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THE EUROPEAN UNION'S PEACE MISSIONS
IN THE UNITED NATIONS COLLECTIVE SECURITY SYSTEM

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*The European Union's Peace Mission
in the United Nations Collective Security System*

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Abstract

The recent and interesting practice of European Security and Defence Policy peace missions testifies to a great vitality of EU in the field of peace maintenance and international security. This is an asset, considering that the Common Foreign and Security Policy is traditionally considered the least effective of the three EU pillars.

In this field of EU Law there is an aspect deserving attention, namely the international legal aspect of the EU competence in crisis management. In fact, the implementation of ESDP requires one to consider the role of EU in the United Nations collective security system, in order to identify the international legal basis of EU peace missions.

This is not a simple task. The UN collective security system has the appearance of a patchwork obtained by stitching together legal and political 'pieces', and the presence of different sources can make more difficult to legally frame activities of international organizations for peace. Any attempt can seem like entering into a labyrinth, where the presence of many variables takes us down many paths with different exit-doors. The aim of this working paper is just to open all those exit-doors, trying to identify the most appropriate one.

Keywords

European Union; European Security and Defence Policy; International Law; United Nations; International Organizations; Use of force

Introduction*

Even if the European Union (EU) is a “still young and relatively weak global actor”¹, the recent and interesting practice of European Security and Defence Policy (ESDP) peace missions testifies to a great vitality in the field of peace maintenance and international security. Since 1999 ESDP has reached some important goals and it can be considered quite an effective policy. For instance, the deployment of the EU missions in Kosovo, Georgia and Somalia are producing positive effects on the local crisis², and the same is the case for previous missions. This is an asset for the EU, considering that the Common Foreign and Security Policy (CFSP) – to which ESDP belongs – is traditionally considered the least effective of the three EU pillars.

In this field of EU Law there is an aspect that deserves attention, namely the international legal aspect of the EU competence in crisis management³. In fact, the implementation of ESDP requires one to consider the role of EU in the United Nations (UN) collective security system, in order to identify the international legal basis of EU peace missions. That issue leads directly to the following question: even if the EU is an international organization⁴, is it to be considered a regional organization acting autonomously under Chapter VIII of the UN Charter, or a sort of agency coordinating the efforts of its Member States?

The subject is complex and topical, as the growing interest in the literature testifies, but it is only partially explored. So this working paper plugs into the same vein of interest and aims to consider EU peace missions within the legal framework of the UN collective security system. In that regard it is worth stating in advance that some recent developments in UN practice, in particular the Report of the UN Secretary General (UNSG) of April 2008, seem to open the path for a reconsideration of the UN Charter provisions legally founding international organizations activities for peace that goes beyond Chapter VIII.

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¹ W. ASSANVO, C. E. B. POUT, *The European Union (EU): African Peace and Security Environment's Champion?*, Foundation pour la Reserche Stratégique, 27 November 2007, at 17.

² See Joint Actions 2008/124/CFSP about *EULEX Kosovo* (OJ 42/2008), 2008/736/CFSP and 2008/760/CFSP about *EUMM Georgia* (OJ 248/2008; OJ 272/2008), and 2008/851/CFSP about *Atalanta* (OJ 301/2008). On the obtained results see, for instance, *Conclusions on ESDP*, 2943rd Relex Council meeting, Brussels, 18 May 2009.

³ Literature has already faced some related single aspects. Regarding the application of International Humanitarian Law (IHL) to EU missions and their accountability, see N. TSAGOURIAS, *EU Peacekeeping Operations: Legal and Theoretical Issues*, in M. TRYBUS, N. D. WHITE, *European Security Law*, Oxford, Oxford University Press, 2007, 115 ff. and L. PALADINI, *Le missioni di pace dell'Unione europea e il rispetto dei diritti dell'uomo*, in *Storicamente*, 2008, http://www.storicamente.org/05_studi_ricerche/paladini.htm. About UN and NATO (but similar considerations can be extended to the EU) see M. ZWANENBURG, *Accountability of peace support operations*, Leiden-Boston, Martinus Nijhoff Publishers, 2005; F. MÉGRET, F. HOFFMANN, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, in *Human Rights Quarterly*, 25 (2003), 314 ff, and F. CASOLARI, *Le operazioni di peacekeeping tra protezione e rispetto dei diritti dell'uomo*, in *Storicamente*, 2008, http://www.storicamente.org/05_studi_ricerche/diritti-umani/casolari.htm.

⁴ Amongst all, D. R. VERWEY, *The European Community, the European Union and the International Law of Treaties*, TMC Asser Press, The Hague, 2004, 63 ff.

That being so, this working paper will be structured in four parts.

In Part I the role of regional organizations in the UN collective security system will be introduced, highlighting two points. First, there is an ongoing process aimed at re-defining the legal framework of the participation of those organizations in the maintenance of peace. Second, the UN collective security system appears to be like a patchwork, where ‘legal pieces’ and ‘political pieces’ contribute to legally frame the activities of international organisations.

In Part II the issue of the UN Charter ‘primacy’ in relation to EU Law will be considered, both at legal and political level. The aim of the second part is to highlight international legitimacy as a key element of every peace mission, so that the provisions regulating activities of international organizations in the maintenance of peace is International Law, EU peace missions included.

In Part III ESPD practice will be analyzed through the ‘UN magnifying glass’. The aim is to highlight all the elements that allow EU missions to be correctly framed in the UN collective security system and to show how that practice contributes to the assertion of the EU role as peace keeper.

In light of the conducted analysis, in Part IV three hypotheses regarding the international legal basis of EU peace missions will be presented. Some considerations about those hypothesis and the implications for the EU presence in the international community will end this working paper.

Finally, a pair of explanations are due.

The first regards the ‘double’ position that studying international organizations’ activities in the UN collective security system requires. The issue has to be analyzed under both International Law, in particular the UN collective security system, and the single international organization legal order, and this is bound to happen also in considering the EU. So through the working paper there will be following changes of perspective, shifting from an International Law standpoint to the EU Law one, and *vice versa*. This necessary ‘shifting focus’ will also give the opportunity to analyze the general issue of the role of international organizations in the maintenance of peace, so it may be useful in considering the position of other international organizations in the UN collective security system, such as the North Atlantic Treaty Organization (NATO) or the African Union (AU).

The second is a terminology explanation. Many official documents and scholars use the expressions ‘regional organizations’ and ‘international organizations’ (and their acronyms) alternatively, and this can give rise to an overlap between different expressions. Firstly because between international organizations and regional organizations there is a relationship of *genus* to *species*: ‘international organizations’ includes ‘regional organizations’. Secondly because the UN Charter uses ‘regional organizations’ to indicate those acting under Chapter VIII. That being so, when possible, in this working paper ‘regional organizations’ will indicate the latter and ‘international organizations’ will identify all international organizations or, via the expression ‘Other IO’, those acting under other chapters of the UN Charter.

I. International organizations in the UN collective security system

1. Chapter VIII

It is well-known that the United Nations Security Council (UNSC) has the primary responsibility for the maintenance of peace and international security under Article 24 of the UN Charter, and the pertinent powers are regulated in Chapters VI, VII, VIII and XII⁵. UNSC encourages and promotes the

⁵ Respectively: “Pacific settlement of disputes”, “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”, “Regional arrangements” and “International trusteeship system”.

peaceful settlement of disputes under Chapter VI (for instance recommending 'appropriate procedures' in order to adjust a dispute), it can use force or authorize its use under Chapters VII and VIII⁶, and it can exercise some powers within the international trusteeship system (Chapter XII).

Indeed the powers under both Chapters VII and VIII are more intense. Under the former the UNSC can directly use force, even if it has implemented this chapter authorising Member States to use force, individually or collectively, and instituting peace-keeping operations (blue helmets)⁷. The latter, instead, allows the UNSC 'to utilize' regional organizations in the maintenance of peace and international security and it also regulates their autonomous initiatives.

Thus Articles 52-54 of the UN Charter represent a more appropriate legal framework for regional organizations' military and civilian activities in favour of peace. Article 52 encourages the creation of 'regional arrangements or agencies', whose activities are consistent with the UN purposes and principles. Those "exogenous entities"⁸ can either be used by UNSC for conducting operations under its control or launch local autonomous activities. Regional autonomous activities have to be authorised if coercive (i.e., with a mandate including the use of force over the self-defence)⁹ *ex* Articles 53 and communicated to UNSC if non coercive under Article 54. In practice the use of Chapter VIII is quite poor: no case of 'functional use', a few cases of regional organizations autonomous authorized activities¹⁰ and some communications about non-coercive actions¹¹.

Nevertheless, "able and willing" regional organizations have in many cases played an effective role in crisis management, for reasons of effectiveness¹², using force too. For instance, this took place with NATO and Western European Union (WEU) during the Balkan conflict¹³. It seems that within the UN collective security system a pragmatic and flexible approach in co-operating with regional organizations has been adopted. On the one hand, Chapter VIII has scarcely been implemented and regional organizations' actions on the ground have not received formal recognition even if performed with a high degree of autonomy¹⁴. On the other, their co-operation and co-ordination with UN was welcome and has been facilitated.

⁶ This is an exception to the general prohibition to use force *ex* Article 2(4) of the UN Charter. That prohibition is also a *jus cogens* provision (International Court of Justice [ICJ], *Nicaragua v. United States of America*, Judgment of 27 June 1986, Reports 1986), but it seems that there is not an exact coincidence between the *jus cogens* provision and Article 2(4). In the opinion of N. RONZITTI, *Diritto internazionale dei conflitti armati*, Torino, 2006, at 32-3, the former would be limited to the prohibition of aggression.

⁷ Amongst all, B. CONFORTI, *The Law and Practice of the United Nations*, 3rd edition, Martinus Nijhoff Publishers, Leiden/Boston, 2005 (in particular 195 ff.).

⁸ K. GRAHAM, *Towards a Coherent Regional Institutional Landscape in the United Nations? Implications for Europe*, Bruges Regional Integration & Global Governance Papers, 1/2008, College of Europe, Bruges, at 6.

⁹ The part regarding measures against any enemy states can be considered fallen into desuetude [see A. TANZI, *Il ruolo delle organizzazioni regionali nel dibattito alle Nazioni Unite*, in F. LATTANZI, M. SPINEDI (a cura di), *Le organizzazioni regionali e il mantenimento della pace nella prassi di fine XX secolo*, Napoli, 2004, 22 ff].

¹⁰ UNSC resolution 1132 (1997) about ECOWAS and UNSC resolution 1244 (1999) about NATO. The latter case is controversial (see note 168).

¹¹ UNSC resolution 199 (1964) about Organization of African Unity (OAU) and UNSC resolution 504 (1982) about OAS. With regard to the latter, UNSC "takes note [italics added] the decision of the Organization of African Unity to establish ... a peace-keeping force for the maintenance of peace and security in Chad" (para 1). Note that in the authoritative opinion of B. CONFORTI, *The Law and Practice of the United Nations*, *cit.*, at 235, this is a case of direct authorisation to use force.

¹² S. GRASSI, *L'introduzione delle operazioni di peace-keeping nel Trattato di Amsterdam: profili giuridici ed implicazioni politiche*, in *La Comunità Internazionale*, 1998, p. 306-7 and U. VILLANI, *Il ruolo delle organizzazioni regionali per il mantenimento della pace nel sistema dell'ONU*, in *La Comunità Internazionale*, 1998, at 444.

¹³ Amongst all, M. ZWANENBURG, *cit.*, 23 ff.

¹⁴ Some UNSC resolutions [787 (1992), 816 (1993) and 820 (1993)] recalled Chapter VIII, but they were legally founded on Chapter VII, thus Member States were the formal addressees of the authorizations to use force.

So regional organizations performed the ‘dirty work’ without being recognized, and they appeared as a Member States framework of co-ordination or as “arenas in which States co-ordinated their efforts”¹⁵. In other words, regional organizations were the ‘psychological addressees’ of the UNSC resolutions¹⁶.

2. Beyond Chapter VIII: co-operation between the UN and regional organizations

Facilitating without formalizing regional activities has required the development of new forms of co-operation and co-ordination between UN and regional organizations beyond Chapter VIII. Those new modalities have been indicated in some important UN documents of the 90s.

Firstly in the United Nations General Assembly (UNGA) resolution 49/57 of 1994, which confirms the UNSC main responsibility in the maintenance of peace and Chapter VIII centrality and goes beyond it. The document grants regional organizations a variety of collaboration methods not apparent in Chapter VIII and encourages them to operate in co-ordination with the UN in order to realize the objectives of the Charter. In fact, it states

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-building¹⁷.

Similarly, in the *Agenda for Peace* of 1992, after recalling Chapter VIII and the necessity for regional organizations activities to be consistent with UN Charter purposes and principles, the UNSG introduces concepts such as ‘complementarity’, ‘cooperative work’, ‘division of labour’, ‘flexibility’ and ‘creativity’. In particular, he affirms

What is clear, ..., is that regional arrangements or agencies in many cases possess a potential that should be utilized in serving the functions covered in this report: preventive diplomacy, peace-keeping, peacemaking and post-conflict peace-building. Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but 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 affairs¹⁸.

In the following *Supplement* of 1995 the UNSG is more explicit. He specifies that regional organizations can implement such co-operation thanks to some new modalities of military support for the UN, i.e. operational support, co-deployment and joint operations¹⁹. In the opinion of the UNSG,

The capacity of regional organizations for peacemaking and peace-keeping varies considerably ... Given their varied capacity, the differences in their structures, mandates and decision-making processes and the variety of forms that cooperation with the United Nations is already taking, it

¹⁵ S. GRASSI, *cit.*, at 307-8.

¹⁶ *Ibidem*, at 307. See also 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?*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, 21 ff.

¹⁷ UNGA resolution 49/57 (1994), A/RES/49/57, 9 December 1994, *Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security*, Annex, para 2.

¹⁸ *An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, 17 June 1992, A/47/277-S/24111, UNSG report, para 62, 64-65.

¹⁹ *Supplement to an Agenda For Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, 3 January 1995, A/50/60-S/1995/1, SG Report, para 86. In the operational support regional organizations perform a military presence to support UN on the ground. In the co-deployment regional organizations play an operative role under UN support and verify. Finally, The joint operations involve an equal participation of regional organizations and UN.

would not be appropriate to try to establish a universal model for their relationship with the United Nations. Nevertheless it is possible to identify certain principles on which it should be based²⁰.

Amongst these, there are consultation between the UN and regional organizations, respect for UN primacy, a clear division of labour between UN and regional organizations (towards the same conflict) and the need for States belonging both to a regional organization and UN to be consistent in facing issues of interest in both organizations²¹.

From those UN documents of 90s it emerges the establishment of concepts such as “decentralization” and “delegation” of maintenance of peace and international security. Those concepts can be summarized in the expression “regionalization of peace keeping”, under which UNSC holds ‘normative power’ (authorizing, controlling and being informed), while States (singularly or collectively) and international organizations (independently or as framework of intervention of their Member States) perform the work on the ground.

