a particular crisis. More importantly, regional

This idea of a geographic and multipolar distribution of responsibility concerning the maintenance of international peace and security is not new. Churchill advocated strongly for "a collective security system organized around several geographic regions, which would have resulted in a multi-polar infrastructure for dealing with threats to international peace and security."[41]

However, Kofi Annan went even further in his report, entitled *In larger freedom*, in which he said clearly that "the time is now ripe for a decisive move forward: the establishment of an interlocking system of peacekeeping activities that will enable the United Nations to work with relevant regional organizations in predictable and reliable partnerships."[42] Consequently, an argument is made for synergy between peacekeeping activities, which are based on ad hoc agreements, and cooperation with regional organisations.[43] This approach conflates the previously proposed standing United

organizations have a keen interest in resolving crises that erupt in their backyard. Nevertheless, regional organizations may be caught up in and made less effective because of the complex dynamics of regional conflicts. They may also lack substantive political and diplomatic leverage, and/or economic and military capacities, to successfully address peace and security challenges, especially in conflicts involving multiple stakeholders within and outside the region.", Report of the Secretary-General on the relationship, *supra* note 5, 7, para.9. In another report, he expressed himself similarly "[t]he scope for optimizing the resources and stimulating the political will of the international community in serving peace and security through an effective operational partnership between the United Nations and regional and subregional organizations is vast; and the time is also ripe. That is why we agreed upon the vision of a regional-global security partnership at the fifth high-level meeting. (…) Overall, it means that the international community stands to benefit in the maintenance of peace and security from a balance between the intimate knowledge of a conflict situation possessed by a regional organization and the global legitimacy and authority of the Security Council. More specifically, it might mean two things. First, that the global security mechanism of the future rests on a balanced distribution of capacity and resources across all regions around the world. This will relieve certain regions and alliances of the burden they face at present, financial and human, and the risks they confront, political and military, in undertaking the principal responsibility for maintaining peace and security. Secondly, the Security Council must always retain primary responsibility for that task, but, within that context, it should be able to rely upon, and should seek, a willing and capable subsidiary role on the part of regional and other intergovernmental organizations in peace and security from every region of the world, without exception.", A regional-global security partnership: challenges and opportunities, Report of the Secretary General, UN Doc. A/61/204–S/2006/590 (2006), 18, paras. 87-88.

[41] D. Doktori, 'Minding the Gap: International Law and Regional Enforcement in Sierra Leone', (2008) 20 *Florida Journal of International Law*, 329, 330

[42] Secretary-General, In larger freedom, *supra* note 40, 31, para. 112. One has to note in this context that question whether final decisions concerning peace and security are taken on a universal or rather a regional level was a source of controversy during the negotiations leading up to the establishment of the League of Nations as well as during the San Francisco conference in 1945, Hummer, Schweitzer, 'Chapter VIII: Regional Arrangements. Article 52', *supra* note 32, 807, 813 – 15; the rising acknowledgment of relations between the UN and regional organisations is also witnessed in another, later report of the Secretary-General, where it is said "[w]ith the increase in the interface and synergies between the United Nations and regional organizations, particularly the African Union, there appears to be recognition that regionalism as a component of multilateralism is necessary and feasible.", Report of the Secretary-General on the relationship, *supra* note 5, 1.

[43] Another argument submitted is that regarding the complexity of attributed tasks to international forces and the insufficient means they have at their disposal; indeed, it became difficult for states to carry out the new multidimensional operations, which led the Security Council to authorise member states or international organisations to come to the help of UN forces, R. Kolb, G. Porretto, S. Vité*, L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoires* (2005), 39.

Nations forces, on the basis of agreements concluded under Article 43 of the UN Charter, with the practice and structure of peacekeeping as developed in practice throughout the existence of the United Nations, and the cooperation with regional organisations. A clear expression of this policy can also be found in the Report of Secretary-General Ban Ki-moon on the relationship between the United Nations and regional organisations in the maintenance of international peace and security.[44] He points out that

> [t]he past decade has witnessed a strengthened relationship, at different levels, between the United Nations and regional organizations. Resolutions and presidential statements adopted by the Security Council signal a deepening recognition of the growing role and influence of regional organizations in international peace and security (…) This has yielded interesting perspectives and fruitful cooperation between the United Nations and regional organizations. It is, therefore, critical that regional organizations be encouraged and empowered to take actions to restore peace and security in conflicts and areas under their respective purview. These actions, however, cannot be viewed in isolation as many actors have a part to play in attaining overall global security.[45]

The proposition of the conclusion of agreements under Article 43 and the vision of standing United Nations forces with enforcement capacity failed to receive the necessary support by states. As Higgins says

> it remains baffling that (…) the Secretary-General (…) suggest[ed] that the UN should establish a rapid reaction force (..), when the establishment of what he terms 'the Security Council's strategic reserve' required exactly all those commitments of political will that the member states are so manifestly unwilling to make.[46]

This lack of will by states was unsurprising, as states have started to rely on regional organisations with their more advanced military capabilities for peace-keeping and peace enforcement purposes

[44] This holistic approach is still valid for the relations of the United Nations with regional organisations, see, *infra* 1.3, 1.6. – 1.9.

[45] Report of the Secretary-General on the relationship, *supra* note 5, 5, para. 3. Contrary, "[u]ntil 1990, there were no references in Security Council resolutions to regional organizations. From 1991, references to regional organizations' engagement in prevention and resolution of conflicts became common. The period that followed saw resolutions expressly recalling Chapter VIII of the Charter; conveying appreciation of regional efforts aimed at the settlement of conflicts; supporting cooperation between the United Nations and regional organizations or endorsing regional efforts (see S/25184). While most of the references pertained to attempts at peaceful settlement of disputes, in 1992 the Security Council for the first time authorized the use of force by a regional organization. Since 2004, the Council's relationships with respect to regional organizations have grown." Ibid., para. 4.

[46] R. Higgins, 'Peace and Security Achievements and Failures', in (1995) 6 *European Journal of International Law,* 445, 451. The Security Council also reacted to Boutros-Ghali's Proposal for UN Rapid Reaction Force for Peacekeeping Operations, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1 (1995), 11, para. 44; Statement by the President of the Security Council, UN Doc. S/PRST/1995/9 (1995), 2, final paragraph.

(*infra*. 1.2). In this context, the High-level Panel report welcomed the decision of the European Union "to establish standby high readiness, self-sufficient battalions that can reinforce United Nations missions" and also mentioned the African Union favourably.[47] Arguably, one can speak of the establishment of standing UN forces through "outsourcing" to regional organisations which might have united proponents of regional organisations and supporters of standing UN forces. The Panel also recognised that "in recent years, decisions to authorize military force for the purpose of enforcing the peace have primarily fallen to multinational forces" and that

> there has been a trend towards a variety of regional- and sub-regional based peacekeeping missions (…) [which] poses a challenge for the Security Council to work closely with each other and mutually support each other's efforts to keep the peace and ensure that regional operations are accountable to universally accepted human rights standards.[48]

Boutros-Ghali's proposal was thus abandoned in favour of more modest ideas and cumulative ameliorations, including regional initiatives.[49] Consequently, throughout the 1990s the United Nations remained unable to deploy forces quickly and effectively on the ground. The Brahimi Report stated clearly that "few of the basic building blocks are in place for the United Nations to rapidly acquire and deploy the human and material resources required to mount any complex peace operation in the future." It also highlighted other arguments brought forward by Member States against standing UN forces, stating that

> [m]any Member States have argued against the establishment of a standing United Nations army or police force, resisted entering into reliable standby arrangements, cautioned against the incursion of financial expenses for building a reserve of equipment or discouraged the Secretariat from undertaking planning for potential operations prior to the Secretary-General having been granted specific, crisis-driven legislative authority to do so. Under these circumstances, the United Nations cannot deploy operations "rapidly and effectively" within the timelines suggested.[50]

The increased support for regional organisations by Member States was interconnected with traditional troop contributors decreasing their support to peacekeeping operations.[51] This

[47] Report of the High-Level Panel, *supra* note 22, 35-36, para. 94; 58, para. 210.
[48] *Ibid.*, 58, para. 210; 60, para. 220.
[49] Roberts, 'Proposals for UN Standing Forces', *supra* note 38, 99, 120.
[50] Panel on United Nations Peace Operations, Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 and S/2000/809 (2000), 15, paras. 85, 90.
[51] "Examples of non-UN multilateral peace-support operations include various NATO-led missions to the Balkans since 1995; the Italian-led operation in Albania in 1997 (Operation Alba); the 1997 Mission Interafricaine de Surveillance des Accords de Bangui (MISAB) in the Central Africa Republic; the ECOWAS Monitoring Group (ECOMOG) in Sierra Leone from 1998 to 2000; the International Force in East Timor (INTERFET) between 1999 and 2000; the Peace-Truce Monitoring Group in Bougainville (BELISI) from 1998 to

development was more initiated by the end of the Cold War and the omission of the conflict between the West and the East than by the report of the Secretary-General and his plea.

Whereas the Charter preserves a compromise between a universalist and regionalist approach regarding the maintenance of international peace and security, the practice of the 1990s demonstrates that this task could not be fulfilled differently than through a multilateral, decentralised construction in which the Security Council acts primarily as the authorising entity. In the new era of cooperation with regional organisations there are new problems and challenges to face which necessitate a professional, concerted approach to peacekeeping. The Secretary-General said frankly that "the real challenge for the Security Council is to replace the improvised, at times selected, resource-skewed approach with more planned, consistent and reliable arrangements."[52]

The different organisations introduced in this part are all, in one way, *sui generis* organisations, as they were all created under different political circumstances and considerations and with an individual legal framework. This part focused on the framework as well as on the development of the broader area of maintenance of international peace and security by the United Nations and regional organisations. Thus, the effect of these developments on the applicable legal framework for peacekeeping and peace enforcement operations as well as in practice (*infra* 1.2., 1.3), and in the legal framework applicable in the domain of cooperation between the United Nations and regional organisations (*infra* 1.3), are analysed in the following parts. Chapter II will then focus exclusively on the cooperation between the United Nations and regional organisations, and will in particular trace the developments since the beginning of this millennium.

1.2. The legal framework of peacekeeping and peace enforcement operations – Chapters VI and VII of the UN Charter

Chapters VI and VII of the United Nations Charter set out the legal framework applicable to the peaceful settlement of disputes as well as to action with respect to threats to the peace, breaches of the peace and acts of aggression. The United Nations Charter, which was drafted after the atrocities of the Second World War, was also conceived with the intention "to save succeeding generations

2003; the European Union Mission in the FYROM (Operation Concordia) in 2003; the EU Mission in the Democratic Republic of Congo (Operation Artemis) in 2003; the African Mission in Burundi (AMIB) in 2003; and the (US-, South African-, and Moroccanled) ECOWAS mission to Liberia in 2003.", M. Berdal, 'The Security Council and Peacekeeping', in V. Lowe, A. Roberts, J. Welsh et al (eds.), *The United Nations Security Council and War* (2008), 175, 198 fn. 75. For the development of contributions to peacekeeping operations, see D. B. Bobrow, M. A. Boyer, 'Maintaining System Stability: Contributions to Peacekeeping Operations', (1997) 41 *The Journal of Conflict Resolution*, 723, 735 – 41 .

[52] Report of the Secretary-General on the relationship, *supra* note 5, 7, para. 12.

from the scourge of war, which twice in our life has brought untold sorrow to mankind."[53] In order to achieve this goal, the drafters of the United Nations Charter, firstly, laid down the prohibition of the unilateral use of force by states which is stipulated in Article 2 (4) and, secondly, centralised the control of the use of force under the Security Council through Chapter VII of the Charter.[54]

The blockade within the Security Council during the Cold War led to the failure of the implementation of the agreements under Article 43 (cf., *infra* 1.1.).[55] Nevertheless, "the UN system proved sufficiently flexible to allow the Security Council to take force measures not expressly provided for in the Charter."[56] As the Security Council could not order the use of force using its own standing army, it resorted to either "authorising" or "calling upon" Member States to use force.[57] The establishment of the concept of peacekeeping was therefore a reaction to both the blockade in the Security Council and the lack of agreements under Article 43, "even though there was no express basis for peacekeeping operations in the Charter scheme."[58]

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[53] Preamble of the Charter of the United Nations, first paragraph.

[54] C. Gray, *International Law and the Use of Force* (2008), 254; Gray, 'The Charter Limitations on the Use of Force', *supra* note 34, 86, 86.

[55] Virally, *supra* note 28, 469-70 ; Gray, *supra* note 54, 254; N. Krisch, 'Chapter VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. Introduction to Chapter VII: The General Framework', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.*), The Charter of the United Nations. A Commentary. Volume II* (2012), 1237, 1241 mn. 7. Another reason was more generally the lack of the possibility to reach unanimity of the permament members, M. Bothe, 'Peacekeeping', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1171, 1175 mn. 2; General Assembly, Forty-ninth Session, 48th meeting, UN Doc. A/49/PV.48 (1994), statement of Malaysia, 6.

[56] Gray, 'The Charter Limitations on the Use of Force', *supra* note 34, 86, 88. As the first Secretary-General of the UN Trygve Lie, noted in his memoirs: "During the spring of 1948, when it was already evident that there would be no possibility of implementing Article 43 in the foreseeable future, I cast about with my advisers for a new approach that might provide the Security Council with some sort of armed force. The outbreak of hostilities in Palestine gave urgency to such thinking, and after much consideration I decided on at least floating a trial balloon for the idea of a small internationally recruited force which could be placed by the Secretary-General at the disposal of the Security Council", T. Lie, *In the Cause of Peace: Seven Years with the United Nations* (1954), 98. Generally regarding UN standing forces, see, Roberts, 'Proposals for UN Standing Forces', *supra* note 38, 99 – 130.

[57] Gray, 'The Charter Limitations on the Use of Force, *supra* note 34, 86, 88.

[58] Ibid. 86, 88. The Legality of Peacekeeping Operations was confirmed in the Certain Expenses Case by the ICJ and is now not disputed. The very same reasoning should apply for authorisations of peace enforcement operations and it is now widely accepted. Furthermore, it is supported by UN practice N. Krisch, 'Article 42', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1330, 1337 mn. 11; N. Blokker, '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"', in (2000) 11 *European Journal of International Law*, 541, 547-49; E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 260-63; T. M. Franck, *Recourse to Force. State Action Against Threats and Armed Attack* (2002), 24-31; A. Orakhelashvili, *Collective Security* (2011), 223-26; against, i.e. B. H. Weston, 'Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy', in (1991) 85 *American Journal of International Law*, 516; 518-22; M. Bothe, 'Les limites des pouvoirs du Conseil de Sécurité', in R.-J. Dupuy (ed.), *Le développement du rôle du Conseil de sécurité* (1993), 67, 73-74 ;J. Quigley, 'The "Privatization"' of Security Council Enforcement Action: A Threat to Multilateralism, (1995-1996) 17 *Michigan Journal of International Law*, 249, especially 261-83; other authors give a more cautious, policy-oriented view such as Chesterman who considers the delegation

Throughout its existence, the Security Council has relied only on the determination of a situation as a "threat to international peace and security" or sometimes a "breach of the peace" as the trigger for the application of Chapter VII of the Charter. [59] The term "threat to the peace" in particular involves wide powers of discretion as

> il s'agit en effet d'une hypothèse très vague et élastique qui, contrairement à l'agression et à la rupture de la paix, n'est pas nécessairement caractérisée par des opérations militaires ou en tout cas impliquant l'utilisation de la force, et qui par conséquent peut correspondre aux comportements les plus variés des Etats.[60]

A determination of an act of aggression would also entail the responsibility of the aggressor state under international law, and even individual criminal responsibility[61] and both reasons explain the political preference of the Security Council to rely on the concept of a "threat to the peace" to mandate peacekeeping or peace enforcement operations.

1. The evolution and definition of peacekeeping – peacekeeping vs. peace enforcement

An analysis of peace-keeping operations necessitates a definition of peacekeeping and an exploration of its origin.[62] There is no comprehensive definition of peacekeeping which would comprise all operations and functions exercised within an operation, as each operation has its specific mandate

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of enforcement powers at least partially to be based on national interests by states, S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), 163-218. Dinstein considers that the authorisation to use force amounts to a mere recommendation under Article 39, Y. Dinstein, *War, Aggression and Self-Defence* (2005), 310. This authorisation has no other qualifying elements for regional organisations under Chapter VIII (*ibid.*, 311). For a critique of Dinstein's view, Orakhelashvili, *ibid.* 225-226; See also Report of the High-Level Panel, *supra* note 22, 57, para. 203; 58, para.210; cf. N. Krisch, 'Article 42', *ibid.*, 1330, 1337 mn. 12 – 1338 mn. 13; T. M. Franck, *Fairness in International Law and Institutions* (1998), 299-300.

[59] J. Allain, 'The True Challenges to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', (2004) 8 *Max Planck Yearbook of United Nations Law*, 237, 245.

[60] B. Conforti, 'Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression', in R. J. Dupuy (ed.), *The Development of the Role of the Security Council* (1993), 51, 53 ; see also N. Krisch, 'Article 39', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), The Charter of the United Nations. A Commentary. Volume II (2012), 1272, 1278 mn. 12 – 1293 mn. 39.

[61] Individual criminal responsibility of the involved soldier and possibly the commanding officer(s) either on the basis of customary international law or domestic criminal law. Subject to a decision to be taken after 1 January 2017 by a two-third majority of States Parties to the Rome Statute and subject to the ratification of the amendment to the Rome State by thirty States Parties, the ICC will have effective jurisdiction over the crime of aggression. See also, Allain, *supra* note 59, 237, 245.

[62] It is not necessary for the purposes of the present study to delve into the abyss of the origins of peace-keeping, but rather to focus on some key developments. For the development of peacekeeping and its problems and challenges, see i.e. Annan (with Mousavizadeh), *supra* note 39, especially pp. 29 – 78; J. P. Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict', in (2001) 50 *Air Force Law Review*, 1, 6-32

and nature,[63] despite good arguments made for such an agreed definition.[64] Likewise, there has been an evolution in the conceptual understanding, as well as in the organisational implementation, of peacekeeping operations since the creation of the first mission.[65] According to the United Nations itself, peacekeeping operations are,

> [o]perations involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation (…) [achieving] their objectives not by force of arms, thus contrasting (…) with the 'enforcement action' (…) under Article 42.[66]

Peacekeeping operations can be separated into two broad categories; "observer missions which consist largely of officers who are almost invariably unarmed and peace-keeping forces, which consist of lightly armed infantry units, with the necessary logistic support elements."[67] Peacekeeping operations are traditionally based on the principles of consent of the host-state, neutrality, impartiality of the force and non-intervention in the state's internal affairs and the non-use of force,

[63] As correctly observed by Higgins: "To some, peacekeeping is a broad concept, referring to the entire role of the UN in maintaining, or restoring, international peace. According to this definition any book on peacekeeping must refer not only to UN Forces, but to investigation committees, special representatives of the Secretary-General and diplomacy within the UN system. Others have suggested that peacekeeping is a term which has come to refer to UN Forces and observer groups which are operational on a territory with the consent of the government. Yet others have insisted that the term peacekeeping cannot include UN observers. There is, of course, no one 'correct' definition", R. Higgins, *United Nations Peacekeeping 1946 – 1967: Documents and Commentary, Vol I: The Middle East* (1969), ix.

