

The legal basis for the use of force by UN peacekeeping operations

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Contents

1	INTRODUCTION	1
2	THE USE OF FORCE PROVIDED FOR IN THE UN CHARTER	3
3	PEACEKEEPING	7
3.1	THE CONCEPT OF PEACEKEEPING	8
3.2	CONDITIONS FOR PEACEKEEPING	11
3.2.1	CONSENT BY THE HOST STATE TO THE ESTABLISHMENT OF THE OPERATION	12
3.2.2	CONSENT FROM THE STATES CONTRIBUTING TROOPS	12
3.2.3	NEUTRAL AND IMPARTIAL	12
3.2.4	NO USE OF FORCE EXCEPT IN SELF DEFENCE	13
3.3	THE ESTABLISHMENT AND ORGANIZATION OF PEACEKEEPING OPERATIONS	14
4	THE LEGAL BASIS FOR THE USE OF FORCE BY UN PEACEKEEPING OPERATIONS	17
4.1	CUSTOM	17
4.1.1	THE RIGHT TO PROTECT THE UN PERSONNEL	18
4.1.2	PROTECTION OF UN MATERIALS	23
4.1.3	PROTECTION OF CIVILIANS IN THE CONFLICT AREA	26
4.2	AUTHORISATION	28
4.2.1	EXPLICIT AUTHORISATION TO USE FORCE	28
4.2.2	THE USE OF FORCE WHEN FORCE IS NOT EXPLICITLY AUTHORISED IN THE RESOLUTION	31
4.3	CONSENT	33
4.3.1	CONDITIONS FOR A LEGITIMATE CONSENT	33
4.3.2	WHAT DOES THE CONSENT EMBRACE?	34
4.3.3	DURATION OF THE CONSENT	37
5	THE CONFLICT OF THE FORMER YUGOSLAVIA	39

5.1	BACKGROUND	39
5.2	THE DELIVERY OF HUMANITARIAN ASSISTANCE AND RELIEF	42
5.3	THE PROTECTION OF SAFE AREAS & PROTECTED SITES & POPULATION	43
5.4	FREEDOM OF MOVEMENT OF UN PERSONNEL	48
5.5	CONCLUSION	50
6	CONCLUDING REMARKS	51
7	BIBLIOGRAPHY	53

1 Introduction

The use and scope of United Nations (UN) peacekeeping operations have greatly expanded in the last decades, and can now be regarded as UN's main instrument to uphold international peace and security.

Another important development has been that such peacekeeping operations increasingly have had to use more force in the execution of their mandates. This is at least partly due to the fact that peacekeeping operations are used more in intra state conflicts. Such conflicts are often more complex and more force is required to execute the peacekeeping operations mandates. The use of force is always questionable and viewed with suspicion by the public. The use of force therefore requires a clear justification and legal basis.

I will in this dissertation focus on UN peacekeeping operations use of force and in particular the legal basis for such use of force. Although there is a vast body of literature on international law and peacekeeping, I have found no literature, which deals directly with my subject. I have based my thesis on general literature on peacekeeping and international law, a review of Security Council resolutions and reports from the Secretary General interpreting these resolutions, judgements from the ICJ and my own views.

I have chosen to limit my dissertation to peacekeeping operations. In doing this I exclude from my definition of peacekeeping operations, UN enforcement operations, even though the purpose of such operations may well be to achieve peace and stability. My reasons for drawing this line are at least twofold. First, most writers on this subject do draw such a line. In the opinion of many legal writers peacekeepers can only use

force in self-defence.¹ There are however different views as to what lies within the concept of self-defence. Another reason is the need to protect the institute of peacekeeping and its legitimacy and usefulness in international conflicts. Enforcement operations includes a higher degree of force which is extremely interfering towards the parties in a conflict and therefore much more controversial, both in relation to the conflicting parties and to the international community. The concept of peacekeeping has however been expanded, in particular in relation to measures of force used by such operations. The lines between peacekeeping and enforcement are therefore not clear and the development may possibly lead to a “merger” of the two instruments in the future.

Further I will limit my dissertation towards international humanitarian law.² International humanitarian law refers to the whole body of law applicable during hostilities amongst them the four Geneva Conventions. Even though the UN is not a party to the Geneva Conventions or any of the other treaties concerning International humanitarian law, it was stated in the reparations case that the UN is a subject of international law and thereby capable of possessing international rights and duties, see also part 2 below.³ In any circumstance UN is subject to customary international law and most of the Geneva conventions are customary international law. It is stated that where the UN force becomes involved in hostilities with other organised armed forces, the rules of war will apply.⁴ However since there is no agreement about the applicability of the rules and there are many difficult and unsolved questions concerning this subject it will be fare to extensive to include it in my dissertation. As a consequence of this limitation I will not write about responsibility in case of a breach of international humanitarian law by members of a UN force.

I will divide the rest of this dissertation into four main parts. In the first two parts I will give a general description of the use of force by the UN, see part 2, and of UN peacekeeping operations, see part 3. The third part will concern the legal problem of this

¹ White, (1993) : pp. 204-206., Eknes, (1995) : p. 17., Cox, (1999) : p.3., Meijer, (1994) : p.66., Goulding, (1996) : pp. 7-12., Fleitz, (2002) : 42-44.

² Information about International Humanitarian Law can amongst others be found in: Greenwood, (1998) : pp. 3-34.

³ Reparations Case, paras. 178-179.

⁴ Greenwood, (1998) : pp. 20-23.

dissertation, see part 4. I will discuss the legal basis for the use of force by peacekeeping operations, which I have found to be custom, see part 4.1, authorisation under chapter 7 by the Security Council, see part 4.2 and consent see part 4.3. In the fourth part I will analyse the conflict of Bosnia and Herzegovina (Bosnia) and the legal basis for the use of force by the peacekeeping operation UNPROFOR in that case, see part 5. I have chosen to limit my dissertation towards other conflicts where a peacekeeping force has used force. However when I discuss the legal bases for the use of force by a peacekeeping operation and when I describe the conflict in Bosnia, I will try to draw lines to other conflicts.

2 The use of force provided for in the UN charter

In this part I will discuss to what extent the use of force is permitted by the UN charter and thereafter how these rules applies to UN peacekeeping operations.

A basic principle in international law is that states shall not use force, see the UN charter art 2(4). This principle can be considered as being part of customary international law, see the Nicaragua judgement.⁵ The UN can be considered a subject of international law, see the reparations case.

It follows from this case that:

“the court has come to the conclusion that the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is it the same thing as saying that it is a super state, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights

⁵ Nicaragua Case, paras 188-190.

and duties, and that it has capacity to maintain its rights and duties, and that it has capacity to maintain its rights by bringing international claims.”⁶

The prohibition in art 2(4) will therefore be applicable to UN.

However the UN Charter establishes two exceptions from the principle of non-use of force in order to create international peace and security.

First the Security Council can authorise the use of force through chapter 7.

In order to make a binding decision the Security Council has to follow the voting procedure in art 27.

Furthermore the Security Council has to determine whether there is a “threat to the peace, breach of the peace or act of aggression,” see art 39. The conditions are alternative so it doesn’t matter what the act is classified as. This is a power which can not be delegated and which rests exclusively upon the Security Council.⁷

The important part in relation to peacekeeping actions is whether there is a “threat to international peace and security.” This part covers a wide range of behaviour by a state. The wording of this part is vague and elastic, which unlike the other alternatives is not necessarily characterised by military operations, or operations involving the use of armed violence.

Traditionally a “threat to the peace” has not been applied to inter state conflicts. The Security Council has, however increasingly defined intra state conflicts which in many cases cause humanitarian disasters as a sufficient threat to peace to warrant intervention by the UN.

However, there has been an international element in most conflicts or disasters. In the conflict of Liberia the fighting had spilt over the border into Sierra Leone, in Haiti it

⁶ Reparations Case, paras 178-179.

⁷ Sarooshi, (1999) : pp. 32-34.

was a refugee problem and in Somalia, which can be considered as one of the cases where the Security Council has gone furthest in its authorisation of the use of force, the international element was threats to UNOSOM and other UN personnel in the country and a flow of refugees to the neighbouring states.⁸

The fact that an internal conflict can be considered a threat to the peace is important in relation to peacekeeping. Since the new kind of conflicts are more complex and the operations has got additional tasks added on to its mandate, it has resulted in a need to employ a higher degree of force, which in many cases requires an authorisation under chapter 7 by the Security Council. It is therefore of importance that an internal conflict can be considered a “threat to international peace and security.” If not, it would not be possible for the UN to authorise the use of force by a peacekeeping operation under chapter 7, since a determination of a “threat to the peace, breach of the peace or act of aggression” is a prerequisite for the use of force.

The legal basis for actions involving the use of force in chapter 7 is art 42, see art 43. The intention of the writers of the UN Charter was that states should enter into agreements with the UN to commit troops to a permanent force, which the Security Council could use whenever it was needed. However no such agreement has ever been concluded.

The Security Council has instead intervened in international or domestic conflicts with measures of a military nature in two different ways. First, it has authorised the use of force by the member states individually or within regional organisations. Secondly it has used UN peacekeeping forces.

The question is whether an authorisation to use of force can be based in art 42 since the requirement in art 43 is not fulfilled.

If one interprets the charter provisions literally, no enforcement action can be taken until armed forces are available in accordance with art 43.