It does not represent a pre-defined model, but a ‘flexible framework’ whose functioning requires the accomplishment of certain principles. Moreover, it does not imply affecting the primacy of the UN Charter provisions, quite the reverse: the aforementioned documents confirm the centrality of Chapter VIII, but at the same time they offer an ‘operational alternative’ *a latere*, in order to enlarge international organizations’ possibilities of acting in favour of peace. So facilitating regional activities has been possible without formalizing the international organizations’ role or abjuring UN Charter provisions.

As the following paragraphs will highlight, this can be considered the starting point of a process aimed to redraw the role of international organizations in the UN collective security system.

3. Re-evaluating Chapter VIII

That flexible framework survived without any significant change until 2005, when some developments intervened. The first is represented by resolution 1631 (2005) on cooperation between the UN and regional organizations in maintaining peace²², in which the UNSC showed a new interest towards the implementation of Chapter VIII. This resolution is interesting, because the UNSC expresses the will to enhance co-operation with regional organizations in harmony with Chapter VIII.

Firstly the UNSC takes into consideration the issue of resources, both from the UN and the donors’ standpoints. It invites regional organizations to develop the necessary capabilities and calls on them to offer those resources in the framework of the UN Stand By Arrangements System, i.e. a catalogue of resources put on stand-by in their home country but at the disposal of the UN. At the same time, the UNSC invites Member States to contribute to strengthen regional organizations competences and capabilities in crisis management.

That being so, the core of this resolution is to strengthen partnership between the UN and regional organizations²³ and to this end it stresses two points. First, the need to develop regional organizations’ ability to perform the peaceful settlement of disputes, deploying forces in support of UN operations (or other UNSC mandated operations), and carrying out counter-terrorism efforts²⁴. Second, the

²⁰ *Ibidem*, para 87.

²¹ *Ibidem*, para 88.

²² UNSC resolution 1631 (2005) of 17 October 2005 on the *cooperation between the United Nations and regional organizations in maintaining international peace and security*.

²³ K GRAHAM, *UN-EU Cooperation on Security: in Search of ‘Effective Multilateralism’ and a Balanced Division of Tasks*, in J. WOUTERS, F. HOFFMEISTER, T. RUYTS (eds), *The United Nations and the European Union: An Ever Stronger Partnership*, TMC Asser Press, The Hague, 2006, at 290-1.

²⁴ Para 3, 5, 6.

importance of improving interactions, meetings, communication (also with regard to Article 54 of the UN Charter) and consultations between the UN and regional organizations²⁵.

Considering those ‘priorities’, what the resolution seems to achieve is a more direct link between the flexible framework reached in the 90s and the ‘rediscovered’ intention to implement Chapter VIII. Moreover, the document seems to give the ‘right weight’ to co-operation between the UN and regional organizations; its importance in clarifying the operational modalities of the partnership with UN does not question the centrality of Chapter VIII²⁶.

Resolution 1631 (2005) ends with an invitation to the UNSG to submit a report on this issue, taking into due consideration the already existing cooperation guidelines between UN and some regional organizations²⁷.

4. Re-considering the scope of Chapter VIII

The UNSG adopted the requested report on 7 April 2008 after consulting many regional organizations²⁸.

The report’s starting point is the existing framework of co-operation between the UN and regional organizations. Such co-operation is defined as a ‘partnership’, but this concept is unclear²⁹, because it has a multifaceted nature. It clearly depends on the individual regional organization and the established co-operation, and it can evolve in different domains (for instance, disarmament, human rights *et cetera*). The report underlines that regionalism is necessary and feasible³⁰, but its working requires a division of responsibilities in the field of maintenance of peace under Chapter VIII. In order to reach such a division, it is necessary both to solve some issues concerning Chapter VIII (for instance, what ‘type’ of responsibilities can be assigned to regional organizations) and to improve co-operation and co-ordination between the UN and regional organizations.

The Report ends by making some important recommendations and proposals to UNSC³¹. They regard various issues: the nature and structure of UN-regional organizations partnership, the strengthening of their co-ordination and consultation, the enhancement of regional organizations capacity of intervention (also from a financial standpoint³²) and the development of the co-operation in specific fields. With particular regard to the nature and structure of the partnership³³, the UNSG asks for clarification of regional organizations role and mentions the possibility that UNSC might consider

Discussing how to make a distinction between regional organizations for Chapter VIII activities and all other regional organizations’ activities, and developing a structure for identifying regional security mechanisms either by membership, focal area and/or mandate³⁴

Thus the UNSG has asked to UNSC to consider regional activities for peace taking into consideration the regional organizations performing them. There could be regional activities legally based on

²⁵ Para 7, 8, 9.

²⁶ Para 3-5 and 11.

²⁷ Para 10 ff.

²⁸ *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, S/2008/186, 7 April 2008.*

²⁹ *Ibidem*, para 8.

³⁰ *Ibidem*, para 7 ff.

³¹ *Ibidem*, Part X.

³² *Ibidem*, para 76.

³³ *Ibidem*, para 71.

³⁴ *Ibidem*, Part X, para 71, letter d).

Chapter VIII and performed by certain regional organizations, and interventions carried out by other regional organizations whose legal basis lies in other relevant provisions of the UN Charter. Looking at the UN Charter, it seems that the other possible alternative is Chapter VII, which provides for the use of force.

The proposed differentiation represents a development within the aforementioned process towards redrawing the role of international organizations in the UN collective security system. This point will be reconsidered in Part IV, but it is worth underlining that the Report of 2008 can be considered an important point of reference and it is a prelude to interesting changes without being revolutionary. In fact, it can lead to a UNSC resolution redrawing the role of many international organizations in the UN collective security system, opening the path to an alternative legal basis (in respect to Chapter VIII) in framing their activities for peace. At the same time, the report is not revolutionary, because it confirms Chapter VIII centrality and the importance of co-operation, taking into due consideration the current and diverse state of relationships between the UN and regional organizations, as the UNSC requested in resolution 1631 (2005)³⁵.

The UNSG proposal also appears a request coming 'bottom up' from some UN meetings involving international organizations. As in a sort of flashback, the next paragraph will be focused on such a request.

5. Chapter VIII or not Chapter VIII?

The UN Charter does not offer a definition of regional arrangements³⁶, nor does it specify criteria to identify an intergovernmental organization for the aims of Chapter VIII ('Chapter VIII RO'). It does not even support the idea of dividing international organizations in two or more groups, depending on the legal basis of their activities for peace.

Nevertheless, the UNSG recommendation of April 2008 does not sound totally new. Such a distinction was considered in the High-Level Panel on Threats, Challenges and Change of 2004. The final report underlines that

In recent years, such alliance organizations as NATO (which have not usually been considered regional organizations within the meaning of Chapter VIII of the Charter but have some similar characteristics) have undertaken peacekeeping operations beyond their mandated areas.³⁷

The same distinction emerged during the Sixth High-Level Meeting between UN, regional organizations and other intergovernmental organizations of 2005³⁸. In the conclusive document, the participants – delegations from twenty regional organizations – agreed that

interested regional and sub-regional organizations will pursue joint activities under the umbrella of highlevel meetings under Chapter VIII of the Charter while other intergovernmental organizations

³⁵ Para 10 ff.

³⁶ On the unsuccessful Egyptian proposal for a definition see A. GIOIA, *The United Nations and regional organizations in the maintenance of peace and security*, in M. BOTHE, N. RONZITTI, A. ROSAS (eds), *The OSCE in the maintenance of peace and security. Conflict prevention, crisis management and peaceful settlement of disputes*, The Hague-London-Boston, 1997, at 195-6).

³⁷ *A more secure world: our shared responsibility-Report of the High-Level Panel on Threats, Challenges and Change of 29 November 2004*, para 273, attached to the UNSG Note A/59/565. EU contributed to the works through a Paper (see Council of 17-18 May 2004, 2581st meeting, doc. 9211/04, p. IV).

³⁸ The meeting aimed to discuss some recommendations made by the High-level Panel of 2004 and by the UNSG Report *In larger freedom* [Report of 21 March 2005 (A/59/2005)].

will partner with the United Nations under the other Charter provisions, in response to the distinction made by the High-level Panel to that effect.³⁹

Among those declaring themselves as ‘Chapter VIII RO’, both via their constituent Charter or later declarations, there are the AU, the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE). In contrast, among international organizations that claimed to prefer acting under other relevant provisions (‘Other IO’) there are the EU and the NATO⁴⁰.

De facto such documents anticipated the UNSC Report of 2008. Those meetings were held years before, so it is not arbitrary to assume – from the silence of the Report – that the UNSG had taken into consideration expressed positions when asking the UNSC to discuss sharing regional organizations in two groups. For this reason the UNSG recommendation to the UNSC sounds like granting the request coming ‘bottom up’.

6. On the distinction between ‘Chapter VIII RO’ and ‘Other IO’

It is worth briefly focusing on two aspects of the distinction between ‘Chapter VIII RO’ and ‘Other IO’. The first regards the usefulness and the implications of such a distinction, while the second highlights the relevance that it has already achieved in practice.

With regard to the former, it has been observed that this distinction would bring different responsibilities towards local conflicts. ‘Chapter VIII RO’ operate in the context of regional collective security (‘regional focus’)⁴¹ and represent the first institutional instance of pacific settlement of local

³⁹ *Conclusions of the Chairman of the sixth high-level meeting between the United Nations and regional and other intergovernmental organizations* of 25-26 July 2005, para 7, attached to the letter dated 29 August 2005 from the UNSG addressed to the UNGA President and the UNSC President, 8 September 2005 (A/60/341).

⁴⁰ In literature, F. CAMERON, *The EU and international organizations: partners in crisis management*, European Policy Centre, Issue Paper n. 41, Brussels, 24 October 2005; T. TARDY, *EU-UN cooperation in peacekeeping: a promising relationship in a constrained environment*, in S. BISCOP, F. FRANCONI, K. GRAHAM, *The European Union and United Nations. Partners in effective multilateralism*, Chaillot paper 78, ISS, Paris, 2005, at 91-2; K. GRAHAM, T. FELÍCIO, *Regional organizations and collective security: the role of the European Union*, in the same ISS Chaillot paper, at 91; J. WOUTERS, T. RUYS, *UN-EU Cooperation in Crisis Management*, in J. WOUTERS, F. HOFFMEISTER, T. RUYS (eds), *The United Nations and the European Union: An Ever Stronger Partnership*, TMC Asser Press, The Hague, 2006, at 231; finally, J. CLOOS, *UN-EU Cooperation in Crisis Management – Putting Effective Multilateralism into Practice*, in the same book edited by J. WOUTERS, F. HOFFMEISTER and T. RUYS, at 265. With regard to EU, that approach would be confirmed by the ‘detached’ language of the Paper presented to the *High-Level Panel on Threats, Challenges and Change* (see note 38). Point 20 reads: “The Panel should also have regard to the increasing capacity and readiness of regional organisations to act in support of international peace and security. The UN should intensify its co-operation with such organisations, with a view to enhancing their capacity for crisis management in accordance with Chapter VIII of the UN Charter. The EU, for its part, stands ready to assist the UN in early warning and conflict prevention, as well as in responding rapidly to crisis situations. ... It is also ready to assist regional organisations to enhance their capacity. It has established an African Peace Facility and is engaged with the African Union on making it operational and is considering other possibilities to support regional organisations’ efforts on peace and security”. That being so, there are not official statements in that regard and many scholars consider EU a ‘Chapter VIII RO’ (see note 68). Moreover, Secretary-General Jaap de Hoop Scheffer declared that NATO acts in the spirit of Chapter VIII (quoted by F. CAMERON, *cit.*, and K. GRAHAM, T. FELÍCIO, *cit.*, at 91). In that regard, C. DOMINICÉ, *Co-Ordination between Universal and Regional Organizations*, in N. M. BLOKKER & H. G. SCHERMENS (eds), *Proliferation of International Organizations – Legal Issues*, Kluwer International Law, The Hague-London-Boston, 2001, at 69-70 underlines that “(t)he case of NATO is a special one, because that organization has claimed for long not to be a regional organization but a collective self-defence organization based upon article 51 of the UN Charter, in order to avoid the application of Chapter VIII. Recently, however, NATO has been considered, for functional purposes, to be a regional organization, although it is not exclusively regional”.

⁴¹ K. GRAHAM, *UN-EU Cooperation on Security*, *cit.*, at 293-4.

disputes under Article 52⁴². In some cases (when empowered by their founding treaty), they can perform local enforcement actions if UNSC decides to use and authorize them. 'Other IO' carry out the same actions but in global collective security ('global focus')⁴³, so they act in benefit of all UN Member States, outside their region and under other relevant UN Charter provisions. In other words, 'Other IO' can perform enforcement actions under Chapter VII when the UNSC decides to use and authorize them. Clearly the usefulness of such a distinction becomes an issue of priority, because it allows us to determine which regional organizations have to intervene first in a regional crisis. A progressive approach would indicate that the first responsible is the 'Chapter VIII RO' and only in the case of lack of capacity or unwillingness, one of the 'Other IO' can intervene.

As for the second aspect, the operability of such a distinction will clearly require the UNSC effectively to grant the UNSG recommendation of April 2008. Nevertheless, the distinction seems to be already relevant in the UN offices and in the literature. A recent survey on the capacities of regional organizations with a security mandate, that the UN Department of Political Affairs requested from the United Nations University⁴⁴, has taken into consideration the groups of 'Chapter VIII RO' and 'Other IO'. The document includes a matrix that considers international organizations in light of Chapter VIII and the other relevant UN Charter provisions. Among 'Chapter VIII RO' there are AU, the Commonwealth of Independent States (CIS), the Council of Europe (COE), the Economic Community of West African States (ECOWAS), the League of Arab States (LAS) and OAS, while 'Other IO' include EU, NATO and the Organization of Islamic Conference (OIC). A very similar taxonomy has been proposed in the literature⁴⁵.

7. Recent modest developments

It is worth remembering the recent adoption of the UNSC resolution 1809 (2008) on *Peace and security in Africa*⁴⁶.

Prima facie some elements indicate that the resolution is addressed to all regional organizations. First, it was adopted on the 16 April 2008, so a few days after the UNSG Report, that the UNSC takes into due account. Second, the UNSC confirms some consolidated points: enhancing the relationship between the UN and regional organizations in accordance with Chapter VIII, supporting regional organizations' participation in peaceful settlement of disputes, developing co-operation among regional organizations and enhancing their capacities. Nevertheless the resolution is focused on the AU. In fact, it confirms the 'big emphasis' in considering the AU as a 'Chapter VIII RO' and its 'core' relates to UN-AU co-operation, the improvement of the latter's capacity to intervene⁴⁷ and the acceptance of the UNSG proposal to institute an AU-UN Panel⁴⁸.

These are already known elements, thus this recent resolution can be considered as a small step towards a more recognized and formalized role for regional organizations in the maintenance of peace. Indeed it does not represent an answer to the UNSG recommendations of April 2008, because it does not properly face the issue of the role of regional organizations, as well as not distinguishing between

⁴² K GRAHAM, *Towards Effective Multilateralism. The EU and the UN: Partner in Crisis Management*, European Policy Centre WP, 13, November 2004, at 14.

⁴³ *Ibidem*.

