

Legal Basis for United Nations Peacekeeping Operations: The Importance of the Certain Expenses Case.

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Abstract

This article will attempt to identify the basis upon which United Nations Peacekeeping Operations have been justified and founded, since the beginning of the 20th century, through the use of force to ensure the maintenance of international peace and security. This work approaches the development of a theory, which explains the legal restrictions of UN rules concerning sovereignty and its own limits of power with regard to Peacekeeping Operations, while there is no explicit provision in the UN Charter. The adopted methodology is linked to the deductive-logic method, observing the historicity of the phenomenon and the legality of Peacekeeping Operations, in terms of the use of force in the international environment, using a wide base of research literature.

Keywords

United Nations, Security Council; Peacekeeping Operations.

Introduction

This article will attempt to identify the basis upon which United Nations Peacekeeping Operations have been justified and founded, since the beginning of the 20th century, through the use of force to ensure the maintenance of international peace and security. This work approaches the development of a theory, which explains the legal restrictions of UN rules concerning sovereignty and its own limits of power with regard to Peacekeeping Operations, while there is no explicit provision in the UN Charter. The adopted methodology is linked to the deductive-logic method, observing the historicity of the phenomenon and the legality of Peacekeeping Operations, in terms of the use of force in the international environment, using a wide base of research literature.

This study has, therefore, the objective of seeking to explain, in modern terms, the legal construction of the use of force, especially the phenomenon of Peacekeeping Operations in international society, as derived from the Peace of Westphalia in 1648, after the Thirty Years War, when the roots of national states were established, due

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to the conflict between the universalism of the Holy Roman-Germanic empire and secular power balance, then inaugurated by France.³

The first and second chapters present the design of the United Nations, which takes its origin from the San Francisco Charter, addressing its legal identity, the extent of its powers and its nature, as well as describing and specifying its constituent bodies.

The third, fourth and fifth chapters, whose central theme is the consideration of the legal nature of the UN Security Council, attempt to determine its origin, defining its procedures relating to Chapters VI and VII of the Charter of San Francisco, and to develop new practices to aid in the maintenance of international peace and security.

Finally, the sixth chapter intends to present a hermeneutic interpretation of the standards derived from the practice of Peacekeeping Operations.

1. The United Nations

The United Nations (hereafter UN), headquartered in New York⁴, has as its main objective the maintenance of international peace and security and, to that end, to take effective collective measures to prevent and remove threats to peace, to punish any acts of aggression and any breach of the peace in accordance with the principles of justice and international law, and resolve international disputes that might lead to a breach of peace.

Further, the UN should develop friendly relations between States, based on respect for the principle of equal rights and self determination of peoples, and develop international cooperation in solving economic, social, cultural and humanitarian problems, promoting and encouraging respect for human rights and fundamental freedoms for all.

2. Structure

In accordance with Article 7(1) of the San Francisco Charter the six principal organs of the United Nations are a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat⁵. According to the UN Charter and the doctrines of implicit and inherent powers, subsidiary bodies can be created when considered necessary. We will address, for the purposes of this article, only one body - the Security Council.

3. The Security Council

The Security Council is the UN body to which has been assigned the maintenance of international peace and security. It is one of the principal UN bodies and that

3 KISSENGER, Henry. *Diplomacy*. New York: Simon & Shuster, 1994. p.56-77.

4 The headquarters of the United Nations is considered an international zone.

5 SHAW, Malcom. *International Law*. 5.ed. Cambridge: University Press, 2004. p.1084.

which has the primary responsibility in case of conflicts. Thus it embodies one of the fundamental purposes of the UN Charter: to save succeeding generations from the scourge of war.

In accordance with Article 23 of the San Francisco Charter, the Security Council (hereafter SC) consists of 15 (fifteen) Member States of the United Nations and finds itself constrained by a veto power from the five permanent members⁶.

It remains the responsibility of the General Assembly to elect 10 (ten) other members alternately to the Security Council, considering, in geopolitical terms, their contribution to maintaining peace and security, and other goals of the organization, while maintaining an equitable geographical distribution⁷.

3.1 Functions and powers

The UN represents the largest collaborative effort ever to ensure world peace. This effort was accomplished by the San Francisco Charter through two chapters - VI and VII in 1945 - and later through the creation of two additional practices not covered by the UN charter.

The specific powers granted to the Security Council by the Charter of San Francisco for the discharge of these duties are defined in Chapter VI, which deals with the so-called *peaceful solutions to disputes* or *Establishment of Peace (Peacemaking)* and Chapter VII, which discusses the action of the SC in case of threats to peace, breaches of peace and acts of aggression, as well as in Chapters VIII and XII, are acts called *Imposition of Peace (Peace Enforcement)*.⁸

Two new practices related to international security were created (or enhanced) by the SC - and therefore are not specified in the Charter. They are the *Peace Maintenance Operations (Peacekeeping)* and the *Construction of Peace (or Peace Building)*.