⁸ Further information about art 39 can be found in Simma, (2002) : pp. 718-729

It follows, however, from the expenses case that:

“It cannot be said that the charter has left the Security Council impotent in the face of an emergency situation when agreement under art 43 have not been concluded.”⁹

It was also a general view at the San Francisco conference that armed force could be used even though no agreement was made under art 43.¹⁰ The following represents the general view of legal writers on this issue:

“ The purpose of art 43 was to facilitate action by the Security Council, it would be wholly alien to that purpose to argue that the absence of agreements under art 43 should prevent action by the Security Council. In other words, Article 43 provides a procedure by which the Security Council may act, but it does not prevent the Security Council from choosing an alternative procedure”¹¹

It can be concluded that art 42 can be the basis for an authorisation to use force even though agreements are not concluded in relation to art 43 of the charter. A widened interpretation of art 42 is consequently permissible.

The question is whether art 42 comprise peacekeeping operations. Peacekeeping is not explicitly mentioned in art 42. Some scholars mean however that peacekeeping operations is a mean by which the UN can carry out the international police action described in article 42. When article 42 says that the Security Council “ may take such action by air sea or land forces as may be necessary to maintain or restore international peace and security” they mean that by action not only war or action involving the spilling of blood is meant.¹² One could argue that if article 42 permits military enforcement operations, there is no reason why peacekeeping operations, shouldn't be permitted.

⁹ Expenses Case, p. 167.

¹⁰ Goodrich et.al., (1949), pp. 278-287

¹¹ Malanczuk, (1997) : p. 417. See also Shaw (1997) : p. 868.

¹² Conforti, (2000) : p. 200.

Provided, however, that art 42 is not the legal basis for the use of force, the question is what an alternative basis can be for the authorisation of the use of force by the Security Council. In such a case one can argue that the Security Council has an implied right to authorize the use of force. One can argue that in order to fulfil its obligation in art 24, to “maintain peace and security,” it is necessary for the Security Council to be able to authorize the use of force. I will discuss implied powers in part 4.2.2 below.

In conclusion the Security Council can authorize the use of force by a peacekeeping operation either on the basis of art 42 or on the basis of implied or inherent powers acting under chapter 7.

Furthermore the UN charter provides for the use of force in self-defence, see art 51. However art 51 is only applicable to states and can therefore not justify any use of force by a peacekeeping operation. A peacekeeping operation right of self-defence must either be based on customary international law (part 4.1), an explicit authorisation under chapter 7 (part 4.2) or consent (part 4.3).

3 Peacekeeping

Peacekeeping came into being during the cold war. The use of veto by the permanent members paralysed the Security Council and the collective security system provided for in the UN charter did not function. To fill the vacuum, peacekeeping gradually emerged. Peacekeeping can therefore be seen as an alternative to the means expressly mentioned in chapter 7 of the charter. However the purpose of peacekeeping is different from the idea of collective security.

The main objective of a peacekeeping operation is to contribute to the maintenance of international peace and security by keeping the hostile parties peacefully apart and help them work peacefully together. However it has a variety of other tasks. Bowett lists nine different categories of peacekeeping being: (1) cease- fire, truces and armistice functions entrusted to “observer” groups, (2) frontier control, (3) interpositional

functions, (4) defence and security of UN zones or areas placed under UN control, (5) the maintenance of law and order in a state, (6) plebiscite supervision, (7) assistance and relief for national disasters, (8) disarmament functions and (9) prevention of international crimes.¹³

3.1 The concept of peacekeeping

There is no formal or general recognised definition of peacekeeping. This is probably because the purpose of the operation will vary from case to case and conflict to conflict. However, many scholars, the UN and the Secretary General Boutros- Ghali have tried to define peacekeeping.

In the review of UN Peacekeeping, published by the UN, peace keeping was defined as:

“ an operation involving military personnel, but without enforcement powers, undertaken by the UN to help maintain or restore international peace and security in areas of conflict. These operations are voluntarily and are based on consent and co-operation. While they involve the use of military personnel, they achieve their objectives not by force or arms, thus contrasting them with the “enforcement action” of the United Nations under art 42. “¹⁴

However, peacekeeping has gone through a considerable change since the end of the cold war. Today’s peacekeeping can no longer be categorised as peacekeeping in the traditional sense. Some scholars have tried to distinguish between different kinds of peacekeeping operations and given them different names.

Secretary General Boutros Boutros Ghali chose in his Agenda for peace to develop a set of mutual dependent concepts, which together constituted the organisations record in relation to questions concerning international peace and security.

¹³ Bowett, (1964) : pp. 268-74.

¹⁴ The Blue Helmets: A review of United Nations Peacekeeping, 2. Ed. (1991) : p. 4.

These concepts are defined as follows:

- Preventive diplomacy is defined as action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.
- Peacemaking is defined as action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in chapter 6 of the charter of the United Nations.
- Peacekeeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/ or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.
- Peace-enforcement can be necessary when all other means are insufficient. Peace-enforcement includes the use of military force to maintain international peace and security. However it can only be employed when there is a threat to the peace, breach of the peace or act of aggression see art 39.
- Peace- building is defined as action to identify and support structures, which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.¹⁵

Moreover some scholars divide peacekeeping into three generations, in accordance with the level of force used.¹⁶

The first generation of peacekeeping is the so-called traditional peacekeeping. Steven R. Ratner, of the University of Texas School of law, previously legal adviser to the US delegation to the Cambodian peace talks, defines first generation peacekeeping as follows:

“First-generation operations represent those where a political organ of the UN deploys a military force between two or more armies, with their consent, pending, and in the absence of, a political settlement.”

¹⁵ A/47/277., paras 20-21.

¹⁶ Katayanagi, (2002) : pp. 42-53, Berdal, (1995) : p. 242.

In the first generation of peacekeeping the operation is only allowed to use force in self-defence, and the scope of self defence is defined quite narrow. It does only include the protection of UN personnel.

Second generation peacekeeping is a tougher approach to peacekeeping. It has been argued that the scope of self-defence here was stretched to the limit. The conflict in former Yugoslavia is categorised as second-generation peacekeeping.¹⁷

Third generation peacekeeping envisages the use of military force beyond the principle of self-defence. The conflict in Somalia is categorised as third generation peacekeeping.¹⁸ I will describe this conflict below in part 4.2.3.

It has been argued that third generation peacekeeping is not really peacekeeping. Third generation peacekeeping identifies itself with peace enforcement. If one consider that peace enforcement is one category of peacekeeping, then one of the main traditional principles of peacekeeping, limitation of the use of force to self-defence is not valid any more.

For the purposes of this dissertation it is not necessary to use a precise definition of peacekeeping. The purpose of this dissertation is to discuss the extent to which personnel who participates in peacekeeping operations are entitled to use force, consequently to the extent I conclude that a peacekeeping operation is entitled to use force it will fall within my definition of peacekeeping. However it is in my opinion important to draw a line against enforcement actions. Whether an action shall be considered as a peacekeeping operation or an enforcement action will depend upon the purpose of the operation. The main purpose of a peacekeeping operation is to achieve peace. However this is a necessary but not sufficient requirement. In addition the operation must be in the area of conflict to maintain or preserve a status quo situation to achieve peace. If it is necessary to carry out actions with military means, which will change the existing institutions or the conflicting parties positions, they will fall outside

¹⁷ Katayanagi, pp. 49-50.

¹⁸ Ibid., p. 51.

the scope of this dissertation and outside my definition of peacekeeping. It can instead be categorised as enforcement actions. The reason is that it will always be possible to word the mandate of an enforcement action in such a way as to express a peacekeeping purpose.

3.2 Conditions for peacekeeping

Even though there is no formal or universally agreed definition of traditional peacekeeping, the concept of peacekeeping during the first – generation contained certain principles, which derive from four principles listed by a former Secretary-general, Dag Hammarskjold, and a Canadian diplomat, Lester Pearson, in regard to UNEF1. These requirements are consent by the Host State, consent from the states contributing troops and the personnel who participates in the operation must be neutral and impartial, and no use of force except in self-defence.¹⁹

UNEF 1 was the first modern peacekeeping operation. It operated from 1956 – 1967. It was created, by the General Assembly in response to a joint Anglo, French, Israeli plan to oppose Egyptian nationalisation of the Suez Canal.²⁰ Britain and France justified their intervention on the ground, that they were intervening on behalf of the international community to protect and isolate a waterway essential to international commerce from local war.

UNEF 1's function was to “secure and supervise the cessation of hostilities, including the withdrawal of the armed forces from Egyptian territory, and after the withdrawal, to serve as a buffer between Egyptian and Israeli forces.”²¹

The reason why the Security Council did not establish a peacekeeping operation was because the vetoes of the United Kingdom and France had paralysed the Security Council.²²

¹⁹ A/3943., paras 154-193.

²⁰ General Assembly Resolution 998 and General Assembly Resolution 1001

²¹ Cox, (1999) : p. 17.

²² Fleitz, (2002) : p. 37., White, (1993): p. 200.

3.2.1 Consent by the Host State to the establishment of the operation

First there has to be consent from the Host State to the establishment of the operation. Peacekeeping can only work if the parties to a conflict demonstrate the political will to respect agreements and permit UN personnel to carry out their tasks. However in many circumstances it is a difference between the formal consent of the parties and how they act when the UN personnel are being deployed. I will describe this requirement in further detail below.

3.2.2 Consent from the states contributing troops

Secondly there must be consent from the countries that contributes troops to the operation. Since no country has submitted troops on permanent bases in accordance with article 43, the UN is dependent on states contributing troops from case to case.