⁴⁴ UNU-CRIS, *Capacity Survey - Regional and other intergovernmental organizations in the maintenance of peace and security*, 2008 (on line: <http://www.cris.unu.edu/>).

⁴⁵ See Annex I of this working paper.

⁴⁶ UNSC resolution 1809 (2008), 16 April 2008.

⁴⁷ Para 1-6 and 10-15.

⁴⁸ Para 16. The Panel's final report is attached to the *Identical letters dated 24 December 2008 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council* (A/63/666).

‘Chapter VIII RO’ and ‘Other IO’ (nor does it offer an appropriate criterion to this aim). So, in the ongoing process of redrawing the role of international organizations in the UN collective security system this resolution does not play a fundamental role.

8. Outlook: a diversified legal framework

The conducted analysis shows that the current legal framework of international organizations’ activities in the maintenance of peace has the appearance of a patchwork obtained by stitching together legal and political pieces, as is clear from looking at their variedness.

Among the legal pieces, there are the UN binding sources, i.e. the UN Charter provisions and some UNSC resolutions. Even if they are both legal sources, they ‘belong’ to different levels: while the former are treaty provisions under International Law, the latter are secondary sources (i.e., their existence has been provided for in a treaty). Their aim is to regulate the legality of regional organizations’ activities for peace. That is particularly important with regard to the use of force: every unauthorized coercive action has to be considered unlawful, i.e. an infringement of International Law⁴⁹.

With regard to the political pieces of the patchwork, there are the many non-binding UN sources, as the UNGA resolution 49/57⁵⁰ or the aforementioned UNSG documents. During the 90s those sources clarified the modalities of regional organizations participation’ in crisis management, i.e. what has been generically defined as ‘partnership’. Moreover, at a less important level there are the documents produced on the occasion of the UN meetings, such as the considered Panels statements.

Finally, A third kind of ‘patchwork’ piece is represented by the cooperation agreements concluded between the UN and individual regional organizations, whose aim is to clarify the operational modalities of the co-operation on the ground. Their legal feature depends on the degree of formalization. The greater part of those agreements belong more to the ‘soft law family’ than to international agreements. For instance, EU-UN and AU-UN ‘agreements’ may be considered as belonging to soft law⁵¹. The third kind of piece clearly increases the variedness of the patchwork, because every regional organization has its own ‘background’. The presence (or not) of a cooperation agreement, the availability of capabilities and the intention to intervene in a certain scenario makes the relationship between UN and each regional organization unique, and different compared to the others.

The analysis has also highlighted that the same patchwork is destined to enlarge and further diversify, thus the process is still ongoing. In fact, the recent UNSG Report of 2008 has given visibility to the request coming from some UN meetings to divide international organizations in two groups. This request has been turned into a recommendation to the UNSC, so the UNSG has ‘raised a mortgage’ for the next addition to the patchwork, i.e. a resolution differentiating ‘Chapter VIII RO’ from ‘Other IO’.

Clearly this variedness has represented the ‘secret ingredient’ of the working of the UN collective security system. In fact, in the past (90s) the political pieces of the patchwork guaranteed the participation of international organizations in the UN objective to keep the peace in the world without depriving their actions of legitimacy. Today the UNSG Report of April 2008 – a non-binding document – is opening the path to a new discipline, able to guarantee more responsibilities for

⁴⁹ See U. VILLANI, *The Security Council’s Authorization of Enforcement Actions by Regional Organizations*, in *Max Planck UNYB*, 2002, 535 ff.

⁵⁰ UNGA decisions are not binding (except the case *ex Article 17* of the UN Charter), but they can produce a “legality effect” (see B. CONFORTI, *The Law and Practice of the United Nations*, *cit.*, 291 ff.).

⁵¹ With regard to the AU, see *Declaration on Enhancing UN-AU cooperation: Framework for the ten-year capacity building programme from the African Union*, 16 November 2006, attached to the letter from the UNSG to the UNGA President of 16 December 2006 (A/61/630). About the EU, see Part II, paragraph 13.

international organizations in crisis management. So, tribute has to be paid to the non-binding sources in stitching together the large patchwork of the UN collective security system.

At the same time, the variedness could be also considered as a limit. In fact, the presence of several and different sources can make more difficult to legally frame activities of international organizations for peace. Any attempt can seem like entering into a labyrinth, where the presence of many variables takes us down many paths with different exit-doors. The aim of this working paper is to open all those exit-doors, trying to identify the most appropriate one.

II. UN collective security system and EU Legal order

9. Premise

International legitimacy is a key element of peace missions. A legitimate intervention is (most of the time) locally accepted and benefits the general consensus of the international community. An illegitimate one constitutes an infringement of International Law, with all the consequences that this can imply. In crisis management, international legitimacy is guaranteed in particular by respecting the UN collective security system provisions, and the presence of this requirement is in regard to all the interventions, independently of the performers: one or more States, the UN itself (blue helmets) or international organizations.

This issue clearly affects ESDP peace missions too, so this part is focused on the legal provisions binding the EU to respect the UN Charter in crisis management, and also on some EU political documents recognizing the UN as having primary responsibility in the maintenance of peace and international security.

10. The UN Charter primacy: the International Law standpoint ...

Harmony between the UN Charter and the Treaty on European Union (TEU) in crisis management has to be considered with regard both to customary and treaty International Law.

The first one binds all the members of the international community, including international organizations with legal personality. The issue of EU legal subjectivity has been an object of debate for a long time, and today it seems that the main part of the literature is oriented towards its existence⁵². The correct method to survey it is the 'test' used by the ICJ in the *Reparation case* of 1949, but the new *favor* towards the EU personality is supported also by a declaratory norm that the Constitutional Treaty codified and the Lisbon Treaty has confirmed⁵³. Customary provisions bind the EU independently on the conclusion of any treaty. With regard to ESDP, provisions as, for instance, the prohibition to use force or the principle *volenti non fit iniuria* (that allows entry into the host State territory without infringing International Law) play a fundamental role.

With regard to treaty law, it is well-known that the EU is not a UN member, because membership is reserved to States⁵⁴. So the EU is not directly bound by the UN Charter provisions (excluding those

⁵² Among all, A. TIZZANO, *La personalità internazionale dell'Unione europea*, in *Il Diritto dell'Unione Europea*, 1998, 394 ff.; A. VON BOGDANDY, *The legal case for unity: the European Union as a single organization with a single legal system*, in *Common Market Law Review*, 1999, 905 ff.; N. NEUWAHL, *Legal personality of the European Union – International and institutional aspects*, in V. KRONENBERGER (ed), *The EU and the international legal order: discord or harmony?*, The Hague, 2001, 3 ff. (with a 'doubting position').

⁵³ Article 47 TEU (OJ C 115/2008).

⁵⁴ See Article 4 of the UN Charter. This provision represents an obstacle to a possible EU seat in the UNSC, as N. RONZITTI, *Il seggio europeo alle Nazioni Unite*, in *Rivista di Diritto Internazionale*, 2008 (1), 79 ff, has pointed out.

that mirror the customary law provisions). But EU Member States are all UN members, so they have to respect the UN Charter provisions under Article 103, that reads

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This provision is considered the basis to enact the priority of UN Charter on TEU. While Article 103 binds EU Member States directly, it binds the EU transitively. In fact, Member States have transmitted their competences (or a part) to the EU together with international duties, UN obligations included. Thus the EU is bound to respect UN Charter provisions as a result and to the extent that its Member States are bound, as effect of the principle *nemo plus iuris ad alium transferre potest quam ipse habet*⁵⁵. Looking at the ESDP, it means that when the EU performs peace missions, it has to respect the relevant UN Charter provisions, i.e. mainly Articles 1, 2, 24 and Chapters VI, VII, VIII and XII⁵⁶.

11. ... and the EU Law standpoint

As the CFSP High Representative affirmed

The EU does not just want international laws to be written. It wants those laws to be respected and implemented.⁵⁷

This political statement summarizes the EU position towards the respect of International Law in terms of full respect, but actually the current legal framework is silent in that regard. There is a link to the Geneva Convention of 28 July 1951 about the status of refugees (and the following Protocol of 1967) in Article 63 of the Treaty establishing the European Community (TEC), in order to make it clear that some asylum measures will be in accordance with those international treaties. But there are no codified provisions about the duty to respect International Law, and the same is true for EU second and third pillars. Some indications can be found in the secondary legislation⁵⁸, and in the European Court of Justice (ECJ) case law⁵⁹, even if the latter only regards the first pillar⁶⁰.

⁵⁵ It is worth recalling that Schermers and Blokker proposed that international organizations are bound by international duties previously binding their Member States as a result of the ‘extension by analogy’ of the principles regulating succession among States. They affirm: “According to the principles of state succession, a new state is often bound by the obligations of its predecessor. By analogy, an organization formed by states will be bound by the obligations to which the individual states were committed when they transferred powers to the organizations” (H. G. SCHERMERS & N. M. BLOKKER, *International Institutional Law*, 3rd edition, The Hague/Boston/London, 1995, at 983). This is an intriguing hypothesis, but it is not completely sure that it can work with regard to EU. In CFSP States conferred to EU the competence to reach the objectives *ex* Article 11 TEU, so there was not a transfer of competences in foreign affairs, but a ‘delegation of powers’ (D. SAROOSHI, *International Organizations and their exercise of Sovereign Powers*, Oxford, 2005 in particular, at 31-2 and 54 ff.). In other words, in CFSP competences are shared between EU and Member States. If the extension by analogy involve delegated powers too, EU would be bound to the respect of the UN Charter via a “functional treaty succession” to the position previously occupied by its Member States (see F. MÉGRET, F. HOFFMANN, *cit.*, at 318).

⁵⁶ See U. VILLANI, *La politica europea in materia di sicurezza e di difesa e i suoi rapporti con le Nazioni Unite*, in *La Comunità Internazionale*, 2004, at 72-3.

⁵⁷ Speech by Javier Solana, EU High Representative for the CFSP, “Together we are stronger”, University College Dublin, Dublin, 22 April 2009, at 3.

⁵⁸ For instance, Council Decision 94/276/CFSP, Article 1 (OJ 119/1994).

⁵⁹ F. CASOLARI, *L’incorporazione del diritto internazionale nell’ordinamento dell’Unione europea*, Milano, 2008, in particular 167 ff..

⁶⁰ Nevertheless, in the opinion of Casolari (*ibidem*, at 242-243), the ECJ case law affirming the UN Charter primacy (in particular Chapter VII and UNSC resolutions) could be extended to the EU second and third pillars. A similar extension took place in cases *Pupino* (C-105/03, judgement of 16 June 2005), *Gestoras pro Amnistia* and *Segi* (C-354/04 and C-355/04, judgement of 27 February 2007) with regard to EC principles. Moreover, in the opinion of A. VON BOGDANDY,

Focusing on the UN Charter, some indications suggesting the duty to respect it can be found in the EU first pillar (and in case law)⁶¹, while in the TEU, particularly in the CFSP, UN Charter primacy is more clearly stated. That happens because in its external action the EU acts directly in the international community. Actually also the 'Police and Judicial Cooperation in Criminal Matters' has its own external dimension⁶², but no provision in the Title VI TEU recalls the same primacy in the EU third pillar.

Looking at the CSFP, Article 11 TEU, third point, states that one of its objectives is

to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter.

The reference to the 'principles' recalls Article 2 of the UN Charter, about principles inspiring UN' and Member States' actions, among which there are the peaceful settlement of international disputes, the prohibition to use force and the respect of domestic jurisdiction (without prejudice of enforcement measures under Chapter VII)⁶³. The formulation of those principles is general, so their interpretation requires some strictly connected UN Charter provisions to be taken into consideration. In fact, as Conforti pointed out,

... the prohibition to use the force does not have much sense unless it is considered within the framework of the Organization normally exercising its powers regarding the maintenance of peace⁶⁴

In other words, it is difficult to respect the prohibition to use force without considering the UN Charter provisions granting the necessary competences and powers⁶⁵. Firstly Article 24, giving to UNSC the

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Organizational proliferation under the Treaty on European Union, in N. M. BLOKKER & H. G. SCHERMENS (eds), *Proliferation of International Organizations – Legal Issues*, Kluwer International Law, The Hague-London-Boston, 2001, at 180 the theory of the EU unity "makes it possible *cum grano salis* to apply the legal principles developed on the basis of the EC Treaty with regard to the Treaty on European Union and secondary law adopted under it" (in the related footnote, he specifies that "care has to be taken to respect the differences in competence, procedure and forms of legislation and the institutions' autonomy").

⁶¹ Preamble to TEC, 7th recital, and Article 177(3) TEC, linking the EC (and Member States) Development cooperation policy to the objectives approved in the UN context (see also). It is worth recalling what ECJ affirmed: "Articles 177 EC to 181 EC, which deal with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries ... but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, *in compliance also with commitments in the context of the United Nations [italic added]*" (C-91/05, judgment of 20 May 2008, paragraph 65). Furthermore, Article 302 TEC regards Commission's relations with the UN organs and specialised agencies. An indirect support to the UN Charter primacy comes from Articles 307 and 297 TEC. This was the position of the Court of First Instance (CFI) in the *Kadi* case (T-315/01, judgment of 21 September 2005, paragraphs 185 and 188), that ECJ confirmed (C-402/05 P and C 415/05 P, judgment of 3 September 2008, paragraphs 302 to 304). About the ECJ case law and the International Law primacy in the EU legal order, see F. CASOLARI, *L'incorporazione del diritto internazionale*, *cit.* (388 ff. for the UN Charter primacy).

⁶² The treaty-making power *ex* Article 38 TEU and the practice confirm it. Moreover, the quotation of 'security' among the EU external activities *ex* Article 3 TEU represents a further confirmation. In that regard, see M. CREMONA, *EU External Action in the JHA Domain: A Legal Perspective*, EUI Working Papers, Law 2008/24, on line: <http://cadmus.iue.it/dspace/handle/1814/9487>.

⁶³ Brussels European Council, 24-25 October 2002: "no action will be undertaken that would violate the principles of the Charter of the United Nations, *including* (Italics added) the Charter principles of maintenance of international peace and security, peaceful settlement of disputes, and refraining from the threat or use of force" (Conclusions, para 20).

⁶⁴ B. CONFORTI, *The Law and Practice of the United Nations*, *cit.*, at 11.

⁶⁵ See A. RANDELZHOFFER, *Article 2 (4)*, in B. SIMMA (ed), *The Charter of the United Nations – A commentary*, II ed., Oxford, Oxford University Press, 2002, at 117. The author argues that Article 2 (4) has to be interpreted in its context with Articles 39, 51 and 53. In the opinion of F. CEDE, *The Purposes and Principles of the United Nations*, in F. CEDE, L. SUCHARIPA-BERHMANN (eds), *The United Nations – Law and Practice*, Kluwer Law International, The Hague/London/Boston, 2001, 11 ff., this 'normative fall' starts from Article 1, para 1, of the UN Charter and involves Chapters VI, VII and VIII. The author refers to Article 1, para 1, as the 'core' of the UN collective security system, and

primary responsibility in the maintenance of peace, and secondly the provisions regarding the UNSC specific powers, i.e. Chapters VI, VII, VIII, and XII. So the harmony between UN Charter and TEU is not limited to Article 2, but it includes respect for many other connected UN Charter provisions⁶⁶.