[64] As the former UN Assistant Secretary-General for Legal Affairs wrote: "Insistence on clarifying the nature and meaning of peacekeeping is not merely a lawyer's obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution", Ralph Zacklin, 'Managing Peacekeeping from a Legal Perspective', in D. Warner (ed.), *New Dimensions of Peacekeeping* (1995), 159, 159. This is, in addition to the wish of the ILC to follow the pattern of the articles on State Responsibility, also the reason why the ILC decided not to include a specific rule for the attribution of conduct in peacekeeping operations in the articles on the responsibility of international organisations, G. Gaja, Second Report on responsibility of international organizations, UN Doc. A/CN.4/541 (2004), 16, para.34. The absence of a universally agreed definition has also been criticised as giving states carte blanche: "no single definition of "peacekeeping" is accepted by the international community. The absence of one specific definition has resulted in the term being used to describe almost any type of behavior intended to obtain what a particular nation regards as "peace." Moreover, there can be even discrepancies within national practice; there are even slight inconsistencies within U.S. doctrine and other publications that define peacekeeping and related terms.", A. Gillman, W. Johnson (eds.), Operational Law Handbook, The Judge Advocate General's Legal Center & School (2012), 56, para. III A. For a general overview, cf. M. W. Doyle, N. Sambanis, 'Peacekeeping Operations', in T. Weiss, S. Daws (eds.), *The Oxford Handbook on the United Nations* (2007), 323, 323- 34.

[65] For a good overview, see e.g. S. Chesterman, 'The Use of Force in UN Peace Operations', External Study, UN Peacekeeping Best Practices (2004).

[66] United Nations, *The Blue Helmets: A Review of United Nations Peacekeeping* (1990), 4; K. E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping & the Use of Force', (1998-1999) 27 *Denver Journal of International Law and Policy,* 239, 244.

[67] United Nations, *The Blue Helmets, ibid.*, 8.

except in cases of self-defense.[68] Consent of the host-state is necessary as long as the peacekeeping mission is not established under Chapter VII of the Charter.[69]

Traditionally, the major difference from peace enforcement operations is that the right to the use of force is limited to self-defense.[70] Some confusion has been inserted by the use of certain terminology such as "robust" or "muscled or muscular peacekeeping". The High-Level Panel gave a very good definition of the distinction between peacekeeping and peace enforcement which is noteworthy here:

> [The] Discussion of the necessary capacities has been confused by the tendency to refer to peacekeeping missions as "Chapter VI operations" and peace enforcement missions as "Chapter VII operations" – meaning consent-based or coercion-based, respectively. This shorthand is often also used to distinguish missions that do not involve the use of deadly force for purposes other than self-defence, and those that do.
>
> Both characterizations are to some extent misleading. There is a distinction between operations in which the robust use of force is integral to the mission from the outset (e.g., responses to cross-border invasions or an explosion of violence, in which the recent practice has been to mandate multinational forces) and operations in which there is a reasonable expectation that force may not be needed at all (e.g. traditional

[68] M. Zwanenburg, *Accountability of Peace Support Operations* (2005), 13, cf. A. Ryniker, 'Quelques commentaires à propos de la Circulaire du Secrétaire général des Nations Unies du 6 août 1999', (1999) 836, *Revue internationale de la Croix-Rouge*, 795, available online at : http://www.icrc.org/web/fre/sitefre0.nsf/html/5FZFPQ . The Peace Support Operations Doctrine of the AU only lists consent and impartiality as criteria distinguishing peace support operations from war, Headquarters of the African Union, African Standby Force, Peace Support Operations Doctrine (2006), Chapter 3, para. 3, 3-10 – 3-14; paras. 35-47.

[69] Zwanenburg, *ibid.*, 14, 18; D. Zaum, 'The Security Council, the General Assembly, and War: The Uniting for Peace Resolution' in V. Lowe, A. Roberts, J. Welsh et al (eds.), The United Nations Security Council and War (2008), 154, 171; The Report of the Secretary-General, An Agenda for Peace also implicitly says that consent may not always be necessary, *supra* note 36. In 2005 Eritrea's demand to withdraw UN peacekeepers of certain nationalities was condemned by the Secretary-General and considered to contravene "Eritrea's obligation under the United Nations Charter to respect the exclusively international character of the United Nations staff. (…) The request is inconsistent with the authority of the Secretary-General, in whom command of the peacekeeping operation has been vested by the Security-Council, as well as with the international responsibilities of the Secretary-General and the staff of the Organization", Department of Public Information, Secretary-General Condemns Eritrea's Decision to Expel Peacekeepers, UN Doc. SG/SM/10250 AFR/1298 (2005), available at: http://www.un.org/News/Press/docs/2005/sgsm10250.doc.htm

[70] Cox, *supra* note 66, 239, 248. The Secretary-General of the United Nations Dag Hammarskjöld already warned in a report in 1958 that a wide interpretation of the right of self-defence would blur the distinction between peacekeeping and peace-enforcement, Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary-General, UN Doc. A/3943 (1958), 31, para. 179. The Capstone Doctrine was not helpful to clarify the distinction, for example, it speaks of "proactively using force in defense of their mandates." Furthermore, it elaborates upon the difference between peacekeeping and peace enforcement "[w]hile robust peacekeeping involves the use of force at the tactical level with the consent of the host authorities and/or the main parties to the conflict, peace enforcement may involve the use of force at the strategic of international level, which is normally prohibited for Member States under Article 2(4) of the Charter unless authorised by the Security Council", United Nations Peacekeeping Operations, Principles and Guidelines (2008), 34-35, 19, para.2.2

> peacekeeping missions monitoring and verifying a ceasefire or those assisting in implementing peace agreements, where blue helmets are still the norm).
>
> But both kinds of operations need the authorization of the Security Council (Article 51 self-defence cases apart), and in peacekeeping cases as much as in peace-enforcement cases it is now the usual practice for a Chapter VII mandate to be given (even if that is not always welcomed by troop contributors). This is on the basis that even the most benign environment can turn sour – when spoilers emerge to undermine a peace agreement and put civilians at risk – and that it is desirable for there to be complete certainty about the mission's capacity to respond with force, if necessary. On the other hand, the difference between Chapter VI and VII mandates can be exaggerated: there is little doubt that peacekeeping missions operating under Chapter VI (and thus operating without enforcement powers) have the right to use force in self-defence – and this right is widely understood to extend to 'defence of the mission'.[71]

Self-defence in peacekeeping operations covers both cases of individual and collective self-defence and may also include "resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council."[72] The right of collective self-defence in the peacekeeping context could also serve to delimit peacekeeping from peace enforcement operations. Should it be raised as an argument by a state, it indicates – albeit implicitly – that this given operation is to be considered as a peacekeeping operation.

2. Peacekeeping post-Cold War – The ambiguous practice of the Security Council: blurring the lines between peacekeeping and peace enforcement

The end of the Cold War and the new possibilities for action by the Security Council transformed peace-keeping as it had been conceived up until then. As Kofi Annan wrote:

> Only with the end of the Cold War did the proliferation in peacekeeping really begin (…) In these changed circumstances, the principles and practices which had evolved in the Cold War period suddenly seemed needlessly self-limiting. Within and outside the UN, there is now increasing support for peacekeeping with teeth. When lightly-armed peacekeepers were made to look helpless in Somalia and Bosnia, member

[71] Report of the High-Level Panel, *supra* note 22, 58, paras. 211 – 13; cf. also R. Zacklin, 'The Use of Force in Peacekeeping Operations', in N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force*, 91, 94; Cf. C. Tomuschat, 'The European Court of Human Rights and the United Nations', in A. Føllesdal, B. Peters, G. Ulfstein (eds.), *The European Court of Human Rights in a National, European and Global Context* (2013), 334, 344.

[72] United Nations Security Council, Report of the Secretary-General on the Implementation of Security Council resolution 340 (1973), UN Doc. S/11052/Rev.1 (1973) ; United Nations, Memorandum to the Senior Political Adviser to the Secretary-General, 1993 *United Nations Judicial Yearbook*, 371, 371-2.

> states and public opinion supported more muscular action; an increasing number of situations seem to require it, and the Charter of the United Nations provides the legal authority for it."[73]

In addition to "peacekeeping with teeth", post 1990 peacekeeping operations were often complex and multidisciplinary, including "civilian police, electoral personnel, human rights experts (…) involving nothing less than the reconstruction of an entire society and state."[74] The multiplication of tasks was attended by a more extensive interpretation of the right to use force in self-defence, especially in the so-called "third-generation peacekeeping operations", allowing the use of force under Chapter VII of the United Nations for other specified purposes than self-defence.[75] It can also be argued that the penetration of international law by human rights law has contributed to the changing nature of peacekeeping operations.[76] This increasing complexity and the increasing demands on a peacekeeping operation and peacekeepers since the end of the Cold War have led to missions blurring the previously comparatively clear line between peacekeeping and peace enforcement;[77] indeed, in this vein, one author refers to these operations as "militarised peacekeeping" operations.[78] Gray specifically mentions the cases of Yugoslavia and Somalia when peacekeeping forces were endowed with functions that went beyond the concept of peacekeeping

[73] K. Annan, 'UN Peacekeeping Operations and Cooperation with NATO', (1993) 47 (5) *Nato Review*, 3-7.

[74] B. Boutros-Ghali, 'Beyond Peacekeeping', (1992-1993) 25 *New York University Journal of International Law & Politics*, 113, 115. "In a few exceptional cases, the UN has governed an area under an interim or transitional administration mandate, as in (…) Kosovo (Serbia and Montenegro) and Timor-Leste (formerly East Timor). In addition to the functions fulfilled by other multidimensional peacekeeping operations, a UN interim or transitional administration has authority over the legislative, executive and judicial structures in the territory or country.", Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, Handbook on United Nations Multidimensional Peacekeeping Operations (2003), 20.

[75] Zwanenburg, *supra* note 68, 19. This is also referred to as "robust peacekeeping" or "peacekeeping with muscle". It is argued in the literature that an expansion of the concept of self-defence or a re-interpretation as including the defence of the mandate for the purposes of peacekeeping would be incorrect, N. Krisch, 'Article 42', *supra* note 58, 1330, 1336 fn. 35. As Cox points out the confusion about the notion of use of force in self-defence in peacekeeping operations is linked to the blurring of the distinction between peace-keeping and peace-enforcement operations, Cox, *supra* note 66, 239, 258.

[76] The prime example of the "humanisation", if one wants to designate it as such, of peacekeeping operations is the increased reliance on the protection of civilians and especially women and children in peacekeeping operations as well as the various resolutions and statements regarding the application of human rights law, *infra*, 2.3. and 2.4. Cf. also Franck, *supra* note 22, 597, 600-601; J. Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (2011), 3. Another explanation is the tension between the traditional non-intervention principle of peacekeeping and the quest for the effectiveness of the operation.

[77] T. D. Gill, 'Characterization and Legal Basis for Peace Operations', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 135, 136. See also L. Condorelli, 'Pertinence du DIH pour les organisations internationales et les alliances', in S. Kolanowski, Y. Salmon (eds.), *Proceedings of the Bruges Colloquium. The Impact of International Humanitarian Law on current security policy trends* (2001), 25, 28; Zacklin, 'The Use of Force in Peacekeeping Operations', *supra* note 71, 91, 91 – 100. For the fluidity of the distinction between peace-keeping and peace enforcement, see Headquarters of the African Union, *supra* note 68, Chapter 3, 3-2, Figure 1-3.

[78] Sloan, *supra* note 76, 3.

as it had been previously understood.[79] However, even during the Cold War, the essential characteristics of traditional peacekeeping, such as consent, impartiality, neutrality and the use of force being limited to self-defence, were stretched or ignored when the Security Council acted as it saw fit: "[I]nvolvement of the United Nations in internal conflicts made the strict adherence to these characteristics less feasible and less compatible with the Council's objectives in various situations."[80]

The vague language of mandates prescribed by the Security Council in particular peacekeeping operations does not shed light upon the distinction between peacekeeping and peace enforcement as well.[81] While, on the one hand, this practice might be appropriate and necessary to allow the troops to react to unforeseen circumstances, on the other hand, it simultaneously further obscures the vital difference between peacekeeping and peace enforcement.

This practice is also dubious as it might have a direct impact on the question of international responsibility. Convoluted and vague mandates without clear and defined roles for the involved actors may lead to the authorising entity being considered as responsible for violations of international law. The application of substantive law to peacekeeping forces is also affected. These unclear mandates impede a determination as to whether international humanitarian law is applicable to a peacekeeping operation.[82] This being the case, peacekeepers would fall under the regime of international humanitarian law, would be bound by these rules and could be attacked from the moment of their participation as combatants.[83]

Yet another aggravating factor is that whereas traditional operations were often regarded as being established under Chapter VI rather than under Chapter VII, the new tasks also mean that the Security Council is now relying exclusively on Chapter VII for mandating purposes. [84] Some criticism

[79] Gray, *supra* note 54, 282, also 310. The distinction between peacekeeping and peace enforcement forces was also blurred "through the establishment of both peacekeeping and enforcement forces to operate at the same time." (*ibid.*, 289).

[80] M. J. Matheson, *Council Unbound. The Growth of UN Decision Making in Conflict and Post-Conflict Issues after the Cold War* (2006), 119, 127-28.

[81] The authorisation to use military force given to UN peacekeeping operations is often equally formulated in broader terms, for instance: "Authorizes UNOCI to use all necessary means to carry out its mandate within its capabilities and its areas of deployment", Security Council Resolution 1528, UN Doc. S/RES/1528 (2004), para.8; also Security Council Resolution 1769, UN Doc. S/RES/1769 (2007), para. 15; Security Council Resolution 1996, UN Doc. S/RES/1996 (2011), para.4.

[82] It is of course correct to argue that classification as peace-keeping or peace enforcement is of limited use as the application of IHL depends on factual circumstances, but an unclear mandate makes this process more difficult. See, C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', in (1998) 1 *Yearbook of International Humanitarian Law*, 3, 11.

[83] The application of international humanitarian and human rights law to peacekeeping operations is examined in, *infra*, 2.3. and 2.4.

[84] Cf. Kolb, Porretto, Vité, *supra* note 43, 38. Pellet considers Chapter VII also to be "safer legal ground", with the qualification "that it must be read in a dynamic perspective and in the light of the development of the law

has been made which suggests that the Security Council is now also blurring the distinction between Chapters VII and Chapters VIII and, indeed, there are resolutions which cannot be fitted either into the category of peacekeeping or peace enforcement nor be considered as mandated under Chapter VII *or* Chapter VIII:

> Acting under *Chapter VII* of the Charter of the United Nations, (…) authorizes Member States participating in the ECOWAS forces in accordance with *Chapter VIII* together with the French forces supporting them to take the necessary steps to guarantee the security and freedom of movement of their personnel and to ensure, without prejudice to the responsibilities of the Government of National Reconciliation, the protection of civilians immediately threatened with physical violence within their zones of operation, using the means available to them, for a period of six months after which the Council will assess the situation on the basis of the reports referred to in paragraph 10 below and decide whether to renew this authorization.[85]

These developments all increase the complexity and the difficulty in legally analysing the phenomenon of peacekeeping operations in the context of the United Nations,[86] a phenomenon which exists only in unwritten law.[87] In addition, this particular cited example illustrates that the practice of the Security Council is also problematic with regard to the application of Chapter VIII of the UN Charter.[88] Moreover, they conflate the established practice of the Security Council, which distinguished between peacekeeping operations under United Nations command and control, and enforcement action or peace enforcement operations as authorised by groups of states or regional organisations.[89]

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since 1945", A. Pellet, 'The Road to Hell is Paved with Good Intentions - The United Nations as Guarantor of International Peace and Security: a French Perspective', in C. Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective* (1995), 113, 130. The wording of Article 42 does not exclude peace-keeping operations, cf. Orakhelashvili, *supra* note 58, 291.

[85] Security Council Resolution 1464, UN Doc. S/RES/1464 (2003), para.9. Generally, it seems correct to say that the system of delegated enforcement action which developed within the United Nations due to the lack of implementation of the foreseen agreements and mechanisms under Article 43 and the Charter "brings military enforcement action under Article 42 (…) very close to the system envisaged for regional organisations under Chapter VIII.", N. D. White, 'Towards Integrated Peace Operations: The Evolution of Peacekeeping and Coalitions of the Willing', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 1, 2.

[86] So it is argued that "Some UN operations have consisted of a "combination of traditional peacekeeping, peacekeeping for enforcement purposes, multifunctional peacekeeping, as well as the delegation of the power to use force to member states or regional organisations", G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 197.

[87] Meaning that it was developed in practice and that it is seen as derived from the implicit powers of the Security Council under the Charter.

[88] It will be dealt with more extensively in *infra*, 1.3.

[89] On the practice of the United Nations in this field and international responsibility, see *infra*, 2.5.

As such, it is not very surprising that, in practice, there has been a great deal of criticism from within[90] and outside the United Nations regarding these ambiguous, ambivalent, and unclear mandates handed out by the Security Council which blur the difference between peacekeeping and peace enforcement.

A better criterion to distinguish between peacekeeping and peace enforcement operations would be "consent of the host-state"; an operation based on consent is not – *per se* – violating international law, whereas an operation without consent of the host-state is justified by the power and authority of the Security Council under the United Nations Charter. The lack of consent would thereby be an indicator that the operation holds an enforcement character. Nevertheless, the practice of the Security Council is not absolutely consistent and Secretary-General Boutros-Ghali and the Security Council acknowledged that in some cases the consent of all parties to the conflict might not be necessary.[91]

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[90] The Special Committee on Peacekeeping Operations was highly critical:
"*United Nations peacekeeping operations are frequently deployed into volatile environments with lingering sporadic violence and where the potential for relapse into resumed conflict is high.* Multiple parties to a conflict, including non-State actors and armed militias, increase the possibility of challenges to a peace process (…)

The complexity of today's peacekeeping mandates also demands more of missions. Tasks such as disarming and demobilizing former combatants, supporting the restoration and maintenance of public security, helping Governments to exercise their authority throughout their territory, (…) and taking deterrent action to decrease levels of violence and crime *all demand a level of activity and capability, or robustness, that traditional static peacekeeping forces do not provide*.