The consent of the country contributing troops is important since the UN will exercise the exclusive control over the personnel. The relationship between the state providing the troops and the UN has to be regulated by an agreement. The contributing states must accept that the troops no longer serve the state, but rather the UN. On the other hand, the contributing states will retain certain powers over the personnel, in particular criminal and disciplinary jurisdiction.²³

The question is whether a contributing country can withdraw its consent. Even though it is not likely that a contributing country will do so, there is nothing the UN can do if the country decides to withdraw. This is because the submission of troops is voluntarily in the first place. In Rwanda Belgium decided to withdraw its troops.

3.2.3 Neutral and impartial

Furthermore the operation must be neutral and impartial.

²³ Simma, (2002) : pp. 690-692.

It is stated that:

“Its creation must not cause any prejudice to the solution of the political question at stake. It must not be used either to protect certain positions of one of the parties or to oblige one party to accept a certain political result or to influence the political balance. In an internal conflict, the Force may not support either the legal government or the insurgents or any other party to the conflict.”²⁴

This is normally a condition for the willingness of the parties to co-operate. A party must not associate the troops with the interest of the opponent party.

3.2.4 No use of force except in self defence

Lastly the operation must not use armed force except in self-defence. This requirement serves to ensure that the peacekeeping operation does not lose its neutrality, its status of being above the conflicting parties.

When UNEF was established the scope of self-defence was very narrow. It did only include a right to protect the UN personnel if shot at.

However the scope of what can be considered as self-defence has changed considerably after the end of the cold war. I will discuss the use of force in self-defence in further detail when I start discussing the legal basis for the use of force, see part 4.1 below.

In the light of the development of peacekeeping one can raise a question as to whether these principles are still valid. This question will be discussed in part 6 below.

²⁴ Von Grunigen, pp. 137-138.

3.3 The establishment and organization of peacekeeping operations

The first modern peacekeeping force was established by the General Assembly. Subsequently it has been the Security Council who has been the mandating body. Today it is quite clear that both these UN organs possess the power to establish peacekeeping operations.

There is however no clear legal basis for the establishment of a traditional peacekeeping operation. The term “peacekeeping” is not provided for in the UN charter. There is a considerable debate amongst legal writers with respect to where the UN gets its more specific mandate within the charter to establish such operations. There are numerous articles and books discussing this issue.²⁵ Since it is not essential to determine the exact legal basis for UN peacekeeping operations for the purpose of this dissertation, I will not discuss this question in any further detail.

The Security Council delegates the execution of its decision to organize and control a peacekeeping operation to the Secretary General. The Secretary General has therefore been delegated the power to establish the UN peacekeeping operations and the power to exercise command and control over these operations.

Before I discuss these powers it is necessary to determine where the Security Council gets its competence to delegate such powers to the Secretary General.

There is no express provision in the charter giving the Security Council the power to delegate its chapter 7 powers to other principal UN organs. However it is clear that the Security Council does possess such a power. This is supported by reference to implied powers and a uniform practice by the Security Council in consistently delegating its powers.

²⁵ Halderman, (1962) : pp. 971-996., Simma, () : pp. 590-592., Cox, (1999) : pp. 4-5., Fleitz, (2002) : pp. 38-39., White, in Pugh : pp. 43-61., D. Nigel, Conforti, (2000) : pp. 200- 201., Miller, (1961) : pp. 2-9., (1961), Rzymanek, (1987) : pp. 88-90.

The next question is whether there are any limitations on the Council in delegating powers.

The general rules of delegation by the Security Council are as follows.

First the Security Council need to possess the power. Furthermore it cannot delegate the determination that there is a threat to international peace and security. Lastly, the Security Council cannot delegate an unrestricted power of command and control.²⁶

Those rules presents no problems in relation to the Security Council's delegation of powers to the Secretary General's execution of the mandate for peacekeeping operations.

The next question is whether there are any limitations that can be put upon the Secretary General's exercise of these delegated powers.

There is both express and implied limitations. The express limitations can be found in the Security Council resolutions. The implied limitations can be divided into two. First the Secretary General has to do what is best for the organisation. The opinion of the UN member states cannot constitute a sole basis for decision making by the Secretary General. The Secretary General must have a degree of independence. Furthermore the Secretary General must exercise his delegated power with discretion and in good faith.²⁷

First, the Secretary General has been delegated the power to organize and execute a peacekeeping operation.

The Security Council does not usually delegate the power to determine the composition of a UN peacekeeping force in express terms to the Secretary General. However the Secretary General is of the opinion that such powers are necessary for the effective exercise of the delegated power of execution. This view was upheld in the Expenses case.²⁸

²⁶ Sarooshi, (1999) : p. 53.

²⁷ Ibid., pp. 55-57.

²⁸ Expenses case, para. 151.

In determining the composition of a peacekeeping operation, the Secretary General had for a long period developed a practice whereby he would observe two principles.

First he has taken geographical considerations into account. There must be no troops from any of the neighbouring countries. These countries will probably have a special interest in the outcome of the conflict and will therefore not be neutral and impartial as they are supposed to be.

Moreover there shall be no troops from the permanent members of the Security Council. This is for the same reasons as above mentioned, countries taking part in the operation shall have no interest in the conflict.

In the Suez crises, Hammarskjold excluded troops from UNEF that would unduly offend Israel or Egypt. Hammarskjold excluded, according to the UN “troops from the permanent members of the Security Council or from any country which, for geographical and other reasons, might have a special interest in the conflict.”²⁹ To Hammarskjold, this especially applied to Arab states and Warsaw Pact members.³⁰

However these principles have not been strictly observed. The United States and the Soviet Union provided personnel for UNTSO, the peacekeeping operation who should support Palestine in 1948. A French contingent was supplied to the UN Interim Force in Lebanon established in 1978. France and UK participated in UNPROFOR and UNOSOM in Somalia was composed of contingents from countries geographically close to Somalia.

Moreover the Secretary General has been delegated the power of command and control over the peacekeeping forces.

The UN charter provides in art 47 that UN’s use of military force shall be directed and controlled by a military staff committee. This system has never been used in practice.

²⁹ A/3943., para. 160.

³⁰ Fleitz, (2002) : p. 41.

In all cases where the UN has established peacekeeping operations, the Security Council has chosen to delegate its powers of command and control to the Secretary General. There has been no legal objection to this practice. And the practice is consistent.

The Secretary General usually exercises control through his special representative and the force commander. It is a necessary and important way in which the effective exercise of delegated chapter 7 powers can be carried out.

4 The legal basis for the use of force by UN peacekeeping operations

4.1 Custom

States right to use force in self-defence can be considered a general principle of international law. And it goes a long way back. Amongst others it was understood to constitute an exception to the regulation of the “resort to war” in the League of Nations of 1919 and to the prohibition of resort to war as an instrument of national policy in the pact of Paris in 1928.

It is reasonably clear that the UN also have a general right to use force in self-defence. The main question is however how far the right of self defence reaches in relation to UN peacekeeping operations.

First, the UN can be considered a subject of international law and hence is in general entitled to benefit from the rights and duties under international customary law, see part 2 above.

It can be argued that this is a sufficient basis to conclude that the UN personnel are entitled in general to use force in self-defence. The special character and purpose of

peacekeeping operations does however also make it necessary to discuss the scope of the use of force in self defence in relation to peacekeeping operations.

In order to determine how far the right of self-defence reaches it is necessary to distinguish between the right to use force in self-defence in relation to UN personnel (part 4.1.1 below), the materials used by the UN operation in carrying out its mandate (part 4.1.2 below) and civilians in the conflict area (part 4.1.3 below).

There are two factors, which are decisive in the determination of whether there is a customary international rule, or not. These factors are state practice and *opinio juris* see the ICJ Statute art 38 1 (b).

4.1.1 The right to protect the UN personnel

When UNEF was established Hammarskjold took a very narrow approach as to what could be characterised as self-defence. Force could only be used in defence of the UN personnel and strictly in response to an armed attack.

Hammarskjold stated that:

“The rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander.... The basic element involved is clearly the prohibition against any initiative in the use of armed force.”³¹

I will below shortly review how the requirements of practice and *opinio juris* have evolved with respect to the right to protect UN personnel in self-defence.

In order for the requirement of practice to be fulfilled the practice must be “constant and uniform.”³² However it follows from the Nicaragua case that:

³¹ A/3943, para. 179.

³² Peruvian asylum case, p. 266.

“the court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.”³³

The question is whether there is a “constant and uniform” practice supporting a right of self-defence including a right to protect the UN personnel. This is a question of whether the UN has made use of its right to protect the peacekeepers in the conflicts where the UN has established a peacekeeping operation. It will go beyond the scope of this dissertation to go in and analyse each UN peacekeeping operation in order to ascertain whether force has actually been used in self-defence.

It is a further requirement that the practice has to be performed over a certain time. It does, however, follow from the North Continental Shelf case that one cannot impose this as an absolute requirement.³⁴ However, if the practice has been performed over a long time it will be an important factor counting towards the establishment of a rule of customary international law.

The traditional peacekeeping concept came into being in 1956 when UNEF was established in Egypt. It was in this conflict that the legal principles governing peacekeeping became firmly established. One of these principles was, as mentioned in part 3.4.5, a right of self-defence to protect the UN personnel. The same rule has been applied in subsequent conflicts where UN peacekeeping forces have been deployed. Provided that the UN has made use of the right to protect the peacekeepers, the rule has been utilised for almost 50 years. 50 years can be considered a long time, which will count towards the establishment of such a rule. Under this assumption the requirement of practice has been fulfilled.