This is indirectly confirmed by the (curious) partial symmetry between Article 11, third point, and Article 52(1) of the UN Charter. While the former adheres to the respect of UN Charter principles, the latter refers to

such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations

In mirroring Article 52(1), Article 11 TEU seems to suggest that EU performs ESDP within the framework of Chapter VIII, i.e. one of those Chapters providing powers to UNSC in order to keep the peace, strictly connected to the interpretation of Article 2 of UN Charter. Moreover, Article 21(2) TEU introduced by the Lisbon Treaty completes the aforementioned symmetry, stating that EU shall act in order to

preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter.

Although the *travaux préparatoires* of EU treaties do not mention this symmetry with Article 52(1) of the UN Charter, *de facto* those two provisions converge on the same issue. While the latter regulates direct activities of regional organizations in favour of peace, Article 11, third point (and Article 21(2) TEU) regards the single case of the EU. That sounds interesting if we remember that part of the literature considers EU a ‘Chapter VIII RO’⁶⁷.

That being so, Article 11 has two main functions.

First, it is aimed at co-ordinating EU activities with the UN Charter. Many treaties founding international organizations include similar provisions; for instance, the Charter of Bogotá (OAS)⁶⁸, the Treaty of Washington (NATO)⁶⁹ or the Helsinki Final Act (OSCE)⁷⁰.

Second, it establishes the ‘limit’ of respecting the UN Charter principles (and connected provisions) in performing CSFP⁷¹, in particular ESDP. In this regard, UN primacy is unilaterally established and it can be seen as declaring voluntary accession to some UN Charter provisions. This circumstance is important in reminding us that the EU is not directly bound by the UN Charter. This ‘unilateral obligation’ clearly cannot lead to any form of international liability, excluding the case of infringement of UN Charter provisions mirroring customary provisions, which would imply EU liability⁷². Moreover, from an internal standpoint, since the EU does not respect UN Charter provisions

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this is interesting, because there is no clear-cut distinction between purposes (Article 1) and principles (Article 2) of UN Charter (see A. RANDELZHOFFER, *Article 2*, in B. SIMMA (ed), *The Charter of the United Nations — A commentary*, II ed., Oxford, Oxford University Press, 2002, at 64).

⁶⁶ See N. D. WHITE, *cit.*, at 334.

⁶⁷ This is the opinion of A. TANZI, *cit.*, at 7; F. MARTINES, *Il ruolo dell’Unione europea nel mantenimento della pace e il suo coordinamento con le Nazioni Unite e la UE*, in F. LATTANZI, M. SPINEDI (a cura di), *Le organizzazioni regionali e il mantenimento della pace nella prassi di fine XX secolo*, Napoli, 2004, at 379; A. ABASS, *Extraterritorial Collective Security: The European Union and Operation ARTEMIS*, in M. TRYBUS, N. D. WHITE (eds), *European Security Law*, Oxford, Oxford University Press, 2007, at 138; finally, N. D. WHITE, *The EU as a Regional Security Actor within the International Legal Order*, in the same book, 335 ff.

⁶⁸ Articles 1 and 2.

⁶⁹ Preamble, Articles 1, 7 and 12.

⁷⁰ Preamble and Articles II, IV, VII, VIII, IX.

⁷¹ E. CANNIZZARO, *Commento all’art. 11 TUE*, in A. TIZZANO (a cura di), *Trattati dell’Unione europea e della Comunità europea*, Milano, 2004, at 68 (para 4).

⁷² It does not fit in the scope of this working paper facing the issue of the international organizations responsibility. It is worth recalling that the International Law Commission is working on a draft. The very recent Seventh report of 27 March

it could infringe the principle *patere legem quam ipse fecisti*, which affirms that an authority is bound by the rules it has itself laid down until it repeals or amends them. Naturally this principle is not 'justiciable' because the ECJ has no jurisdiction in the CFSP, but its infringement exists independently of the possibility to activate a judicial review.

Finally, the Lisbon Treaty has introduced more explicit provisions regarding UN Charter primacy. There are express references to the respect of International Law in Articles 3(5) TEU, 21 TEU and 241 TFE and the TEU-UN Charter harmony has been confirmed in Articles 3, 21(1) and 42⁷³ TEU. Furthermore, Article 21 'pushes' the harmony with the UN Charter even further: it declares that the EU promotes multilateral solutions to common problems, in particular within the UN framework, so it indirectly recalls the concept of 'multilateralism'⁷⁴.

12. The 'political guarantee' to UN Charter relevance

UN Charter relevance has been declared in some political documents, so the harmony between EU legal order and UN collective security system benefits from a further guarantee. Political acts are not binding documents, but often they become an important point of reference in implementing policies. For this reason it seems opportune to focus attention on the European Security Strategy (ESS)⁷⁵, on the EC Commission communication about multilateralism and, finally, to some EU Council conclusions affirming the UN Charter relevance. Also the EU-UN Joint Declaration of 2003 and some related documents are political acts, but they will be considered in the next paragraph in light of their specific focus on crisis management.

The most influential of the aforementioned political acts is the ESS. This document was approved in the Brussels European council of 12 December 2003 and contains the EU priorities in the matter of security. It offers a 'strategic framework'⁷⁶, whose implementation requires "concrete proposals"⁷⁷, and for this reason some CFSP acts recall ESS in their preambles⁷⁸.

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2009 by the Special Rapporteur Giorgio Gaja, addressed to the International Law Commission, Sixty-first session, 4 May-5 June and 6 July-7 August 2009, will bring soon to a first reading draft (see para 1). In that regard, two draft provisions deserve to be quoted. First, Article 29 about the 'Responsibility of a State that is a member of an international organization for the internationally wrongful act of that organization' that reads: "Except as provided in the preceding articles of this chapter, a State that is a member of an international organization is not responsible for an internationally wrongful act of that organization unless: (a) It has accepted with regard to the injured third party that it could be held responsible; or (b) It has led the injured third party to rely on its responsibility" (Fourth Report, Addendum, 20 April 2006). It seems that the subsidiary responsibility only arises exceptionally. Second, Article 64, entitled 'Charter of the United Nations', is lapidary: 'These articles are without prejudice to the Charter of the United Nations' (Seventh Report). The Report of 2009 confirms that "the impact of the Charter is not limited to obligations of members of the United Nations. The Charter may well affect obligations, and hence the responsibility, of an international organization", but it also adds that "It is not necessary, for the purpose of the present draft, to define the extent to which international responsibility of an international organization may be affected, directly or indirectly, by the Charter".

⁷³ Protocol 10 on permanent structured cooperation. The preamble specifies that "United Nations Organisation may request the Union's assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter" and the same is in Article 1. The reference to Chapter VII clearly regards peace-keeping operations and the still existing EU-UN co-operation.

⁷⁴ Moreover, Article 208 TFEU (Development cooperation) highlights the need to act accordingly with the objectives adopted "in the context of the United Nations", and Articles 214 (Humanitarian Aid) and 220 TFEU (EU relations also with international organizations) generically stress the intention to co-operate with UN.

⁷⁵ *A Secure Europe In A Better World*, European Security Strategy, Brussels European Council, 12 December 2003.

⁷⁶ *Discours de Javier SOLANA, Haut Représentant pour la Politique étrangère et de Sécurité commune (PESC), à la session d'ouverture du séminaire relatif à la relation UE-OTAN, S243/08, Paris, le 7 juillet 2008* (http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/fr/discours/101718.pdf).

⁷⁷ Brussels European Council of 12 December 2003, conclusions, para 86.

⁷⁸ See Joint Action 2007/528/CFSP about certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (OJ L 194 /2007).

Some of those proposals involve ESDP: for instance, the question of State failures regards cases such as the former Yugoslavia and Somalia, and the pertinent EU peace missions launched *in loco*. This aspect re-proposes the issue of UN Charter relevance in the maintenance of peace, and ESS indicates the UN centrality in international relations as a priority. In fact, it states that:

The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority.

The idea that the UN represents the centre of international relations directly recalls another ESS' objective: strengthening an international order based on 'effective multilateralism'⁷⁹. This concept is based on the ideas of multilateral cooperation and respect of International Law as a way to guarantee global governance, and the UN represents the 'heart' of that system⁸⁰. Thus, considering that co-operation between the UN and regional organizations is part of 'effective multilateralism', this ESS' objective further confirms the need for the EU to act within the framework of the UN Charter⁸¹.

Effective multilateralism is also the focus idea of an EC Commission communication of 2003⁸². The Commission has a marginal role in the EU second pillar, but this communication shows that the EU is one of the strongest advocates of multilateralism and, in particular, that 'effective multilateralism' represents an *leitmotif* for the CFSP⁸³. The document pays attention to EU-UN co-operation in crisis management⁸⁴ and confirms the UN Charter relevance, since it states that

Given that EU actions in this area will invariably be consistent with, and in many cases complementary to, decisions and frameworks developed by the UN, the need for effective complementarity with the UN is also crucial.

The communication focuses on the existing co-operation and its potential developments, but it does not face issues such as the possibility for the EU of an UNSC mandate, nor does it consider that EU military operations have to be previously authorized to use force⁸⁵. Nevertheless, since it expresses concepts like acting within the UN framework or respecting International Law, the communication confirms for the EU the need to respect the UN Charter. That is the same as saying that the EU could act under a UNSC mandate or that it has to be previously authorized to use force.

Finally, since 1999 European Council conclusions have confirmed that ESDP evolution and developments are aimed at contributing to the maintenance of peace and international security, whilst respecting the UN competences and UNSC primary responsibility. For instance, the Cologne European Council of 3-4 June 1999 stated that

⁷⁹ ESS, p. 9-10.

⁸⁰ *Summary of remarks to the press by Javier SOLANA, EU High Representative for the CFSP, at a joint press briefing with UN Secretary-General BAN KI-MOON*, Brussels, 24 January 2007 (on line: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/discours/92533.pdf).

⁸¹ Such objective has been confirmed by the ESS revision of December 2008. See *Report on the Implementation of the European Security Strategy - Providing Security in a Changing World*, Brussels European council, 11-12 December 2008, in particular point C (p. 11). This new document underlines that "(e)verything the EU has done in the field of security has been linked to UN objectives".

⁸² Communication from the Commission to the Council and the European Parliament, *The European Union and the United Nations: The choice of Multilateralism*, COM (2003) 526 final. The communications has been welcomed by the Brussels European Council, 12-13 December 2003 (conclusions, para 91).

⁸³ S.BISCOP, E. DRIESKENS, *The European Security Strategy: Confirming the Choice for Collective and Comprehensive Security*, in J. WOUTERS, F. HOFFMEISTER, T. RUYTS (eds), *The United Nations and the European Union: An Ever Stronger Partnership*, TMC Asser Press, The Hague, 2006, at 278.

⁸⁴ Communication *The European Union and the United Nations: The choice of Multilateralism*, 13 ff.

⁸⁵ S.BISCOP, E. DRIESKENS, *cit.*, at 273-4.

We, the members of the European council, are resolved that the European Union shall play its full role on the international stage. To that end, we intend to give the European Union the necessary means and capabilities to assume its responsibilities regarding a common European policy on security and defence ... the Union must have the capacity for autonomous action, ..., in order to respond to international crises without prejudice to actions by NATO. The EU will thereby increase its ability to contribute to international peace and security in accordance with the principles of the UN Charter⁸⁶.

That reference is significant, but the recent Presidency conclusions of the Brussels European council of 11-12 December 2008 seem 'to push' the accordance of EU action beyond the UN Charter provisions. In fact,

The European council states its determination to give ... a fresh impetus to the European Security and Defence Policy. Compliant with the principles of the United Nations Charter and the *decisions of the United Nations Security Council* [*italic added*], this policy will continue to develop ...⁸⁷.

In recalling UNSC resolutions, the European Council makes it clear that the EU performs ESDP in compliance with both UN Charter provisions and UNSC decisions. That more expressly confirms that EU can act under UNSC request or mandate.

13. The EU-UN Joint Declaration of 2003

The "Joint Declaration on UN-EU Co-operation in Crisis Management", signed on 24 September 2003 by the UNSG and the EU Presidency and some related documents further support the necessity for the EU to respect the UN Charter in performing ESDP.

The Joint Declaration is not an international agreement. It has not been concluded under Article 24 TEU⁸⁸, its structure is informal and nothing in the document refers to its legal nature, the intention to consider it as a legal instrument or the possibility to denounce it. Thus, the Joint Declaration is a soft law instrument and rather than rights and duties, it establishes a sort of co-habitation *more uxorio*.

That being so, two observations are due. First, the Joint Declaration belongs to the network of guidelines that the UN agrees with regional organizations in order to implement their co-operation. In fact, it expresses the intention to co-operate with the UN, specifying some operative modalities and proposing practical steps⁸⁹. Second, the Joint Declaration reaffirms the UN Charter relevance in the maintenance of peace and international security and the EU's will to act in the framework of the UN Charter, since it states that

⁸⁶ Presidency conclusions, Declaration on strengthening the Common European Policy on Security and Defence, para 1. See also conclusions of European Council meetings held in Helsinki (10-11 December 1999), Santa Maria de Feira (19-20 June 2000), Nice (7-9 December 2000), Goteborg (15-16 June 2001) and Brussels (24-25 October 2002).

⁸⁷ Presidency conclusions, para 30.

⁸⁸ There are two cases of international agreements concluded between EU and other international organizations: NATO (OJ L 80/2003) and International Criminal Court (OJ L 115/2006). About EU treaty-making power in the CFSP, see D. R. VERWEY, *cit.*, 59 ff.; P. KOUTRAKOS, *EU International Relations Law*, Hart Publishing, Oxford and Portland, 2006, 406 ff.; R. A. WESSEL, *The EU as a party to international agreements: shared competences, mixed responsibilities*, in A. DASHWOOD, M. MARESCAU (eds), *Law and practice of EU external relations: salient features of a changing landscape*, Cambridge, Cambridge University Press, 2008, 152 ff. For a comment on the EU- International Criminal Court agreement, see L. PALADINI, *Note a margine della conclusione dell'accordo di cooperazione ed assistenza tra l'Unione europea e la Corte penale internazionale*, in *DUE*, 2006, 865 ff. Finally, with regard to international agreements aimed to guarantee the implementation of ESDP (i.e. the best part of Article 24 practice), see A. SARI, *The conclusion of International Agreements by the European Union in the context of the ESDP*, in *The International and Comparative Law Quarterly*, 2008, 53 ff. and, by the same author, *Status of Forces and Status of Mission Agreements under the ESPD: The EU'S Evolving Practice*, in *The European Journal of International Law*, 2008, 67 ff.

⁸⁹ Point 3.

The United Nations and the European Union are united by the premise that the primary responsibility for the maintenance of international peace and security rests with the United Nations Security Council, in accordance with the United Nations Charter. Within this framework, the European Union reasserts its commitment to contribute to the objectives of the United Nations in crisis management.

