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Karine Bannelier-Christakis, Theodore Christakis

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Strengthening the rule of law through the United Nations Security Council

Workshop paper series



Strengthening the rule of law through the United Nations Security Council

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Strengthening Oversight of Use of Force Mandates by the UN Security Council: A Set of 9 Proposals

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Assistant Professor Karine Bannelier & Professor Théodore Christakis



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Strengthening Oversight of Use of Force Mandates by the UN Security Council:

A Set of 9 Proposals

Karine BANNELIER & Theodore CHRISTAKIS¹

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Since 1990 the United Nations Security Council (UNSC) has authorized in a great number of cases some States or coalitions of States to use force in order to achieve various objectives. Unlike use of force mandates given to "robust" UN peacekeeping forces acting under UN flag and command,² these authorizations given to individual States or "coalitions of the willing" introduce into the collective security system a strong element of decentralization. This system of "delegation" of the power to use force to individual States raises a lot of concerns especially taking into consideration the fact that States (and major powers) who accept to intervene on the basis of such UNSC resolutions often have direct interests in the countries where they intervene. There is thus a clear danger that some States might use these UNSC authorizations as a cover in order to achieve their own agenda and justify otherwise unlawful intervention and interference.

If this risk of abuse and misuse of the system of collective security is sufficient enough to justify the need for an effective control, things are not that simple.³ In practice there is always a tension between the need of such an effective control on the one hand, and the

¹ Karine Bannelier is Assistant Professor of International Law at the Univ. Grenoble-Alpes, France (kbannelier@gmail.com). Theodore Christakis is Professor of International Law & Director of the Centre for International Security and European Studies (CESICE), Univ. Grenoble-Alpes, France (Theodore.Christakis@upmf-grenoble.fr).

² The most "robust" mandate of this kind has been given by UNSC Resolution 2098 of 28 March 2013 to the United Nations Intervention Brigade in the Democratic Republic of Congo, a new-style U.N. "offensive" combat force, intended to carry out targeted operations to "neutralize and disarm" the M23 and other Congolese rebels and foreign armed groups. Similarly the UNSC established on 25 April 2013 (S/RES 2100) the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) which also has a robust mandate. In this paper we will not discuss the problems related to oversight of use of force by UN forces acting under UN flag and command. We will only focus on the delegation, by the UNSC, of the power to use force to individual States or "coalitions of the willing" acting under national command.

³ See Theodore Christakis & Karine Bannelier, "Acteur vigilant ou spectateur impuissant ? Le contrôle exercé par le Conseil de Sécurité sur les Etats autorisés à recourir à la force", *Revue Belge de Droit International*, 2004/2, 498-528.

willingness of operating States to benefit from maximum flexibility in order to perform a costly and often very dangerous mission. "Binding" the operating States by imposing a very tough control could be counterproductive: the "volunteers" could vanish and the UN could fall back to precisely the same kind of inaction that stigmatized the cold war years or relegated the organization to a helpless spectator role during the genocide in Rwanda. As R. Kolb rightly observed: "the choice between complete inaction and imperfect action was made".⁴

When the Libyan crisis broke out, the Council was still looking for the right mix between the institutional requirement of centralization and control and the functional necessity of flexibility and decentralization. The Libyan crisis shattered this delicate balance within the UNSC. The modalities of interpretation of S/RES 1973 and implementation of "Operation Unified Protector" raised important issues concerning the compliance by the coalition of the UNSC mandate. Several States within the UN considered, as a matter of fact, that "NATO actions in Libya were a flagrant abuse of resolution 1973" and 'seriously undermined and damaged the reputation of R2P'. For them, the intervening western States had "hijacked" the UNSC mandate and abused internationally agreed concepts like "responsibility to protect" and "protection of civilians" in order to achieve regime change in Libya.⁵

It was immediately after the conflict in Libya and in relation with it that Brazil presented a concept paper entitled "Responsibility while protecting: elements for the development and promotion of a concept" at the UN in Sept. 2011.⁶ Although this paper discussed all three pillars of the R2P, it included some proposals in order to limit the risks of abuse of a UNSC use of force mandate. This paper has already led to several discussions within the UN with an initial fairly warm welcome from several countries, but a rather mixed, if not frosty reception by several Western countries who expressed the fear that the Brazilian proposals could lead to the institutionalization of "inaction".⁷

In reality, nonetheless, there was nothing really revolutionary in relation with our topic in the Brazilian paper. We could find there a more elaborated version of the ideas already expressed by the UNSC in 1998 concerning the need for accountability and for enhanced Security Council procedures to monitor and assess the manner in which use of force resolutions are interpreted and implemented.⁸

In this paper we will precisely try to build upon not only the Brazilian proposals but also all other ideas advanced during these last 23 years within the UN and also our own suggestions in order to discuss the relevance of 9 different avenues of action which could give the possibility to the UNSC to strengthen oversight and control of use of force mandates. As it will be seen, we do not necessarily agree with all these nine ideas, although we share most of them.