The next requirement is the requirement of *opinio juris*. I will discuss this general requirement in some detail here, since it also is relevant for the discussion under part 4.1.2 and part 4.1.3.

³³ Nicaragua Case, para. 186.

³⁴ North Continental Shelf case, p. 43.

First of all the Secretary General has stated in his reports interpreting the resolutions that the UN must possess such a right, see amongst others the report on UNEF mentioned above.

One can ask what legal weight the statements of the Secretary-General can be considered to have.

First of all the Secretary General is “the chief administrative officer of the organisation.” He holds a great authority as he is elected by all the members of the United Nations, see art 97 of the UN charter, and represents all the states in the organisation. In the same way as one attributes a great weight to the statements made by the prime minister representing the national Governments, one should attribute considerable weight to the statements made by the Secretary General, especially taking into account that he can be considered to be the chief representative for the world community.

Moreover as mentioned above, the Secretary-General has been delegated the power of command and control over UN peacekeeping forces. The way in which these powers are to be exercised is rarely specified in detail. There is a lack of clarity in the wording of the resolutions, which gives a wide room of interpretation. In order to clarify these ambiguities the Secretary General makes a report to the Security Council with an interpretation of the resolution. That report is used as an authoritative interpretation of the Secretary-Generals delegated powers.³⁵ The fact that the Security Council attaches importance to the Secretary General statements makes the reports authoritative and gives them a great weight.

Furthermore the office of the Secretary General is impartial. This means that the person is not the organ of any State and “shall not seek or receive instructions from any government or from any other authority external to the Organization,” see art 100. Accordingly the Secretary General is much less subject to political influence and pressures than the Security Council. The fact that the Secretary General is impartial gives his reports a higher weight. Especially in this case when the question concerns the

³⁵ Sarooshi, (1999) : pp. 57-59.

content of the right to self defence. Self-defence includes the right to use force, which is a very sensitive politically, decision. If all the members of the UN should have a word in the formation of the rule there would never have emerged a rule. Moreover the states does possess a right to deny the right in relation to conflicts in which they are involved, which supports the legitimacy of the rule. I will come back to this right below.

In conclusion, given the fact that the Secretary General is a person holding a great authority, that his reports are used as authoritative interpretations of his delegated powers and that he is impartial one can conclude that the Secretary General reports have a considerable weight.

Furthermore the host states and the states contributing troops to the operations have never denied a right to protect the UN personnel. This supports the opinio juris of such a rule.

If a state should deny the right to use force in self-defence, the question is what legal weight such a denial by a state should have. It is the states through the different organs of the UN who decides what measures the organs shall take. If there were many opposing votes to a resolution this would mean that there is not a substantial support for the rule. A rule concerning the use of force should have a substantial support.

Moreover the right to protect the UN personnel has been consistently provided for in the rules of engagement established for each peacekeeping operation since their inception.

The rules of engagement “specify the circumstances in which armed force may be used by a military unit and its permissible extent and degree.”³⁶

The importance of the rules of engagement should not be underestimated. Rowe has stated that:

“ In reality the importance of the mandate given by the Security Council is no real indication of how much force has been authorised by the Council for those engaged in

³⁶ McCoubrey et.al., (1996) : p. 146.

enforcing it. Rather, it is the rules of engagement which set out the degree of force that may be used.”³⁷

Amongst others, it follows from the unclassified rules of engagement in Bosnia that:

“You may open fire against an individual who plants, throws, or prepares to throw an explosive or incendiary device at you, friendly forces or persons or property under your protection.”

Furthermore it follows that:

“You may open fire against an individual who deliberately drives a vehicle at you, friendly forces, persons with protected status or protected property.”³⁸

However even though the rules of engagement further elaborates the situations where force can be used, it is impossible to make them clear enough to include every situation the use of force is permissible. This is because the conflict situations can be so complex.

In relation to the conflict of Somalia it is stated that:

“The constant call for a more detailed Rules of Engagement for every situation with precise, exact answers would be ideal, but unrealistic..... The rules of engagement must be detailed enough to be understandable but not too detailed to restrict the commander from doing his job”³⁹

On the basis of the above, it can be concluded that the requirement of *opinio juris* also has been fulfilled.

In conclusion there is both practice and *opinio juris* supporting a rule of self-defence permitting the UN to protect its peacekeepers. Furthermore considerations of equity

³⁷ Peter Rowe, (1994) : p. 947.

³⁸ Unclassified Bosnia: Rules of Engagement, internet source

³⁹ Fair, (1997) : p. 123.

supports such a rule. Everyone should have a right to protect themselves. A UN contingent should have the right to claim the same level of protection as a person belonging to a troop under national command and control. In one way one can argue that the use of force in self-defence by the UN should be considered more acceptable than the use of force by personnel under national command and control. In contrast to a contingent under national command and control the UN can not be suspected of having other motives than just to defend its personnel, since UN peacekeepers are supposed to be neutral and impartial.

4.1.2 Protection of UN materials

As mentioned above recent conflicts have shown that it has been necessary for peacekeeping operations to use a higher level of force in order to be able to fulfil their mandate.

The question I will discuss here is whether the customary right of self-defence also includes the protection of the materials used in the operation in addition to the protection of the UN personnel. In such a case there must be practice and *opinio juris* supporting the rule.

Materials used by the UN peacekeeping operation can be the UN buildings, cars, trucks, ships, food and medical stores used for humanitarian assistance and relief.

One can illustrate the right to protect the materials included in the mandate with the conflict in Haiti. In the beginning of 1990's there was disturbance and political instability in Haiti. There were many military coups and as a consequence of this a peacekeeping force, UNMIH, was established.⁴⁰ However when the first troops arrived at Port Au Prince 11 October 1993 they were met by armed forces who prohibited the UN soldiers to go on shore. The question here will be whether the UN troops could be permitted to use force in self-defence against the Haitian troops in order to enter the port if the Haitian forces attacked the UN ships.

⁴⁰ S/RES/867

The requirement of practice is fulfilled if the peacekeeping operation over time have made use of its possibility to use force in order to protect the material used in the execution of the mandate. Also with respect to materials used in an UN peacekeeping operation, an answer to this question will require a thorough analyse of many conflicts which the scope of this dissertation does not permit. For the purpose of this dissertation I assume however that the requirement of practice has been fulfilled.

The next question is whether the requirement of *opinio juris* is fulfilled.

The Secretary General has in many cases, where an explicit authorisation to use force is not given, interpreted the mandates to include an extended right to use force in self defence in protection of the material used in the execution of the mandate. The first two cases where the Secretary General used such an extended interpretation of the right to self-defence was in the conflict in Cyprus and UNEF 2 in Egypt.

UNFICYP was established in Cyprus in 1964.⁴¹ The problem in Cyprus was a conflict between Greek and Turkish communities. There was a threat of foreign intervention. The peacekeeping force should prevent a recurrence of fighting and contribute to the maintenance and restoration of law and order.

The Secretary General stated in a report interpreting UNFICYP's mandate that the peacekeeping force was permitted to use force in self defence where:

“Specific arrangements accepted by both communities have been or ...are about to be violated, thus risking a recurrence of fighting or endangering law and order (Or where there were) attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders.”⁴²

⁴¹ S/RES/187

⁴² S/5653., paras 17c-18c.

It follows from this wording that the Secretary General considered that UNFICYP was permitted to use force in self-defence to protect the material included in the mandate if the operation was prevented by forceful means in fulfilling it.

The widened interpretation of self-defence as laid down in Cyprus was reapplied in UNEF 2. UNEF 2 was established in 1973 and operated until 1979.⁴³ Its function was to supervise the redeployment of Egyptian and Israeli forces and, following the conclusion of agreements and to supervise the redeployment of Egyptian and Israeli forces and to man and control the buffer zones established under those agreements.⁴⁴

In the report of the Secretary General on the implementation of Security Council Resolution 340, Kurt Waldheim, the then Secretary General wrote that self defence included:

“Resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council.”⁴⁵

As established above in part 4.1.1 the interpretations of resolutions by the Secretary General is of considerable weight in relation to the requirement of *opinio juris*.

Furthermore an extended right of self defence to protect the materials included in the mandate has not been denied by the host states and the states contributing troops to the operations, which also supports the *opinio juris* of such a rule.

On the basis of the above, it can be concluded that the requirement of *opinio juris* is fulfilled.

Considerations of equity do also support such an extended right. If it's not possible to fulfil the mandate without the use of force, there must be an implicit presumption that the operation shall be permitted to defend its material. Moreover, as already mentioned,

⁴³ S/RES/340

⁴⁴ The Blue Helmets, (1996) : pp. 164-167.

⁴⁵ S/11052 para 4 d

one can argue that it is less doubtful that the UN uses force than a state since the UN is supposed to be neutral and impartial and not taking sides in the conflict. The UN operation should therefore not be suspected to have other motives for the use of force than the right to protect their mandate.

In conclusion provided that the requirement of practice is fulfilled it can be concluded that there is a customary international right to self-defence which includes the protection of the material used in the execution of the mandate. However it is important to note that the troops have got no right to initiate the use of force and it can not use force in retaliation.

This represents an extension of the traditional concept of self-defence. It is less obvious that the use of force in self-defence also shall include the protection of materials, in addition to human life. Most people put greater value on human life and can thereby justify the use of force in self-defence in this relation. Given the fact that UN peacekeeping operations have a very worthy purpose, the preservation of peace and stability, and that they have been established by the UN which represents the international community, I believe that an extension of the concept of self defence is justified in relation to materials.