In order to provide for its implementation, the Brussels European Council of 17 and 18 June 2004 approved the document *EU-UN co-operation in Military Crisis Management Operations*. This document clarifies some practical elements of such co-operation, particularly in the military support area. Two main options are taken into consideration.

The first one sounds traditional: EU Member States can decide to provide national military capabilities to UN peace-keeping operations. As this option is a national responsibility, Member States are the main characters and the EU can only play a limited role. In fact, it can perform a co-ordination role through the ‘clearing house process’, i.e. a framework by which Member States can exchange information on their contributions to the UN and co-ordinate them (also involving the EU Permanent Missions to the UN).

The second one, instead, provides for the launch of an ESDP mission at UN request. In this regard, two modalities are possible. In the first case the EU operation acts under a UN mandate, both in the forms of the autonomous operation (for instance, EU military operation *Althea* in Bosnia) and the specific component of a UN peace-keeping operation. In the second case the EU supports the UN through a “bridging model” operation or adopting the “stand by model”. In the “bridging model” EU operation aims to provide the UN with time to organize a new operation or to reorganise an existing one. In the “stand by model”, the EU offers a sort of “reserve” in support of a UN operation. That second option requires an immediate reaction and a working co-ordination between the EU and the UN (participation in the planning, command and control of the UN operation included). At the moment, the more feasible option seems to be the “bridging model”, as ESDP practice testifies (for instance, EU military interventions *Artemis*, *EUFOR RD Congo* and *EUFOR TChad/RCA*).

Recently, an UN-EU Joint Statement⁹⁰ has reaffirmed the intention co-operate in crisis management. The document seems like a ‘follow-up’ to the Joint Declaration of 2003, recalling the existing co-operation (and its practice) and taking note of the ESDP developments, in particular with regard to capabilities. But the Joint Statement also affirms that

The United Nations and the European Union are united by the premise that the primary responsibility for the maintenance of international peace and security rests with the United Nations Security Council, in accordance with the United Nations Charter. ... The European Union reiterates its commitment to contribute to the objective of the United Nations in crisis management.

The Joint Declaration of 2003 and the Joint Statement of 2007 are soft law documents focused on operational aspects, so they do not propose any alternative legal basis. On the contrary, they confirm the UN Charter relevance and the importance for the EU to contribute to the UN objectives in crisis management. They testify to the common parties’ will to take some common practical steps in order to strengthen and implement the existing co-operation, so they guarantee that the EU-UN partnership works ‘on the ground’.

Finally, it is worth remembering that from the UN standpoint, those two documents belong to the aforementioned patchwork of the UN collective security system⁹¹. They embody ‘cooperation agreements’ and they clarify the operational modalities of co-operation between the UN and the EU. So they contribute to the variedness of the patchwork and, because of this, also to the ongoing process

⁹⁰ *Joint Statement on UN-EU cooperation in Crisis Management*, 7 June 2007.

⁹¹ Part I, paragraph 8.

toward the re-definition of the role of international organizations in the maintenance of peace and international security.

III. ESDP practice under the 'UN magnifying glass'

14. *The ESDP: Member States policy or EU policy?*

The ESPD⁹² has turned the EU into an even more 'multifaceted player'⁹³. The EU was already the main donor in development cooperation and an important actor in humanitarian aid, but those policies cover only the financial aspect of the external action. Peace missions have added an operational aspect to the EU action in the international scene.

There is a growing interest towards ESDP practice; in the last two years literature and public opinion have paid more attention to the EU presence in crisis scenarios, as took place in the cases of Kosovo, Georgia or Somalia, and this clearly represents an asset for the CFSP. Nevertheless, the matter of ESDP autonomy is still open. Turning this issue into a question: are EU peace missions instituted, organized and launched autonomously by the EU or do they belong to its Member States acting in a co-ordinated way?

Legally speaking, ESDP belongs to the CFSP legal framework, which is considered the 'most intergovernmental' among the EU pillars. That would suggest that ESDP is a form of co-operation among Member States, performed through the single institutional framework *ex* Article 3 TEU and using Title V TEU provisions.

Nevertheless, many elements indicate that the EU is an international organization with a unique legal order and international subjectivity. Under this approach, CFSP allows the EU to act in the international scene, and because of this it cannot only be considered an intergovernmental form of co-operation among the Member States. Moreover, looking at the ESDP institutional framework, it seems that this policy benefits from a certain degree of autonomy and this further distances it from the idea of 'form of co-operation', supporting, on the contrary, the EU as a single international organization.

In that regard, Von Bogdandy has pointed out that

The terms "Communities" and "pillars of the European Union" do not demarcate different organizations but only describe different capacities and partially specific legal instruments and procedures of a single organization, namely, the Union. All the Treaties and the secondary law form a single legal order.⁹⁴

⁹² In literature, P. KOUTRAKOS, *cit.*, 453 ff.; ZWANENBURG, *cit.*, at 24-25; J. WOUTERS, T. RUYS, *cit.*, 233 ff.; B. BELCOURT, M. MARTINELLI, E. KLIMIS (edite par), *L'Union européenne et la gestion de crises*, IEE, Bruxelles, 2008. On the practice, L. N. GONZALES ALONSO, *De las declaraciones a los hechos: las primeras operaciones de gestión de crisis de la Unión Europea*, in *Revista de Derecho Comunitario Europeo*, 2003, 653 ff.; G. LINDSTROM, *On the ground: ESDP operations*, in N. GNESOTTO (ed), *EU Security and Defence Policy*, EU Institute for Security Studies, Paris, 2004, 111 ff.; M. MERLINGER, R. OSTRUSKAITE, *ESPD Police missions: meaning, context and operational challenges*, in *European Foreign Affairs Review*, 2005, 215 ff.; A. NOWAK (ed), *Civilian crisis management: the EU way*, Chaillot paper 90, ISS, Paris, 2006; F. NAERT, *ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations*, in M. TRYBUS, N. D. WHITE, *European Security Law*, Oxford, Oxford University Press, 2007, 61 ff.. See also the ESPD website: <http://ue.eu.int/showPage.asp?id=268&lang=it&mode=g>. ESDP extensive practice has not to be confused with UN practice. For instance, UNIFIL II in Lebanon is a UN flag mission, even if EU Member States participate [UNSC resolutions 423 (1978) and 1701 (2006)].

⁹³ About EU roles, M. CREMONA, *The Union as a global actor: roles, models and identity*, in *Common Market Law Review*, 2004, 553 ff. See also S. BISCOP, E. DRIESKENS, *cit.*, at 271 and T. TARDY, E. WINDMAR, *The EU and Peace Operations*, Geneva Centre for Security Policy, September 2003, 14 ff.

⁹⁴ A. VON BOGDANDY, *Organizational proliferation under the Treaty on European Union*, *cit.*, at 179. C. HERRMANN, *Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' Revisited*, in M. CREMONA & B. DE WITTE (ed),

This observation constitutes the synthesis of the so called ‘thesis of unity’. Under this theory, the EU is a single subject created by its Member States (Article 1 TEU), with its own general (and ambitious) objectives *ex* Article 2 TUE, but articulated in three pillars having their own specific scopes. The EU has principles underpinning its action (Article 6 TEU), a single institutional framework (Article 3 TEU)⁹⁵, and some common final provisions (Articles 46 ff. TEU). Under Article 49 TEU third European States possessing certain requirements can accede to the EU. Moreover, some textual indications further support the EU as a single subject; including references in Article 17 TEC about EU citizenship⁹⁶, in Articles 99 and 113 about the role of European Council in some EC competences and in 301 TEC recalling TEU. Also those indications support the theory of unity and the existence of EU legal subjectivity.

With regard to ESDP, it seems that the EU performs this policy with a certain degree of autonomy. EU peace missions are instituted by the Council of Ministers and directed by the Political and Security Committee (PSC)⁹⁷. Under Article 25 TEU, the latter guarantees the political control and the strategic direction on these missions, and it can be mandated to adopt some relevant decisions, such as the appointment of the head of mission/military commander or the constitution of the contributors’ committee. Depending on the nature of the mission, some *ad hoc* structures provide the planning and management⁹⁸. Permanent military structures, as the EU Military Committee (EUMC) and the EU Military Staff (EUMS)⁹⁹, operate in the case of military operations, while the ‘Civilian Planning and Conduct Capability’ (in close cooperation with the Commission) carries out the same task for civilian missions. Even if military operations are financed by the Member States and the third participating States, the EU financing mechanism Athena has been created to provide the management of common costs¹⁰⁰. Finally, the EU Special Representatives (EUSR)¹⁰¹, when appointed, are part of the chain of command, so they contribute in the communication between the political level and the mission on the ground. This specific institutional framework guarantees a ‘centralized control’ on EU peace missions¹⁰², and this appears more than a simple co-ordination network for the Member States.

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EU Foreign Relations Law – Constitutional Fundamentals, Hart Publishing, Oxford and Portland, 2008, 19 ff is sceptic in that regard. In his opinion, “it makes little sense to claim the ‘unity of the legal order’ with regard to the relationship between the TEC and the TEU ... it is a more *façon de parler* than anything else, at least beyond the sphere of pure legal theory, ie in the real world of European law, where interpretations are born, live and work and die” (at 49-50).

⁹⁵ F. CAPOTORTI, *Corso di diritto internazionale*, Milano, 1995, at 34 observed that when the institutional framework of an international organization is reduced to the lowest terms, some doubts can be considered with regard of its legal subjectivity (original quotation: “bisogna ammettere che, nella misura in cui l’apparato di un’organizzazione è ridotto al minimo, è possibile nutrire dubbi circa la personalità”). This argumentation would support the idea of the EU legal subjectivity, considering its complex single institutional framework.

⁹⁶ R. A. WESSEL, *The inside looking out: consistency and delimitation in EU external relations*, in *Common Market Law Review*, 2000, at 1145 and 1167.

⁹⁷ See Article 25 TEU (previously, Council Decision of 22 January 2001 [OJ L 27/2001]).

⁹⁸ Interventions having a mixed mandate are planned and managed by an Operations Centre, provided for EUMS Civilian-Military Cell. This is alternative respect activating one of the five available national HQ (France, United Kingdom, Germany, Italy and Greece), as occurred in *Artemis*, *EUFOR DR Congo*, *EUFOR Tchad/RCA* and *Atalanta* cases.

⁹⁹ Council decisions 2001/79/CFSP (OJ L 27/2001) and 2005/395/CFSP (OJ L 132/2005).

¹⁰⁰ The ESDP financial aspect is provided for by Article 28 TEU. General rule foresees that CFSP administrative and operating expenditures are financed by the EU budget. Civilian missions are financed by the EU budget (looking at the Budget for 2009 [OJ 69/2009], Chapter 19.03 on CFSP forecasts about 200.000.000 € for civilian missions). EU budget does not cover expenses arising from operations having military or defence implications. In this case, costs are a Member State’s responsibility (excluding Denmark). With regard to Athena, see Council decisions 2004/197/CFSP (OJ 63/2004) and 2008/975/CFSP (L 345/2008). In literature, D. SCANNELL, *Financing ESDP military operations*, in *European Foreign Affairs Review*, 2004, 531 ff.).

¹⁰¹ Article 18 TEU.

¹⁰² The control of ESDP missions is also centralized *in loco*. Military operations are conducted by the military commander and civilian missions are managed and coordinated by the head of mission. For instance, see Article 7 of Joint Action 2008/851/CFSP (OJ 301/2008) and the same article of Joint Action 2007/677/CFSP (OJ L 279/2007) respectively on EU

The mentioned elements do not deny the presence of weaknesses or internal disagreements in the ESDP. As Wessel observed

In general the operations reveal a large degree of support on the part of the Member States. Nevertheless, it is clear that in many operations not all member States participate and that, if they do, contributions differ greatly. At the same time, only Denmark withheld its participation on a structural basis, which raises the question of the legal basis for the non participation of the other Member States. After all, the current treaty excludes enhanced cooperation for matters having military and defence implications. Practice thus reveals a form of differentiation that is not foreseen (or perhaps even explicitly excluded) by the treaty. The fact that almost all operations are at the same time characterized by an extensive participation of non-Member States, substantively adds the variation.

Effectively, EU peace missions appear like many little jigsaw puzzles, with regard both to human resources and finance. That being so, Wessel also argued that

Irrespective of this complex picture, the fact remains that the operations are all 'Union' operations and were based on unanimously adopted Council decisions.

In fact, the launch of an EU peace mission requires a unanimously adopted Joint Action¹⁰³, and when agreement of all Member States is not unanimous, the abstention mechanism allows the mission to be instituted, thus giving to the dissenting State the possibility of maintaining its position (in case of 'positive abstention' it is not bound by the CFSP act)¹⁰⁴. Moreover, the launch of an ESDP mission also requires the conclusion of some international agreements *ex* Article 24 TEU (status-of-forces-agreements and participation agreements). The Council decisions adopting these binding agreements clearly state that they are approved on behalf of EU¹⁰⁵.

Finally, Wessel added that

In that respect, the final composition of the troops may be less relevant. The same seems to hold true for multinational forces of some Member States. The possibility of making these forces available to the Union is foreseen by the EU Constitutional Treaty (...). And, as we have seen, the

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military operations *Atalanta* and *EUFOR Tchad*. With regard to civilian missions, see Article 5 of Joint Action 2007/405/CFSP on *EUPOL RD Congo* (OJ 151/2007) and Article 6 of Joint Action 2005/797/CFSP on the European Union Police Mission for the Palestinian Territories (OJ 300/2005).

¹⁰³ Article 14 TEU. About the Joint Actions' "fairly standard content", see A. DASHWOOD, *The Law and practice of CFSP Joint Actions*, in M CREMONA & B. DE WITTE (ed), *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing, Oxford and Portland, 2008, at 60-62.

¹⁰⁴ Article 23(1) TEU. Cyprus invoked the positive abstention in the adoption of Joint Action 2008/124/CFSP on *EULEX Kosovo*. This is the only one (documented) case, so it is worth quoting its text: "One delegation replied by "constructive abstention" ... on the basis of Article 23, paragraph 1 of the Treaty and therefore made the following unilateral statement...: 1) Cyprus recognises the European Union's responsibility to contribute to and, to the extent possible, ensure the stability of the Western Balkans. Cyprus also respects the wish of its partners for an active engagement of the European Union in Kosovo. 2) In line with its commitment to the role of the UN Security Council and the latter's primary responsibility for the maintenance of international peace and security, Cyprus has consistently argued for an explicit decision of the UN Security Council for the EU mission in Kosovo. 3) Notwithstanding its firm views, especially on the question of the legal basis for the involvement of the European Union in Kosovo, and any possible future implications in terms of international law, Cyprus has decided not to hinder the decision of the Council to adopt the Joint Action on the EU Rule of Law Mission in Kosovo. 4) In a constructive spirit of loyalty and mutual solidarity, the Government of Cyprus has arrived at the above decision which is without prejudice to any future decisions on EU action in similar matters and without prejudice to the status of Kosovo. 5) The Government of the Republic of Cyprus would therefore like to inform partners that for the above reasons, it has decided to invoke the provisions of the first subparagraph of paragraph 1 of Article 23 TEU" [Council communication about the end of written procedure, 4 February 2008 – I would like to thank Martine Spennbauer (EUI-Department of Law) for this text].