3.2 Voting

Each member of the Security Council has, in theory, one vote. Article 27 of the UN Charter provides that the decisions of the Security Council on non procedural matters, i.e. those that deal with action to be taken in case of a threat to peace, a breach of the

6 The Republic of China, France, Russia, the former Union of Soviet Socialist Republics (now Russia), the United Kingdom of Great Britain and Northern Ireland and the United States are permanent members of the Security Council.

7 "The Security Council, since the amendment of the Charter in 1965, is composed of fifteen members, five of which are permanent (China, France, Russia, which succeeded the former USSR, The United Kingdom and United States of America) and ten non-permanent, elected for two years by the General Assembly. Under paragraph 1 of Article 23, this designation should be seen primarily in the contribution of Member States for peacekeeping and the need to obtain an equitable geographical distribution. In the early years of the Organization, when the number of Council members was eleven, a 'Gentlemen's agreement' was arranged among its members, which set the modalities for the application of geographical criteria: six seats then existing on the Security Council would be allocated thus: two to the Latin American States, one to Western Europe, one for Eastern Europe, one in the Middle East and one to the other 'Commonwealth' of Britain. This understanding was observed until 1960. But the entry of African states to the Organization brought an end to the deal as they were not benefited. Thus, Resolution 1991 of December 17, 1963, of the General Assembly led to a new arrangement of geographical criteria. The four criteria became the Western European, Eastern Europe, Latin America, and Africa and Asia. With the change in number of non-permanent members from 10 to 15, the first of those groups happened to have two seats, the second one, the third, two, and the group in Africa and Asia, five. It was the latter who most benefited from new distribution of non-permanent seats." See: QUADROS, Fausto de.; PEREIRA, André Gonçalves. Manual de direito internacional público. 3. ed., Coimbra: Almedina, 1995. p. 496. (translation by the authors)

8 Idem, p.1084-1085. (translation by the authors)

peace and acts of aggression, will be taken by a vote of nine members including the votes of all permanent members, who may or may not be vetoed.

On procedural issues, the votes of all members have the same value. The UN Charter determines the forced abstention of any state involved in the issue, in two instances: decisions under Chapter VII and Article 52 (3). In all other cases the state has the right to vote, even if party to the conflict.

The distinction between procedural issues and those related to international peace and security has posed difficulties. The Council always decides on the qualification of the issue, but in doing so, this act is not considered a procedural issue, which in turn allows for the possibility of a veto. When this occurs, there is a system called double veto: a permanent member opposes an issue that should be considered merely procedural, and then, when discussing the issue, opposes the adoption of the resolution. This process has suffered criticism for a long time, given the fact that it is doubtful that the question of the voting procedure is a procedural issue⁹.

The Security Council is organized so that it can operate continuously. To this end, each member of the SC must, at all times, be represented at UN headquarters.

The Security Council is the only permanent intergovernmental body in the Charter. Strictly speaking, only members, permanent or not, of the Security Council are obliged to maintain a permanent representation in the UN, although the majority of members do. The Council may meet at any time, at the request of one of its members and also to discuss specific issues at the request of: a) a member state under Article 35 § 1, to examine anything it considers a threat to international peace and security under Article 34, b) a non-member State under Article 35 § 2, if it is an issue of which it is part and since it accepts in advance, in relation to this dispute, the obligations of pacific settlement provided in the charter, c) of the General Assembly under Article 11, d) the Secretary-General, under Article 99. [...] The Council may meet outside headquarters, in accordance with Article 28 § 3, but this has only happened in 1948 and 1951, to follow the General Assembly before its installation in New York and in 1972, to address African issues at a meeting held in Addis Ababa.¹⁰

Any UN member state, which is not a member of the Security Council, may participate without the right to vote in discussions on any issue before the Security Council, where it is considered that the interests of that member are specifically affected. Also, any member of the UN, whether a member of the Security Council or not, or indeed any State not a member of the United Nations may be invited to participate in a discussion before the Security Council, without the right to vote, provided that it is a party related to the dispute.

⁹ Idem, p. 497-498. (translation by the authors)

¹⁰ RIBEIRO, Manuel de Almeida. A Organização das Nações Unidas. Coimbra: Almedina, 1998, p. 75-76. (translation by the authors)

4. The Operations of the Establishment and Levy of Peace: Procedures Relating to Chapters vi and VII of the Charter of San Francisco.