4.1.3 Protection of civilians in the conflict area

Here I will discuss the question of whether a peacekeeping operation has a customary right to use force to protect civilians in a conflict area. It can be a situation where the personnel of the peacekeeping operation who is already deployed in a conflict area needs to use force to protect the civilians and where the operations mandate does not cover such use of force.

The right to use force in such a situation can be based on either an extended definition of self-defence or an independent customary right for peacekeepers to protect civilians on humanitarian grounds.

In my opinion one can not extend the customary right of self-defence to include the protection of civilians. The concept of self-defence for UN peacekeeping only extend to the protection of UN personnel and UN materials used in the peacekeeping operations. In all definitions of self defence in relation to states the concept of self defence only extend to persons and physical assets belonging to the state. The concept of self-defence can not be extended to the protection of third party interests. Since the concept of self defence implies the use of force it is necessary to restrict its use in order to preserve its acceptance and integrity.

Further, one can ask whether there is an independent customary right for UN peacekeepers to protect the civilians based on humanitarian grounds. I discuss this matter on the basis that the mandate does not include the establishment of safe areas to protect civilians.

I have not found any practice or opinio juris which supports a general customary right for UN peacekeepers to intervene on humanitarian grounds. Such a right would extend the right for UN peacekeepers to use force without any clear or defined limits or restrictions of such use of force.

Further the protection of civilians on humanitarian grounds will in most cases require a humanitarian intervention. Humanitarian intervention is military intervention within a state without the Governments consent, for the purposes of protecting the people of the state. Such operations can not as a general rule be categorised as peacekeeping operations under my definition of peacekeeping. Consequently it falls outside the scope of this dissertation.

It can be argued that there is a need for such a customary right in order to avoid humanitarian disasters. The conflict in Rwanda is a case in point. The country suffered from a conflict between Hutus and the Tutsis. Following the murder of the Rwandan president massacres of Tutsi civilians were carried out by the Rwandan Army. Up to 1 million people died in 4 months. Before UNAMIR got an extended mandate to use force in self-defence to protect civilians, it did only have the limited right to use force in self defence based on customary international law see part 4.1.1 and 4.1.2 above. There was a considerable need in getting a mandate, which could make UNAMIR able to save the

civilians. In this case one could ask whether the operation should be permitted to use force on humanitarian grounds taken into consideration the emergency situation they were put into.

Given the fact that most civil wars creates humanitarian problems the creation of a customary right to protect civilians in such conflicts with the use of force would extend the possibility to use force by peacekeeping operations without limits or restrictions which in my opinion is not desirable. If the UN wish to intervene to prevent humanitarian disasters a clear and specific mandate for such an operation should be given.

4.2 Authorisation

In this part I will discuss the peacekeepers right to use force based on an authorisation by the Security Council under chapter 7. I will distinguish between two different situations. First the right to use extended force when such force is explicitly authorised in the resolution. Furthermore the right of peacekeepers to use force if it is not explicitly authorised in the resolution.

These categories raise different questions, which I will discuss in the following.

4.2.1 Explicit authorisation to use force

The subject I will discuss here is to what extent a peacekeeping operation can use force and still be considered a peacekeeping operation. This will rely on an interpretation of the given mandate. It will be necessary to determine for what purposes the force can be used.

However whether the operation is classified as a peacekeeping operation or an enforcement action, hence what level of force the operation is authorised to use will not have any legal significance. The Security Council is permitted to authorise the use of force if the conditions in art 39 are fulfilled. Nevertheless I find it important to make

such a distinction for the purposes of this dissertation. This is as I stated introductorily, because it is necessary to maintain the legitimacy and usefulness of the institute of peacekeeping operations.

In the case of Congo, the Security Council, in resolution 143 authorised the Secretary General to provide military assistance to the Congolese Government until Congo was able to maintain domestic order by itself. As a result a peacekeeping force was established, ONUC, and it was based upon the same legal principles as UNEF. ONUC operated between July 1960 and June 1964. Its function was to ensure the withdrawal of Belgian forces, to assist the Government in maintaining law and order and to provide technical assistance.⁴⁶

However as the situation in Congo became worse and it was not possible for the UN operation to fulfil its mandate with the permitted level of force. The Security Council extended its mandate in resolution 161 in order for it to be able to operate effectively.

“United Nations take immediately all appropriate measures to prevent the occurrence of civil war in Congo, including arrangements for cease – fire, the halting of all military operations, the prevention of clashes, and the use of force if necessary, in the last resort.”⁴⁷

This was the first time an UN operation changed its character, from being a traditional peacekeeping force with only a narrow right to use force in self defence, to get an explicit mandate based in chapter 7 to use force and a corresponding military capacity to pursue offensive operations

However the consensus is that ONUC was not an “enforcement action.” This was also the view of the ICJ in the expenses case.⁴⁸ Even though ONUC had an enforcement mandate, ONUC was in Congo with the purpose of establishing peace by peaceful

⁴⁶ Miller, (1961)

⁴⁷ S/RES/ 161., para. 1.

⁴⁸ Expenses case, para. 177.

means. The enforcement mandate was given in order for the operation to be able to fulfil this task.

The United Nations had three military offensives during the conflict in Congo. The ONUC operation is considered to be one of the UN's most successful operations during the cold war.

Another example where a peacekeeping force got chapter 7 powers added on to its mandate was in East Timor.

The peacekeeping force, UNTAET, was established 25 October 1999.⁴⁹ The mission comprised three main components, which were governance and public administration, humanitarian assistance and emergency rehabilitation.

UNTAET was authorised through resolution 1272, acting under chapter 7, to:

“Take all necessary measures to fulfil its mandate.”⁵⁰

The phrase “all necessary measures” is the expression the Security Council normally uses when it authorises the use of force. It can therefore be argued that UNTAET was authorised to use force. From the above written it can be concluded that UNTAET was to be considered a peacekeeping force since the mission only was authorised to use force in order to be able to fulfil its mandate which consisted of peacekeeping tasks.

Furthermore UNOSOM 2 in Somalia was authorised to use force in resolution 837. UNOSOM had got its size and mandate expanded through resolution 814, where it was given the tasks from a previous enforcement operation, UNITAF, operating in Somalia from 1992-1993. UNOSOM 2 took on the function of consolidating, extending and maintaining the security of the whole country.

Resolution 837 was adopted after a Somali attack on a group of Pakistani blue helmets.

⁴⁹ S/RES/1272

⁵⁰ S/RES/1272., para. 4.

The Security Council authorised the UN operation to:

“take any measure against all those responsible for the armed attacks.”⁵¹

This authorisation constituted the legal ground for a brutal attack against the districts controlled by the Somali General Aidid, an attack that in the name of the UN provoked the killing of innocent victims.

The authorisation in resolution 837 does in my opinion go beyond the level of force a peacekeeping operation need in order to fulfil a peacekeeping task. The purpose of the use of force authorised in resolution 837 was more of a police action to punish the people responsible for the attacks, rather than to ensure one of the purposes with peacekeeping. It can therefore be concluded that UNOSOM 2 should be considered as partly an enforcement operation in the last stage of the conflict.

4.2.2 The use of force when force is not explicitly authorised in the resolution

In some cases the Security Council has given a peacekeeping operation a mandate under chapter 7 without explicitly authorising the use of force.

The question in these cases is whether the peacekeeping operations can be considered to have implied or inherent powers to use force in order to fulfil their mandate.

Implied powers are powers not expressly mentioned in the charter, which are necessary for an organ to possess in order to execute the given mandate.

The most precise and also the widest formulation of implied powers was given in the Reparation case. The court held that:

⁵¹ S/RES/837., para. 5.

“Rights and duties must depend upon its purposes and functions as specified or implied in its constituent documents. Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁵²

In applying the theory of implied powers to the UN organs, the ICJ has considerably extended their reach, even inferring that certain powers of the organs stem directly and exclusively from the objectives of the Organisation, objectives, which are vague. Inherent powers mean the competence to undertake any action within the UN’s purposes as long as the Charter does not expressly prohibit it.⁵³

Whether the use of force should be justified upon implied or inherent powers will only be a question of terminology since the ICJ has extended the concept of implied powers to also embrace powers taken from the objectives of the organisation. In the following I will use the concept of implied powers.

The first question is whether the peacekeeping operations can possess an implied power to use force in order to fulfil their mandate.

First, peacekeeping forces are considered as UN organs and are consequently able to possess implied powers.⁵⁴

Further, the Security Council has established peacekeeping operations as a mean of fulfilling its primary task of “restoring international peace and security,” see art 24. Increasingly, peacekeeping operations have been established to deal with complex situations, which have made it necessary for them to use force in order to fulfil their mandate. If the mandate doesn’t specify that the operation can use force to fulfil their tasks, it must be possible to imply such a power.

⁵² Reparations case, p. 326.

⁵³ Further information on inherent powers can be found in: Seyersted, (1966) : pp. 143-172., White, (in Pugh) : pp. 48-49.

⁵⁴ Simma, (2002) : p. 694.

Moreover, the maintenance of international peace and security is one of the purposes of the United Nations charter, see art 1(1). This supports the view that if peacekeeping operations are not able to fulfil their tasks by peaceful means they should possess an implied power to use force in order to fulfil their mandate.