Although troop- and police-contributing countries frequently call for better guidance and capabilities to perform these tasks, no shared understanding exists as to what robust peacekeeping means in scope and in practice. As a result, efforts to equip missions with the guidance, capabilities and support they require to carry out such tasks remain insufficient.

(…) *First, robust peacekeeping is not a military issue alone*. It is a political and operational strategy to signal the determination of a peacekeeping operation to implement its mandate and, where necessary, to deter threats to an existing peace process, in the face of resistance from spoilers. It therefore involves all components of the mission, directed and coordinated by the senior mission leadership.

(…)*Third, robust peacekeeping is not peace enforcement. It operates within the principles of United Nations peacekeeping: consent by the host Government, impartiality and the non-use of force except in self-defence or defence of the mandate. Where a robust approach necessitates the use of force by peacekeeping operations, it takes place at the operational, tactical level, on a case-by-case basis, and in full adherence to these principles*." [Emphasis added], Implementation of the recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/64/573 (2009), 5-6, paras. 20-26.

[91] Boutros-Ghali was realistic and acknowledged the blurring of peace enforcement and peacekeeping in his Agenda for Peace. This development was attenuated by his suggestion that peacekeeping would not always need the consent of all parties concerned, *supra* note 36, paras. 20, 45. See. H.G. Schermers, N. M. Blokker, International Institutional Law (2011), 945, para. 1495; 947-954, paras. 1501-1512; Verdirame, *supra* note 86, 197; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 199-200; Rensmann, 'Reform', *supra* note 31, 25, 53-54, mn. 96; K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und*

3. Lessons learned from Bosnia and Somalia; the restoration of traditional UN Peacekeeping

As mentioned previously, (*infra* 1.1), plans to activate the mechanisms foreseen under Article 43 of the Charter and the establishment of United Nations standby forces failed and, in contrast, cooperation among regional organisations was strengthened. This development has also to be set against the background of United Nations operations in Somalia and Yugoslavia, which led to major criticism and a crisis in United Nations peacekeeping. The slaughters in Somalia as well as the massacre at Srebrenica gave rise to the question as to why the United Nations had not acted to prevent these atrocities from happening. Criticism fell upon the lack of an imperative mandate to allow peacekeepers to react with force, as well as a lack of equipment. Higgins, referring to Bosnia and the mandate of UNPROFOR, stated that peacekeepers were put in a place, with a mandate to deliver humanitarian aid and therefore "all realistic prospect of 'enforcing the peace' has [sic] gone. The enforcement of the peace of the victims of violations of Article 2(4) had already effectively been put aside by this selection of method of UN operation."[92] In fact, the United Nations troops found themselves in a highly adversarial environment and partly engaged in activities going beyond peacekeeping. Tharoor explains that these activities included, *inter alia*, the establishment of "no-fly zones" and "safe areas", punitive actions against warlords, "acquiescence in NATO declared 'exclusion zones", and "peacekeepers mount[ing] anti-sniping patrols and call[ing] in air strikes."[93] The reaction within the United Nations was a readjustment of the policy by the Secretary-General and the return to more traditional peace-keeping operations regarding the use of force. It is worth quoting from the *Supplement to the Agenda for Peace*:

Territorialverwaltungen (2004), 170; United Nations Peacekeeping Operations, Principles and Guidelines (2008) ("Capstone Doctrine"), *supra* note 70, 18, para. 2.2. In a presidential note, the Security Council elaborated some operational principles for peace-keeping operations which take into account this development. They comprise "the consent of the government and, where appropriate, the parties concerned, *save in exceptional cases*", the "readiness of the Security Council to take *appropriate measures* against parties which do not observe its decisions" and also "the right of the Security Council to authorize all means necessary for United Nations forces to carry out their mandate", Note by the President of the Security Council, UN Doc. S/25859 (1993), 1.

[92] Higgins, *supra* note 46, 445, 457. Higgins argues that the more muscular mandates including the protection of safe havens under Security Council Resolution 836 were only given out in "sole consideration" of the safety of peacekeeping troops, *ibid.* This seems rather doubtful as the general practice of the Security Council and also the infiltration of international law by and the proliferation of human rights law rather point to an explanation of this particular mandate. However, it goes without saying that the protection of peace-keepers was and always has been of concern for the United Nations as is also illustrated by the Convention on the Safety of United Nations and Associated Personnel; See also Zacklin, 'The Use of Force in Peacekeeping Operations', *supra* note 71, 91, 94-95.

[93] S. Tharoor, 'The Changing Face of Peace-keeping and Peace-Enforcement', (1995) 19 *Fordham International Law Journal*, 408, 414.

> The United Nations can be proud of the speed with which peace-keeping has evolved in response to the new political environment resulting from the end of the cold war, but the last few years have confirmed that respect for certain basic principles of peace-keeping are essential to its success. Three particularly important principles are the consent of the parties, impartiality and the non-use of force except in self-defence. Analysis of recent successes and failures shows that in all the successes those principles were respected and in most of the less successful operations one or other of them was not.
>
> There are three aspects of recent mandates that, in particular, have led peace-keeping operations to forfeit the consent of the parties, to behave in a way that was perceived to be partial and/or to use force other than in self-defence. These have been the tasks of protecting humanitarian operations during continuing warfare, protecting civilian populations in designated safe areas and pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept. The cases of Somalia and Bosnia and Herzegovina are instructive in this respect.
>
> In both cases, existing peace-keeping operations were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties, impartiality and the non-use of force. It was also not possible for them to be executed without much stronger military capabilities than had been made available, as is the case in the former Yugoslavia. In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.[94]

This return to the traditional values of peacekeeping was welcomed by both the General Assembly and the Security Council.[95] Consequently, these policy intentions led the Security Council to further institutionalise relations with regional organisations[96], establishing a general division of labour insofar as the Council would mandate regional organisations to conduct operations which take the nature of enforcement operations.[97] Nevertheless, peacekeeping operations have kept their

[94] Supplement to an Agenda for Peace, *supra* note 46, 8-9, paras.33-35; More substantiated critique in, B. Boutros-Ghali, *Unvanquished: A U.S.-U.N. Saga* (1999), 239.

[95] Statement by the President of the Security Council (1995), *supra* note 46, 2. Cf. also Higgins, *supra* note 46, 445, 459-60; P. Schori, 'UN Peacekeeping', in A. F. Cooper, H. Heine, R. Thakur (eds.), The Oxford Handbook on Modern Diplomacy (2013), 779, 794; Also Roberts, *supra* note 38, 99, 127; S. Tharoor, 'Should UN Peacekeeping Go 'Back to Basics?'', in (1995-1996) 37 *Survival*, 52, 52-53.

[96] *Infra*, 1.3. and 1.4.-1.9. Cf. also generally A. F. Douhan, *Regional Mechanisms of Collective Security. The New Face of Chapter VIII of the UN Charter?* (2013).

[97] This will be analysed more extensively in 1.2.4 as well as in Chapter II. One has to take into account that "[o]perating environments and mandates of such operations have varied considerably, and no standard

integrated structures and mandates covering all different kinds of areas and many potential conduits for problems to arise. The problem of imprecise mandates has only been displaced by this shift of practice by the Security Council from UN operations to UN-mandated operations.[98] The recent practice of the Security Council underlines the clear separation between peacekeeping and peace enforcement. Reacting to the ongoing security and humanitarian crisis and activities of armed groups in the DRC, the Security Council adopted Resolution 2098 on 28 March 2013 in which it

> decides that MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, on an exceptional basis and *without creating a precedent or any prejudice to the agreed principles of peacekeeping*, include an "Intervention Brigade" consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities[99] [Emphasis added].

division of labour between the UN and other actors involved in peace operations has emerged.", K. E. Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 45, 49; In other words, member states also preferred acting through regional organisations and alliance for the implementation of post—Westphalian peacekeeping operations, T. F. Weber, *Die Zusammenarbeit zwischen den Vereinten Nationen und Regionalen Organisationen bei Peacekeeping-Einsätzen: Interessengegensätze und ihr Management (unter besonderer Berücksichtigung von Co-Deployment)* (2007), 5.

[98] Kritsiotis suggests that Operation Alba in Albania falls also under this "new concept of peace-keeping, which involves a mutation between traditional peace-keeping and peace-enforcement operations.", D. Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania', in (1999) 12 *Leiden Journal of International Law*, 511, 538-39; Cf. also Dinstein, *supra* note 58, 309. It should be noted, however, that the resolution contained only an authorisation for a multinational operation, but that it was not *per se* a United Nations operation, Security Council Resolution 1101, UN Doc. S/RES/1101 (1997), paras. 3, 8-9.

[99] Security Council Resolution 2098, UN Doc. S/RES/2098 (2013), para.9. The very same formulated as highlighted was reiterated in Security Council Resolution 2147, UN Doc. S/RES/2147 (2014), 5, para. 1. Para. 12 (b) of Resolution 2098 reads as follows: "In support of the authorities of the DRC, on the basis of information collation and analysis, and taking full account *of the need to protect civilians* and mitigate risk before, during and after any military operation, carry out *targeted offensive operations* through the Intervention Brigade referred to in paragraph 9 and paragraph 10 above, either unilaterally or jointly with the FARDC*, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights* due diligence policy on UN-support to non-UN forces (HRDDP), *to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities*." [Emphasis added] See also the statement of the Russian Federation following the adoption of Security Council Resolution 2100 on Mali, Security Council, 6952nd meeting, UN Doc. S/PV.6952 (2013), 2. While renewing and modifying the mandate of UNAMID, the Security Council followed along the lines of the mandate of MONOSCU and encouraged "UNAMID to move to a more preventive and pre-emptive posture in pursuit of its priorities and in active defence of its mandate (…) without prejudice to the agreed basic principles of peacekeeping", Security Council Resolution 2148, UN Doc. S/RES/2148 (2014), 4, para. 9.

Although the Resolution emphasises the exceptional character of this extension of the mandate, it nevertheless proves again that the threshold between peacekeeping and peace enforcement is marginal at most[100] and that the application of international humanitarian law is independent from the classification as a peacekeeping or peace enforcement operation, and is rather based on factual circumstances.[101] The preparatory report by the Secretary-General for a United Nations peacekeeping operation in Mali likewise adopts a traditional understanding of peacekeeping:

> At the same time, it is critical that *a clear distinction be maintained between the core peacekeeping tasks of an envisaged United Nations stabilization mission and the peace enforcement and counter-terrorism activities of the parallel force* that will necessarily need to be established to preserve the hard-won security gains achieved so far. *Any blurring of this distinction* would place severe constraints on the ability of United Nations humanitarian, development and human rights personnel to safely do their work. If this were to happen, the United Nations would find it difficult to mount the kind of comprehensive system-wide response required to address the political, social and economic root causes of the multifaceted crisis in Mali[102] [Emphasis added].

[100] The mandate is congruent with the definition of peace enforcement given in the Peace Support Operations Doctrine of the AU which defines these operations as follows: "*They are coercive in nature* and are conducted when the consent of all parties has not been achieved or might be uncertain. *They are designed to maintain or re-establish peace or enforce the terms specified in the mandate*. (…) *It is important to emphasise that the aim of the PE operation will not be the defeat or destruction of factions or belligerents, but rather to compel, coerce and persuade the parties to comply with a particular course of action, i.e. to desist from abusing the basic right to life and dignity, and to support the peace process (…)* the long term demands of peace will require that coercive techniques are used with restraint and in conjunction with other techniques designed to promote co-operation and consent (…) the military component must be organised, equipped, trained and deployed to enforce compliance whilst also conducting a 'hearts and minds' campaign and providing support to the longer-term peace building process. *Should the conflicting parties not be deterred or persuaded and fail to comply with the mandate, the military component must be able to react in an appropriate manner, based upon ROE compatible with mission accomplishment* "[Emphasis added], Headquarters of the African Union, *supra* note 68, Chapter 3, 3-6, paras. 13-14. The statement of the Special Representative of the Secretary-General for the DRC and Head of MONUSCO, Mr. Martin Kobler, before the Security Council also suggests strongly that it is a peace enforcement operation. He said that "[w]e have been able to conduct more robust military operations. We have made it clear that there would be no cohabitation with armed groups – any of them. Our position is clear. We are in the [DRC] not to react, but to act, we are there not to deter, but to prevent (…) all armed groups are aware now that we have the will and means to take robust action at any time (…) Our rules of engagement are clear. Our mandate is clear. Our determination is clear", Security Council, 7094th meeting, UN Doc. S/PV.7094 (2014), 3. See also his Statement in Security Council 7137th meeting, UN Doc. S/PV.7137 (2014), particularly p. 3.

[101] Paragraph 12 (b) of Security Council Resolution 2098 does not only refer specifically to compliance with international humanitarian law but also speaks of steps normally taken as preparatory steps in military operations before an assault such as information collation and analysis, precautions to protect civilians. The most interesting fact is, however, that – following this Resolution – self-defence in the meaning of defence of the mandate can now include fully-scaled military operations to which IHL applies.

[102] Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/189 (2013), 19, para.100; Also Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/338 (2013), 18, para.83.

This quote is also particularly relevant as it highlights the professionalisation[103] and diversification that has taken place in peacekeeping since the end of the Cold War. Part of this development has been economy-driven due to the lack of sufficient funds by the United Nations and the holding back of payments by certain states.[104] The UN has also developed extensive financial and accountability mechanisms for its activities which have contributed further to the professionalisation of peacekeeping.[105] Notwithstanding, it cannot be emphasised enough how important it is that the Security Council adopts resolutions with precise mandates.[106] Problems can also arise if the mandate

[103] Since 2007 the UN relies on its Integrated Missions Planning Process (IMPP) as part of the wider 'Peacekeeping 2010' reform. The IMPP provides a coherent and unified framework for the planning of all multidimensional UN operations covering three stages: advance planning (pre-mission planning), operational planning after authorisation by the SC, review and transition planning. In the advance stage, the Integrated Mission Task Force (IMTF) relies also on In-country planning and consultation with regional and other actors and partners, S. Wiharta, 'Planning and deploying peace operations', in *SIPRI Yearbook 2008: Armaments, Disarmament and International Security*, 97, 98, 102.

[104] As the New Horizon Report states:
"This new phase may help create the necessary space to realize difficult but all-important transformations required to strengthen the effectiveness and efficiency of UN peacekeeping. This includes putting into practice a new strategy for field support, shifting peacekeeping toward a more capability-driven approach, and bolstering systems for identifying and sustaining the range of – often highly specialized – capabilities required to implement complex peacekeeping mandates. In this context, it is hoped that advances in the New Horizon reform agenda thus far will give greater opportunity to broaden the contributing base for UN peacekeeping. The evolving environment also gives impetus for progress in the areas of transition planning, national capacity-building, *oversight and benchmarking to help increase synergies among peacekeepers and other peacebuilding actors* and to better prepare peacekeeping missions from the outset to build the foundation for transition to longer-term peace consolidation and development. *While taking into account the risks that increased pressure for cost-savings may bring to the reform efforts and the realities of the global financial situation, the Secretariat will continue to propose effective and efficient means of matching resources to mandated tasks to ensure that the investment in peacekeeping is financially sound and contributes to the long-term sustainability of peace."* [Emphasis added], Department of Peacekeeping Operations and Department of Field Support, The New Horizon Initiative: Progress Report No. 1 (October 2010), 20-21.

[105] See e.g. Budget for the United Nations Multidimensional Integrated Stabilization Mission in Mali for the period from 1 July 2013 to 30 June 2014, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/68/653 (2013), 4, para.17; 5, para.19 and especially 6, para.22 – p. 8, para.29.

[106] The difficulty of a precise delimitation can also be due to a certain ambiguity of the mandate of the operation, Villani, *supra* note 8, 225, 398. Security Council Resolution 501, for instance, defined self-defense for the purpose of the operation as follows "self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council", Security Council Resolution 501 (1982), para. 3 (d). A deterioration of the security situation might equally call for an adjustment of the mandate, including enforcement measures (*ibid.*, 398). The Brahimi Report elaborates upon this matter in the following way: "The Panel concurs that consent of the local parties, impartiality and use of force only in self-defence should remain the bedrock principles of peacekeeping. Experience shows, however, that in the context of modern peace operations dealing with intra- State/transnational conflicts, consent may be manipulated in many ways by the local parties. A party may give its consent to United Nations presence merely to gain time to retool its fighting forces and withdraw consent when the peacekeeping operation no longer serves its interests. A party may seek to limit an operation's freedom of movement, adopt a policy of persistent non-compliance with the provisions of an agreement or withdraw its consent altogether. Moreover, regardless of faction leaders' commitment to the peace, fighting forces may simply be under much looser control than the conventional armies with which traditional peacekeepers work, and such forces may split into factions whose existence and implications were not contemplated in the peace agreement under the colour of which the United Nations mission operates.", Panel on United Nations Peace Operations, *supra* note 50, para.48. See also Evaluation of the implementation and results of protection of civilians mandates in United Nations

of an operation has to be changed depending on the situation on the ground.[107] The UN operation in Sierra Leone started as a 70 strong observer mission (UNOMSIL). After the failure of the peace agreement, the Council authorised the deployment of more than 17,000 troops with a robust mandate adopted under Chapter VII of the Charter, deploying a completely different operation on the ground (UNAMSIL).[108] The debate in the Security Council in June 2014 on new trends in UN peacekeeping illustrates, however, that the issue of peacekeeping operations with more of a peace enforcement mandate is not yet settled.[109]

peacekeeping operations, Report of the Office of Internal Oversight Services, UN Doc. A/68/787 (2014), 11-12, para. 28.

[107] Verdirame states that the change of mandate is problematic if it is combined with an ambiguous mandate that produces confusion, uncertainty of interpretation and also leads to a tension between the operation and the political command of the operation Verdirame, *supra* note 86, 198; R. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2004), 233-38.

[108] For UNOMSIL, Security Council Resolution 1181, UN Doc. S/RES/1181 (1998), for UNAMSIL, Security Council Resolution 1270, UN Doc. S/RES/1270 (1999) and Security Council Resolution 1289, UN Doc. S/RES/1289 (2000).