4.1 The Establishment of peace

According to Article 33 of the UN Charter, parties to a dispute which may constitute a threat to international peace and security must seek, above all, to reach a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or agreements, or any other peaceful means of their choice. The Security Council can, when deemed necessary, require the parties to settle, by such means, these controversies. Such methods are known as *Preventive Diplomacy* - a set of measures to prevent the emergence or aggravation of disputes between parties. Basically, it involves the consolidation of confidence through the exchange of diplomatic missions and military personnel, exchange of information, supervision of regional agreements on arms control, and investigation of facts, allowing the accurate and timely knowledge of the facts (also encountered in Chapter VI) and conformity with the article itself as already cited, the *Establishment of Peace* ("*Peace-making*") is regarded as a process aimed at securing agreements that extinguish confrontation and facilitate the solution of the initial grievances that led to the conflict. Usually it is triggered through diplomacy, mediation, negotiation and other forms of political accord.

Chapter VI of the UN Charter includes the measures to be adopted for the "establishment of peace" which, among others, include the following: (i) recourse to the International Court of Justice, effective when all parties recognise and obey the deliberations and the competences of said body, in an unqualified way, (ii) mediation or negotiation through intermediation by the authorities designated by the SC, by the General Assembly or by the Secretary-General, (iii) providing assistance to parties in conflict, or hostile groups, in order to alleviate the circumstances that contributed to the emergence of controversy or conflict.

Importantly, the decisions taken under the auspices of Chapter VI are merely recommendatory. Therefore, when the SC makes any resolution based on Chapter VI, it is not mandatory.

4.2 Peace Enforcement

The Security Council, through the emission of resolutions, recommends and decides on necessary measures to maintain or restore international peace and security. Seeking to prevent the situation from worsening, the Security Council may, before making the recommendations or deciding upon the measures, urge the parties concerned to comply with provisional measures, as it deems necessary or advisable.

The Security Council may decide on any measures which, not involving the use of armed force, should be taken to enforce its decisions and should urge members of the United Nations to apply such measures, which may include complete or partial interruption of economic relations, interruption of communications with the nation

in question, be they rail, sea, air, postal, telegraph, radio or any other means of communication, and the severance of diplomatic relations.

If the SC considers these measures inadequate, action can be undertaken, by means of air, naval or land forces, that which it deems necessary to maintain or restore international peace and security.

Article 39 is the key to the unlocking of the charter VII enforcement system. Without the determination that there exists a threat to peace, breach of the peace or an act of aggression, the United Nations would not have the authority to take action in any given situation. However, where such a determination is made, the effect is to override any claim by a State that a matter is entirely within its domestic jurisdiction. Accordingly to the power bestowed on the Security Council on this context is considerable and one would not expect it to be used without due consideration. Article 40 allows the Security Council to recommend the taking of provisional measures in order to contain the situation. However, the real power of the Security Council is to be found in Articles 41 and 42 of the Charter. In the terms of the Article 41, the Security Council is authorized to impose measures not involving the use of force against an aggressor state. These include economic sanctions, the severance of communications and the breaking off of the diplomatic relations. Ultimately, the Security Council has the power, in the terms of the Article 42, to authorize the use of force.”¹¹

As for the decision making process of the Security Council, it seeks a resolution under Chapter VII, which requires other member states to comply with it¹². Decisions of the Security Council in this case *are made by an affirmative vote of nine members, with no veto from any of the permanent members. If one of the permanent members vetoes the resolution, there will be no Council decision.*

Importantly, the decisions taken under the auspices of Chapter VII *are binding on members and non-members of the United Nations.*

¹¹ BARKER, J. Graig. International law and international relations. London & New York: Continuum, 2000. p. 98-99.

¹² “Even in matters related to peace and security, the UN has an important role to play beyond that established in Chapter VII of the UN Charter. In particular, the UN has built for itself a role of ‘peacekeeping’ that exists outside the peace enforcement provisions of Chapter VII. In fact in his ‘Agenda for Peace’ in 1992, the Secretary General of the UN faced a five-stage process involving the United Nations to ensure peace and security. These are preventive diplomacy, ‘peacemaking, peacekeeping, peace-building and peace-enforcement’. Only the last gives respect to Article VII of the UN charter. The role of ‘peacekeeping’ in the United Nations is now mentioned in the Charter. However, it is a paper developed directly out of the stagnation of the implementation procedures of Chapter VII, as a result of the veto process. In the early 50s, already frustrated by the use of the veto, the General Assembly passed the resolution called United for Peace. The resolution cited the minor role of the General Assembly and Secretary-General in the maintenance of international peace and security, stating that when the Council failed to exercise its responsibility as a result of using the veto, the General Assembly could consider the matter and make recommendations. Such recommendations could include recommending the use of force. The constitutionality of the resolution was tested before the ICJ, in the ‘Certain Expenses Case’, in which the ICJ agreed that the General Assembly and the Secretary General had the authority to make recommendations to the extent they were not going against the **enforcement actions** that remained within the exclusive authority of the Security Council under Chapter VII. ‘(Bold by the author) Idem, p. 26-27.