A more difficult question is the extent to which the use of force based on implied powers is permissible. In my opinion it is reasonably clear that the force permitted under an extended definition of self-defence to include both the protection of UN personnel and UN materials must be acceptable. If the mandate also calls for aid to and/or the protection of civilians it can be argued that the implied powers to use force also must include a limited but sufficient degree of force as a defensive measure only.

4.3 Consent

In this part I will discuss to what extent consent from the host state can be considered as a legal basis for the use of force by a peacekeeping operation.

First, consent can serve as an independent legal basis for the use of force in the following two situations. Consent can be the legal basis for the use of force by a peacekeeping operation, which has got a mandate to use force based in chapter 6. Furthermore, consent can be the basis for the Secretary General to enter into an agreement which provides for the use of force beyond the customary right of self-defence. Secondly, consent can be an alternative legal basis for self-defence in addition to the customary right and to an authorisation under chapter 7.

4.3.1 Conditions for a legitimate consent

If a country has consented to the mandate for a peacekeeping operation, which includes the use of force, then the consent can constitute a separate and independent legal basis for such use of force.

Consent can either be given by a unilateral act by the Host State or a bilateral act between the Host State and the UN.

The Vienna Convention on the law of treaties establishes the rules for when a treaty can be considered as binding and how the treaty is to be interpreted. The rules can be considered as customary international law and will therefore be binding upon all states even though a state is not party to the treaty. Such rules of customary international law will also apply to the UN.

It is the government of the state that has the competence to consent to the peacekeeping operation including the right of such operation to use force.

In a civil war however one can argue that consent from the legitimate government is not enough. In order for a peacekeeping operation to fulfil its mandate it is desirable to obtain consent from all factions involved in the civil war. The UN took this approach and tried to obtain consent from the factions fighting in Yugoslavia and Cambodia. In most conflicts however it is difficult to obtain consent from all conflicting factions. It is therefore not possible to impose a requirement that there has to be consent from all the factions involved in the conflict. Hence, the consent from the legitimate government is all that is required.⁵⁵

4.3.2 What does the consent embrace?

The next question is what the government has consented to. The consent of the parties can be divided into two levels or categories of agreements. First there is an agreement relating to the tasks or functions of the peacekeeping force. This is generally expressed when the Host State accepts the relevant resolutions of the UN. The tasks and functions are further elaborated in the rules of engagement. Furthermore there is an agreement concerning the specific status of the peacekeeping operations as such and its individual

⁵⁵ White, (1993) : p. 202.

members, in particular the privileges and immunities.⁵⁶ I will not discuss this last type of agreement since it falls outside the scope of this dissertation.

The agreements accepting the relevant resolutions and the rules of engagement are the agreements, which are important in relation to the use of force by the peacekeeping operation.

When a state gives consent to a resolution it means that it is accepting the terms of the resolution. Moreover, the consent can embrace the rules of engagement. This means that consent can also be the legal basis for the use of force in the situations in which the rules of engagement specify that force can be used.

However the text of the resolution and the rules of engagement can in many cases be unclear and have an ambiguous wording. In those cases it can be difficult to decide what the Host State has consented to. In order to find out what the Host state has consented to, in this case what level of force the peacekeeping force is permitted to use, it is important that the wording is clear and that the permitted use of force is clearly defined.

The Security Council has given resolutions under chapter 6 where it is stated that the peacekeeping operation can use force in self-defence in order to fulfil its mandate.

In Rwanda the peacekeeping operation, UNAMIR, got an extended mandate to use force in self-defence.⁵⁷ It follows from this resolution that the Security Council:

“Recognizes that UNAMIR may be required to take action in self-defence against persons or groups who threaten protected sites and populations, United Nations and other humanitarian personnel or the means of delivery and distribution of humanitarian relief.”

The resolution was based in chapter 6. The reason why the basis for this resolution was chapter 6 was a disagreement in the Security Council concerning the question of

⁵⁶ Simma, (2002) : pp. 692-694.

⁵⁷ S/RES/925., para. 5.

whether UNAMIR should be given an enforcement mandate under chapter 7 in order to be able to protect the civilians.⁵⁸

Chapter 6 can not be the legal basis for the use of force. Chapter 6 does only provide for peaceful means in restoring international peace and security. The right of self defence stated in the resolution must therefore be justified upon another basis. This can either be customary international law or consent.

In Rwanda it was stated that the operation could use force in self-defence in order to protect the civilians. The customary right of self-defence does not include the protection of third parties see part 4.1.3 above. Custom can therefore not be a basis for the use of force stated in resolution 925. Accordingly, the legal basis for the use of force in this case had to be the consent to the resolution from Rwanda.

Furthermore even though the right to self defence is not explicitly mentioned in the resolution, it can be argued that when the state accepts the establishment of a peacekeeping force it is also consenting to the underlying principles governing the peacekeeping operation. As already mentioned one of these principles is the right to use force in self defence. It can therefore be concluded that the state has consented to the right to self-defence including both a protection of the UN personnel and a right to protect the materials used to execute the mandate. However in this case consent will not serve as an independent legal basis for the use of force. It will only be an alternative justification to the customary right of self-defence.

A further question can be whether the Secretary General has the competence to enter into an agreement with the Host State which specifies the use of force beyond customary self-defence and where the mandate does not authorize such use of force.

It follows from art 98 of the UN charter that the Secretary General shall:

“perform such other functions that are entrusted to him by these organs.”

⁵⁸ Eknes, (1995) : pp. 88-89.

Such “other functions” includes the Secretary General’s delegated powers of command and control over the peacekeeping forces.

The question is whether such delegated powers can include a right to enter into an agreement with the Host State concerning the use of force by the peacekeeping operation.

It is stated in the Commentary on the United Nations Charter by Bruno Simma that the Secretary General:

“represents the UN in the negotiation and the conclusion of agreements with governments and other intergovernmental organizations. He directs the negotiation and conclusion of agreements, either at the request of an organ of the UN, with the approval of the GA, or within the framework of the implied powers of the SG.”⁵⁹

One can argue that in the competence of directing and controlling a peace keeping force there is an implied power for the Secretary General to enter into an agreement with the host state, concerning the use of force by the operation. If the Host State consent to the use of force it is no intervention. It can be argued that a state must be able to decide itself what it want’s to consent to. However, in my opinion the Secretary General can not conclude such an important agreement without a decision in either the General Assembly or the Security Council. It is the Security Council, which gives the peacekeeping operation its mandate and the Secretary General can, in my opinion, not extend the use of force beyond what has been authorised by the Security Council.

4.3.3 Duration of the consent

The question here is how long the consent last. The main rule is that the consent lasts as long as the mandate lasts.⁶⁰

⁵⁹ Simma, (2002) : p. 1216.

⁶⁰ Von Grunigen, (1978) : pp. 136-137.

In many conflicts the peacekeeping operations have got an extended mandate during the operation. The question is whether the consent from the Host State to the establishment of the original mandate for the peacekeeping operation also includes extensions of the mandates.

Von Grunigen states that “an enlargement or any other modification of the mandate of the force during the operation would also need the consent, at least tacit, of the Host State.”⁶¹

Whether the consent to the original mandate also includes an extension of the mandate will in my view depend upon the scope of the extension of the right to use force. Only a limited extension can be allowed without a new or renewed consent from the Host State. It should further be a condition that a change in the conflict requires a different or extended use of force.

This question is particularly important where the government of the country loses control or ceases to exist. The conflict in Bosnia is an example where it can be said that the government lost control.

A further question is whether a Host State can withdraw its consent. Until 1967 a State had not withdrawn its consent. In 1967 President Nasser of Egypt made it clear that Egypt’s consent had been withdrawn. Secretary General U Thant ordered the withdrawal of UNEF 1. It follows from the literature that a state can withdraw its consent.⁶²

If a state withdraws its consent the legal basis for the peacekeeping force disappears. In such a case it will be necessary for the peacekeeping operation to have a different legal basis. Moreover the peacekeeping force cannot act effectively in fulfilment of its mandate if its presence is opposed.

⁶¹ Ibid., p. 136.

⁶² White, (1993) : p. 202., Higgins, (1969) : pp. 335-367., Von Grunigen, (1978) : pp. 136-137.

Another problem is a situation where the Government ceases to exist during the operation. It can be the case in a civil war or in a country, which falls into anarchy. In Liberia President Doe had given consent for ECOWAS (Economic community of West African states) to establish a peacekeeping force in the country. It was a civil war where fighting between several factions had reduced the country to virtual anarchy by the summer of 1990. However Doe was killed and the original Liberian Government ceased to exist. It was replaced by an interim regime created by ECOWAS. The legal problem was whether the peacekeeping force could continue to stay in Liberia based on consent. In such a case the legal base for the operation will not disappear. It is the state who is bound and not the government, which represent the state.

5 The conflict of the Former Yugoslavia

In the following I will discuss and analyse the use of force by the peacekeeping operation UNPROFOR in its various stages primarily acting within Bosnia but also in Croatia.

5.1 Background

After Tito died in 1980 it was a growing nationalism in the Former Yugoslavia.

The dissolution of the country started as a consequence of Croatia and Slovenia declaring themselves independent in 1991. After a referendum the people of Macedonia also decided for independence. It soon became a conflict with the Yugoslavian army, the Serbs and the new states.

The socialist Federal Republic of Yugoslavia consisted of six republics: Bosnia and Herzegovina, Macedonia, Montenegro, Serbia, Slovenia and Croatia. Within the republic of Serbia there were two autonomous regions: Vojvodina and Kosovo.