¹⁰⁵ EU-International Criminal Court international agreement (OJ 115/2006) is clearer. Its preamble reads: "covers terms of cooperation and assistance between the International Criminal Court and the European Union and not between the International Criminal Court and the Member States of the European Union".

establishment of the so-called permanent structured cooperation will be embedded within the Union's institutional framework (...).¹⁰⁶

In fact, looking at UN practice, even if only some Member States participate in the UN peace-keeping operations, those missions are UN interventions.

So, it seems that ESDP autonomy is sustainable, it is supported by many argumentations, and the presence of weaknesses or the lack of unity within CFSP is not sufficient to affirm that ESDP works as a mere framework of co-ordination of EU Member States.

That being so, in the following paragraphs ESDP practice will be analyzed under the 'UN magnifying glass', in order to clarify how the UN collective security system considers EU peace missions. It will be interesting to verify the role assigned to those missions and to ascertain whether UNSC resolutions consider them EU autonomous actions (or not).

Civilian missions will be faced first, while military interventions, which involve the issue of the use of force, will be considered later. Clearly dividing EU peace missions into 'civilian missions' and 'military operations' does not pursue the aim of proposing a classification. Considering that EU missions often perform a mixed nature mandate, any such model would be too rigid. That distinction is simply aimed at explaining the modalities of EU support to UN on the ground and at considering the peculiar discipline of military operations in a separate paragraph.

15. EU civilian missions: partnering UN

ESDP civilian mission practice is extensive. It does not fit within the scope of this work to introduce EU peace missions with a civilian mandate. It can simply be mentioned that EU has launched 20 missions, 12 of which are still ongoing. They cover various thematic fields (police training, rule-of-law assistance, monitoring peace agreements and States' borders) and a wide geographical variety too. The ESDP 'ray of action' has increased progressively, reaching three continents (Europe, Africa and Asia) and some hot areas (for instance, the Middle East)¹⁰⁷.

Those missions have been taken into consideration in several UNSC resolutions. In those occasions UNSC adopted a resolution about a conflict or a crisis, decided on the matter and simultaneously (a) welcomed the ongoing launch of the EU civilian mission or (b) encouraged its activities or (c) reported on and mentioned the obtained results. For instance, this took place in resolutions 1845 (2008) and 1785 (2007) on Bosnia-Herzegovina¹⁰⁸, in resolutions 1806 (2008) and 1868 (2009) on Afghanistan¹⁰⁹ or in resolution 1856 (2008) on Congo¹¹⁰.

None of those resolutions provide any authorization, because civilian interventions only require the consent of the host State, normally agreed via the conclusion of a status-of-forces-agreements. Once that international agreement has entered into force, the principle *volenti non fit iniuria* allows an EU mission to operate in the host State. Neither do those UNSC resolutions indicate the mandate, normally agreed with the host State in the status-of-forces-agreements and simultaneously indicated in the Joint Action instituting the mission.

¹⁰⁶ R. A. WESSEL, *Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility*, in M. TRYBUS, N. D. WHITE, *European Security Law*, Oxford, Oxford University Press, 2007, at 246.

¹⁰⁷ L. PALADINI, *The implementation of the article 17 of the Treaty on European Union*, in M. DONY, L. S. ROSSI (eds), *Démocratie, cohérence et transparence: vers une constitutionnalisation de l'Union européenne?*, Editions de l'Université Libre de Bruxelles, 2008, at 325-6.

¹⁰⁸ Para 20 (both cases).

¹⁰⁹ Respectively para 17 and 19. See also the preamble of the UNSC resolution 1833 (2008).

¹¹⁰ Para 3, letter 1).

UNSC can indicate a general objective aimed at solving (or contributing to solve) the local crisis, and the EU civilian mission *in loco* acts in order to achieve it. For instance, that is the case in support for the transition process and the reform of the security sector in Congo, which many UNSC resolutions indicated as an objective¹¹¹ and the EU contributed to achieve launching some civilian missions¹¹². The same could be said, for instance, with regard to the interventions in Iraq¹¹³, Kosovo¹¹⁴ or Guinea-Bissau¹¹⁵.

Those UNSC resolutions do not mention Article 54, that reads

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

and some elements would indicate that EU does not have to perform this duty. Firstly, the UNSC resolutions do not expressly indicate such a duty for the EU. Secondly, performing those communications would imply an assumption that the EU is a 'Chapter VIII RO', but the EU has self-declared to be one of the 'Other IO'. On the other hand, it is true that those indications testify that UNSC is fully informed of the deployment and functioning of EU peace missions, i.e. as is provided for in Article 54. Thus it would not be arbitrary to read those indications as form of communications *per relationem*.

That being so, another possible interpretation of those references lies in the recognition of the EU civil presence on the ground. Since UNSC resolutions recall EU missions, they pay tribute to EU commitment in solving local conflict. For instance, that is the case in the references to EU missions *EUPM* and *EUPOL Afghanistan* in resolutions 1845 (2008), 1785 (2007) and 1806 (2008), that recognize the EU *pro quota* contribution in helping the solution of the Bosnian and Afghan crises. From this standpoint, UN practice gives indications of the working of the EU-UN partnership and represents a formal indication of the EU role in the maintenance of peace and international security.

¹¹¹ For instance, UNSC resolution 1756 (2007).

¹¹² See Joint Actions 2004/847/CFSP on *EUPOL Kinshasa* (OJ L 367/2004), 2005/355/CFSP on *EUSEC RD Congo* (OJ L 87/2005) and 2007/405/CFSP on *EUPOL RD Congo* (OJ L 151/2007).

¹¹³ Joint Action 2005/190/CFSP on *EJUST LEX* (OJ L 62/2005). This mission has been launched in the framework of the implementation of UNSC resolution 1546 (2004).

¹¹⁴ Joint Action 2008/124/CFSP on *EULEX Kosovo* (OJ L 42/2008). This mission has been launched in the framework of the UNSC resolution 1244 (1999) and taking account of the objective indicated in UNSC resolution 1674 (2006). The issue of the legitimacy of EULEX Kosovo in light of UNSC resolution 1244 (1999) is under debate. However, some political documents indicate that EULEX Kosovo acts in the framework and towards the objectives indicated in the UNSC resolution 1244 (1999). Javier Solana affirmed that "Let me also reiterate the EU's commitment to play a leading role in Kosovo, in particular in the area of rule of law. Reconfiguration of the civilian presence will allow for the EULEX mission, in the framework of the UNSC 1244, to intensify its deployment and to move towards assuming its operational functions. I want to underline that stability in Kosovo as well as of the whole Balkan region is essential and remains a high priority for the European Union" (EU High Representative for the CFSP statement on UN reconfiguration of the civilian presence in Kosovo, Brussels 21 June 2008, doc. S223/08). Moreover, recently UNSG affirmed "In line with my reports of 24 November 2008 (S/2008/692) and 17 March 2009 (S/2009/149) and the Security Council's presidential statement of 26 November 2008 (S/PRST/2008/44), the European Union Rule of Law Mission in Kosovo (EULEX) has continued to operate under the overall authority of the United Nations and within the status-neutral framework of Security Council resolution 1244 (1999)" (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 10 June 2009, doc. S/2009/300, para 6).

¹¹⁵ Joint Action 2008/112/CFSP on *EU SSR Guinea-Bissau* (OJ L 40/2008). The mission has been launched in order to support the security sector reform in Guinea-Bissau (Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Peacebuilding Support Office in that country, 10 June 2009, doc. S/2009/302, paras 24-25).

16. EU military operations: using the force and co-operating with UN

Since 2003 the EU has performed six military operations and a ‘half’: *Artemis* and *Eufor RD Congo* in Congo, *Concordia* in the Former Yugoslavian Republic of Macedonia, *Althea* in Bosnia-Herzegovina, *EUFOR Tchad/RCA* in Chad and Central African Republic, and finally *Atalanta* in Somalia. The ‘half’ was the *EU supporting action to AMIS II*, performed in favour of the AU, which had a military component. The operations in Congo, *Concordia* and the supporting action to AU are concluded, *EUFOR Tchad/RCA* has recently completed its mandate (15th March 2009), while the operations in Bosnia and Somalia are still ongoing.

The use of force represents the main feature of those interventions. The *Concordia* mandate provided only self-defence, the military component of the supporting action to the AU had no operative tasks¹¹⁶, but in the other cases the UNSC authorized the use of force in advance in order to fulfil the operation mandates.

UNSC always adopted resolutions under Chapter VII, but the authorizations have been expressed in different formulas.

In the cases of *Artemis* and *Althea*, UNSC resolutions 1484 (2003) and 1575 (2004) expressly authorized EU Member States to use force¹¹⁷. Thus, in accordance with Article 48 of the UN Charter¹¹⁸, the EU acted as a ‘coordination framework’ of intervention of Member States in order to implement UNSC resolutions and it was the ‘psychological addressee’ of the authorizations to use force. That probably happened because the EU launched those operations without a well-established experience in crisis management, so when it had still not acquired real credibility.

In the cases of *Eufor RD Congo* and *EUFOR Tchad/RCA*, UNSC used a different language, addressing the authorization directly to the military operation. In fact, in resolution 1671 (2006) the UNSC

stresses that Eufor R.D. Congo is authorized immediately to take all appropriate steps ... in order to prepare its full operational capability

and

decides that Eufor R.D. Congo is authorized to take all necessary measures, within its means and capabilities, to carry out the following tasks, in accordance with the agreements to be reached between the European Union and the United Nations¹¹⁹.

while in resolution 1778 (2007) on *EUFOR Tchad/RCA* the UNSC

(a) Authorizes the European Union to deploy, ..., an operation

(b) Authorizes the European Union operation, ..., to take all appropriate measures to achieve an orderly disengagement, by means including fulfilment of the functions indicated in subparagraph a, and within the limits of its residual capacity;¹²⁰

Those authorizations are not addressed to EU Member States. The resolutions do not consider them: it only mentions States close to the theatre of crisis, that UNSC invites to facilitate the deployment of the

¹¹⁶ Article 9 of the Joint Action 2005/557/CFSP (OJ L 188/2005) included the possibility to perform “aerial observation, if required by the AU”.

¹¹⁷ Respectively para 4, and para 10 and 14.

¹¹⁸ See O. BRYDE, A. REINISCH, *Article 48*, in B. SIMMA (ed), *The Charter of the United Nations — A commentary*, II ed., Oxford, Oxford University Press, 2002, 775 ff. and P. M. EISEMANN, *Article 48*, in J. P. COT, A. PELLET (eds), *La Charte des Nations Unies. Commentaire article par article*, II ed., Paris, 1991, 749 ff.

¹¹⁹ Para 6 and 8.

¹²⁰ Para 6.

EU operations. Nor is the EU authorized to use force, even if it is mentioned as addressee of individual paragraphs of the UNSC resolutions¹²¹.

Excluding the possibility of a misprint, the used formula could be seen as a 'cautious way' of authorizing the EU to use force¹²², as the subject 'responsible' for the operations¹²³. The Joint Actions 2006/319/CFSP on *EUFOR RD Congo* and 2007/677/CFSP on *EUFOR Tchad/RCA*¹²⁴ support this interpretation. They recall UN proposals for an EU presence on the ground, the resolutions indicating the mandates¹²⁵ and authorizing the deployment of the operations¹²⁶, and finally some communication duties¹²⁷. But there is no mention of Member States, nor any in relation to the missions budget: the Joint Actions state clearly that *Athena* manages the common costs.

In the *Atalanta* case, the picture is more complex, because the UNSC adopted several resolutions. In resolution 1814 (2008) Member States and regional organizations were called upon to take coordinated action to protect shipping involved in delivering humanitarian aid to Somalia¹²⁸, while in resolution 1816 (2008) UNSC authorized Member States to use force in order to repress piracy¹²⁹. Protecting humanitarian aid and repressing piracy are two aspects of the same crisis, but the use of force was expressly addressed only to Member States¹³⁰.

But in resolution 1846 (2008) the authorization to use force has been extended to regional organizations. After welcoming the initiatives already taken and the EU decisions to launch a military operation¹³¹, UNSC authorized Member States and regional organizations to use force in order both to protect humanitarian aid and repress piracy¹³². In a following resolution, 1851 (2008), UNSC welcomed the launch of *Atalanta*, it invited 'States, regional and international organizations' to participate in the fight against piracy and armed robbery¹³³ and authorized the same subjects to take all necessary measures, i.e. the use of force¹³⁴.

In those resolutions regional and international organizations are authorized to use force together and in coordination with Member States. They do not play the role of 'psychological addressees', but they are direct addressees of the authorization to use force, even if they are generically mentioned as 'regional and international organizations'. This is clear with regard to the EU, since in the resolution 1838 (2008) UNSC welcomed the ongoing planning for an EU military operation, commending

The establishment by the European Union of a coordination unit with the task of supporting the surveillance and protection activities carried out by some member States of the European Union

¹²¹ UNSC resolutions 1671 (2006) [preamble and para 1, 7, 8, 9, 11, 12 and 15] and 1778 (2007) [preamble and para 6 (a) (b), 7, 8, 9 and 12].

¹²² This was my first hypothesis (L. PALADINI, *Alcune considerazioni sull'inquadramento delle missioni di pace dell'Unione europea nel sistema di sicurezza collettivo delle Nazioni Unite*, in *DUE*, 2008, 319 ff.).

¹²³ See paragraph 12 of this working paper.

¹²⁴ Respectively, OJ L 116/2006 and OJ L 279/2007.

¹²⁵ *Ibidem*, respectively Articles 1 and 1.

¹²⁶ *Ibidem*, respectively recitals 7 and 9.

¹²⁷ *Ibidem*, respectively Articles 9 and 9.

¹²⁸ Para 11.

¹²⁹ Para 7.

¹³⁰ Moreover, in resolution 1838 (2008) UNSC renewed the authorization to Member States and regional organizations to take coordinated action aimed at protecting the World Food Programme (WFP) convoys.

¹³¹ Para 6.

¹³² Para from 7 to 10.

¹³³ Para 2 and 4-5.

¹³⁴ Para 6.

off the coast of Somalia, and the ongoing planning process towards a possible European Union naval operation.

This resolution distinguished between an EU Member States coordinated action¹³⁵ and an EU military operation, highlighting the difference existing between the EU acting as a framework of co-ordination and the EU acting as an autonomous subject. The same is indirectly confirmed by UNSC resolution 1846 (2008)¹³⁶ and by resolution 1851 (2008), where UNSC welcomes

the launching of the EU operation *Atalanta* to combat piracy off the coast of Somalia and to protect vulnerable ships bound for Somalia¹³⁷.

Further confirmation arises from UNSC inviting Member States and regional organizations fighting piracy to conclude agreements with countries willing to detain arrested pirates¹³⁸, and the EU fulfilled that duty by concluding an international agreement *ex Article 24 TEU* with Kenya¹³⁹.