*Thus, the Security Council can act as mediator or peacemaker, under Chapter VI, or an enforcer of international law in situations where it is felt that there are threats to or breaches of the peace under Chapter VII. In the latter case, the Council may adopt measures ranging from political or economic embargoes to authorizing the use of force.*¹³

In the history of the United Nations there are numerous examples of preventive diplomacy and peacemaking, and only some of the imposition of peace: The conflict in Korea in 1950, the second Gulf War in 1991 and, most authors argue, the third Gulf War of 2003 were authorized by the Security Council.¹⁴

Therefore, there are measures taken through the employment of military forces that aim to restore peace and re-establish the *status quo* in an area of conflict against the army which represents a country that insists on violating the peace, where the parties involved (or one of them) do not consent to the intervention and are engaged in war.

Articles 42 and 43 provide military accords for the establishment of a military force under the command of the SC.¹⁵

5. Peacekeeping Operations, and the Construction of Peace: A New Practice.

5.1 Peacebuilding

Consolidation of peace deals with acts subsequent to a conflict between states, or civil conflicts, which are dedicated to consolidating peace, and to prevent the resurgence of conflict. In some circumstances, the actions planned for the “consolidation of peace operations” are developed within a peacekeeping operation. Typically, involving projects that not only contribute to socioeconomic development, but also to increased trust and interaction between former enemy groups, such as the restoration of public order and the police force, creation of livelihoods for the civilian population (agriculture projects, for example), restoring the country’s institutions, monitoring elections and human rights protection, repatriation and relocation of refugees, and support for the actions of demobilization and reintegration of former combatants into civilian life.¹⁶

13 CASARÕES, Guilherme. Guia de Estudos do Conselho de Segurança. Mundhi 2006. Available: <www.humanitas-mg.org.br/mundhi> Searched in: 15/10/2007. (translation by the authors)

14 C.f. LIMA, Alexandre Lopes et al. A Unidade do Diverso: O uso da Força, as Operações de paz e o raciocínio problemático nas Organizações Internacionais. Belo Horizonte: Movimento Editorial da UFMG, 2005. (translation by the authors)

15 However, this article was never implemented as the agreements set out, as the former USSR did not come up with a proposal for proportional composition of forces, demanding equal participation of the permanent members. Gradually, other obstacles to the creation of armed forces under the control of CS appeared, as in the case of France and Nationalist China, which advocated the preservation of the capacity to convene their own forces, assigned at any time. All were positioned to oppose the use of bases outside their respective territories, as well as on the size of forces placed at the disposal of the General Staff of SC. Hence, the SC has no authority to determine the creation of their army with the military of Member States. The absence of legal force in Article 43, given its lack of implementation, resulted in the order of the security system of the San Francisco Charter, as originally sought, and consequently, the military personnel used are wholly owned by the United Nations Member States. “ (translation by the authors) See: CARDOSO, Afonso José Sena. O Brasil nas operações de paz das Nações Unidas. Brasília: Instituto Rio Branco, Funag, 1998, p. 45.

16 See: COUSENS, Elisabeth M, KUMAR, Chetan & WERMESTER, Karin. Peace Building as politics. London: Lynne Rienner Publisher, 2001. p.1-21. REYCHLER, Luc, PAFFENHOLZ, Thania. Peacebuilding: A Field guide. London: Lynne Rienner Publisher, 2001. p.3-21.

5.2 Peacekeeping Operations

Peacekeeping Operations are interventions with the use of military and civilian organisations, within countries, to assist in the implementation of ceasefire agreements which have already been concluded between states in conflict, or civilian groups in conflict within a single state.

The first peacekeeping operation that did not “*have the model of military combat between clearly recognizable enemies was UNEF I*”¹⁷, created when the Egyptian president Gamal Abdel Nasser nationalized the Suez Canal.

While the U.S. and Britain drafted a proposal for nationalization of the canal under the control of an association of countries, which subsequently was not accepted by Nasser, Anthony Eden, the English Prime Minister, secretly planned an invasion with Israel and France. Israel had threatened to punish the guerrilla movement financed by Nasser. Britain and France then intervened in Egypt in order to safeguard their interests in the canal. Israel then invaded Egypt and according to plan, Britain and France threatened to intervene. The day after the attack by Israel, the U.S. submitted a resolution to the Security Council condemning the ruse and ordered a ceasefire.