Fighting in Croatia began in June 1991 when Serbs living in Croatia, with the support of the Yugoslav People's army, opposed the declaration of independence.

By 1991, Bosnian Serbs had been extremely disturbed over the majority Muslim governments separatists moves and fighting from Croatia had begun to spread over the border into Bosnia as of early 1992.

After the breakaway from Slovenia, Croatia and Macedonia, three of the dominant ethnic groups of the former Yugoslavia had got their own nation states. The situation in Bosnia however was different. It did not have one single ethnic group. The country was compound of Muslims, Croats and Serbs. It was a Muslim majority, but Serbs and Croats were significant and influential. When the Muslim majority proclaimed independence in March 1992, this immediately led to the break out of a civil war. The war lasted for 3 and a half year, 200 000 died, it was a massive destruction of property and the displacement of millions throughout the rest of the world. It proved to be one of the most brutal conflicts in recent history.

UNPROFOR was established on the request of the Government of Yugoslavia by resolution 743 in 1992. It was established for an initial period of 12 months as an interim arrangement to create the conditions of peace and security required for negotiation of an overall settlement of the crisis within the framework of the European Community's Conference on Yugoslavia.

The mandate in resolution 743 was a traditional peacekeeping mandate given in accordance with chapter 6 of the UN charter. It did not say anything explicit about the use of force by UNPROFOR. Consequently the use of force in that stage of the conflict had to rest upon customary international law and consent, see part 4.1 and 4.2 above.

It can be asked whether the original consent to the UNPROFOR peacekeeping operation lasted throughout the conflict, see part 4.3.3 above and part 5.2 below.

UNPROFOR was first deployed in Croatia. Subsequently its mandate was extended to Bosnia and Herzegovina and to the former Yugoslav Republic of Macedonia. It also had an operational mandate in the Federal Republic of Yugoslavia and a liaison presence in

Slovenia. UNPROFOR established its headquarters in Sarajevo, in Bosnia and Herzegovina. The headquarters was later moved to Zagreb, in Croatia.

On 31 March 1995, the Security Council decided to replace UNPROFOR by three separate but interlinked peace- operations. In Bosnia and Herzegovina the council retained the mandate and the name of UNPROFOR.

UNPROFOR's preliminary aim was to enable humanitarian aid into the areas of the conflict.

UNPROFOR ceased to exist on 20 December 1995 when authority was transferred from UNPROFOR to the International Implementation force as provided for in the peace agreement.⁶³

In the following I will go through some of the resolutions concerning UNPROFOR and see in what situations the operation was permitted to use force. I will divide the resolutions into three different categories and discuss the use of force in relation to each category. The categories are organised as to the extent the operation was permitted to use force. I will start with the category where less force was permitted and end with the category where the operation could use the most force. Consequently, I will first discuss the use of force to ensure the delivery of humanitarian aid, then I will discuss the use of force in protection of the safe areas, and lastly the use of force to ensure free movement of UN personnel. However there is no rigid line between these categories. For instance, an authorisation to ensure freedom of movement can also include an authorisation to protect the delivery of humanitarian relief. If the UN personnel can't move freely, there will also be a problem in delivering humanitarian relief.

⁶³ For more information see: *The Blue helmets*, (1996) : pp. 487-539., Grandhagen, (2001): pp. 66-69.

5.2 The delivery of humanitarian assistance and relief

The role of UNPROFOR delivering humanitarian relief was confirmed in numerous Security Council resolutions.⁶⁴ All resolutions, with the exception of resolution 836, were based in chapter 6, which can not serve as a legal basis for the use of force.

Under this part I will only discuss the legal basis of the use of force by UNPROFOR when there was no explicitly authorisation to use force and no mandate under chapter 7. I have chosen to discuss the explicit authorisation to use force to ensure humanitarian relief (including the authorisation to use force under resolution 836) under part 5.3 to avoid discussing the subject twice.

The legal basis for the use of force by UNPROFOR in this case can be the customary international law concept of self defence including a right to protect UN personnel and a right to protect the materials used in the execution of the mandate, see part 4.1.1 and 4.1.2 above.

This was also the view of the Secretary General. It follows from his report on the situation in Bosnia and Herzegovina, that in the context of ensuring the delivery of humanitarian aid and protecting humanitarian convoys:

“Self-defence is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate.”⁶⁵

The use of force under these resolutions falls therefore, squarely within the established international law concept of self-defence.

Further, UNPROFOR could rely on consent as an alternative legal basis for the use of force, see part 4.3 above.

⁶⁴ See S/RES/ 743, 749, 761, 764, 770, 776.

⁶⁵ S/24540 (1992) para. 9.

On the assumption that consent only was given by the Yugoslav Government to the first resolution 743 which established UNPROFOR, extensions of the mandate to embrace the delivery of humanitarian relief only represents a limited extension to use force for purposes which was the result of the development of the conflict and can consequently be deemed to be covered by the original consent, see part 4.3.3.

In conclusion, UNPROFOR could not use force to a greater extent than covered by customary international law and the use of force covered by the consent given in this case. In so far as the delivery of humanitarian resistance and relief required an extended use of force, UNPROFOR did not have the legal basis for such use of force in this stage of its operation.

5.3 The protection of safe areas & protected sites & population

As the conflict widened, the UN moved to declare the capital, Sarajevo, and five other Muslim enclaves- Tuzla, Srebrenica, Gorazde, Bihac, and Zepa, safe areas under U.N protection in April 1993.⁶⁶ Those areas should be free from armed attacks. The Council declared that it included:

“ the immediate cessation of armed attack by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica.”

And demanded that:

”all parties guarantee the safety and full freedom of movement of UNPROFOR and of all other United Nations personnel as well as members of humanitarian organizations.”⁶⁷

⁶⁶ S/RES/819, S/RES/824

⁶⁷ S/RES /819 paras 2, 10.

Safe areas were established for the first time in the conflict of Yugoslavia. The establishment and protection of such areas represented a considerable extension of the tasks of a peacekeeping operation.

It is in relation to the safe areas that the Security Council first expressly authorized the use of force by UNPROFOR under chapter 7.

An authorisation to use force under chapter 7 is a sufficient legal basis for the use of force and consent will therefore not have any legal significance in this case. On the other hand, consent will have a political significance for the legitimacy of the institute of peacekeeping operations and for the co-operation of the parties.

Under resolution 836 the Security Council decided to ensure full respect for the safe areas. For this purpose the Council extended the mandate of UNPROFOR to enable it to deter attacks made against these areas. It authorised UNPROFOR:

“Acting in self defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.”⁶⁸

In order to establish the content of the right to use force it is necessary to read paragraph 9 in conjunction with the mandate given in paragraph 5.

The mandate given in paragraph 5 reads as follows:

“deter attacks against the safe areas, to monitor the cease –fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776.”⁶⁹

⁶⁸ S/RES/836 para. 9.

⁶⁹ S/RES/836 para. 5.

The use of force will be necessary in three different situations that is in order to “deter attacks against the safe areas,” to “ensure the freedom of movement of UNPROFOR” in these areas and to “protect humanitarian convoys.”

The use of force to ensure the freedom of movement of UNPROFOR in relation to the safe areas authorised under resolution 836 was extended to the whole area of Croatia in resolution 871. I will therefore discuss this situation separately under part 5.4 below.

The authorised use of force in self-defence to protect humanitarian convoys does in my opinion not go longer than the customary right of self-defence, including the right to protect UN personnel and the right to protect the materials used in the execution of the mandate see part 4.1.1 and 4.1.2 above. This authorisation does therefore in my opinion not cause any problem.

The more difficult question is how one shall interpret the right to use force to “deter attacks against the safe areas.” I will discuss this further below in three different relations. First, I will discuss how the mandate shall be interpreted. Secondly, I will discuss this right to use force in relation to the concept of self-defence. Lastly, I will discuss whether such use of force goes beyond the concept of peacekeeping.

First, the scope of the mandate must depend on a concrete interpretation of the mandate.

The use of force to deter attacks against the safe areas must be interpreted to mean that use of force could be utilised in protection of third parties, the protection of the civilian population inside the safe areas. However it is stated in paragraph 9 that the operation only could use force “in reply to bombardments.” Accordingly, the right to use force did not extend to pre-emptive or punitive attacks. In any case in Yugoslavia the number of personnel in the peacekeeping operation was so small that even though it had a mandate to deter attacks this would not be possible. The Secretary-General had asked for 34, 000 troops, in order to protect the safe areas in Yugoslavia. However he said it would be possible to start implementing resolution 836 if he got 7,600 troops.⁷⁰ The Security

⁷⁰ S/25939

Council opted for the light option and authorised the deployment of 7,600 troops.⁷¹ In February 1994, however, only about 3,500 troops had been deployed and most in Sarajevo and Tuzla.⁷²

Secondly, the question is whether the Security Council's use of self-defence can be considered the right understanding of the concept.

A right to protect civilians is an extension of the traditional concept of self-defence.

It follows from a report of the Secretary General that:

“Although the Council acted under chapter 7 in both resolutions, that chapter was cited in the context of resolution 815 (1993), which had referred to it in relation only to the security of UNPROFOR personnel. As a result, there was no enforcement component to the safe area concept at its inception. Resolution 836 (1993) referred to chapter 7, but paragraph 9 defined the parameters for the use of force as being “in self defence” and the mandate given to UNPROFOR did not include any provision for enforcement.”⁷³

Accordingly the Secretary General did not mean that paragraph 9 could be seen as anything else than a right to self-defence.