[109] The concept note prepared for the Council under the Russian presidency points out – while referring to Mali and the DRC – that these "new circumstances of United Nations Peacekeeping" may not be in full conformity with, and even contrary to the fundamental principles of peacekeeping; so far the UN was only able to adopt a "fragmented approach" towards "trends that are gaining momentum", United Nations peacekeeping operations: new trends, Concept note, Annex to the letter dated 1 June 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. A/68/899–S/2014/384 (2014), 3, para. 1. In the ensuing discussion in the Council, it became obvious that the opinion of members is split. The Secretary-General himself called Resolution 2098 for MONUSCO "a milestone" as an expression of the resolve of the Council to address the changing nature of conflicts and peacekeeping operations, Security Council 7196th meeting, UN Doc. S/PV.7196 (2014), 3. Rwanda (*ibid.*, 3), France (*ibid.*, 9), the UK (*ibid.*, 12), the USA (*ibid.*, 19), Jordan (*ibid.*, 16-18) and the EU (*ibid.*, 30) are not opposed to similar future mandates for other operations on the basis of a variety of arguments. France and the USA consider the mandates to be effective and they emphasise the need to protect civilians which for the latter is also a "moral imperative". In similar fashion, the EU sees MONUSCO as an example that "peace enforcement where necessary and under defined conditions can support the success and legitimacy of a United Nations operation." The UK and Jordan do not consider the mandate of MONUSCO to be a radical departure from previous practice, pointing to recent examples of the AU (the UK) or regarding the current UN practice as "a repetition of previous cycles in peacekeeping." Jordan goes even so far to call for the establishment of UN standing forces. Several states are opposed to any future similar mandates and they also provide various reasons. Some countries are afraid that this practice might either turn the UN into a party to the conflict (China, *ibid.*, 20), expose peacekeepers to unnecessary risks (India, *ibid.,* 27) or compromise the impartiality of UN peacekeepers (Turkey, *ibid.*, 58), a view which is not shared by Ireland (*ibid.*, 59). Pakistan and Bangladesh believe that peacekeeping and peace enforcement should not be conflated (*ibid.*, 33, 60). The Latin-American countries (Guatemala, Peru and Uruguay, *ibid.*, 35, 42, 43) remain apprehensive and emphasise that MONUSCO's mandate should not be a precedent for future operations. Ethiopia shares this view (*ibid.*, 45), but is convinced – as is Chile (*ibid.*, 6-7) that "some serious thinking" is necessary. Reacting to the developments unfolding in Mali in May 2014, the government also asked for a "much more robust mandate under Chapter VII" for MINUSCA, Security Council 7179th meeting, UN Doc. S/PV.7179 (2014), 4. To a certain extent that wish was fulfilled by the Council with the adoption of Security Council Resolution 2164, UN Doc. S/RES/2164 (2014), 6, para. 13 a) (i), (iv). With regard to this issue, cf., ICRC, 'Interview with Lieutenant General Babacar Gaye', (2014), *FirstView* Article, *International Review of the Red Cross*, 1, 4, 9-10.

4. An emerging division of labour between international organisations in peacekeeping operations

The multiplication of tasks in peacekeeping operations has been part of the increased inter-institutional cooperation between different international organisations during peacekeeping operations. In 2007, 54 peace operations were deployed around the world, of which not less than 40 involved an element of cooperation with another international organisation.[110] The practice suggests that there is a general tendency towards the UN focusing on traditional peacekeeping operations regarding the level of the use of force authorised, with an emphasis also on the multi-dimensional and non-military level and that UN-mandated operations will be provided with more robust mandates.[111] The massive presence in the field has also contributed to the overstretching in the capacities of the United Nations which in 2008 alone deployed 120,000 peacekeepers on the ground.[112]

The organisations use different terminology. Whereas the UN uses the classic terminology of "peacekeeping operations", the European Union refers normally to "crisis management operations" and the African Union speaks of "peace support operations". In the present study the terminology of the United Nations will be used.[113]

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[110] A. S. Bah, B. D. Jones, 'Peace Operations Partnerships: Lessons and Issues from Coordination to Hybrid Arrangements', Center on International Cooperation, New York University (2008), 1.

[111] Besides political and practical reasons, e.g. the military capacity of each organisation is one of the relevant aspects. Secretary-General Annan was very direct in this matter, while addressing NATO Parliamentarians, saying that "[i]t is also likely that the year ahead will see other new peace operations in Africa, as well as in Haiti and possibly elsewhere. Should such a surge take place, stronger support from NATO would be tremendously helpful. Specifically, NATO might be employed in a "peace enforcement" role, much as the European Union deployed "Operation Artemis" in the Democratic Republic of the Congo as a bridging force before the deployment of a UN operation. NATO could also provide an "over-the-horizon" capacity, should the need arise for localized enforcement tasks.", Secretary-General's opening remarks at meeting with Nato Parliamentarians, New York, 8 March 2004, available at: http://www.un.org/sg/statements/?nid=808.

[112] M. Derblom, E. Hagström Frisell, J. Schmidt, 'UN-EU-AU Cooperation in Peace Operations in Africa', FOI, Swedish Defence Research Agency (2008), 30. The significant engagement of resources also put conflict prevention and early warning systems under the spotlight. The Security Council adopted, for example, Resolution 1625 aimed at strengthening the effectiveness of the Security Council's role in conflict prevention, particularly in Africa, Security Council Resolution 1625, UN Doc. S/RES/1625 (2005). That resolution includes the objective to strengthen likewise regional and subregional capacities for early warning (para. 2 (d)) and it stresses the importance of a regional approach to conflict prevention (para. 5). See also, Department of Peacekeeping Operations and Department of Field Support, A New Partnership Agenda. Charting a New Horizon for UN Peacekeeping (2009), Section 1:4. See also, A regional-global security partnership, *supra* note 40, 18, para. 88.

[113] The importance of a common terminology was stressed by the Study of the Lessons Learned Unit which state clearly that "[i]t is important that the UN and regional organizations use the same terminology of peace-keeping and have the same understanding of the terminology, that they understand each other and avoid misunderstandings that could undermine the other's efforts", Lesson Learned Unit, Department of

In the past years, at least three different kinds of cooperation between international organisations in the area of peacekeeping have emerged. They are sequential, parallel and integrated deployment of troops by international organisations.[114] Besides, the strains of international and regional politics are "pushing global peacekeeping towards a different future, one in which several different organizations –principally the UN, NATO, the EU and the AU – each develop a fuller range of multi-faceted capacities, ranging from rapid, robust response to longer-term, civilian peacebuilding functions."[115]

(i) Sequential Operations include, *inter alia*, the 2003 operation of ECOWAS in Liberia which gave way to the long-term presence of the United Nations Operation in Liberia (UNMIL). Normally peacekeeping operations transit from being an authorised regional or multilateral operation or an *ad hoc* authorised operation to a United Nations operation. This is explained by the more effective and faster decision-making process of small actors, and certain other advantages such as geographic proximity, which allow a faster deployment on the ground. However, some recent operations mirror a contrary development, the handover of the NATO operation in Bosnia to the European Union, the similar transfer of operational power from the UN to the EU in Kosovo and also the transition from a UN operation into a Special Task Force of the African Union.[116] This development underlines the growth of multi-faceted capacities by regional organisations, although one has to keep in mind that many of the Member States of these organisations which take part in the new incoming peacekeeping operation have already deployed troops as part of the old, outgoing operation. The transfer from one operation to the other is then limited to a "re-hatting" and the transfer of operational command and control.

(ii) In contrast, parallel operations have taken various forms. They include temporary, military, support operations by one organisation for another, for example, operations of the EU in the

Peacekeeping Operations, Cooperation between the United Nations and Regional Organizations/Arrangements in a Peacekeeping Environment, Suggested Principles and Mechanisms (1999), Part II A., para. XII.

[114] Bah, Jones, *supra* note 110, 2-3; cf. Thematic evaluation of cooperation, *supra* note 36, 5, para. 5; see also A regional-global security partnership, *supra* note 40, 8, para. 36; Challenges Project, Meeting the Challenges of Peace Operations: Coopration and Coordination (2005), 12, para. 5; Department of Peacekeeping Operations and Department of Field Support, *supra* note 112, 9; Statement by the President of the Security Council, UN Doc. S/PRST/2010/2 (2010), at 3 which calls for coordination of peacebuilding plans and programmes of regional and subregional organisations with United Nations peacekeeping operations and the wider United Nations presence on the ground. Other classifications mention, e.g., "subcontracting; bridging operations; joint operations; integrated operations; and evolving operations", W. Pal Singh Sidu, 'Regional Groups and Alliances', in T. Weiss, S. Daws (eds.), *The Oxford Handbook on the United Nations* (2007), 217, 218; Balas speaks of sequential, parallel and hybrid peace operations, A. Ballas, 'It Takes Two (or More) to Keep the Peace: Multiple Simultaneous Peace Operations', in (2011) 15 *Journal of International Peacekeeping*, 384, 393-396.

[115] Bah, Jones, *supra* note 110, 1.

[116] *Ibid.*, 2. Other recent examples follow the traditional pattern; AFISMA in Mali was transformed in MINUSMA, pending the improvement of security conditions on the ground, AMISOM will most likely be transformed into a UN operation and the operation of ECCAS in the Central African Republic was now transformed in an African-led peacekeeping operation.

Democratic Republic of the Congo – Operation Artemis and EUFOR RD Congo. More common is a separation of tasks, from military operations existing alongside observer operations to separated civilian and military operations such as KFOR by NATO and UNMIK in Kosovo.[117]

UNMIK is also one example of an integrated operation, as UNMIK consisted of four different organisations working together: the UN Secretariat, UNHCR, the EU and the OSCE. The general structure is that either the organisations share the command between themselves or that one organisation subordinates itself to the other.[118] The first example was the International Civilian Mission in Haiti (MICIVIH) which joined the UN operation alongside the operation of the Organisation of American States (henceforth: OAS). The most integrated operation so far is nonetheless the hybrid United Nations/African Union operation in Darfur whose structure is completely under unified command.

The Elements of Implementation of the European Security Strategy distinguish first of all between national contributions to a UN operation and a "stand alone operation".[119] The "stand alone operation" comprises two different models, the "bridging model" and the "stand by model". As the name suggests, the bridging model refers to an organisation "which aims at providing the UN with time to mount a new operation or to reorganize an existing one."[120] The challenge is to provide a rapid deployment of troops on the ground, but the advantage is that if troops of a previous EU operation are "re-hatted" and continue to be deployed on the ground as part of the follow-up UN operation, a smoother transfer of power can take place.[121]

Whereas the "bridging model" is a temporary arrangement to enable the UN to mandate and initiate a peacekeeping operation or to reorganise and restructure such an operation, the "stand by model" consists "of an 'over the horizon reserve' or an 'extraction force' provided by the EU in support of an UN operation [which] would be of particular relevance in an African context."[122] Thus, the "stand by model" is used in cases in which immediate, short-term support of a peacekeeping operation is necessary, calling for the rapid deployment of contingents and this is why there are substantive issues of coordination between the UN and the EU.[123]

[117] Bah, Jones, *supra* note 110, 3.
[118] *Ibid.,* 3.
[119] EU-UN co-operation in Military Crisis Management Operations, Elements of Implementation of the EU-UN Joint Declaration (2004), para. 7.
[120] *Ibid*., paras. 8 – 9.
[121] *Ibid*., paras. 9, 12.
[122] *Ibid*., para. 13.
[123] *Ibid.*, para. 13.

The different forms of cooperation between international organisations in the area of peace and security emphasise anew the complexity of the topic and why an analysis, such as that carried out in the present study, is important. It also highlights some of the underlying advantages and disadvantages. While cooperation allows organisations to build upon the competence of one another,[124] there are also shortcomings such as handover challenges and questions of legitimacy and ownership in inter-institutional arrangements.[125]

The increased activism of regional organisations since the end of the Cold War has also led to a reactivation of another chapter of the Charter, namely Chapter VIII, which had also been impaired during the Cold War.[126]

1.3. The new "old" Chapter VIII of the UN Charter – or the merger of Chapters VII and VIII?

> "The ability of the Security Council to become more proactive in preventing and responding to threats will be strengthened by making fuller and more productive use of the Chapter VIII provisions of the Charter of the United Nations than has hitherto been the case."
>
> - Report of the High-Level Panel on Threats, Challenges and Change (2004) [127]

> "The principle of establishing stronger partnerships with regional organizations is embedded in the very DNA of the United Nations. With great vision and foresight, Chapter VIII of the Charter of the United Nations lays out the critical role of regional Organizations in maintaining international peace and Security."
>
> - Secretary-General Ban Ki-moon (2014)[128]

[124] M. Brosig, 'The Multi-Actor Game of Peacekeeping in Africa', (2010) 17 *International Peacekeeping*, 327, 329.

[125] Bah, Jones, *supra* note 110, 4-5. One also has to keep in mind that "[r]egional organizations have their own objectives and interests, which do not always coincide with those of the United Nations, and it may be difficult for the United Nations to predict which organizations can and will cooperate and the resources that they will bring to the relationship", Thematic evaluation of cooperation, *supra* note 36, 5, para. 7.

[126] Secretary-General, An Agenda for Peace, *supra* note 36, 17, para. 60; Rensmann, 'Reform', *supra* note 31, 25, 52, mn. 93.

[127] Report of the High-Level Panel, *supra* note 22, 70, para. 270. Another argument made in favour is that "There are multiple pressures for a wide range of problems to be tackled on a regional rather than global basis – an approach that accords with the provisions on regional arrangements in Chapter VIII of the Charter. A UN rapid-reaction capability might tilt the balance too far away from regional responsibility, thereby overloading the UN and undermining efforts to build up standing force capabilities on a regional basis", Roberts, 'Proposals for UN Standing Forces', *supra* note 38, 99, 128.

The previous two sections have traced the development of peacekeeping within the wider framework of the United Nations Charter as well as under Chapter VII. They confirmed that the maintenance of international peace and security by the Security Council cannot be seen in isolation from the larger framework of cooperation with regional organisations. This part therefore analyses Chapter VIII of the United Nations Charter, which applies to relations with regional organisations in the field of the maintenance of international peace and security. Whereas it is generally accepted that peacekeeping is in conformity with the United Nations Charter, the interpretation of Chapter VIII is rather disputed. This is firstly due to the very vague language used in Chapter VIII. Secondly, it is a result of the interests of various actors in interpreting Chapter VIII in their favour, which is once again an expression of the duality between universality and regionalisation: "total formal control by the UN Security Council to *de facto* discretion and arbitrariness of (…) regional organizations; subsidiarity in UN-regional relations to complementarity of intergovernmental tasks."[129]

1. The relevance of practice for the interpretation of the Charter and the dispute over a definion of "regional arrangements and agencies"

The practice of the United Nations and the involved regional organisations is particularly relevant for the interpretation of Chapter VIII. This approach has the additional advantage of guaranteeing the flexible interpretation necessary to ensure that the Security Council can exercise its mandate effectively and efficiently. Being a political body, this method might also be better at accommodating the political implications in the activity of the Security Council. Furthermore, it must be underlined that the drafters of the United Nations Charter decided that each organ of the organisation has primary responsibility for interpreting the parts of the Charter which regulate its competences and functions. The debate on this issue at the San Francisco Conference began with a proposal by the Kingdom of Belgium that "[t]he General Assembly has sovereign competence to interpret the provisions of the Charter."[130] The "sovereign" notion in this context was intended "to mean that the original part lies with the Assembly, but the Assembly may of course consult the International Court."[131] Following another proposition by the UK representative, it was decided to refer the whole

[128] Statement by the Secretary-General during the 7112th meeting of the Security Council on Cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security, European Union, Security Council 7112th meeting, UN Doc. S/PV.7112 (2014), 2.
[129] Douhan, *supra* note 96, 22.
[130] United Nations, Documents of the United Nations Conference on International Organization, San Francisco, 1945, Volume III Dumbarton Oaks Proposals Comments and Proposed Amendments (1945), 339.
[131] *Ibid.*

matter to the Fourth Committee.[132] Following a lengthy debate in the subcommittee, the Fourth Committee approved the report in which it was stated that

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. (…) Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.[133]

To safeguard the necessary flexibility for the Security Council, the drafters of the UN Charter also decided to refrain from defining "regional arrangements and agencies" for the purposes of Chapter VIII. As stated in the *Agenda for Peace*,

> [t]he Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.[134]

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[132] Documents de la Conférence des Nations Unies sur l'organisation internationale, San Francisco, 1945, Tome IX, Commission II Assemblée Générale (1945), 74, 347. The issue was debated extensively in Commission IV and then referred to a subcommittee for further study by an affirmative vote of 16-13, Documents de la Conférence des Nations Unies sur l'Organisation Internationale, San Francisco, 1945, Tome XIII, Commission IV, Organe Judiciare (1945), 633-34, 653-54.

[133] *Ibid.,* Tome XIII, 709-710, 831-32. See generally also, L. B. Sohn, 'Interpreting the Law', in O. Schachter, C. C. Joyner, *United Nations Legal Order. Volume I* (1995), 169 – 230. This competence of interpretation was also explicitly recognised by the ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3rd, 1950*, 9, 2nd para. from the top of the page; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion* (20 July 1962), 10 (of the advisory opinion), 2nd last paragraph. Also, the Security Council alone and any organ authorised by it – arguably – may give an authoritative interpretation of its resolutions, E. Papastavridis, 'Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis', in (2007) 56 *International & Comparative Law Quarterly*, 83, 91. As the PCIJ held "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it", Publications of the Permanent Court of International Justice, Series B, No. 8, December 6th, 1923, Collection of Advisory Opinions, Question of Jaworzina (Polish-Czechoslovakian Frontier), p. 37. It also should be recalled that, although Security Council resolutions are documents of a primarily political body, they can contain legal rules binding upon states as well as trigger the application of legal rules. Cf. also *Certain Expenses*, *ibid.,* 168.

[134] Secretary-General, An Agenda for Peace, *supra* note 36, 17, para. 61; also M.N. Shaw, *International Law* (2008), 1274 ; Villani, *supra* note 8, 225, 271. This lack of definition is also once again a result of the compromise between the regionalists and universalists when the Charter was adopted, E. P. J. Myjer, N. D. White, 'Peace Operations Conducted by Regional Organizations and Arrangements', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 163, 164-5.

This particular point was debated during the San Francisco Conference, and Egypt proposed the following definition

> There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical, or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise (…) as well as for the safeguarding of their interests and the development of their economic and cultural relations.[135]

The proposition was however rejected on the arguments that

> on oppose qu'il n'est pas souhaitable d'inscrire une définition dans une Charte générale comme celle qui est en cours de préparation ; qu'une telle définition provoquera de longs débats, et qu'on a des raisons de douter que cette définition se révèle suffisamment large. On estime qu'il est bien évident que le paragraphe additionnel, concernant le droit de légitime défense, individuelle ou collective, contre une attaque armée, recommandé par le Conseil (…) est suffisamment compréhensif et que son application n'est nullement limitées aux accords régionaux. [136]

The only sustainable, judicial argument made is the solicitude that the proposed definition would not be comprehensive enough;[137] the latter part of the argument acknowledges the compromise solution between the proponents of the universalist approach and those of a regionalist vision (*infra,* 1.1). No further attempts at clarification have been made during the history of the United Nations. In 1994, the General Assembly adopted a Declaration concerning the enhancement of cooperation with regional entities in the area of international peace and security, but that declaration merely acknowledged the "variety of mandates, scope and composition of regional arrangements or agencies."[138]

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[135] United Nations, Documents of the Conference on International Organisation, San Francisco, 1945, Vol. XII, Security Council (1945), 857.