Thus many elements indicate that the authorization to use force has been directly addressed to the EU as one of the generically mentioned 'regional and international organizations'. The Joint Action 2008/851/CFSP establishing *Atalanta* supports this reading. Article 1 states that

The European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC)

and Article 2 links to the 'relevant international law'¹⁴⁰ and to UNSC resolutions 1814 (2008), 1816 (2008) and 1838 (2008) concerning the mandate. The Joint Action also includes communication duties with the UN during the operation¹⁴¹, and Member States are mentioned only with regard to the budget.

That being so, those different formulas shows that UNSC used a progressive approach in recognizing the EU role and directly authorizing it to use force. This point is interesting and will be taken into due account in Part IV, when some hypotheses about this issue will be formulated.

Finally, it is worth remembering that those military interventions represent also forms of co-operation with the UN¹⁴². The operations in Congo were two examples of 'operational support' to the

¹³⁵ Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) EU NAVCO (OJ 252/2008).

¹³⁶ Respectively, preamble and para 6.

¹³⁷ The UNSC started referring to *Atalanta* since EU had officially launched that operation (8th December 2008). Similar references are in the UNSG *Report pursuant to Security Council resolution 1846 (2008)*, 16 March 2009, para 15, 25, 27, 27-29, 31. It is worth reminding that UNSC resolution 1846 (2008) welcomes the already taken initiatives, among which "the decision by the North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast, including by escorting vessels of the WFP" (para 6).

¹³⁸ UNSC resolution 1851 (2008), para 3.

¹³⁹ Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer (OJ L 79/2009). The agreement is working (the 16th May 2009, there have verified fifth transfer of pirates to Kenya), so EU is exploring the possibilities of entering into similar legal agreements with other countries in the region. In that regard, see *EU NAVFOR - Atalanta frigate hands over 14 suspected pirates to the Kenyan authorities*, press release, 16 May 2009, available at <http://www.consilium.europa.eu>.

¹⁴⁰ The reference is to the United Nations Convention on the Law of the Sea (UNCLOS), with particular regard to the possibility to arrest pirates. It is worth reminding that the aforementioned convention mirrors in the best part the international customary law (amongst all, A. AUST, *Handbook of International Law*, Cambridge University Press, Cambridge, 2005, at 8).

¹⁴¹ Article 9.

¹⁴² See T. TARDY, *United Nations – European Union Relations in Crisis Management*, at 5-6, Background Paper at the *International Forum for the Challenges of Peace Operations*, held in Paris the 20-22 October 2008.

UN¹⁴³, while *Eufor Tchad* was an example of a 'bridging operation' to the incoming 'United Nations Mission in the Central African Republic and Chad' (MINURCAT). The latter EU operation has recently finished, but a component of 2000 soldiers has been incorporated in the UN peace-keeping operation. This represents another case of operational support to the UN¹⁴⁴, which allows the EU to continue contributing to the solution of the Darfur crisis under the UN flag¹⁴⁵. Moreover, *EU supporting action to AMIS II* and *Atalanta* represent part of the international efforts and initiatives pursuant to UNSC resolutions about African crises, i.e. a further form of co-operation with the UN.

17. The EU as a recognized peace keeper

The main purpose of checking ESDP practice under the 'UN magnifying glass' was to clarify how UNSC resolutions considered the EU peace missions, highlighting the elements which allow those interventions to be legally framed within the UN collective security system. This issue is still open and it will be faced in the next and last part of this working paper.

At the same time, this analysis has enabled us to disclose the EU role as a peace keeper. It clearly emerges from UNSC resolutions authorizing EU military operations to use force and it results from UNSC resolutions indicating that the EU acts in partnership with the UN. This is not simply a formal element, because UNSC has not often taken into consideration international organizations in its practice.

Moreover, EU peace missions have also been requested by the UN, such as the military operations *Artemis*¹⁴⁶ and *Eufor RD Congo*¹⁴⁷ or some EU civilian missions. For instance, in resolution 1756 (2007) UNSC

Calls on the donor community to continue to be firmly committed to the provision of the urgent assistance needed for the integration, training and equipping of the Armed Forces and of the National Police of the Democratic Republic of the Congo as well as for the reform of the administration of justice and *urges* the Government and its partners, in particular the European Union, to agree promptly on ways to coordinate their efforts and to carry out security sector reform by building on the results already achieved¹⁴⁸

Those requests have been addressed to the EU and can be read as a recognition of its credibility as a peace keeper. It is not superfluous to observe that this acquired role represents an 'internal asset'. In fact, it contributes to the achievement of one of the EU general objectives *ex* Article 2 TEU, and in particular

to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17.

¹⁴³ With regard to *EUFOR RD Congo*, see C. MAYOR, *EU-UN cooperation in military crisis management: the experience of EUFOR RD Congo in 2006*, Occasional Paper 72, September 2008, ISS, Paris.

¹⁴⁴ General Affairs and External Relations Council meeting of 16 March 2009, doc. 7564/09 (Presse 62), p. 10.

¹⁴⁵ In the opinion of G. TROELLER, *The importance of Humanitarian Actors in Peace Operations – The need for Effective Coordination*, p. 13, Background Paper at the *International Forum for the Challenges of Peace Operations*, held in Paris the 20-22 October 2008 EU is reluctant to place military and assets under UN command.

¹⁴⁶ Joint Action 2003/423/CFSP, preamble, point 4.

¹⁴⁷ UNSC resolution 1671 (2006), para from 7 to 9, and Joint Action 2006/319/CFSP, preamble, point 4.

¹⁴⁸ Para 9.

IV. Framing EU peace missions in the UN collective security system

18. Three alternatives

Part I ended taking note of the variedness of the UN collective security system, which was compared to a patchwork, and the labyrinth metaphor has been used with regard to any attempt to legally frame international organizations activities for peace.

This part offers three alternatives, each aimed at trying to exit the labyrinth, with a particular focus on EU peace missions. Each is a potential exit and each one presents elements for and against. The choice depends also on the reader's standpoint: what differentiates them the most is consideration of the degree of EU autonomy in performing ESDP and the idea that the UN collective security system already includes all necessary legal provisions to frame activities of international organizations for peace.

19. First: framing EU (Member States) missions in Chapter VII

Under the first hypothesis EU peace missions belong to EU Member States. In accordance with Article 42 and 48 of the UN Charter, States perform peace missions utilizing international organizations as frameworks of co-ordination. Pertinent UN practice is extensive. This use of international organizations produces an advantage in terms of effectiveness, because all resources are coordinated by the 'same offices'. Thus, States are the formal addressees of the authorization, while international organizations the psychological ones.

This interpretation has received authoritative support in the literature. As De Wet pointed out

Article 53(1) of the Charter should be understood as the clause facilitating enforcement action between the regional organization and its members. Article 42 in conjunction with Article 48(2) of the Charter, on the other hand, enable the military *utilization* [*italic added*] of a regional organization outside of its territory and/or against non-members, as well as the military utilization of other organizations such as regional defence organizations¹⁴⁹.

This would also be the case in ESDP missions and this approach finds some confirmation in practice.

With regard to military operation, in the *Artemis* and *Althea* cases Member States are the formal and direct addressees of the authorizations to use force, while in the *EUFOR RD Congo*, *EUFOR Tchad* and *Atalanta* cases, independently of the used language, the authorizations to use force were based on Chapter VII. The EU was never 'directly and individually' authorized to use force, and that would indicate that it always acted as a framework of intervention of Member States¹⁵⁰. Indirect confirmations would come from the recent renewal of the authorization to use force for *Althea*, still addressed to States.

Considering the direct quotations relating to EU's activity, those could be read as indicating Member States have acted co-ordinately¹⁵¹ and with regard to non-coercive interventions, UNSC never said that EU had the duty to report *ex* Article 54 of the UN Charter¹⁵². This would confirm that those

¹⁴⁹ E. DE WET, *The relationship between the Security Council and Regional Organizations during Enforcement Actions under Chapter VII of the United Nations Charter*, in *Nordic Journal of International Law*, 2002, at 10. By the same author, see also *The Chapter VIII Powers of the United Nations Security Council*, Hart publishing, Oxford and Portland, 2004, 290 ff.

¹⁵⁰ Amongst all, G. GAJA, *Introduzione al diritto comunitario*, Bari, 2003, at 7-8 and 41 ff.

¹⁵¹ UNSC resolution 1845 (2008), para 9 and from 14 to 16.

¹⁵² Part III, paragraph 15.

missions are not disciplined by Chapter VIII, so they represent Member States 'common interventions'.

Moreover, recalling De Wet's position, no ESDP missions were ever sent to the Member States territories', thus rightly they had to be framed under Chapter VII. Finally, there is an argument *a contrario* in favour of Chapter VII: acting under Chapter VIII and being the main referee for European disputes would have required a more structured and organized co-operation between the EU and the UN, and this would not be the case under ESDP¹⁵³.

This alternative represents a possible exit from the labyrinth. It is consistent with the UN Charter and its implementation, it has been supported in the literature and it also receives some confirmation in the ESDP practice.

Nevertheless, some weaknesses undermine its credibility, so that it is not totally convincing. It seems that the formula 'Chapter VII outside action, Chapter VIII inside action' proposed by De Wet is not totally supported in the literature. As Abass argued,

it appears both presumptuous and unconvincing to limit the Security Council's ability to delegate its powers only to organizations acting within their regions. Nothing in the history of the negotiations of the UN Charter or its text supports this interpretation¹⁵⁴

Abass suggests that when international organizations perform missions under Chapter VII, those are not necessarily multinational forces. This undermines the assumption that international organizations' actions under Chapter VII necessarily represent cases of utilization by States.

Moreover, this interpretation does not explain part of recent UN practice. For instance, there is the case of the authorization to use force regarding the African Union Mission to Somalia (AMISOM)¹⁵⁵. The authorization was based under Chapter VII and expressly addressed to AU Member States, even though this international organization has declared itself as a 'Chapter VIII RO' and acted in the territory of a member. In theory, in accordance with De Wet's position, this case would have required legal basis in Chapter VIII.

In conclusion, focusing on the EU, this interpretation is not convincing since it implies that ESDP missions do not 'belong' to the EU. Many elements regarding the ESDP legal and organizational framework suggest that the EU performs that policy autonomously¹⁵⁶. This is a weakness that the first alternative does not face, inasmuch as it does not explain the 'creeping ambiguity' of some UNSC resolutions. If the indications about EU peace missions are not convincing concerning EU autonomy because they can be read as indicating Member States acting co-ordinately, actually the same quotations do not indicate that UNSC wanted to refer to Member States. Certainly this ambiguity does not offer a solid basis for the idea that ESDP missions belong to EU Member States.

20. Second: framing EU missions in Chapter VIII

Under the second alternative Chapter VIII is the more appropriate constitutional framework of international organizations' activities for peace. It is worth remembering that Articles 52-54 provide for the regional organizations 'functional use' by UNSC and disciplines their autonomous civilian and military initiatives. The practice is poor and for a long time Chapter VIII has not been implemented. Nevertheless in its resolution 1631 (2005) UNSC expressed the will to develop UN-international organizations co-operation in accordance with Chapter VIII.

¹⁵³ J. WOUTERS, T. RUYS, *cit.*, at 256.

¹⁵⁴ A. ABASS, *cit.*, at 145.

¹⁵⁵ UNSC resolution 1863 (2009).

¹⁵⁶ Part III, paragraph 14.

Assuming that Chapter VIII offers the most appropriate discipline to legally frame ESDP missions, the EU should be considered an international organizations in the meaning of Article 52(1), that reads

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Many elements would support the consideration of the EU as a ‘Chapter VIII RO’. The EU is a stable international organization, it has been established by treaty¹⁵⁷, it has a regional membership¹⁵⁸, it possesses the legal subjectivity¹⁵⁹, it has the competence in crisis management¹⁶⁰ and its activities are consistent with UN Charter purposes and principles¹⁶¹.

This approach has received authoritative support in literature. As White affirmed

... it is difficult for the EU to deny that it is subject to Chapter VIII¹⁶²

and

States can gain Security Council authority under Chapter VII, while regional organizations can do so under Chapter VIII. It follows then that the EU, as a regional security actor with separate will, is bound by the provisions of Chapter VIII.¹⁶³

This interpretation is ‘constitutionally appropriate’ and it would be consistent with the recent UN practice involving ESDP. Authorizations to use force regarding EU missions and to the EU as one of the international and regional organizations acting along the Somali coasts suggest that the more appropriate legal basis is Chapter VIII, and not Chapter VII. Moreover, looking at *Concordia* and civilian missions, the aforementioned quotations in the UNSC resolutions testify that UN body is fully informed of their deployment and functioning, i.e. as provided for by Article 54. Finally, this alternative pays tribute to EU autonomy in performing ESDP.

Thus this second alternative represents a possible exit from the labyrinth, but some obstacles indicate that it is not the most appropriate. Firstly, it does not explain the legal basis of UNSC resolutions involving ESDP, i.e. Chapter VII. Secondly, it appears un-consistent with the UNSG Report of 2008 and the proposal to consider the issue of differentiating between ‘Chapter VIII RO’ and ‘Other IO’, since the EU has declared itself as not acting within Chapter VIII. This represents a critical point that the second alternative does not solve.

Finally, this alternative would be in contrast with *Artemis* and *Althea* cases, because UNSC directly authorized States to use force under Chapter VII. In that regard, it would not be impossible to argue that *Artemis* and *Althea* represent two exceptions. In other words, the authorizations were addressed to States because those interventions were multinational forces launched when EU had not a well-established experience in crisis management at that time. This would explain those authorizations based on Chapter VII and at the same time it would not exclude the following authorizations (*EUFOR RD Congo*, *EUFOR Tchad* and *Atalanta* cases) from being addressed directly to the EU ... but not under Chapter VIII. Those indications further undermine the feasibility of the second alternative.

¹⁵⁷ ICJ, *Nicaragua v. United States of America*, cit..

¹⁵⁸ Article 49 TEU. The first paragraph reads (italics added): “Any *European* State which respects the principles set out in Article 6(1) may apply to become a member of the Union.”.

¹⁵⁹ Amongst all F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, in M. CREMONA (ed), *Developments in EU External Relations Law*, Oxford, Oxford University Press, 2008, at 42-3.

¹⁶⁰ On this requirement, see ICJ, *Cameroon v. Nigeria*, Judgment of 11 June 1998, Reports 1998, para 67.

¹⁶¹ Part II, paragraph 11.

¹⁶² N. D. WHITE, *cit.*, 332 ff.

¹⁶³ *Ibidem*, at 349.

21. Third: framing EU missions in Chapter VII

Abass observed that

Article 39 of the UN Charter states that the Security Council shall make ‘recommendations, or decide what measures shall be taken’ in order to deal with a situation in respect of which it has determined that a threat to, or breach of, peace has occurred. That provision does not only cover the kind of measures the Security Council could prescribe, but it also governs the range of recommendations that it might decide. There is no sensible reason why such recommendations could not include the Security Council delegating its powers to regional organizations under Chapter VII¹⁶⁴

Abass admits the possibility to legally frame autonomous international organizations’ activities under Chapter VII. His opinion is to be highly respected, but the core of the third alternative is that this possibility does not yet exist, because it is the content of a new customary norm derogating the UN Charter ‘still in the making’.