⁴ Robert Kolb, *An Introduction to the Law of the United Nations*, Oxford and Portland, Oregon: Hart Publishing, 2010 at 97.

⁵ See the debates within the UNSC in S/PV 6620 (16 September 2011).

⁶ A/66/551-S/2011/701, *Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General* (11 November 2011).

⁷ See T. Christakis, 'L'encadrement juridique des autorisations et le concept de responsibility while protecting' in Karine Bannelier & C. Pison (ed.), *Le recours à la force sous mandat de l'ONU : Questions de ius ad bellum et de ius in bello*, Paris, Pedone, 2013.

⁸ See Presidential Statement S/PRST/1998/35 (30 November 1998).

1. Better defining the scope of use of force mandates

A basic principle governing delegation of powers in general and authorization to use force in particular is that the delegate cannot act *ultra vires*: the discretionary power of the States authorized to use force only exists as far as these States remain within the framework fixed by the act of delegation.

However, to say that the delegates cannot exceed the powers conferred on them is useless when the scope of the mandate is such that its boundaries become invisible. The UNSC has, indeed, sometimes been accused of using extremely open-ended expressions and thus failing to determine the objectives of use of force missions. One of the best examples is S/RES 678 (1990) authorizing UN members "to use all necessary means [...] to restore international peace and security" after the invasion of Kuwait by Iraq. As R. Kolb rightly pointed out, this kind of "carte blanche" given to States is dangerous for the UN system because the SC acts as a "bailiff, who opens the door and disappears".⁹ This is in sharp contrast with other resolutions authorizing the use of force where the SC clearly defined the scope of use of force. There is nothing justifying "double standards" in this field. Respect of the rule of law and transparency require a clear identification of the situations/objectives authorizing the use of force.

The UNSC should also abandon the pernicious technique of "referrals" used sometimes: instead of specifying clearly and precisely in what situations and for what reasons the multinational forces are authorized to use force, these resolutions refer to different texts which are supposed to give the answers to these questions. One of the best examples is S/RES 1546 (2004) which "decides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution..." – in reality the letter of the US Secretary of State Colin Powell. Thus, the UNSC, instead of defining the objectives of the use of force, pathetically endorses the will of the State which leads the operation!

2. Balancing the margin of appreciation of intervening States with the principle *exceptio est strictissimae interpretationis*

The "magical formula" used by the UNSC in order to authorize the use of force ("States can use all necessary means...") clearly indicates that States enjoy a large margin of appreciation within the framework of the authorization and the objectives fixed by the Council. This large discretion is justified by political, legal and military considerations. It leads to absolute freedom in relation with the planning, command and conduct of the eventual military operations in compliance with the mandate and international law.

This large margin of appreciation is a necessary guarantee for the "coalitions of the willing" who accept to act and intervene at their own risks. It is indeed part of the necessary flexibility so that the system can remain functional: States acting alone or multinational forces under unified command will thus have the feeling that there is no external interference concerning military planning and the conduct of operations as long as they remain within the framework of the authorization.

⁹ Robert Kolb, *Ius contra bellum : Le droit international relatif au maintien de la paix*, Bruylant, Bruxelles, 2003, at 98.