[136] United Nations, Documents de la Conférence des Nations Unies sur l'Organisation Internationale, San Francisco, 1945, Tome XII, Commission III, Conseil de Sécurité (1945), 860 ; Cf also A regional-global security partnership, *supra* note 40, 16, para. 77.

[137] M. Akehurst, 'Enforcement Actions by Regional Agencies with special References to the Organization of American States', in (1967) 42 *British Yearbook of International Law*, 175, 177-78; Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1439 mn. 16.

[138] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 2-3, Preamble. In his report of 1995, the Secretary-General interestingly, however, preferred to explain the lack of definition by making the following remark: "Cooperation between the United Nations and regional organizations must constantly adapt to an ever-changing world situation. The Charter itself anticipated this need for flexibility by not giving a precise definition of regional arrangements and organizations, thus enabling diverse organizations and structures to contribute, together with the United Nations, to the maintenance of peace and security.", Report of the Secretary-General on the work of the Organization, August 1995, UN Doc. A/50/1 (1995), 122, para. 930.

It is consequently hard to define the idea and the character of regional arrangements and entities as expressed in Chapter VIII of the Charter. The political arguments which were raised during the preparatory conference of the United Nations and the fact that the League of Nations explicitly mentioned political constructs such as the Monroe Doctrine in the Covenant suggest that the concept of "regional" or "regional organisation" is a political, and adjustable one, rather than being legal in origin, safeguarding the necessary flexibility to include potentially new regional entities as well. Unfortunately, these political concerns can hardly be reconciled with legal principles such as the principle of legal certainty; however, one can argue that legal principles are intrinsic to Chapter VIII. Chapter VIII can be interpreted as a mechanism to distribute competences, rights and obligations; in other words, it determines whether the United Nations or a regional organisation is *responsible* for action. Therefore, this Chapter has a direct bearing on the law of international responsibility which determines responsibility on the basis of the attribution of conduct.

All in all, it appears that Chapter VIII has to be seen as incorporating the conflict between supporters of a universalist and a regionalist view of the system of collective security, as well as an interplay between arguments of law and politics. As a result, any attempt of interpretation of Chapter VIII is highly delicate.

2. The unrelenting influence of Chapter VII on Chapter VIII

The influence of universalism versus regionalism as enshrined in the United Nations Charter is reinforced by the virtue of Chapter VII. Whilst Chapter VII establishes the universalist perception as regards the maintenance of international peace and security – with the Security Council as the guardian – Chapter VIII establishes the tradition of the regionalistic perspective:

> There was a reason Chapter VIII was drafted by the Charter's framers and that reason is as valid today as it was 61 years ago. It is to ensure that global and regional collective security is mutually complementary and that the total effort of the international community for securing the peace is optimized through the collaboration of our various international organizations.[139]

A joint consideration of Chapter VIII and Chapter VII is required for several reasons. First of all, Chapter VIII does not provide the Security Council with any substantive powers of peace enforcement in addition to the powers the Security Council holds under Chapter VII of the Charter. Article 53 (1) of the Charter only gives the Security Council the right to delegate Chapter VII powers to regional arrangements; thus "[t]he delegation of Chapter VII powers to a regional arrangement (…)

[139] A regional-global security partnership, *supra* note 40, 16, para. 80.

takes place by the Council using its specific competences so to delegate under Chapter VIII."[140] Consequently, there is no legal difference if the Security Council were to authorise states to use force under Article 53 of the Charter or simply under Chapter VII as its powers under Chapter VIII derive from Chapter VII. Nevertheless, there might be a symbolic importance, given that the use of Chapter VIII amounts to recognising the specific role of regional organisations.[141]

An analysis of Chapter VIII in the context of peacekeeping is also pertinent as "[a]ny endeavour to enhance [and understand] the relationship between the United Nations and regional organizations under Chapter VIII will need to be based on a clearer definition of the basis and processes of such cooperation."[142] The Secretary-General proposed that the Security Council "[d]iscuss[es] the desirability and practicability of partner organizations identifying themselves either as regional organizations acting under Chapter VIII or as other intergovernmental organizations acting under other provisions of the Charter."[143] But, "[t]he question could be asked, however, whether the partnership would be operationally more effective if each partner knows under which Charter provisions it is functioning."[144] However, from a legal point of view, it does not matter whether a regional organisation can be subsumed under Chapter VIII or whether there is acquiescence by the regional organisation to be bound by Chapter VIII and a corresponding agreement by the Security Council. To offer an example to the contrary, NATO could arguably be considered as a regional organisation under Chapter VIII, but it refuses to be considered as such (*infra* 1.8).

[140] D. Sarooshi, 'The Security Council's Authorization of Regional Arrangements to Use Force: The Case of NATO', in V. Lowe, A. Roberts, J. Welsh (eds.), *The United Nations Security Council and War* (2008), 226, 288; This implies also that the Security Council can only rely on Chapter VIII if the conditions of Article 39 are fulfilled and if the envisaged action has as its aim to restore international peace and security, Villani, *supra* note 8, 225, 325.

[141] Gray, *supra* note 54, 426; C. Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 271. One difference might be that Article 54 foresees that the Security Council shall at all times be kept fully informed of activities undertaken or contemplated by a regional organisation. However, it is the established practice of the Security Council that operations conducted on the basis of an authorisation under Chapter VII will report regularly to the Security Council. Following the decision in *Behrami/Saramati* and the subsequent decisions, it is rather likely that the Security Council will have underlined its request for reports on operations under UN authorisation. J.-P. Schütze, *Die Zurechenbarkeit von Völkerrechtsverstößen im Rahmen mandatierter Friedensmissionen der Vereinten Nationen* (2010), 55. An extensive analysis of the Security Council's practice of authorisation came, indeed, to the conclusion that most of the resolutions adopted in the period of 2000-2012 contain more specific mandates, almost all of them have specific time limits and reporting requirements, cf. N. Blokker, 'Outsourcing the use of force. Towards more Security Council control of authorised operations?', to be published in M. Weller, (ed.), *The Oxford Handbook on the Use of Force in International Law* (2014).

[142] Report of the Secretary-General on the relationship, *supra* note 5, 6, para.8.

[143] A regional-global security partnership, *supra* note 40, 16-17, para. 82; 21, para. 99.

[144] *Ibid*. The fulfilment of formal criteria is, in practice, "not a major issue" for the UN as long as there is a permanent secretariat or a secretary-general as first point of contact, regional organisations are seen as partners in cooperation, Griep, *supra* note 10, 37.

For the purposes of analysing the applicability and the procedural framework of Chapter VIII of the UN Charter to regional organisations, it is firstly necessary to define certain criteria as contained in Articles 52 – 54 of the Charter.

3. Defining the elements in Article 52 of the UN Charter

Article 52 enshrines the priority of regional organisations as regards matters relating to the maintenance of international peace and security, and underlines that they are appropriate for regional action. Regional organisations enjoy particular priority for the pacific settlement of "local disputes" under Article 52 (2) and (3).[145] It suggests that the "regional" criterion is of a geographical nature, meaning that in order to qualify as a regional arrangement or agency under Chapter VIII, the member states of this agency or arrangement need to be in geographical proximity to each other.[146] Such an interpretation is supported by two other aspects; the feeling of solidarity, and the intimate knowledge of the geopolitical conditions in a given situation, which argue both in favour of a geographical interpretation of the "local disputes" wording in Article 52 as it concerns the meaning of "regional".[147]

The drafting history however shows that a large majority of states were against any specification as to the regional criterion.[148] Equally, the existing advantages of geographical proximity for dispute resolution can be offset by the existence of arbitral or judicial proceedings within a regional

[145] Cf. Griep, *supra* note 10, 62, 65-66.

[146] Boisson de Chazournes argues– while citing Kelsen – that the "regional" notion refers to the nature of the conflict and not to the organisation, Boisson de Chazournes, *supra* note 11, 79, 245-6 ; according to Kelsen, "it is not required that the parties to the regional arrangement are geographically neighbors. It is essential only that the actions of the organization established by the regional arrangement be restricted to a certain area (…) The action taken under the arrangement must have the character of 'regional action'", H. Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?', (1951) 45 *The American Journal of International Law*, 162, 163.

[147] Cf. Villani, *supra* note 8, 225, 273. Villani also argues that a group of states which are not geographically conjoined could be perceived as being only united for the purpose of exercising their influence or predominance in a specific region (*ibid.*), an argument which is often also raised against NATO in the Arab world. A "local" dispute per se implies "that the dispute is not of a nature as to affect international peace and escurity in a global dimension", Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1469 mn. 78. Taking into account of the overall development of the practice regarding the interpretation of threats to international peace and security under Article 39, "local dispute" covers both interstate as well as internal armed conflics (*ibid.*, 1469 mn. 79); See also B. Boutros-Ghali, *Contribution à l'étude des ententes régionales* (1949), 169-173.

[148] Villani, *supra* note 8, 225, 274 ; The same view is expressed by Myjer and White who emphasise that Chapter VIII was included on the insistence of the then already existing "regional" organisations, Myjer, White, 'Peace Operations Conducted by Regional Organizations and Arrangements', *supra* note 134, 163, 167; The regional concept is thus interpreted as "non-universal" and the rejection of the draft proposal of Egypt as a rejection of any requirement of geographical proximity. But in the end it is not equivalent to saying that the delegates in San Francisco were opposed to every single criterion; Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1447 mn. 3; 1448 mn. 10; also R. Pernice, *Die Sicherung des Weltfriedens durch regionale Organisationen und die Vereinten Nationen. Eine Untersuchung zur Kompetenzverteilung nach Kapitel VIII der UN Charta* (1972), 26-29.

organisation, and nor is it indispensable that the states intervening in a dispute are located in the same geographic region.[149] The General Assembly has also repeatedly granted the status of observers to organisations based on political, religious or even linguistic ties rather than on geographical ties, such as OSCE, the Commonwealth, the OIC and the Organisation international de la francophonie.[150] Nevertheless, the fact that Chapter VIII speaks of "regional" agencies and supports an interpretation of the regional specification as meaning that the organisation or its constituent instrument shall concern one specific geographic region; that its rules and competences shall have as their object this zone in order to abet the maintenance of peace and security. Otherwise, one could consider the organisation to be acting outside of Chapter VIII of the Charter.[151] A teleological approach underlines the need of "some geographical link" as "activity on the local level, (…) pre-existing greater familiarity with the subject-matter of a disputed, enhanced legitimacy, and solidarity are factors favouring a peaceful settlement."[152]

Other factors including a shared language or cultural aspects may contribute to the coherence and common identity of a given organisation strengthening the "close and reliable ties" between the

[149] Villani, *supra* note 8, 225, 274. Other arguments can be found in Article 53 of the Charter; regional organisations can be used by the discretion of the Security Council "where appropriate" and without any other qualification and the connector between states against an ex-enemy state is that the latter is outside of the (regional) organisation or arrangement. *Ibid.*, 275. Indeed, whereas in the earlier literature geographic vicinity is determinative, recent academia seems to consider organisations as regional even if their area of action is regionally limited, one example being the Antarctica Treaty, Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1447 mn. 6-7, 1449 mn. 14-15 ; J. I. Charney, 'The Antarctic System and Customary International Law', in F. Francioni, T. Scovazzi (eds.), *International* Law *for Antarctica* (1996), 51, 64-65.

[150] The GA does, however, not distinguish between universal and regional organisations. Villani, *supra* note 8, 225, 275. See also, Secretary-General, An Agenda for Peace, *supra* note 36, 17,para. 62; 23, para. 83. In the doctrine, it is also the signification of an observer status of a given (regional) organisation at the General Assembly regarding its status as a regional organisation or arrangement under Chapter VIII of the UN Charter. One can distinguish three different approaches within the sphere of the United Nations; first of all, the granting of observer status as a recognition of the fact that Chapter VIII is applicable for the given situation (pure recognition of a fact), secondly – similar to the two theories concerning statehood – a constitutive approach which regards the bestowal of the observer status as constitutive of its recognition as a regional arrangement or agency under Chapter VIII of the Charter, thirdly, an approach which considers the conferral of an observer status as entailing no consequences regarding the question if the given situation falls under Chapter VIII of the Charter, cf. Boisson de Chazournes, *supra* note 11, 79, 180-2.

[151] Villani, *supra* note 8, 225, 276. In the case between Cameroon and Nigeria, the ICJ recognised the "regional" character of the Lake Chad Basin Commission on the basis that "it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter", *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11 June 1998, para. 67.

[152] Walter, 'Chapter VIII Regional Arrangements' *supra* note 8, 1445, 1448 mn. 11 ; Boisson de Chazournes, *supra* note 11, 79, 246 ; For a general overview of advantages and disadvantages of conflict management on a regional level, see P.F. Diehl, 'New Roles for Regional Organisations', in C.A. Crocker, F.O. Hampson, P. Aall (eds.), *Leashing the Dogs of War : Conflict Management in a Divided World* (2007), 537, 540-47.

members of the organisation which generate the expectation that the organisation in question can contribute to the maintenance of peace and security.[153]

One can however infer, from the "regional criterion" – *argumentum e contrario* – that the membership has to be limited in order to distinguish them from universal organisations falling outside the scope of Chapter VIII.

In academic writing, controversy has also arisen over the question of whether a given regional organisation can be qualified as falling under Chapter VIII if under its constitutive instrument the organisation can take action – whether under Article 52 or Article 53 – against a non-state member (external threat), as these actions are also covered by the right of self-defense as enshrined in Article 51.[154] But there are no indications that such a limitation is imposed by Chapter VIII. Article 53 refers to enforcement action against enemy states "whether these states are or are not members of the regional organization."[155] That self-defense, as an exception to the prohibition on the use of force, also applies to Chapter VIII is evident from the introductory words of Articles 51 and 52: "nothing in this Charter precludes".[156] Moreover, this approach is not convincing from a functional perspective, since the very same organisation may fulfill quite different tasks according to specific strategic requirements given in precise circumstances. The OAS provided for collective security and collective self-defence,[157] while the re-orientation and expansion of NATO activities following the end of the Cold War is another example of an organisation fulfilling different tasks in a simultaneous manner.[158]

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[153] Walter, *supra* note 141, 39-47. For a summary of a functional analysis, see Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1450 mn. 16 and especially 1459 mn. 48 ; a liberal interpretation also takes into account that regional organisations are "self-defining in terms of membership and objects and purposes", N. D. White, 'The EU as a Regional Security Actor within the International Legal Order', in M. Trybus, N. D. White (eds.) , European Security Law (2007), 329, 332-33.

[154] Boisson de Chazournes, *supra* note 11, 79, 246. In contrast, the wording of a joint communiqué by the Security Council and the AU PSC suggests that the dispute settlement role of regional organisations is limited to "the settlement of disputes among and within their Member States", Annex to the letter dated 14 October 2013 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, Joint communiqué of the seventh annual consultative meeting between members of the Security Council of the United Nations and the Peace and Security Council of the African Union, UN Doc. S/2013/611 (2013), 2, para.2.

[155] H. Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement ?', (1951) 45 *The American Journal of International Law*, 162, 165.

[156] As Kelsen argues, although the "framers of the Charter did not anticipate that the system of collective security laid down in the Charter will not work at all (…) [and although] it may not be in conformity with the intention of the framers of the Charter to organise self-defense by a treaty (…) the rule of Article 53, that no enforcement action shall be taken without the authorization of the Security Council (…) is restricted by Article 51", *ibid.,* 162, 54.

[157] Articles 28 and 29 of the Charter of the Organisation of American States.

[158] See below, Chapter II, 2.2., and Walter, *supra* note 141, 1452-53 mn. 24; R. Wolfrum, 'Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeiten und Grenzen', in (1993) 53 *Heidelberg Journal of International Law*, 576, 579.

The distinction in Chapter VIII between "arrangements" (in French: accords) and agencies (organismes) contains, once again, a broad margin for interpretation and the inclusion of regional entities under Chapter VIII. It is probably for this purpose that the distinction was made, which is irrelevant in practice as the application of the dispositions of Chapter VIII is identical for both of them.[159] The term "agency", as a synonym for "organisation" presupposes a permanent, institutionalised structure, although it does not necessarily amount to the definition of "international organisation" (*infra* 2.1.1.).[160] The word "arrangements" refers to the less-developed form of acting together through an "alliance" or based on a treaty. The intersection with agencies constitutes the treaty as organisations, at least those with an international legal personality, are based on such an international agreement. Thus, any-less developed forms of cooperation do not enter the remit of Chapter VIII. Therefore, the extensive practice of 'ad hoc' authorisations to use all necessary means or measures given to a group of states falls outside the scope of Chapter VIII.

Articles 52 and 53 also imply that organisations subject to Chapter VIII have internal mechanisms to resolve disputes (Article 52 (2)) and that they are able to conduct coercive measures (Article 53 (1)). In order to enable the United Nations to "maintain international peace and security" and "to take *effective collective measures*" [Emphasis added] and to "bring about by peaceful means (…) adjustment or settlement of international disputes or situations"[161], any interpretation of Chapter VIII has to be done in conjunction with the general rules of the organisation. To guarantee the effective maintenance of international peace and security, it has to be sufficient that a regional organisation disposes of either internal dispute resolution mechanisms or that it is able to carry out coercive measures.[162] As the general requirements for regional organisations are laid down in Article

[159] Douhan, *supra* note 96, 46; Villani, *supra* note 8, 225, 297 ; Boisson de Chazournes, *supra* note 11, 79, 248 ; Myjer, White, 'Peace Operations Conducted by Regional Organizations and Arrangements', *supra* note 134, 163, 165 ; Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1451 mn. 21.

[160] Villani, *supra* note 8, 225, 295. Security Council Resolution 816, i.e., also speaks of "regional organizations or arrangements", Security Council Resolution 816, UN Doc. S/RES/816 (1993), 2, para. 4. See also G. Lind, 'Chapter VIII of the UN Charter. Its revival and significance today', in P. Wallensteen, A. Bjurner (eds.), *Regional Organizations and Peacemaking. Challengers to the UN?* (2015), 28, 29.

[161] Article 1 (1) of the United Nations Charter. "Situation" as a term has a broader meaning than "disputes" and it is normally accompanied by additional explanation. A dispute refers to a specific claim raised by a party which is denied by the other party, Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1469 mn. 76-77.