The unexpected happened: the Soviet Union and the U.S. voted for the resolution which was vetoed by Britain and France. The General Assembly, calling on the powers of the Acheson Resolution, with the support of Dag Hammarskjöld - the UN Secretary General - and the Secretary of Foreign Affairs of Canada, Lester Pearson, formed a peacekeeping force, which would occupy the region and prevent British and French plans to occupy the region. The resolution was approved and the U.S. supported the Hammarskjöld plan - without mentioning that they had put sterling under pressure to prevent the British from receiving a loan from the IMF. The move did not materialize, and British and French had to support the ceasefire.

*On november, 15 the first U.N. expeditionary force was inserted into the Sinai between the opposing forces, and later, in December, the United Nations took on the task of cleaning the ships that had been sunk in the canal. The use and abuse of International law and organizations played an essential political part in the politics of the Suez crisis. In major conflicts of interest, international law may not restrain states, but it often helps to shape the flow of policy. Law is part of the power struggle. Cynics may say these are just games that lawyers play; but the very fact that governments find it important to make legal arguments or to take the resolution of international organizations into account shows they are not completely insignificant.*¹⁸

17 THAKUR, Ramesh; SCHNABEL, Albrecht. Cascading generations of peacekeeping: Across the Mogadishu line to Kosovo and Timor. In: THAKUR, Ramesh; SCHNABEL, Albrecht. United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement. Tokyo: United Nations University, 2001, p. 9.

18 NYE, Joseph S. Understanding international conflicts: an introduction to theory and history. 3. ed., New York: Longman, 1999. p. 159.

Its distinctions of peace enforcement operations are various, among them the *consent of the parties*. While it is not necessary in the case of peace enforcement, it is imperative in the case of peace maintaining operations.

Other differences are *impartiality* and *minimum use of force* limited to self-defense. In Peacekeeping Operations, the Blue Helmets (as they are known) do not take sides - as opposed to peace enforcement operations where they are clearly positioned, as in the case of the invasion of Kuwait in 1991. Also in Peacekeeping Operations, the goal is to guarantee the ceasefire by the presence of troops; they therefore involve squadrons which are lightly armed or unarmed to achieve the task of monitoring the ceasefire, separation of forces, and establishment of zones safety. They remain fully visible while doing so, with their prominent blue helmets. In contrast, in peace enforcement operations, the troops of the member states which comply with the resolutions based on Chapter VII generally are well camouflaged, numerous and well armed, being required by the nature of the resolution to enter into combat. Moreover, another difference of peace operations that is a voluntary participation of Member States of the UN.

Although not specifically mentioned in the UN Charter, the Peacekeeping Operations were implemented as a management tool, for use by third party states, in conflicts between or within states, through impartial, nonviolent and voluntary international intervention, and consented to by the host state or states.

As we have seen, Peacekeeping Operations were born of the Hammarskjöld strategy to prevent small conflicts leading to a major confrontation between two superpowers with nuclear capability. Their origins are to be found in the failure of the SC to deal with the intensification of the cold war. Because only the SC could restrict the sovereignty of a State through a resolution based on Chapter VII, the General Assembly had to seek an operation that had characteristics of impartiality, neutrality, minimum force and especially the broad and full consent of the parties to the conflict¹⁹.

However, the very nature of the conflict was changing: the majority of conflicts, especially those originating in Asia and Africa, were no longer characterised as clashes between warring states - the conflicts became more internalised, with many parts that were not easily delineated, which caused changes in the nature and the concept of Peacekeeping Operations²⁰.

The consent of the parties in conflict could no longer guaranteed, and the protection of civilians could lead to a disagreement with the State concerned, and tougher measures of force may be needed, introducing the need for the involvement of Member States who are able to provide such forces. Despite this pressure to continue development through the progress of Peacekeeping, the main

19 MARSHALL, Monty G.; GURR, Ted Robert. Peace and Conflict 2003. New York: CIDCM 2003, p. 1.

20 MINGST, Karen A; KARNs, Margaret P. The United Nations in the Post-Cold War Era. 2.ed. Boulder: Westview Press, 2000, p.84.

problem of Hammarskjöld's version of Peacekeeping Operations became evident on UNOCI, the first UN intervention in Congo. The measures taken ended up multiplying the actors in the conflict and this led to the birth of new States from the Civil War, the peacekeeping forces suffered great losses and became involved in operations of a military nature. Among the losses of the UN was Secretary General Hammarskjöld himself who was killed when his plane crashed while flying over the Congo²¹

Not only the distinct nature of Peacekeeping Operations in Congo, but also those conflicts in Bosnia, Rwanda and Somalia forced changes to the characteristics outlined by Hammarskjöld. Concern for the protection of civilians and United Nations personnel, led to the merger of peacekeeping and peace building operations, and the incorporation into these security operations of the concepts of human rights protection and the solution of humanitarian crises.