A major question, nonetheless, is to what extent this margin of appreciation can be reconciled with the principle *exceptio est strictissimae interpretationis* which, according to several scholars, should apply all the more readily in the field of use of force and in a case of delegation of Chapter VII powers. We think that the principle *exceptio est...* should clearly prevent a State from perverting and revising the objectives fixed by the UNSC, which should be respected in all circumstances, but not become an impediment in relation with the *means* used to attain these objectives. In the case of Libya, for ex., the UNSC mandate was “to take all necessary measures... to protect civilians and civilian populated areas under threat of attack”. The principle *exceptio est...* could not authorize the conclusion that the objective fixed by the UNSC in S/RES 1973 was regime change. On the other hand, nobody seriously put in question the fact that the coalition had the discretion to read its mandate as authorizing bombings not only against troops *directly* involved in the attacks against civilians, but also against other military targets and infrastructures of Gadhafi’s army as a ‘necessary measure’ to reach the legitimate objectives stated in S/RES 1973.¹⁰

3. Imposing precise rules of engagement for intervening States

It has sometimes been suggested that the Security Council should develop rules of engagement (ROE) to guide the parties responsible for implementing use of force mandates. Indeed, under recommendation 3.5 of the *Draft Practical Recommendations* drawn from discussions at expert workshops held in Canberra and New York within this project: “The Council could initiate a process to develop a model rule of engagement, similar to the model status of forces/mission agreement (SOFA/SOMA) that have evolved to guide arrangements regulating the deployment of UN peace operations”.

Although such an evolution will certainly be useful (especially where troops are sent on the ground) we should also understand that imposing detailed and severe rules of engagement on intervening States could sometimes hamper military effectiveness and wipe out their necessary margin of appreciation. This could especially be the case when complicated “double-key” procedures are established by the ROE. Past experience (for ex. in Bosnia, Somalia or Ivory Coast) demonstrates that we should not underestimate the problems that might appear when the Security Council subordinates the use of force to a process of “co-decision” or authorization by the UN Secretary General or the Chief-of-Staff of a UN Peace Keeping Operation also present on the ground.

4. Drawing the consequences of the principles of necessity and proportionality

If the expression “States can use all necessary means...” confers to intervening States a large margin of appreciation, it also imposes a limit: States cannot do more than what is “necessary” in order to implement a UNSC resolution. Use of force under UNSC authorization is thus subordinated to exactly the same conditions as use of force in self-defense, namely respect of the principles of necessity and proportionality.

Although these two principles imply, as always when they are applicable, difficult judgments concerning what is required by the circumstances, this does not put in question the margin of appreciation of States. The control by the UNSC should thus principally concern a manifest error of assessment on the part of the delegate (the facts justifying a military operation did not

¹⁰ See for example Olivier Corten, Vaïos Koutroulis, “The Illegality of Military Support of Rebels on the Libyan War: Aspects of *Jus contra Bellum* and *Jus in Bello*”, *Journal of Conflict and Security Law*, vol. 18, 2013, at 59-93.

exist in reality) and the manifestly disproportionate nature of the military operation (a blatant and obvious mismatch between the military action undertaken, the facts and the objectives set by the Council).

5. Reaffirming the applicability of *jus in bello* & other rules of International Law

States who conduct an operation under a UNSC mandate are of course bound by the *jus in bello*, human rights and other obligations that they have accepted. In its 1998 declaration, the UNSC had “stresse[d] that missions and operations must ensure that their personnel respect and observe international law, including humanitarian, human rights and refugee law”.¹¹ It would be very useful if the UNSC could recall in each of its resolutions authorizing the use of force these requirements and the accountability of *all* actors in case of violation of these rules.

6. Contribute to resolving attribution problems

This point is directly linked to the previous one. Affirming the principle of accountability is futile if attribution for violations of *jus in bello* or others rules of international law become impossible due to the usual nebula of interoperating actors undertaking military action. Recent experience has demonstrated an almost complete lack of transparency concerning the identification of the authors of attacks. Factors such as the extreme variety of rules binding upon each participating State (for ex. in relation with the ratification of *jus in bello* or arms control treaties), the invocation of immunities rules and problems of shared responsibility not adequately addressed by the ILC Draft Articles on Responsibility of Intl Organizations (DARIO) render attribution for violations of international law almost impossible in case of actions of a multinational force.

The UNSC should undertake a reflection on this problem working closely, if necessary, with other international institutions interested by such questions. Assuming a function of clarification of “who did what” will serve the rule of law without constituting an impediment for action. Within this framework, the UNSC could also put in place fact finding missions or commissions of inquiry in cases of serious allegations of violations of international law during military operations.

7. Enhancing reporting requirements and monitoring

The UNSC constantly requires from intervening States to report to the Council on the implementation of the use of force mandate. This is of course positive but several things could be done in order to enhance the reporting system and monitoring by the Council.