[162] Cf. Villani, *supra* note 8, 225, 282-3. The necessary flexible interpretation is confirmed by the practice of the United Nations. In the Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security of the General Assembly, UN Doc. A/RES/49/57 (1994) Annex, it is expressed that "Regional arrangements or agencies can, in *their fields of competence* and in accordance with the Charter, make important contributions to the maintenance of international peace and security, *including*, *where appropriate*, through the peaceful settlement of disputes, preventive diplomacy, peacemaking, peace-keeping and post-conflict peace-building" (para.2) [Emphasis added]. The emphasised points show that the contribution and integration of regional

52 (1) it also remains unclear why paragraph 2 should add new requirements; the latter delineates competences between the United Nations and a regional organisation.[163]

4. The relationship between the UN and regional organisations under Articles 52 and 53

The effectiveness of the cooperation with regional organisations can, however, be impaired if several organisations deem themselves to be competent in a given situation which is "appropriate for regional action". All actions falling short of "enforcement action" under Article 53, are not subject to the authorisation of the Security Council, and thus there can be situations in which a regional organisation is engaged in activities maintaining international peace and security, and the Security Council simultaneously decides to act or to authorise enforcement action. Generally speaking, Article 52 seems to be inspired by the idea of an alternative rapport between the universal level of the Security Council and the regional level.[164] The practice shows a preference for an increased cooperation between the United Nations and regional organisations as can be inferred, *inter alia*, from the 1994 Declaration in which states and regional arrangements and agencies are encouraged to cooperate further with the United Nations in the whole area of the maintenance of international peace and security.[165] An example of joint action by the Security Council and regional organisations was the crisis within the Democratic Republic of the Congo. In its Resolution 1234, the Security Council not only expressed its support for the mediation process of the OAU and the Southern African Development Community, but simultaneously, the Security Council requested all parties to

organisations in the maintenance of international peace and security is not limited to these activities, but can take various forms.

[163] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1455 mn. 30-31.

[164] Villani, *supra* note 8, 225, 318 ; The practice is unclear as to whether there is a priority for regional action. In several cases the United Nations and regional organisations have been active, it "seems to reject clear alternatives between universal or regional jurisdiction" Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1445, 1470 – 77, 1476 mn. 106 ; See equally Wolfrum, *supra* note 158, 576, 579-80.

[165] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 4-5, especially paras. 8 – 10. Nevertheless, increased cooperation in practice means that the Security Council might decide whether to act itself or whether to delegate and support the actions of a regional organisation. In the case of the dispute between Ethiopia and Eritrea, the Security Council expressed its support for the actions of the OAU and called upon the parties to fully cooperate with the latter, Villani, *supra* note 8, 225, 319; Security Council Resolution 1177, UN Doc. S/RES/1177 (1998), 2, paras. 4-5. This organ of the UN strengthened its supports for the mediation efforts of the OAU in the two follow up resolutions, Security Council Resolution 1226, UN Doc. S/RES/1226 (1999), 1, paras. 1, 3; 2, para. 4, and Security Council Resolution 1227, UN Doc. S/RES/1227 (1999), 1, paras. 4-5. After fights restarted, the Security Council issued a resolution under Chapter VII demanding the states to resume peace-talks under AU auspices, Security Council Resolution 1298, UN Doc. S/RES/1298 (2000), 2, paras. 4-5. Furthermore, it imposed an embargo on weapons (see, in particular paras. 6-8), thus putting pressure on the two states so that they would accept the proposed settlement by the OAU.

cooperate fully with its special envoy by also reaffirming the readiness of the UN to help with the application of a ceasefire agreement.[166]

In comparison to Article 52, the relationship between the United Nations and regional organisations is reversed in Article 53. The priority of regional organisations under Article 52 is replaced by the priority of the Security Council.[167]

The Security Council keeps its broad margin of discretion, which it disposes in maintaining international peace and security under Chapter VII also within Chapter VIII, as it shall utilise "where appropriate" regional arrangements or agencies. Any other interpretation would only add more than was intended by the drafters of the Charter.[168] In practice, the Security Council normally refers to all "relevant international organisations" in its resolutions rather than to pick up a specific one.[169]

5. The interpretation of "enforcement action" in Article 53

Another problem of interpretation is the question as to which circumstances the Security Council can rely upon regional organisations. Article 53 (1) speaks of enforcement action, which seems to exclude other coercive measures which can be found in the United Nations Charter such as "preventive action" (Article 5) or "preventive measures" (Article 50).[170] The logical consequence is to presume that the application of Article 53 is limited to cases in which the coercive measures are a *re*action rather than an action, similar in nature to self-defense which is applicable only in cases of an actual armed attack to repel invaders.

Another argument of systematic interpretation, while referring to Article 1 of the Charter which mentions "effective collective measures for the *prevention and removal of threats to the peace"*

[166] Security Council Resolution 1234, UN Doc. S/RES/1234 (1999), paras. 11-15.
[167] Villani, *supra* note 8, 225, 325. Kelsen said therefore, that "Article 52 and 53 of the Charter refer to regional agencies which may be considered to be – at least indirectly – organs of the United Nations in so far as Members of the United Nations are authorised by the Charter to constitute such agencies for purposes of the United Nations (…) Regional agencies are neither principal nor subsidiary organs within the meaning of Article 7" and "[r]egional organisations may act as organs of the United Nations not only in settling local disputes, but also in taking enforcement action under the authority of the Security Council", H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (1950), 145-6, 326.
[168] Cf. Villani, *supra* note 8, 225, 327.
[169] *Ibid.,* 328. However, as always in the context of peace-keeping and peace-keeping operations which are all unique in their individual make-up, it depends on all the relevant circumstances, Resolution 2085 refers expressly to some specific organisations, Security Council Resolution 2085, UN Doc. S/RES/2085 (2012).
[170] Villani, *supra* note 8, 225, 329. But in the Spanish version of the Charter, Article 42 speaks of "medidas" and not of "acción" and action is equally used in non-military contexts in other articles, e.g. Article 2 (5) and Article 11. Taking into account of other differences in the English, French and Spanish versions, no positive conclusion can be drawn from the terminology, C. Walter, 'Article 53', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1478, 1482 mn. 2-3.

supports the view of a broader interpretation of "enforcement action". The powers of the Security Council under Chapter VIII are derived from Chapter VII and its actions under Chapter VIII are based on the existence of a situation under Article 39, so that a broad interpretation of enforcement action is justified.[171] In practice, the Security Council has in most cases in its resolutions either referred to a "threat to international peace and security" or even abstained from giving any determination, but decided "to act under Chapter VII of the United Nations Charter". This practice allows the Council to keep a greater margin of discretion and appreciation and this non-distinction between the three different scenarios in Article 39 should accordingly be applied to Article 53 as well.[172]

Furthermore, what kinds of measures are comprised by "enforcement action" under Article 53 should be determined. Article 39 does not distinguish between measures taken under Article 41 and 42 but qualifies both as measures to restore international peace and security. Articles 50 and 5 also show that enforcement measures can be of a non-military nature.[173] Thus, enforcement action under Article 53 comprises all measures which can be coercive upon a state. That interpretation is supported by the principle of effectiveness; in order that the enforcement action is effective, the international organisations have to be able to use all means necessary. Moreover, as established, the power of the Security Council under Chapter VIII derives from Chapter VII so that they comprise *per se* all possible forms of enforcement measures under Chapter VII should the Security Council decide to authorise a regional organisation to act. [174]

This interpretation also finds support in the practice of the Security Council. In its resolution 757, the Security Council imposed a ban on the import and export of all goods from Yugoslavia, which was binding for international organisations.[175] Limitations of enforcement action arise in the form of the respective constitutional framework of each regional arrangement or agency which either permits them to carry out a certain action (the action would be *intra vires)* or prohibits them from doing so as

[171] Another supportive argument is the effectiveness and proper functioning of the organisation. Against this view, for instance, Wolfrum, *supra* note 158, 576, 581-82; Argument *a maiore ad minus*, if the Security Council can use regional organisations for military purposes, it can most certainly do so in cases involving non-military measures, Walter, 'Article 53', *ibid.*, 1478, 1497 mn. 53.

[172] Security Council Resolution 883 which imposed an embargo against Libya was based on a qualification of the situation as a "threat to international peace and security" and called upon all states and international organisations to act accordingly with the resolution, Security Council Resolution 883, UN Doc. S/RES/883 (1993), 1, Preamble; 4, para. 12.

[173] Including economic measures (under Article 50) or the suspension of rights and privileges of membership (under Article 5).

[174] Cf. also Villani, *supra* note 8, 225, 331-32 ; Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/54/87 (1999), 14, para. 116, 118.

[175] Security Council Resolution 757, UN Doc. S/RES/757 (1992), para. 11. The resolution contains many other measures which international organisations are asked to apply.

this would be tantamount to acts *ultra vires*.[176] This inherent limitation is recognised in the 1994 Declaration according to which "Cooperation between regional arrangements or agencies and the United Nations should be in accordance with their respective mandates, scope and composition."[177]

On the basis of the principle of *pacta tertiis nec nocent nec prosunt* which is enshrined in Article 34 of the Vienna Convention on the Law of Treaties, the Security Council likewise cooperates with regional organisations, for example in the form of recommendations and consultations, as the Security Council cannot create obligations for non-members of the United Nations.[178] D'Aspremont makes a very similar argument with regard to regional organisations which have not submitted themselves at least formally under Chapter VIII of the UN Charter, e.g. NATO.[179]

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[176] Similarly, Villani, *supra* note 8, 332. As Villani correctly says "toute la matière de la compétence de l'organisation régionale se situe en dehors de la portée et des pouvoirs du Coseil de sécurité et doit être appréciée uniquement par rapport au statut de l'organisation", *ibid.*, 335-6. Article 48 (2) of the Charter likewise stipulates that "decisions [of the Security Council] shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." In practice, the question as to whether a regional organisation has the constitutive rights to engage in peacekeeping has been discarded, but the question of the legality of action has been examined on the basis of the UN Charter and general international law. The argument made, especially during peacekeeping action in the Cold War, is that what states can do separately, they can also do together, notwithstanding the question as to whether the formal procedures of the respective internal law of the organisations were respected, Gray, *supra* note 54, 391-2. In practice, some organisations have later adopted instruments allowing them to conduct such operations, see C. Gray, 'The Use of Force and the International Legal Order', in M. D. Evans, *International Law* (2010), 642; Cf. also Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/53/127 (1998), 15-16, paras. 107, 110; Comprehensive review of the whole question of peacekeeping operations in all their aspects, Report of the Special Committee on Peacekeeping Operations, UN Doc. A/54/839 (2000), 18-19, paras. 156, 160

[177] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 4, para. 4.

[178] Articles 24 and 25 of the UN Charter stipulate that the members of the organisation confer primary responsibility for the maintenance of international peace and security on the Security Council, that the Council acts on their behalf and that they agree to accept and carry out its decisions. One cannot forget however that the organisations are bound indirectly by their respective members which are also free to choose in which form they execute the decisions of the Council on the basis of Article 48 (2) of the Charter and bearing in mind that the Security Council often leaves the decision to the states in which form they act. In its Resolution 794, it held "[a]cting under Chapter VII and VIII of the Charter, calls upon States, nationally or through regional agencies and arrangements, to use such measures as may be necessary to ensure strict implementation of paragraph 5", Security Council Resolution 794, UN Doc. S/RES/794 (1992), 4, para. 16. In Resolution 770, the Security Council equally called upon "States to take nationally or through regional agencies or arrangements all measures to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo.", Security Council Resolution 770, UN Doc. S/RES/770 (1992), 2, para. 2. Further examples can be found, *inter alia*, in Security Council Resolutions 787, UN Doc. S/RES/787 (1992), 4, para. 12 and Security Council Resolution 820, UN Doc. S/RES/820 (1993), 4, para. 17; 6, para.29. In some limits, one could imagine an obligation for regional organisations to carry out decisions of the Security Council in the form that the Security Council could impose on its members the need to act through the regional organisations of which they are members, cf. Villani, *supra* note 8, 225, 345 – 9.

[179] J. d'Aspremont, 'The Law of International Responsibility and Multilayered Institutional Veils: The Case of Authorized Regional Peace-Enforcement Operations', in SHARES Research Paper 24 (2013), ACIL, 2013-10, available at www.sharesproject.nl and SSRN, 6-7. In his view, such a scenario has also an impact on the law of international responsibility. By the lack of submission to Chapter VIII of the UN Charter by a given regional organisation, the application of Article 17 ARIO to a peace enforcement operation conducted by this

Another requirement of Article 53 is that the enforcement action is taken under the authority of the Security Council which corresponds to an adoption of coercive measures by the Security Council in the form of a resolution.[180] Should the Security Council authorise enforcement action, it nevertheless keeps control of the activities as it is specified under Article 54 of the Charter.[181] In this way, the Security Council acts upon its primary responsibility for the maintenance of international peace and security, that is conferred on it by virtue of Article 24 of the Charter.[182]

Various forms of control exist and are used by the Security Council. The committees created by the Security Council in order to supervise sanctions are one form of supervision at its disposal, but the Secretary-General can also be included in the control mechanism as e.g. in Resolution 787 in which the "[s]tates concerned [are requested], nationally or through regional agencies or arrangements, to coordinate with the Secretary-General inter alia on the submission of reports to the Security Council regarding actions taken."[183] With regard to the operational level, the authority of the Security Council is normally limited to the examination of reports presented to it by states or directly by the regional organisations, as the latter regional organisations conduct the enforcement action.[184]

6. A different interpretation of "enforcement action" for Article 53 (1) second sentence: the practice of sanctions by the UN and regional organisations

In the case of regional organisations taking enforcement action under their own initiative, according to Article 53 (1), second sentence, "enforcement action" has to be interpreted more restrictively than in the alternative scenario of the Security Council utilising regional organisations for enforcement actions under its authority. Otherwise, regional entities would have to ask for the authorisation of the Security Council for all kinds of acts that were potentially coercive in nature possibly coercive nature, such as diplomatic, economic, political, financial and military measures.

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organisation authorised by the Security Council would be precluded if the effect of the authorisation on the law of international responsibility extends only to the fulfilment of the obligations under the UN Charter., *ibid.*, 17-18.

[180] Villani, *supra* note 8, 225, 349.

[181] Article 54 stipulates that the Security Council shall be kept fully informed of all activities undertaken or in contemplation by regional organisation for the maintenance of international peace and security.

[182] Villani, *supra* note 8, 225, 349 – 50.

[183] Security Council Resolution 787, UN Doc. S/RES/787 (1992), 4, para. 14. Villani, *supra* note 8, 225, 350-1. In the case of Sierra Leone, the Security Council attributed the power to the sanction committee to coordinate with its counterpart at ECOWAS, Security Council Resolution 1132, UN Doc. S/RES/1132 (1997), 4, para. 10 (h).Even more comprehensive, in Resolution 1196, the Security Council encouraged the chairmen of the established sanction committees imposing arms embargos on Africa to "seek to establish channels of communication with regional and subregional organizations and bodies.", Security Council Resolution 1196, UN Doc. S/RES/1196 (1998), 2, paras. 3-4.

[184] Cf. Villani, *supra* note 8, 225, 352-3. So, KFOR, e.g. submitted regular reports directly to the Security Council.

On the basis of Article 31 of the VCLT, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Taking into account that the terminology is identical to the first sentence of Article 53, not to mention that the first sentence is contextualised by the second sentence, any other interpretation does not seem to be reasonable.

Yet, the object and purpose are different. As explained, in the first sentence, the purpose is to allow the Security Council to utilise – in an effective way – regional organisations for the maintenance of international peace and security which permits and justifies a broad interpretation, whereas in the second alternative, the authorisation renders an otherwise illegal action legal.[185] Moreover, by applying once more the principle of effectiveness, a stricter interpretation of enforcement action is preferable for the second alternative; otherwise the Security Council would have to authorise all manners of measures and the resulting work-load and delay would not be insignificant. A stricter interpretation further allows the regional entities to keep a certain autonomy, rendering their performance more effective.[186]

This later interpretation is confirmed by the practice of the Security Council and the relevant organisations. [187] The European Union imposed an embargo on weapons and military equipment

[185] F. L. Morrison, 'The Role of Regional Organizations in the Enforcement of International Law', in J. Delbrück (ed.), U. E. Heinz (ass. ed.), *Allocation of Law Enforcement Authority in the International System. Proceedings of an International Symposium of the Kiel Institute of International Law, March 23 to 25, 1994*, 39, 43.

[186] Cf. also for similar arguments, Villani, *supra* note 8, 225, 356-7. ; Also in favour of a restricted interpretation, J. Frowein, 'Zwangsmaßnahmen von Regionalorganisationen' in U. Beyerlin, M. Bothe, R. Hofmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (1995), 57, 66-7; A. Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) 43, 45-46, 49, 53-54; Article 2(4) also only prohibits states and consequently, group of states to use military force against each other, but permits other forms of coercion. This is supported by Schreuer, *supra* note 27, 477, 491, who says "[t]here is nothing to stop a group of States from joining efforts in the framework of a regional organization and to do what they are permitted to do under general international law, such as taking reprisals not involving the use of force." This presupposes however a permissive ground in international law to apply other coercive measures such as a violation of an obligation *erga omnes*, Frowein, *ibid.*, 67. The very same argument was already made by the Columbia Chairman of Committee III/4 in San Francisco: "Enforcement action, with the use of physical force, is obviously the prerogative of the Security Council (…) [b]ut the other measures, those of Article 41, are not; (…) it is with any State – withouth necessarily violating the principles of the Charter – to break diplomatic, consular and economic relations or to interrupt its communications with another State", as cited in F. V. Garcia-Amador, *The Inter-American System, ,Its Development and Strengthening* (1966), 190; N. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 102, 127; Orakhelashvili, *supra* note 58, 310; Also supporting an authorisation for the use of force, M. Roscini, 'L'articolo 17 del Trattato sull'Unione europea e i compiti delle Forze di pace', in N. Ronzitti (ed.), *Le Forze di Pace dell'Unione Europea* (2005), 49, 58.