The starting point is UN practice regarding international organizations’ activities for peace: Chapter VIII practice is poor, while international organizations have often acted under Chapter VII as a framework of intervention, in accordance with the first alternative. This situation is inconsistent with the UN Charter, as underlined by White:

States can gain Security Council authority under Chapter VII, while regional organizations can do so under Chapter VIII¹⁶⁵.

Moreover, the idea that regional organizations’ activities for peace can be legally framed only under Chapter VIII has some significant limits, as the second alternative has pointed out.

That being so, recent practice has shown cases of international organizations acting under a UNSC resolution based on Chapter VII. The Somali case offers a good example: UNSC resolutions authorize the ‘international presence’ along the Somali coasts and address the authorization to use force for States and international organizations. Thus EU and NATO¹⁶⁶ do not act as a framework of intervention, but as autonomous subjects¹⁶⁷. Moreover, looking to ESDP, in *EUFOR RD Congo* and *EUFOR Tchad* cases the EU acted as an independent subject, so it was the addressee of the authorization to use force on the basis of Chapter VII. Finally, UNSC resolutions considering EU civilian missions are based on Chapter VII, which seems to represent the legal basis for the management of the local crises.

This practice is consistent with some UN documents, in particular the aforementioned UN meetings final documents and the UNSG Report of 2008. The emerging idea is to divide international organizations in ‘Chapter VIII RO’ and ‘Other IO’. The UNSG Report addressed to UNSC the recommendation to clarify the regional organizations’ role in maintaining peace and international security and the invitation to consider the issue of dividing international organizations into those groups.

¹⁶⁴ A. ABASS, *cit.*, at 144.

¹⁶⁵ N. D. WHITE, *cit.*, at 349.

¹⁶⁶ UNSC resolutions 1814 (2008), para 11, and 1846 (2008), para 10, on the duty to notify in advance the participation in the fight against piracy and armed robbery at sea and UNSG Report pursuant to UNSC 1846 (2008), 16 March 2009, S/2009/146, para 15, for the list of notifications from “States and regional organizations”.

¹⁶⁷ UNSC resolution about NATO in Kosovo could be considered ‘precedents’ of this new trend. For instance, UNSC resolutions 1160 (1998) and 1199 (1998) are based on Chapter VII, but they are addressed to States, international organizations and regional organizations. The same could be for UNSC resolution 1244 (1999): regional organizations and Member States were authorised under Chapter VII “to establish the international security presence in Kosovo as set out in point 4 of annex 2” (para 7), while that annex recalls the “substantial North Atlantic Treaty Organization participation” (annex 2, para 2).

It is possible that such recommendation might lead to a UNSC resolution about the international organizations' role in the collective security system, as already happened with UNSC resolutions 1631 (2005). There would be two effects of such a resolution. The first is that some international organizations could legally found their autonomous activities under Chapter VIII, while some others under Chapter VII. Among the latter organizations there would be two of the most important current UN partners, i.e. EU and NATO. The second effect is that UN Charter would be derogated, because it does not provide for international organisations' activities to be legally framed in Chapter VII¹⁶⁸.

The latter effect would not be completely new, because it has already been verified within Chapter VII: even if Article 42 provides for UNSC to perform 'international police actions'¹⁶⁹, the UNSC itself preferred to handle international crisis authorizing Member States 'delegated enforcement action'¹⁷⁰ or giving to the UNSG the mandate to constitute UN peace-keeping operations. It has been observed that this alternative way of implementing Chapter VII was founded in a customary provision recently consolidated without serious opposition of UN Member States, derogating the UN Charter and allowing UNSC to assume more directive than operative functions¹⁷¹. The phenomenon of spontaneous creation of local or particular customs having effect amongst the Member States is indeed possible in the framework of the international organizations, and those customs can integrate, modify or interpret the treaty instituting them¹⁷².

The third alternative considers that the same could happen with autonomous activities of international organizations for peace. 'Other IO' (EU, NATO, *et cetera*) could be delegated to use force under Chapter VII, and their non coercive military operations and civilian missions should be communicated to UNSC, as a result of an extension of the effects of Article 54. In fact, as Abass pointed out

If the rationale of Article 54 is confined to Chapter VIII, then there can be no doubt that the chain of reporting is broken once the Security Council authorizes a regional organization under Chapter VII. However, such an interpretation flies in the face of common sense, and also is inconsistent with the *travaux préparatoires* of Chapter VIII as a whole. The entire framework of Chapter VIII itself was originally intended to form part of Chapter VII's legal continuum; it is a matter of convenience that Article 54, as with the rest of Chapter VIII, finds itself disconnected from Chapter VII. There is an acknowledgement interrelationship between certain provisions of Chapter VII and VIII. ... there is the need to accommodate some level of interaction between the provisions of the two chapters when applying them to specific situations... the utilization of a regional organization outside its own region actually raises the stake of that obligation much higher than when regional organizations act within their own region¹⁷³

¹⁶⁸ It would be a case of use of implied powers. There are four limitations in using those powers: (a) it has not to change the distribution of functions within an organization; (b) it is necessary to perform the international organizations' functions; (c) it requires the existence of explicit powers in the area concerned and finally (d) it has not to violate fundamental rules and principles of International Law. See N. BLOKKER, *Is the Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by Coalitions of the 'Able and Willing'*, in *European Journal of International Law*, 2000, 547 ff.

¹⁶⁹ B. CONFORTI, *L'azione del Consiglio di sicurezza per il mantenimento della pace*, in P. PICONE, *Interventi delle Nazioni Unite e Diritto internazionale*, Padova, 1995, at 3.

¹⁷⁰ N. BLOKKER, *cit.*, at 542.

¹⁷¹ B. CONFORTI, *The Law and Practice of the United Nations*, *cit.*, at 208.

¹⁷² M. GIULIANO, T. SCOVAZZI, T. TREVES, *Diritto internazionale*, Volume I, Milano, 1991, 237 ff. See also B. CONFORTI, *Diritto internazionale*, Napoli, 2002, at 42-43: particular customs cannot derogate the treaty instituting an international organization having judicial bodies that watch over the respect of the same treaty (the author quotes the well-known ECJ case C-327/91 *France/Commission*, regarding the Commission treaty-making power).

¹⁷³ A. ABASS, *cit.*, at 148 ff.

Clearly, the aforementioned non-extensive practice does not possess the value of a new custom. At this stage we could talk about an existing 'usage' in the UN collective security system. In fact, as the former President of the ICJ Judge Higgins observed,

It is essential ... to distinguish international customs from international usage, for while the latter may reflect the growth of a habit, the habit is not performed for conviction of legal obligation¹⁷⁴

Faced with this usage, two options are possible. First, is a step towards the extension of the already existing customary provision allowing the States authorization to use force. In other words, the current customary provision in favour of States in the future could relate to 'Other IO'. Second, the usage is the first step towards a new customary provision derogating the UN Charter in the direction to authorize international organizations to use force under Chapter VII.

In both cases, what is needed is wide and constant practice and a widely spread conviction, expressed also through a continuous lack of opposition by UN Member States. The latter element plays an important role, because it indicates

That point at which states regard themselves as legally bound by the practice.¹⁷⁵

In other words, the customary provision (or the 'extension' of the existing one) exists since the two elements of *diuturnitas* and *opinio iuris sive necessitatis* can be surveyed. Naturally, talking about customary provisions of International Law, a very prudent approach is due. As Conforti observed

a great deal of caution is necessary in ascertaining customary law of this kind. It is not enough that a certain principle or a certain rule has been observed over a period of time, even a lengthy period, by the organs, that is, that it has been expressed and upheld by majorities within the organs. It is also necessary to pay attention to the conduct, to the reactions of the individual States, to the capacity of individual States to effectively oppose majority tendencies. Anyone who undertakes an examination of the practice with this rigorous method will conclude that the number of true customary rules that have been superimposed on the Charter norms is not very high.¹⁷⁶

In that regard, the more appropriate *locus* to survey the existence of those new rules is the UN. As Judge Higgins observed,

The United Nations is a very appropriate body to look for indications of developments in international law, for international customs is to be deduced from the practice of the states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts; and the number of occasions on which states see fit to act collectively has been greatly increased by the activities of international organizations. Collective acts of states, repeated by an acquiescent in by sufficient numbers with sufficient frequency, eventually attain the status of law¹⁷⁷

The third alternative is the last possible exit from the labyrinth, but the fact that the customary provision derogating the UN Charter is 'still in the making' represents a relevant weakness.

Yet it offers a legal explanation to some critical points apparently not mutually compatible. For instance, the third alternative explains why some international organizations' autonomous activities for peace are legally based on Chapter VII, even if traditionally the latter has been used to authorize multinational forces. Thus, it conciliates the autonomy reached by some international organizations in crisis management with the ongoing process towards a redefined legal framework for the international

¹⁷⁴ R. HIGGINS, *The Development of International Law through the political organs of the United Nations*, Oxford University Press, London/NY/Toronto, 1969, at 2.

¹⁷⁵ *Ibidem*, at 6.

¹⁷⁶ B. CONFORTI, *The Law and Practice of the United Nations*, cit., at 11.

¹⁷⁷ R. HIGGINS, *cit.*, at 2.

organizations' participation in the UN collective security system. More precisely, the third alternative can constitute a step in that process.

Finally, the merit of this alternative is to go beyond the patterns of the first and second alternatives, strictly adherent to the traditional formula 'Chapter VII for States and UN peace-keeping operations, Chapter VIII for regional organizations'.

Final considerations

The conducted analysis was aimed at legally framing EU peace missions in the UN collective security system.

In order to reach this objective, in Part I the legal framework of international organizations' participation in the maintenance of peace has been analyzed. The existence of an ongoing process towards the re-definition of their role within the UN collective security system emerged. In Part II the issue of the UN Charter primacy and relevance to the EU legal order has been considered, and in Part III ESDP practice 'has been sifted' through UNSC resolutions. A potentially controversial element emerged: EU missions have been legally framed on Chapter VII even if they appear to be EU autonomous interventions. Moreover, the recognition of the EU role as a peace keeper also emerged, and this further supports the idea that ESDP missions belong to the EU.

Thus in Part IV three hypothesis have been proposed in order to legally frame EU peace missions in the UN collective security system. The first one appears traditional and considers EU peace missions as multinational forces performed by "a loose association of States operating in a coordinated way"¹⁷⁸. The second alternative is institutionally correct and frames EU missions in Chapter VIII, but it suffers from many weaknesses and appears less feasible. The third one differs from the others in the idea that the UN collective security system still does not include all provisions to legally frame the international organizations activities for peace, because a new customary provision derogating the UN Charter is 'still in the making'.

In my opinion the third alternative is the most appropriate, because it takes into consideration the recent developments in the UN collective security system with regard to international organizations' activities for peace. Furthermore, it can coexist with another alternative. The idea is that the first and the third alternatives could be applied simultaneously to ESDP missions, if we consider the former solution appropriate for earlier ESDP operations (*Artemis* and *Althea*) and the latter addressed to the most recent (*EUFOR RD Congo*, *EUFOR Tchad* and *Atalanta*). This would also be supported by practice, since we remember that before 2005 ESDP missions were launched as multinational forces, while following operations have been considered EU autonomous interventions.

That being so, the conducted analysis allows us to conclude this working paper with two very brief considerations on the UN collective security system and EU participation within its framework.

Generally speaking, the ongoing process towards a re-definition of the international organizations' role in the maintenance of peace could change the morphology of the UN collective security system. This further would encourage international organizations – the EU included – to operate in crisis scenarios, regionally or more widely, under the UN legal umbrella and the UNSC control.

Secondly, the participation in the aforementioned process could lead the EU to develop a new role. If the role as peace keeper represents one of the sides of the 'EU polygon'¹⁷⁹, the indirect backing of the 'change of the rules' within the UN collective security system suggests that EU is becoming a 'promoter of International Law'. Promotion of international standards in legal fields such as

¹⁷⁸ K GRAHAM, *UN-EU Cooperation on Security*, cit., 299 ff.

¹⁷⁹ M. CREMONA, *The Union as a global actor*, cit., 553 ff.

environmental law, the law of the sea or the human rights already suggested the birth of such a role for EU¹⁸⁰. But the considered external and indirect contribution to the assertion of a new customary provision within the UN collective security system – performed by taking part in UN *fora* and expressing its position – just confirms the assertion of this new role for the EU.

¹⁸⁰ That took place especially through the adoption of guidelines aimed to guide Member States in treaties negotiations and the encouragement to Third States to accede to important international agreements. In literature, J. VANHAMME, *Formation and Enforcement of Customary International Law: the European Union's contribution*, in *Netherlands Yearbook of International Law*, 2008, at 127 (in particular, 147 ff.) and A. GIANELLI, *Unione europea e diritto internazionale consuetudinario*, Torino, 2004, 109 ff.

Annex I

CLASSIFICATION OF PARTNERS		
	Agencies	Arrangements
Regional and sub-regional (Chapter VIII)	<ul style="list-style-type: none"> - African Union (AU) - Caribbean Community (CARICOM) - Commonwealth of Independent States (CIS) - Council of Europe (COE) - Economic Community of Central African States - Economic Community of West African States (ECOWAS) - Intergovernmental Authority for Development - League of Arab States (LAS) - Organization of American States (OAS) - Shanghai Cooperation Organization (SCO) - Southern Africa Development Community (SADC) 	<ul style="list-style-type: none"> - Association of Southeast Asian Nations (ASEAN) - Organization for Security and Cooperation in Europe (OSCE) - Pacific Islands Forum (PIF)
Other intergovernmental (outside Chapter VIII)	<ul style="list-style-type: none"> - European Union (EU) - North Atlantic Treaty Organization (NATO) - Common Security Treaty Organization (CSTO) - Organization of Islamic Conference (OIC) - Community of Portuguese Speaking Countries - International Organization of Francophonie (IOF) 	<ul style="list-style-type: none"> - Commonwealth Secretariat (COMSEC)

Source: UNU-CRIS, *Capacity Survey - Regional and other intergovernmental organizations in the maintenance of peace and security*, 2008

Possible Taxonomy of Regional, Sub-Regional and Other Intergovernmental Organizations*			
<i>Organization type</i>	Regional	Sub-Regional	Other intergovernmental
<i>Charter provisions</i>	Chapter VIII		Chapters VI, VII & IX
	AU	ECOWAS IGAD ECCAS SADC	NATO** EU** SCO CSTO Commonwealth OIF CPLP OIC
	LAS COE CIS ASEAN PIF OAS	CARICOM	

Source: K. GRAHAM, *Towards a Coherent Regional Institutional Landscape in the United Nations? Implications for Europe*, Bruges Regional Integration & Global Governance Papers, 1/2008, College of Europe, Bruges, at 294.

* OSCE has been omitted from this table. It has declared itself to be a ‘regional agency’ for the purposes of Chapter VIII of the UN Charter. Yet its membership is cross-regional, spanning North America, Europe and Central Asia. Any formal decision on whether OSCE is a regional Agency or one of the ‘other intergovernmental organizations’ would require legal advice and a consensus within the high-level process.

** Both NATO and the EU have, in fact, indicated that they do not see themselves as regional organizations for the purposes of Chapter VIII of the Charter.

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