That revolutionary idea, combined with the expansion in the design of Peacekeeping Operations, and its growth around the globe led to two reports: An Agenda for Peace²² and the Brahimi Report²³, by the Secretaries of the UN Boutros-Ghali and Kofi Annan respectively.

While the Agenda for Peace was an attempt to expand Peacekeeping Operations to include the models of creation of peace (peacemaking) and imposition of peace (peace enforcement), largely to perfect the idea of human security, the result of this experience was reflected in the "Brahimi Report", which pointed out some reasons for the failures to prevent genocide in Rwanda, Bosnia, and the failure to stabilize Somalia. The report Agenda for Peace was the initial UN response to the change in the global context of the post-Cold War era, when a record number of Peacekeeping Operations were established due to a renewed consensus in the Security Council. This led to an optimistic view of the possibilities faced by UN Peacekeeping Operations, advocating widespread use of these types of operations through a more united and active Security Council, aiming at the expansion of Peacekeeping Operations through measures to protect civilians, and the solution of humanitarian crises, as well as the adoption of new roles such as verification of human rights and election monitoring.²⁴

21 LIMA, Alexandre Lopes et al. A Unidade do Diverso: O uso da Força, as Operações de paz e o raciocínio problemático nas Organizações Internacionais. *Op. Cit.* p.196. (translation by the authors)

22 UNITED NATIONS. *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping*, 1992. Searched in 12.01.2011. Available: <http://www.un.org/Docs/SG/agpeace.html>.

23 UNITED NATIONS. Report of the Panel on United Nations Peacekeeping Operations, 2000. Searched in 12.01.2011. Available: http://www.un.org/peace/reports/peace_operations/.

24 LIMA, Alexandre Lopes et al. A Unidade do Diverso: O uso da Força, as Operações de paz e o raciocínio problemático nas Organizações Internacionais. *Op. Cit.* p.197-198. (translation by the authors)

However several factors have not helped in the diversification and amplification of the role of the SC: a lack of institutional organisation and extremely low supply of funds prevented the expansion of Peacekeeping Operations as desired by Boutros-Ghali, which had significant impact on the initial optimism of the report. The episodes of Somalia²⁵, Rwanda²⁶, and Srebrenica²⁷ conspired vehemently against the expansion of Peacekeeping Operations. Finally, Kofi Annan, because of these failures, created the second panel established under the leadership of Lakhdar Brahimi which sought to find flaws in the organizational system - seeking to move away from the initial neutrality through the distinction between victims and perpetrators and also seeking greater clarity and optimization of the construction of mandates, provision of troops, decision making and in its funding²⁸.

6. Legal Bases and Challenges for un Peacekeeping Operations

The structural problem of Peacekeeping Operations is the absence of its provision in the UN charter as an instrument of collective security. Some authors believe its existence is proven in Chapter VI²⁹. But some operations did not happen with the consent of all parties, contradicting the merely recommendatory nature of the chapter. The same applies to the General Assembly and its residual power. These days, we use the term “Chapter VI and a half” jokingly, since the resolutions that gave rise to Peacekeeping Operations did not explain under which chapter they were created. *“It’s common to use the term ‘Chapter VI and a half’ to describe Peace Operations as an intermediate point between the peaceful settlement of disputes and collective action”*³⁰

The legal solution stemmed from two advisory opinions of the International Court of Justice, the UN court³¹: the Case of Certain Expenses and the Reparation of Injuries

25 “The attempt to give to give peacekeeping real teeth, in terms of the protection of civilian and humanitarian delivered positions, saw the downside of compromising impartiality when, U.S. troops became openly engaged with Somalia warlord Aideed at Mogadishu, flaring up their presence and leading to a rethinking of U.S. and the UN involvement in the conflict” CHESTERMAN, S. The Use of Force in UN Peace Operations. DPKO: External Study, 2004, p.6. In: NADER, Leonardo Soares. From Armed Security to Human Security: Human Rights securitization in the United Nations Peacekeeping Operations. Master of Arts in International Law and Human Rights University of Peace. June 2005. p.43.