First, we must notice that the UNSC has never indicated what the content of the report should be and what information should necessarily appear on it. We can of course understand that the intervening States should not be asked to include confidential military information the disclosure of which could be detrimental to the action of armed forces and the accomplishment of the mission. On the other hand it could be logical to ask States to include to their reports some non-classified information necessary in order to achieve transparency about the operations. For ex. practice has demonstrated that reports presented by the Commander-in-Chief of multilateral forces sometimes do not even identify the participating

¹¹ See *supra* note 8.

States and the role of each one of them in the operations.

Another problem is that the Council often does not fix a periodicity for the presentation of reports – which leaves States total discretion to decide when to report. This could easily change by requesting States to report to the Council frequently (for ex. every three months) so that the Council can be in a position to assess the evolution of the operation. Last but not least, the current reporting system is essentially based on a process of “self-reporting” – which means that States involved in military operations can “pick and choose” what to mention and what to omit in their reports. It could be very useful to provide for independent monitoring by systematically requesting the UN Secretary General or a personality designated by the Council to receive all relevant information (including from NGO’s) and present a report to the Council.

8. Instituting a « Use of Force Committee »

There have been some suggestions, inspired by the UN Sanctions Committees, to create a new subsidiary organ of the UNSC, a “Use of Force Committee” entrusted with the task of monitoring implementation of use of force mandates. Indeed in a recent article¹² two scholars suggested that such a Committee should serve as “an independent, quasi-judicial body” whose conclusions should be binding upon all States – unless the UNSC decides otherwise (which means that the possible veto of a permanent member can only act in favor of the Committee’s conclusions and interpretations but never against them!).

Although we do share the concerns that pushed these scholars to ask for the establishment of such an independent oversight mechanism, we fear that the suggested “Use of Force Committee” is unrealistic and could also become counter-productive.

It is unrealistic because imagining an organ which has the power to impose its findings and interpretations to the UNSC (“unless the Council decides otherwise” – but such a decision could be “blocked” by a veto!) is tantamount to “inventing” an organ superior to the UNSC! This would be like inventing the legendary philosopher’s stone of International Law! It is rather bizarre from an institutional point of view: how could a subsidiary organ of the UNSC have the primacy over its own creator? (but probably the UNSC is so omnipotent that it can create an organ even more powerful than itself?). And we can hardly see how the permanent members of the UNSC could accept such an evolution detrimental to their prerogatives.

Such a solution could also become counter-productive by creating permanent strain and clashes between the operating States, who wish to act under their margin of appreciation, and an increasingly inquisitive Committee who puts under the magnifying lens each individual military operation.

The comparison between the UN Sanctions Committees and the proposed “UFC” is not relevant in this field because the formers adopt decisions concerning essentially private persons, while the latter will “judge” the assessments and interpretations of sovereign States, including the permanent members of the UNSC who often participate in authorized interventions. As a conclusion, although such a “Use of Force Committee” could have a useful monitoring and advisory function, it is very difficult to confer to it an “adjudicative” function or a capacity to impose its findings to the UNSC.

¹² Tamar Hostovsky-Brandes, Ariel Zemach, “Controlling the Execution of a Security Council Mandate to Use Force: Does the Council Need a Lawyer?”, 36 *Fordham Int’l L.J.*, 2013, at 657-705.

9. Avoiding the “reverse veto” risk and other problems by fixing a date of expiration of the mandate

The Council should always be able to intervene in order to clarify, amend or revoke the authorization in case of conflicting interpretation, abuse or other problems. In order to do so it is necessary to avoid the risk of a “reverse veto”, i.e. the risk that one of the permanent members will use his power of veto in order to block revising or ending an authorization to use force. The easy way to do this is by always fixing a “date of expiration” of the authorization. This is not only necessary in order to avoid the “black hole” effect of Chapter VII (=inability to “escape” from the authorization because of the reverse veto) but also very beneficial for the overall monitoring operation as the UNSC will need to assess periodically the evolution of the situation in order to decide its potential extension.

Indeed, after heavy criticism at the beginning of the 90s, the Council initiated this practice with the Rwanda case (S/RES 929 of 29 June 1994) and steadily afterwards till resolution 1973 which, in an amazing departure from previous practice, fixed no deadline for the expiration of the authorization to use force against Libya! This was of course voluntary (the participating western States fearing that the authorization might expire before achievement of the military goals in Libya) and constituted a major setback in the practice of the Council. Avoiding such surprising departures from established practice in the future will certainly serve the rule of all and help establish mutual trust among UNSC members.

New York, 13 June 2013