The Security Council's use of the concept of self-defence is in my opinion questionable, see part 4.1.3 above. The concept of self-defence is old, well established and reasonably clearly defined. The extension of the concept of self-defence to the protection of third parties obscures its content and makes it less clear and understandable to the general public. If the concept of self-defence is extended beyond its normal definition and into areas where it may have less moral acceptance and authority, then the whole concept may fall into disrepute.

⁷¹ S/RES/844

⁷² Berdal, (1995) : p. 233.

⁷³ S/1995/444 para. 33.

Moreover, if the Security Council continues to use this extended understanding of self-defence it might become costume over time, which in my view is an undesirable consequence. Until the conflict of Yugoslavia the peacekeeping operations right of self-defence had included the right to protect UN personnel and the protection of the material used in the execution of the mandate. One can argue that by extending the right of self-defence to also include the protection of civilians, the conflict of Yugoslavia laid the basis for a further extension of the right of self defence. By instance, the widened interpretation of self-defence was used in the conflict of Rwanda.⁷⁴

The use of an extended definition of self-defence does however not affect the legal basis for the use of force in this case. As long as the purpose of the peacekeeping operation falls within the scope of art 39, that is the threat to international peace and security, the Security Council is permitted to authorise the use of force under chapter 7.

Another question is why the Security Council uses the concept of "self-defence" even though the force authorised goes beyond the normal definition of self-defence. An obvious reason is a political motivation. The concept of self-defence is a well-established and recognised concept for the use of force, which makes it easier to get the members of the Security Council to vote in favour of the resolution.

The last question is whether the authorisation in resolution 836 goes beyond what can be considered as an acceptable use of force by a peacekeeping operation.

As long as the use of force is not for enforcement or punitive purposes, is not too comprehensive and is authorised to ensure a peacekeeping purpose it will in my opinion fall within the concept of peacekeeping.

In this case the use of force was authorised to protect attacks against safe areas. This purpose falls well within a peacekeeping concept and the use of force necessary to accomplish this purpose was not punitive. It can therefore be concluded that the authorised use of force in this case was within the permissible use of force by a peacekeeping operation.

⁷⁴ S/RES/925 para. 5.

Furthermore, if a peacekeeping operation is given a mandate to perform certain tasks, it is important that it gets adequate resources to fulfil it. This can be illustrated with the protection of the Srebrenica safe area by a contingent of Netherlands military personnel.

The Netherland contingent was very small and did not have the resources to protect Srebrenica from the massive Serb attack. Furthermore the Serbs took Netherland soldiers as hostages and the Netherland commander was afraid to act for fear that the Serbs should kill the hostages. As a consequence the Netherland remained passive even though they had a mandate to intervene with force to a much higher degree.

In this case the UN did not provide sufficient personnel, consequently it was not possible for the Netherland contingent to achieve the purpose of the mandate. The fact that the UN established a safe area but failed to provide an adequate defence can compromise the use of safe areas in future conflicts.

5.4 Freedom of movement of UN personnel

UNPROFOR is the first peacekeeping force, which was explicitly authorised under chapter 7 to use force to ensure the freedom of movement of its personnel.⁷⁵

Also in this case consent from the Host State will only have a political significance, see part 5.3 above.

In resolution 836 UNPROFOR was authorised to use force in self-defence “in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.”⁷⁶

This was, as mentioned in part 5.3, an explicit authorisation to use force in self-defence under chapter 7. Again, the right does not go any further than the customary right of

⁷⁵ Cox, (1999) : p. 9.

⁷⁶ S/RES/836/ para. 9.

self-defence, see part 4.1.1 and 4.1.2 above, so I can not see that this authorisation causes any problem. The use of force could only be used “in reply to bombardments.”

Furthermore, and more difficult is the authorisation in resolution 871 under chapter 7.

UNPROFOR was authorised to:

“In carrying out its mandate in the Republic of Croatia, acting in self defence, to take the necessary measures, including the use of force, to ensure its security and freedom of movement.”⁷⁷

In resolution 871 the UN personnel was authorised to use force to ensure the freedom of movement in the whole territory of Croatia, in contrast to resolution 836 where the force only should ensure freedom of movement within or around certain “safe areas.”

The first question is how the part shall be interpreted.

First of all one can conclude that the part authorises the right to use force in self defence in protection of the free movement of the UN personnel in reply to attacks by the parties. Moreover it does also authorise a right for UN peacekeepers to use force as a self-defence measure without a previous attack to ensure that they can move freely. This can for instance be in a situation where a road is blocked. In such a situation the peacekeepers will in principle be authorised to shoot their way through the blockade.

The use of self-defence in this case goes beyond what in my opinion can be categorised as self-defence. First, self-defence should in any case only include the use of force as a protection measure. Furthermore, it can not in my opinion include pre-emptive use of force. It can however be argued that the use of pre-emptive force where there is an imminent danger of attack can be seen as self-defence, see the Caroline case.⁷⁸

⁷⁷ S/RES/871 para. 9.

⁷⁸ Simma, (2002) : p. 803.

Secondly, the question is whether the authorised use of force goes beyond what can be considered as an acceptable use of force by a peacekeeping operation.

Freedom of movement is essential to the functioning of all peacekeeping operations and is generally provided for in the Status of Forces Agreements establishing an operation. If a peacekeeping operation can not move freely it will be impossible to perform their duties. It can therefore be necessary to authorise an extended use of force to safeguard freedom of movement in order for a peacekeeping operation to fulfil their obligations. Such an authorisation for the use of force will in my opinion not deprive the operation of its status as a peacekeeping operation.

5.5 Conclusion

The peacekeeping operation in the former Yugoslavia is one of the most controversial operations that the UN has ever conducted. First, because the UN operation increasingly was opposed by all parties to the conflict. Further, the peacekeeping operation did not get the international support, it is dependent upon, because central members in the Security Council disagreed for instance about the principles for a cease fire, how the UN personnel should reply to assaults and the operations mandates.

In the UNPROFOR peacekeeping operation the concept of peacekeeping was in my opinion stretched to the limit. In order to preserve the integrity and legitimacy of peacekeeping operations it is in my opinion necessary to limit the right to use force. The authorisation to use force should as a main rule only be for defensive purposes. Use of force for enforcement and punitive purposes will in my opinion fall outside the scope of peacekeeping.

It is however important to note that even though UNPROFOR had a broad right to use force the operation was very cautious in actually applying force. The force commander was afraid that a use of force would cause UNPROFOR to lose its status of being a neutral and impartial operation and thereby lose the co-operation of the parties.

6 Concluding remarks

After the end of "the cold war" the UN has increasingly used peacekeeping operations in interstate and intrastate conflicts. Intrastate conflicts will often be more complex. This again will require the peacekeeping operation to undertake more tasks in order to execute the mandates for such operations. This will particularly be the case in intrastate conflicts, which causes humanitarian disasters and where the peacekeeping operation is given the task to aid or protect civilians in the conflict area.

The increasing number of complex intrastate conflicts will normally call for an extended use of force by the peacekeeping operation in order to carry out the mandate given by the Security Council. I have analyzed the legal basis for such extension of the use of force under part 4 and 5 above. The main developments have been the expansion of the international customary law concept of self-defence and the fact that the Security Council increasingly are issuing mandates for peacekeeping operations under chapter 7 rather than chapter 6 (part 5.3 and 5.4) above in relation to UNPROFOR. The extended use of force required has changed the concept and scope of peacekeeping. It is reasonably clear that the conditions for peacekeeping operations as set out by Dag Hammarskjöld and Lester Pearson in relation to UNEF (part 3.2 above) must be modified.

An important condition was that force only could be used in self-defence (part 3.3.4 above). At that time self-defence was defined narrowly and only applied to the protection of UN personnel. As I have shown in this dissertation the concept of self-defence has been considerably expanded (part 4.1 above). Further the Security Council has authorised the use of force under chapter 7 beyond the international customary law definition of self-defence (part 4.2 above). Such extended use of force by peacekeeping operations are in my opinion in most cases justified in order for the operation to be effective in carrying out its mandate (an exception may be resolution 837 and the punitive action taken against Somali general Aidid (part 4.2.1 above)). Consent can also be the legal basis for the use of force (see part 4.3 above), but will in practice in most cases serve as an alternative legal base for custom and authorisation under chapter 7. However, extended use of force creates practical and moral dilemmas. This again

should in my opinion require the Security Council to be more specific in authorising the use of force in mandates for peacekeeping operations. The use of force must have a clear legal basis and must be as restrictive as possible in order to preserve the usefulness of the institute of peacekeeping operations.

When the Security Council authorises the use of force under chapter 7 then consent from the Host State can be more difficult to obtain and it can be argued that it no longer is a condition for peacekeeping (part 3.3.1 above). The consent may, however, be important for political reasons and for the peacekeeping operations ability to carry out its mandate effectively. This argues for a restrictive use of force.

It is further important for the Secretary General to be able to draw upon adequate and competent human and other resources from the UN member states when establishing peacekeeping operations (part 3.3.2 above). It is reasonably clear that the member states will be more willing, in particular to contribute personnel to peacekeeping operations, if the use of force by such operations is restricted.

Lastly the use of excessive force by peacekeeping operations may impair the operations neutrality and impartiality (part 3.3 above). This again will make it more difficult to get the co-operation from the conflicting parties and consequently make it more difficult to execute the peacekeeping operations mandate.

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