26 “In 1994, a weekly deployed UNAMIR in Rwanda was obliged to stand-by and then to retreat at the eruption of a genocide in that country. The mission had too few troops in the country to take action and the Security Council refused to reinforce it. The inaction cost over 800,000 death in the space of 100 days. “CF. KUPERMAN, Alan J. The Limits of Humanitarian Intervention: Genocide in Rwanda. Washington DC: Brookings Institution Press, 2001, and CLAPHAM, Christopher, Rwanda: The Perils of Peacemaking, Journal of Peace Research. vol. 35, No. 2, 1998, p. 193-210. In: NADER, Leonardo Soares. From Armed Security to Human Security: Human Rights securitization in the United Nations Peacekeeping Operations. *Op. Cit.*p.43.

27 “The area of Srebrenica, protected by the UN, was taken by the Bosnian Serb Army, resulting in the disappearance of more than 10,000 Bosnian Muslims in a matters of days. Soldiers of the Dutch Peacekeeping Operation in the region protecting the enclave were forced to withdraw due to lack of equipment, as well as an ambiguous mandate and lack of credibility in opposing the Serb conduct. “Luttwak, E., Give war the chance. In: Foreign Affairs, vol. 78, iss. 4, 1999. p. 36-44.

28 THAKUR, Ramesh; SCHNABEL, Albrecht. United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement, *op cit*, p. 243.

29 ARTICLE 33 - 1. The parties to any dispute, which may constitute a threat to international peace and security, seek, above all, to reach a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, **Or any other peaceful means of their choice.** (Italics by the author.)

30 LIMA, Alexandre Lopes et al. A Unidade do Diverso: O uso da Força, as Operações de paz e o raciocínio problemático nas Organizações Internacionais. *Op. Cit.* p.196.

31 For a more comprehensive view of the process of electing members of the Court see: BORGES, Leonardo Estrela. A organização da Corte Internacional de Justiça: o papel dos Juizes e da Secretaria nas decisões judiciais. 2003. 219 f. Dissertação (Mestrado em Direito Internacional). Faculdade de Direito, Universidade Federal de Minas Gerais, Belo Horizonte, 2003.

Case³² The first ruled on the legality of spending on UN Peacekeeping Operations and the countries that fund them.³³ The second stated that the UN has implied powers to create organs for exercising their primary functions, since those organs were needed to achieve the purposes of the UN Charter.³⁴

The more traditional course being taken before this opinion was ruled on had defended the literal interpretation of the UN Charter, founded by Russian publicist Grigory Tunkin. Unlike the modern doctrine, Tunkin did not see the UN as an organization independent of the will of individual states.

*[...] Tunkin highlights that the UN Charter is, ultimately, a treaty, although sui generis to be able to establish a complex international mechanism which is not found in other treaties, because it is an interstate organization, the UN may not push the boundaries of the consent of the Member States.*³⁵

Tunkin argued that the amendments to the Charter should be seen under the auspices of Article 108. That is, they should be made by all UN members, requiring the votes of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of UN members, including all permanent members of the Security Council. Throughout its existence, the San Francisco Charter has been amended several times³⁶.

The second school of thought - that of implied powers - is the most widely accepted today, and is mentioned in the Case of Certain Expenses and Reparation for Injuries Case. It constituted the legal grounds for Peacekeeping Operations. The main argument raised by the Court was that:

[...] in accordance with international law, one must consider the organization as possessing powers which, though not expressly stated

32 See: BRANT, Leonardo Nemer Caldeira. A Corte Internacional de Justiça e a construção do Direito Internacional Belo Horizonte: CEDIN, 2005.

33 INTERNATIONAL COURT OF JUSTICE. Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962 : I.C. J. Reports 1962, p.157.

34 INTERNATIONAL COURT OF JUSTICE. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949: I.C. J. Reports, 1949.

35 TRINDADE, Antônio Augusto Cançado. Direito das organizações internacionais. Brasília: Escopo, 1990. p. 13-14.

36 On December 17, 1963, the General Assembly approved the amendments to Articles 23, 27 and 61 of the Charter. A further amendment to Article No. 61 was adopted by the General Assembly on 20 December 197. The amendment to Article No. 109, adopted by the General Assembly on December 20, 1965. The amendment to Article 23 paragraph raises the number of members of the Security Council from eleven to fifteen. The amendment to Article No. 27 stipulates that decisions of the Security Council on procedural matters shall be taken by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members including among them the votes of five permanent members of the Security Council. The amendment to Article No. 61, took the number of members of the Economic and Social Council from eighteen to twenty-seven. A subsequent amendment to that article, took the number of Council members to fifty-four. The amendment to Article No. 109, related to the first paragraph of that article stipulates that a member of the General Conference, convened for the purpose of reviewing the Charter may be achieved through a vote of two thirds of Assembly members General and the vote of any nine members (formerly seven) of the Security Council.