[187] Boisson de Chazournes, *supra* note 11, 79, 265. Another argument in favour of this interpretation is, that when states can use such measures individually without an autorisation of the Security Council, the very same has to apply, *mutatis mutandis*, when they act collectively through an international organisations, *ibid.*, 266; Gray, *supra* note 54, 403-4. In the Cuba Crisis, sanctions by the OAS were considered not to be "enforcement action" under alternative 2, necessitating an authorisation of the Security Council, M. G. Goldman, 'Action by

against Yugoslavia without asking for the permission of the Security Council which persisted even after the adoption of Security Council Resolution 713. The European measures were actually more restrictive and went beyond what was required by the resolution of the Council.[188] In 1999, by its own initiative, the European Union adopted common position 1999/624/CFSP which imposed a ban on arms, munitions and military equipment against Indonesia. The permissive foundation in international law for the introduction of such measures was the massive violations of human rights (*erga omnes* obligations) and international humanitarian law by Indonesia in East Timor.[189] Seven years earlier, ECOWAS had imposed an embargo on weapons on that part of the territory of Liberia which was controlled by the National Patriotic Front of Liberia (NPFL). ECOWAS then proceeded to ask the United Nations for assistance in the application of the sanctions which was granted by Security Council Resolution 788.[190] Another important resolution is Security Council Resolution 841, in which the Council decided to implement the trade embargo recommended by the Organisation of American States against Haiti and to make it consequently universally compulsory unless

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the Organization of American States: When is Security Council Authorization Required under Article 53 of the United Nations Charter?', in (1962-1963) 10 *UCLA Law Review*, 837, 849-51. Measures taken regionally would be subject to the Security Council's ratification only if they called for the use of armed force", Security Council Official Records, Fifteenth, 893rd meeting: 8 September 1960, 6 para. 32. Similarly Venezuela stated "It is the Venezuelan Government's view that the authorization of the Security Council would be required only in the case of decisions of regional agencies the implementation of which would involve the use of force, which is not the case with this resolution of the American states", *ibid.,* 13 para. 77. See also, Akehurst, *supra* note 137, 175, 195; White, 'The EU as a Regional Security Actor', *supra* note 153, 329, 340-41.

[188] Villani, *supra* note 8, 225, 361-2.

[189] Council Common Position of 16 September 1999 concerning restrictive measures against the Republic of Indonesia (1999/624/CFSP), Preamble, Article 1.

[190] M. Weller (ed.), *Regional Peace-keeping and International Enforcement: The Liberian Crisis* (1994), 226-233. In the letter, ECOWAS requested "United Nations assistance in connection with the application by the international community, in accordance with the relevant provisions of Chapter VIII of the United Nations Charter, of sanctions against those parties to the conflict that do not respect the provisions of the Yamoussoukro IV Accords.", Letter dated 28 October 1992 from the Permanent Representative of Benin to the United Nations addressed to the President of the Security Council, UN Doc. S/24735 (1992), para. 4. In its resolution, the Security Council decided "under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Liberia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Liberia", Security Council Resolution 788, UN Doc. S/RES/788 (1992), 3, para. 8 ; See also Walter, 'Article 53', *supra* note 169, 1478, 1485 mn. 19-20. Although in another example, regarding sanctions against Sierra Leone by ECOWAS, this organisation was authorised to use sanctions by virtue of Security Council Resolution 1132 (1997), an analysis of the debate in the Council as well as of the text of the resolution show that the decisive factor for the mandate was the fact that the implementation of the non-military sanctions might lead to situations involving the use of military force, *ibid.*, 1486 mn. 21-22. France referred to the "authorisation as being exceptional in nature, but legitimized by the past experience of cooperation between the United Nations and ECOWAS." Poland considered the situation to be threatening international peace and security", moreover "[t]he relevant paragraph of the draft resolution related to the enforcement of measures stipulated therein authorizes the regional organization —ECOWAS —to *ensure strict implementation* of Security Council decisions. It is our sincere hope that by creating such an *enforcement mechanism* this draft resolution will contribute to resolving the crisis in Sierra Leone and immediately terminating the plight of its people, thus preventing possible adverse implications for peace and stability in the whole region." [Emphasis added], Security Council, Fifty-second Year, 3822nd meeting, Wednesday, UN Doc. S/PV.3822, 6, 8.

> the Secretary-General, having regard to the views of the Secretary-General of the Organization of the American States, has reported to the Council that, in light of the results of negotiations conducted by the Special Envoy for Haiti of the United Nations and the Organization of American States Secretaries-General, the imposition of such measures is not warranted at that time.[191]

Thus, the Security Council can, by its discretionary power, reverse the relationship of Article 53 and act as an executor of decisions taken by a regional organisation of measures not involving the use of force.[192] Whereas this practice underlines the pragmatic approach taken by the Security Council, it has to be added, however, that the non-application of Article 53 paragraph 1 to non-military sanctions by regional entities does not mean that these sanctions or actions are automatically legal. These actions are justified if they have a valid basis under (general) international law. The one exception is if the regional organisation receives an authorisation of the Security Council which would render actions which were otherwise not justified under international law, legal, on the premise that the Security Council has assessed that the respective situation fulfills the criteria under Article 39 of the Charter.[193]

Recent examples of non-military sanctions by regional organisations not having an authorisation by the Security Council include those adopted by the Arab League and the EU against Syria in 2011 with "no indication that (…) any member of the UN maintained that these measures were illegal."[194] The Security Council likewise only took note of the decisions of ECOWAS and the AU to adopt targeted sanctions in Mali.[195]

Should the Security Council decide to act itself, the legality of actions by regional organisations is more difficult to assess. Measures taken by regional organisations going beyond the measures imposed by the Security Council could affect the efficiency of the latter and the reestablishment of international peace and security.[196] Additionally, in the event that the Council decides to stop or to lift the imposed sanctions and the regional entities continue to maintain or establish enforcement action under their authority, this would contravene first of all the assessment of the Security Council

[191] Security Council Resolution 841, UN Doc. S/RES/841 (1993), paras. 1, 3.
[192] Depending on the specific operation, the Security Council might decide to let a regional organisation intervene and then take over the operation or vice versa. It cannot be strengthened enough that the practice of the Security Council shows a high degree of flexibility. cf. Griep, *supra* note 10; Villani, *supra* note 8, 225, 364.
[193] Villani, *ibid.*, 225, 364-7.
[194] Walter, 'Article 53', *supra* note 169, 1478, 1487 mn. 24-25; EU Council Decision, 'concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP' (1 December 2011), 2011/782 CFSP (2011).
[195] Security Council Resolution 2056, UN Doc. S/RES/2056 (2012), 3, para. 6.
[196] It is also in that regard that one can separate "authorisation" from "delegation of powers". Whereas in the case of an authorisation of the use of force, the Security Council effectively delegates some of its own powers to the regional organisation, in other cases, the Security Council may authorise or impose measures which if executed by the Security Council itself would be *ultra vires*, such as the creation of the ICTY, see Boisson de Chazournes, *supra* note 11, 79, 271-4.

of the existence of a situation under Article 39 as well as contravening its primary responsibility for the maintenance of international peace and security on the basis of Article 24 of the Charter.[197]

Concerning Yugoslavia, the EU adopted severe sanctions which went far beyond all measures imposed by the Security Council. Villani views these sanctions as not legitimate; he considers them to be incompatible with the primary responsibility conferred on the Security Council by the members of the organisation.[198] It seems nevertheless to be correct to consider them as legitimate under certain circumstances[199] and it is preferable to rely upon the self-regulation mechanisms of the Security Council. As the primary guardian of international peace and security, there would be a reaction in the form of a resolution, or informal or formal consultations in the case of enforcement measures, contravening the efforts of sanctions by the Security Council.[200] In practice, there would normally be informal or formal consultations between the UN and regional organisations before the adoption of sanctions by the latter, and even more so in these cases where members of the Security Council are also engaged in enforcement actions by regional entities given that their dual membership allows them to assess the enforcement actions and to oversee their compatibility. [201]

There may be situations in which a regional organisation recommends the use of force against another state, and in such a case, the authorisation of the Security Council is also necessary as it would be illogical to require an authorisation by the Council for a binding decision of the regional organisation, but not for recommendations issued by the regional organisation.[202]

The general practice of the United Nations and the Security Council regarding the authorisation of the use of force by regional organisations also confirms that the Council continues to exercise its own

[197] Villani, *supra* note 8, 225, 367-9 ;

[198] *Ibid.* This legal argument is not convincing, as regional organisations have to be distinguished from member states of the UN, the latter ones are bound by the UN Charter. His other arguments are more plausible, and it may, indeed, happen, that certain supplementary or excessive measures adopted by regional organisations could not only affect the effectiveness of the measures by the Security Council, but that they lead to a resurgence of fighting among parties to a conflict, *ibid.*

[199] See *infra* 1.3.5., as well as the beginning of this part, 1.3.6.

[200] Villani, *supra* note 8, 225, 368-9.

[201] But one cannot deduce an authorisation from the silence or inactivity of the Council as silence does not signify consent (*qui tacet neque negat, neque utique fatetur)*, cf. Villani, *supra* note 8, 225, 377-9.

[202] Villani, *supra* note 8, 225, 369-70. The recommendation to use armed force against a state also constitutes a violation of Article 2(4) of the Charter as a threat of the use of force. In the Cuba Missile Crisis, the United States relied upon this distinction in the crisis when they imposed a naval embargo against Cuba on a basis of a recommendation by the Organisation of American States. In the Resolution, the Organisation of American States recommended "that the member-states (…) take all measures, individually and collectively, including the use of armed force, which they may deem necessary", the text of the Resolution can be found in Security Council, Official Records, Seventeenth Year, 1022nd meeting, UN Doc. S/PV.1022 (1962), 16, para. 81; Boisson de Chazournes, *supra* note 11, 79, 267.

responsibility to maintain international peace and security by supervising enforcement operations.[203] Resolution 816, for example, authorises Member States, "acting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary means in the airspace of the Republic of Bosnia and Herzegovina (…) to ensure compliance with the ban on flights."[204] Although this resolution refers to Chapter VIII in the preamble, it was adopted under Chapter VII and it therefore connects both Chapters of the Charter.[205] Moreover, it effectively blurs the difference between Article 53 (1) first sentence and Article 53 (1) second sentence as any authorisation under Chapter VII can be equated rather to an authorised enforcement action taken by a regional organisation under Article 53 (1) second sentence. The repetition of "under the authority" in the resolution however points towards Article 53 (1) first sentence and thereby to an enforcement action by a regional organisation taken under the authority of the Security Council. Nevertheless, it proves that in practice, the distinction between the two options for enforcement action in Article 53 is less relevant.[206]

7. Peacekeeping operations of regional organisations and the application of Article 53 of the UN Charter

Peacekeeping operations conducted under the auspices of a regional organisation based on the consent of the host-state are exempt from the requirement of an authorisation by the Security Council.[207] The consent given renders their deployment on the ground legal under international law.[208] Another requirement is that their use of military force is limited to cases of self-defence. The

[203] Villani, *supra* note 8, 225, 381-9 ; Sicilianos also held that, regional organisations do not possess "un pouvoir illimité d'auto-interprétation du mandat", L.-A. Sicilianos, 'L'autorisation par le Conseil de sécurité de récourir à la force : une tentative d'évaluation', (2002) 106 *Revue générale de droit international public*, 5, 17.

[204] Security Council Resolution 816, *supra* note 160, 2, para. 4. The resolutions stressing that regional organisations act under the authority of the Security Council were implemented in practice by establishing an agreement between the military command of FORPRONU and NATO. After the conclusion of the agreement, NATO conducted bombardments to defend the security zones in Bosnia-Herzegovina, Villani, *supra* note 8, 225, 383.

[205] Other examples, include, e.g. Security Council Resolution 1744, UN Doc. S/RES/1744 (2007), 2-3, paras. 4 b) and d); See equally, Walter, 'Chapter VIII Regional Arrangements, *supra* note 8, 1429, 1444 mn. 32.

[206] Villani, *supra* note 8, 225, 355-6 ; similar, Boisson de Chazournes, *supra* note 11, 79, 272.

[207] Myjer, White, 'Peace Operations Conducted by Regional Organizations and Arrangements', *supra* note 134, 163, 169; E. Jimenez de Arachaga, 'International Law in the Past Third of a Century', Recueil des cours de l'Académie de La Haye, Volume 159 (1978), 138; Lind, 'Chapter VIII of the UN Charter', *supra* note 160, 28, 32.

[208] *Certain Expenses*, *supra* note 133, 170.

ICJ held in the *Certain Expenses* case that "the operations known as UNEF and ONUC were not *enforcement* actions within the compass of Chapter VII of the Charter."[209]

However, the possible coercive nature of recent third-generation peacekeeping operations challenges that premise and an examination of whether Article 53 of the UN Charter is applicable for these operations is thus necessary.[210] Article 53 does not *per se* apply to peacekeeping operations by regional organisations which were not foreseen during the preparation of the United Nations Charter; as Boutros-Ghali expressed "Peace-keeping can rightly be called the invention of the United Nations. It has brought a degree of stability to numerous areas of tension around the world."[211] Thus, the precise question is whether regional operations conducting peacekeeping operations, which can include the potential use of military force, need an authorisation to conduct these operations or if they can operate independently and autonomously from the Security Council.[212]

Peacekeeping operations, as classically conceived, which are based on the consent and cooperation of all parties and with a conservative mandate such as the supervision of a ceasefire, only allow for the use of force in cases of self-defense. As such, these kinds of operations do not fall under the requirement of authorisation of the Security Council as the use of force is not intended to be employed against a particular party and as self-defense is one of the exceptions to the prohibition of the use of force under the regime of the Charter.[213] Consequently, should an operation include or assume a coercive character, it enters into the field of application of Article 53 and can consequently only be implemented with the authorisation of the Security Council.[214]

Now, it has to be defined under which conditions a peacekeeping operation can be considered coercive under Article 53 of the Charter. Obviously, this includes military operations conducted without the consent of the concerned parties, but more often, the operations are established on the

[209] *Certain Expenses*, *supra* note 133, 165. However, in this context, it is worthwhile to mentioning the statement of the Secretary-General who said that "While the General Assembly is enabled to establish the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be stationed or operate on the territory of a given country without the consent of the Govern[ment] of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter", Secretary-General, Second 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/3276), UN Doc. A/3302 (1956), para. 9.
[210] Cf. Bothe, 'Peacekeeping', *supra* note 55, 1171, 1192 mn. 31.
[211] Secretary-General, An Agenda for Peace, 14, para. 46. Cf. also Virally, *supra* note 28, 483-86.
[212] Villani, *supra* note 8, 225, 392.
[213] Cf. Villani, *supra* note 8, 225, 393-5. But an authorisation by the Security Council always enhances the legitimation of a regional peacekeeping operation. As stated in the study of the Lessons Learned Unit of the United Nations: "peacekeeping operations by regional organizations and/or arrangements command greater consensus if authorized by the Security Council before they are established", Lesson Learned Unit, Department of Peacekeeping Operations, *supra* note 113, Part II A. para II.
[214] Cf. Villani, *supra* note 8, 225, 407.

basis of consent of the parties and implying a mandate to use force. Notwithstanding the consent of all parties, do these operations nevertheless enter into the field of application of Article 53 or, in other words, does the consent render enforcement action legitimate?[215]

In situations of internal crisis or civil war, it can be difficult, first and foremost, to identify the respective parties and the *de facto* government. Nevertheless, as it has been highlighted in the Brahimi report, there are no guarantees that the consent will not be revoked or given for insidious reasons.[216] The 1994 Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies emphasises in this regard that "peace-keeping activities undertaken by regional arrangements or agencies should be conducted with the consent of the State in the territory of which such activities are carried out" and that regional organisations are encouraged to build up and assemble troops "for use as appropriate, in coordination with the United Nations and, when necessary, under the authority or with the authorization of the Security Council, in accordance with the Charter."[217] The reference to "when necessary" can only be interpreted so that as long as the regional organisation conducts a classic peacekeeping operation which does not involve any form of (military) enforcement action, an authorisation by the Security Council is not *necessary*; should the regional agency or arrangement however implement an operation with coercive elements, an authorisation under Article 53 is required.[218] The practice of the Security Council regarding states or groups of states confirms and validates that interpretation, *inter alia*, in Security Council Resolutions 940 and 1080.[219] In practice, it can be problematic if there are different interpretations of a mandate provided by the Security Council for a military operation of a regional organisation. The very recent practice (*infra* 1.3.8. and Chapter II) suggests that regional organisations increasingly tend to ask for an authorisation by the Security Council notwithstanding the qualification of the planned operation as a peacekeeping or peace enforcement operation. Should the Security Council hand out a rather imprecise mandate which may be interpreted differently by the Security Council and the regional organisation, the question would arise what consequences this different interpretation could entail in terms of the law of international responsibility if there is a violation of international law occurring during the deployment of the operation. It could be necessary to inquire if the different interpretation of the mandate by the

[215] *Ibid.,* 225, 407.
[216] Panel on United Nations Peace Operations, *supra* note 50, 9, para.48.
[217] General Assembly, Declaration on the Enhancement of Cooperation, *supra* note 40, Annex, 2-3, Preamble; 4, paras 9-10.
[218] Shaw, *supra* note 134, 1275; Villani, *supra* note 8, 225, 408-9 ; C. Walter, 'Security Council Control over Regional Action', (1997) 1 *Max Planck Yearbook of United Nations Law*, 129, 174-5. Another argument one can made is that the consent of the host state corresponds to the common law doctrine of *volenti fit iniuria*.
[219] Security Council Resolution 940, UN Doc. S/RES/940 (1994), 2, paras. 1, 4; Security Council Resolution 1080, UN Doc. S/RES/1080 (1996), 2, paras. 1-7.

regional organisation would correspond to a failure of supervision by the Security Council. If that were to be answered in the affirmative, one could at least theoretically also engage the responsibility of the United Nations and not only the responsibility of the regional organisation conducting the operation.

8. Towards a merger of Chapter VII and Chapter VIII in the practice of the Security Council

There have been cases when regional peacekeeping operations were conducted without the authorisation of the Security Council, but the very recent practice shows that these operations have been carried out either with a prior authorisation or approbation by the Security Council in the early stages of the peacekeeping operation.[220] The IFOR operation in Yugoslavia was based on the Annex to the Agreement of Paris and was authorised by a Security Council Resolution with a mandate to use all means necessary to guarantee the implementation of the Peace Agreements.[221] These examples are very important as the Security Council considered it to be necessary to give its authorisation, though all the parties had already agreed to the establishment of the peacekeeping operation.[222] Overall, the conclusion is that any assessment will depend on the specific circumstances and the specific mandate given by the Security Council. Confronted with the situation in Mali, the Security Council passed Resolutions 2056 (2012), 2071 (2012) and 2086 (2012) of which not one refers to Chapter VIII of the Charter, including Resolution 2086 which established AFISMA, an African-led[223] operation with a clear enforcement mandate.[224] In this regard, Walter argues that

[220] See, for more details, Villani, *supra* note 8, 225, 411-6.

[221] The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Annex 1A Agreement on the Military Aspects of the Peace Settlement; Security Council Resolution 1031, UN Doc. S/RES/1031 (1995), 3, paras. 14-15. Similarly, the follow-up operation SFOR was authorised by Resolution 1088 to take all necessary measures for the implementation of the Peace Agreement, Security Council Resolution 1088, UN Doc. S/RES/1088 (1996), 3, para. 8; 5, paras. 18-21. The same applies for the KFOR operation in Kosovo, cf. Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), 2, para.7.

[222] Villani, *supra* note 8, 225, 416.

[223] The operation is implementation on the basis of the African Peace and Security Architecture (APSA) in coordination between the AU and ECOWAS.