*in the Charter, are attributed to it by necessary implication, and are essential to the performance of its duties [...].*³⁷

This current doctrine holds that the UN can act with implicit powers to achieve the stated aims in its main objectives and is able, for that purpose, to create bodies such as those that manage Peacekeeping Operations, which were not provided by the original Member States of the Conference of San Francisco to have legal existence.³⁸ This concept is further developed in the dissertation “*Objective International Personality of Intergovernmental Organizations*” by Norwegian Finn Seyersted.

*Arguing that, naturally, UN activities go far beyond the provisions expressed in its Charter, Seyersted argued that an organization like the UN has an inherent legal capacity to intervene in any international acts of aggression, or with a sovereign state that it is in a practical position to intervene in. Not all the powers exercised by the UN necessarily flow from the Charter, since it defines more precisely the limits and purposes of the Organization.*³⁹ (Italics by the author.)

Recently, the International Criminal Tribunal for the Former Yugoslavia confirmed the thesis that would expand of powers of the SC, in the decision of the Tadic case⁴⁰, limiting their responsibilities in the San Francisco Charter. According to the appellate chamber, the SC is not *Legibus solutus*. That is, the SC should conform to the roles and limits based on its primary responsibility of maintaining international peace and security, established by the Charter of San Francisco, for the faithful discharge of its duties. For this, the SC has a wide range in which to work, but their powers are not completely unlimited. Not only are the conditions of application of the powers described limited, but the SC must also comply with the limits imposed by the roles and responsibilities agreed upon in Article 24 of the UN Charter, which decrees that the SC may

37 INTERNATIONAL COURT OF JUSTICE. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949: I.C. J. Reports, 1949. Op. cit., p. 182. In: TRINDADE, Antônio Augusto Cançado. Direito das organizações internacionais. Op. cit., p. 21.

38 “The court admitted, inter alia, that every action taken by the UN to show suitability for the realization of their aims expressed cannot be regarded as ‘ultra vires’ of the Organization.” See: INTERNATIONAL COURT OF JUSTICE. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949: I.C. J. Reports, 1949 p. 168. In: TRINDADE, Antônio Augusto Cançado. Direito das organizações internacionais. Op. cit., p. 16.

39 TRINDADE, Antônio Augusto Cançado. Direito das organizações internacionais. Op. cit., p. 17.

40 “It is clear from that text of the Security Council plays a pivotal role and exerts a broad limit under this article. But that does not mean that its powers are not limited. The Security Council is an organ of an international organization established by a treaty, which serves as constitutional rules for the organization. The Security Council is subject to certain constitutional limitations, albeit a wide range in this constitution. These powers cannot, under any circumstances, go beyond the limits of jurisdiction of the organization as a whole, not to mention other specific limitations or those which may derive from the internal division of powers within the organization. In all cases, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (without legal limit). INTERNATIONAL TRIBUNAL FOR FORMER YUGOSLAVIA. Prosecutor V. Dusko Tadic A/K/A “Dule”. Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, 39.

create organizations that promote international peace and security within their authority.⁴¹

7. Final Considerations

Although there is no explicit provision in the Charter, UN Peacekeeping Operations do not operate in a legal vacuum, they were developed within the judicial constraints interpreted through legal advisory opinions of the International Court of Justice and other international tribunals, which have analysed the general limitations of the SC's powers of organization and therefore its' Peacekeeping Operations

Nevertheless, the modern challenge is to specify its scope of operation and powers, since the Peacekeeping Operations have many modalities - different rules of action and acceptable behaviour in the use force. By virtue of its mandate by the Security Council, the Peacekeeping Operations - restricted during the cold war - had their behaviour changed. They were authorized only by the General Assembly with the concurrence of the states, with a mandate under the auspices of Chapter VI, into operations approved by the Security Council and established under Chapter VII which counts among its number many different nationalities, each with its own operational methods.

An agreement was worked out on provision of troops to the United Nations, and also an agreement on the status of forces with the State that receives a contingent of Peacekeeping Operations. These troops are, in turn, employed by the Special Representative of the Secretary General as Head of Operations and an UN force commander, which report to the Secretary General of the United Nations.

However, the coordination of these two officers did not account for all operations: the day-to-day operations as well as the rules of engagement are left to local officers. Its operations, therefore, have several levels of organization and regimentation that challenge traditional methods due to their complexity. International legal norms, such as the Geneva Conventions and *jus cogens* norms also regulate Peacekeeping Operations, as well as the Status of Forces Agreement that provide the troops, since most of the agreements around the status of forces establish immunity from prosecution to the State which sends its troops into foreign territory.

41 Article 24 2. (UN Charter): In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations. The specific duties of the Security Council are specified in Articles VI, VII and VIII. Searched: www.icj-cij.org/icjwww/ibasicdocuments/basictext/uncharter.htm. Available: 06/05/05.

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