[224] Security Council Resolution 2056, *supra* note 195; Security Council Resolution 2071, UN Doc. S/RES/2071 (2012), Security Council Resolution 2086, UN Doc. S/RES/2086 (2012). That the practice of the Security Council is accommodating can be seen in other cases. In Resolutions 770 (1992) and 1484 (2003), the Council referred exclusively to Chapter VII, In resolutions 875 (1993) and 1464 (2003), the Council gave references to both chapters, while in Resolution 816 (1993) the Council acted under chapter VII while equally reaffirming Chapter VIII. Another variation is contained in Resolution 1497 (2003), while acting under Chapter VII, the Resolution contains a reference to Chapter VIII in its preamble. Yet another variation is that the Security Council will not refer to Chapter VIII but will authorise or encourage states "acting nationally or through regional agencies or arrangements", Security Council Resolution 770, *supra* note 178; Security Council Resolution 816, *supra* note160; Security Council Resolution 875, UN Doc. S/RES/875 (1993), Security Council Resolution 1464, *supra* note 85; Security Council Resolution 1484, UN Doc. S/RES/1484 (2003); Security Council Resolution 1497, UN

> [w]ith the original concept of using troops under Art. 43 for military enforcement measures having generally been replaced by a concept of authorization, the distinction between Chapter VII and Art. 53 (1) as the legal basis for authorizations relating to the use of force by regional organizations has lost its practical relevance.[225]

Other authors offer similar arguments, for example, Boisson de Chazournes sees Article 53 as a precursor of the trend towards the decentralised use of force on the international level.[226] One explanation for the use of Chapter VII rather than Chapter VIII is the fact that many regional organisations are reluctant to be subjected to Chapter VIII and the obligations it entails.[227] From a legal perspective, the shift to Chapter VII does not involve fundamental changes as the practice continues to be based on an authorisation by the Security Council and as the Security Council continues to keep global and ultimate control.[228]

Doc. S/RES/1497 (2003); For the last scenario see e.g. Security Council Resolution 942, UN Doc. S/RES/942 (1994), para.5; Cf. Boisson de Chazournes, *supra* note 11, 79, 297 ; see also S. Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping: The African Example', (2010) 51 *Virginia Journal of International Law*, 185, 195.

[225] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1444 mn. 33; also Gray, *supra* note 54, 426; N.D. White, Ö. Ülgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function', in (1997) *44 Netherlands International Law Review*, 378, 389.

[226] Boisson de Chazournes, *supra* note 11, 79, 275. As she observes, the impossibility to implement the system of Chapter VII based on a channeling of the authority to use force through the Security Council, led to two different reactions. Firstly, the concept of peacekeeping operations under the direct command and control of the United Nations was created. Secondly, there emerged an tendency towards a decentralised approach within Chapter VII according to which the Security Council authorises and delegates the use of force to the member states. As contrary to the framework of the United Nations Charter it may appear, it is an expression of the logic of Article 53, *ibid.*, 275-76.

[227] Boisson de Chazournes, *supra* note 11, 79, 304. One has to note that in practice the Security Council has also adopted a very flexible approach regarding the qualification of organisations as regional arrangements or agencies, irrespective as to whether the organisation in question falls under Chapter VIII or considers itself to be bound by it, Gill, 'Characterization and Legal Basis for Peace Operations', *supra* note 77, 135, 139. Christine Gray also argues that generally it is of limited importance of an organisation was expressly established on the basis of Chapter VIII or was considered to be such an organisation by its founders; the crucial fact is "not the nature of the organisation but the type of action that is undertaken and the attitude of the Security Council", Gray, *supra* note 54, 386.

[228] D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of Its Chapter VII Powers* (2000), 248-49 ; Boisson de Chazournes, *supra* note 11, 79, 304-5. As explained above, there is no legal difference regarding the autorisation under Chapter VII and Chapter VIII as the powers of the Security Council under the latter stem from Chapter VII. Chapter VIII adds however, qualifications such as the question which organisations qualify as regional arrangements or agencies and as already mentioned the specific reporting requirements may be different under Chapter VII depending on what the Security Council decides; cf. Walter, 'Article 53', *supra* note 169, 1478, 1499 mn. 58-59; E. de Wet, 'The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VIII of the United Nations Charter', in (2002) 71 *Nordic Journal of International Law*, 1, 19-20; Paliwal, *supra* note 224, 185, 195-96. Naert, *supra* note 91, 239-40; Sarooshi*, ibid.,* 248-49; As Naert says "Chapter VIII status seems merely to formalize a willingness to integrate in the UN system without any significant rights or obligations under than a reporting duty.", Naert, *supra* note 91, 239-40.

As beneficial as this pragmatic approach by the Security Council may be to prevent tensions arising in its relations with the regional organisations, the potential disadvantages may not be ignored. It may be asked whether this development does not illustrate the gradual impairment of the authority of the Security Council; the stronger and more resourceful – particularly in a political and economic sense – the regional organisations in question are, the more they can dictate the conditions for the deployment of their troops under the authority of the Security Council.[229] Furthermore, as pragmatic as the approach of the Security Council is, these acts of improvisation contribute to the conceptual misunderstandings whose repercussions may influence the legal analysis of the relationship existing between the United Nations and regional organisations.[230]

Another reason offered for this practice of the Security Council is to return to the *raison d'être* of Chapter VIII, which is "to make available the specific contributions of regional organizations to the maintenance of international peace and security which result from the specific ties which bind their members." So, if a regional organisation decides to act outside its region as defined in broad terms, "there are no reasons to assume that such action occurs within the framework of Chapter VIII."[231] Such an interpretation opens up the possibility of reliance on Article 48 (2) of the Charter.[232] The distinction between Chapter VIII and Chapter VII is even less relevant for Article 53 (1), second sentence, which can be equated more closely with authorisations by the Security Council under Chapter VII. [233]

[229] Cf. Boisson de Chazournes, *supra* note 11, 79, 305 ; but compare with the Report of the Secretary-General on United Nations-African Union cooperation in peace and security, UN Doc. S/2011/805 (2011), 2, para. 4.
[230] Boisson de Chazournes, *supra* note 11, 305-6.
[231] It is suggested also suggested that similar considerations apply for measures taken against non-member States of the respective organisation. Walter, 'Article 53', *supra* note 169, 1478 1498-99 mn. 57; Pernice, *supra* note 148, 149.
[232] Security Council Resolutions 770 (1992), 781 (1992) 787 (1992) 1031 (1995) all refer to "actions be taken nationally or through regional agencies or arrangements" which is very similar to the wording of Article 48 (2), Security Council Resolution 770, *supra* note 178; Security Council Resolution 781, UN Doc. S/RES/781 (1992), Security Council Resolution 787, *supra* note 183; Security Council Resolution 1031, *supra* note 221. In this context, Frowein asserts that there was even confusion among member states of NATO and the WEU as to whether Article 48 or Article 53 would be applicable and thus whether the organisations shall be considered as falling under Chapter VIII, J.A. Frowein, 'Das Verhältnis zwischen den Vereinten Nationen und Regionalorganisationen bei der Friedenssicherung und Friedenserhaltung', Vortrag gehalten am 10. Juli 1996, 11-12.
[233] Walter, 'Article 53', *supra* note 169, 1478, 1505 mn. 77. Franck argues, however that there is one difference between Chapters VII and VIII which is that the former presupposes the determination of situation constituting a threat to the peace or one of the two other options under Article 39. This argument seems to be rather formalistic and is not convincing if one takes into account that the powers of the Council to act under Chapter VIII are derived from its powers under Chapter VII. Thus, one might reply that they consequently include an implicit assessment under Article 39, T. M. Franck, 'The Emerging Right to Democratic Governance', in (1992) 86 *American Journal of International Law*, 46, 84 including fn. 209.

This evolution has been characterised as a migration of regionalism from Chapter VIII to Chapter VII,[234] but Chapter VIII has, notwithstanding, real relevance in the practice of the Security Council. As the Secretary-General pointed out: "The complex challenges in the world today require a revitalized and evolving interpretation of Chapter VIII of the Charter of the United Nations."[235] Even more striking is the argument made by the President of the Security Council in the debate on cooperation with regional and subregional organisations:

> More than six decades ago, when the Charter was drafted, there was no practical example of how this cooperation would be structured and executed. However, Chapter VIII of the Charter was groundbreaking in that, in spite of the fact that there were no regional organizations at the time, it provided for flexibility in cases where such regional organizations would be established.[236]

The reactivation of Chapter VIII following the end of the Cold War has led to flows of activity within the UN but also on an inter-organisational level with the aim to further institutionalise relations via established, permanent organs such as the United Nations-European Steering Committee on Crisis Management.[237] Various studies and reports on the reform of peacekeeping and the relationship of the United Nations with regional organisations have been carried out. In 1993, the Security Council invited, within the framework of Chapter VIII, regional arrangements and organizations to study "ways and means to strengthen their functions to maintain international peace and security within their areas of competence, paying due regard to the characteristics of their respective regions." Furthermore, it asked them to analyse ways and means to improve the coordination of their efforts with those of the United Nations.[238] Therefore,

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[234] Boisson de Chazournes, *supra* note 11, 296-304.

[235] Support to African Union peacekeeping operations authorized by the United Nations, Report of the Secretary-General, UN Doc. A/65/510–S/2010/514 (2010), 14, para. 54. This view is shared by the African Union which even calls for a creative reading of Chapter VIII "to allow the African Union and its regional mechanisms for conflict prevention, management and resolution to fully play their role as integral components of collective security" and an "innovative strategic and forward-looking reading of Chapter VIII" Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 6-7, 9, 10; Peace and Security Council, 307th Meeting, PSC/PR/COMM.(CCCVII) (2012), 3. A similar view was expressed by Ethiopia, Security Council, 6702nd meeting, UN Doc. S/PV.6702 (Resumption 1) (2012), 7. See also the Statement of Togo, Security Council, 6903rd meeting, UN Doc. S/PV.6903 (2013), 11.

[236] Mr. Zuma (South Africa), Security Council, 6702nd meeting, UN Doc. S/PV.6702 (2012), 2; See in contrast, G. Ress, 'Article 53' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995), 687.

[237] For each chosen regional organisation and their relations to the UN and among each other, see, *infra* Chapter II.

[238] Note of the President of the Security Council, UN Doc. S/25184 (1993), 1-2. A similar appeal came from the General Assembly, Resolution adopted by the General Assembly, Comprehensive review of the whole question of peace-keeping operations in all their aspects, UN Doc. A/RES/48/42 (1994), 9, paras. 62-65; see also Report of the High-Level Panel, *supra* note 22, 71, paras. 271-272; General Assembly Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security, UN Doc. A/RES/49/57 (1995), 2-5.

> In all areas not involving the use of force, notably as far as cooperation on matters of peacekeeping in the African context is concerned, Chapter VIII has witnessed an enormous boost, which is largely due to limited resources, both at the regional and the universal levels. It is certainly also favoured by the fact that the antagonism between universalism and regionalism which was formative for the understanding of Chapter VIII during the Cold War period, has today lost much of its significance.[239]

The aim of all these efforts is to institutionalise relationships, away from relations on an *ad hoc*, case-by-case basis (*infra* 2.1.-2.6.).

9. Conclusions

This Chapter began by analysing the thesis that the general framework of the UN Charter for maintaining international peace and security had been shaped by supporters of both a universalist and a regionalist view of the system of collective security.

Indeed, by examining the documents of the Dumbarton Oaks conference, it became clear that Chapters VII and VIII of the UN Charter were codified by the founders as a compromise between universalism – Chapter VII – and regionalism – Chapter VIII; maintaining the primary responsibility of the Security Council for the maintenance of international peace and security under Chapter VII while allowing for regional action under Chapter VIII. This dichotomy between universalism and regionalism is mirrored within the specific dispositions of Chapter VIII. Article 52 of the Charter grants, on paper, a high degree of autonomy to regional organisations for the pacific settlement of disputes. In contrast, Article 53 of the Charter retains the primary responsibility of the Security Council for the maintenance of international peace and security. The Council may look to regional organisations for enforcement actions under its authority, and enforcement actions under the authority of the latter have to be authorised by the Security Council.[240]

In practice, however, a much more complex picture has emerged of the system for maintaining international peace and security under the UN Charter which, *prima facie*, is very much removed from the tension characterized by Chapters VII and Chapters III. The analysis revealed that the practice of the UN and regional organisations for maintaining international peace and security is very flexible and pragmatic and that, overall, the practice of the United Nations and regional organisations

[239] Walter, 'Chapter VIII Regional Arrangements', *supra* note 8, 1429, 1444 mn. 34.
[240] This very same dichotomy can be also found within Chapter VI, which grants both rights and obligations to parties in a conflict, and which may, arguably, amount to a group of states all being members of a regional organisation, and to the Security Council, for the pacific settlement of disputes.

gravitates around the epicentre of universalism and regionalism – cooperation between the UN and regional organisations.[241]

Regarding the specific context of peacekeeping operations, a division of labour is emerging between the UN and regional organisations which, once again, constitutes a compromise between universalism and regionalism. The UN focuses on traditional peacekeeping operations based on the consent of all parties and allowing only a very limited amount of military force whereas peacekeeping operations with a more robust mandate, as well as peace enforcement operations are delegated to and conducted by regional organisations.[242] This practice was possibly also catalysed in response to criticism that the UN would be incapable of mounting "militarised" peacekeeping operations.[243]As part of the cooperation of the UN with regional organisations in peacekeeping operations, the former would also focus on the broader spectrum of activities surrounding the concept of peacekeeping, e.g., peacebuilding, state-building and the reconstruction of the political system within the state.

[241] The very same view is contained in the statement by the Representative of Chile during the Security Council's debate on cooperation of the UN with the EU in maintaining international peace and security on 14 February 2014. The Representative said: "Chile believes that collective action is crucial for addressing the threats to international peace and security, and that such action is enhanced by the involvement of regional and subregional organizations. That is the way in which my country interprets Chapter VIII of the Charter of the United Nations. That leads us to promote efficient multilateralism that is endowed with the ability to effectively include contributions by regional and subregional organizations in order to face crises and conflicts that may affect international peace and security", Security Council 7112th meeting, *supra* note 128, 15-16. Cf. Lind, 'Chapter VIII of the UN Charter', *supra* note 160, 28, 30

[242] Regarding specifically the African continent, the Security Council has now twice authorised France to act in such a role, in Mali and in the Central African Republic (CAR) which does not constitute a change in practice, but rather a pragmatic solution by the Security Council when a swift intervention was necessary and bearing in mind France's special interests as a former Colonial Power. Nevertheless, also MINUSMA, interestingly, acts under robust rules of engagement. As an analysis of the case-studies will illustrate, Mali is however, an exceptional case. On 20 January 2014, the European Council decided to deploy an EU peacekeeping operation in the CAR for a period of up to six months, "with a view of handing over to the AU" and "in particular of the possibility of MISCA being transformed into a UN peacekeeping operation.", Council conclusions on the Central African Republic, Foreign Affairs Council meeting, Brussels, 20 January 2014, 1, para.2. The Council emphasised that this operation "must be based on a United Nations Security Council resolution", *ibid.*, 2, para.2

[243] Sloan, *supra* note 76, 7-8; "The UN can no more conduct military operations on a large-scale on its own than a trade association of hospitals can conduct heart surgery", M. Mandelbaum, 'The Reluctance to Intervene', (1994) 95 *Foreign Policy*, 3, 10-11. It is alleged that past practice of the SC was also to provide understaffed operations with enforcement mandates they were unable to implement as it was perceived to be "better" than the alternative in which the SC did not act at all, Kofi Annan is quoted saying that "[t]he time has passed when 15 council members can provide themselves with "an alibi" by passing peacekeeping resolutions that cannot be implemented.", J. Hoagland, 'Who wants Peacekeeping? Put Up or Shut Up', *Washington Post/International Herald Tribune*, 3 August 2000, available at: http://www.globalpolicy.org/component/content/article/199/40895.html ; Chesterman, *supra* note 65, 2, 5.

Legally speaking, this emerging practice between the organisations led to a shift in the mandating practice of the Security Council from authorising regional peacekeeping operations solely under Chapter VIII for which there are several reasons. First of all, traditional peacekeeping operations of regional organisations do not require the authorisation of the Security Council in contrast to robust peacekeeping operations which do require a mandate from the Security Council. Furthermore, the nature of peacekeeping operations and the nature of "situations" in which peacekeeping operations are deployed have evolved. In the majority of cases, peacekeeping operations are now deployed in situations of volatile, armed conflicts in which the enduring consent of all parties to the conflict concerning the deployment of a peacekeeping operation is not deployed. An authorisation under Chapter VII is therefore preferable as it would enable the peacekeeping operation to respond with military force if unforeseen circumstances make it necessary. The emerging practice of the UN to mandate regional peacekeeping operations under Chapter VII corresponds with the UN's practice as regards its own peacekeeping operations which are now routinely mandated under Chapter VII as well.

Nevertheless, this shift in the mandating practice of the Security Council does not equate to a convergence of power in the Security Council at the expense of regional organisations. It has to be emphasised strongly that, in practice, the gap between universalism and regionalism is bridged by cooperation between the UN and regional organisations. It has to be further underlined that there is no blueprint to define – including from a legal point of view – the relations between the UN and regional organisations in the exercise of their functions under Chapter VII and VIII of the UN Charter. Indeed, the cooperation arrangements of the involved organisations are solely dependant on the specific circumstances of the situation.

One can draw three conclusions from the analysis carried out in this Chapter on the law of the responsibility of international organisations.

Firstly, the emerging practice of the Security Council and regional organisations which is based on cooperation and the division of labour or an "institutional balance" is an impetus for a scenario in which the United Nations and regional organisations might be jointly responsible.

Secondly, any criterion of attributing conduct to international organisations for acts or omissions arising in the context of peacekeeping operations needs to be constructed in such a way so as to take into account the varied nature of cooperation arrangements between the United Nations and

regional organisations in peacekeeping operations. In other words, it must be able to capture the *casuistic approach* used by the United Nations and regional organisations.

Thirdly, and perhaps most importantly, while examining the attribution of conduct, it is necessary to embark upon an analysis of the legal foundation of the relationship and cooperation between the UN and regional organisations. As was mentioned rather briefly in this Chapter, regional organisations are *per se* not bound by the United Nations Charter and thereby also not by Chapter VIII which serves as the framework for the relations between the UN and regional organisations for maintaining international peace and security. Therefore, it needs to be analysed if that fact influences the interaction between the regional organisations and the United Nations, as well as the potential distribution of international responsibility. It is also important, as despite the shift in the mandating practice of peacekeeping operations by the Security Council to Chapter VII, Chapter VIII is repeatedly invoked in order to legitimate the relations between the UN and regional organisations.