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Peacekeeping in Eastern Ukraine: The Legitimacy of a Request and The Competence of the United Nations General Assembly

Ilaria Zavoli*

Abstract

In the last two years, the conflict in Eastern Ukraine has been analysed by legal experts in relation to the possible secession of the eastern territories and its legal and political consequences. Less attention has been given to a peaceful settlement of the dispute through the deployment of UN peacekeeping forces. The ‘peacekeeping solution’ is quite appealing, but it is not straightforward, due to the Russian opposition in the Security Council. In order to adopt it, the international community needs to bypass the Security Council’s deadlock using an alternative process. This article discusses the possibility to have a peacekeeping operation in Eastern Ukraine established by the UN General Assembly. Traditionally, the UN Security Council is considered the organ competent for the deployment of peacekeeping operations. Taking a differentiated approach, and recalling the ‘Uniting for Peace’ Resolution, the author argues that there can be a role of the General Assembly on the matter. The analysis focuses on two points: (i) the legitimacy of a Ukrainian request, giving attention to the factual situation in Eastern Ukraine and to the legal conditions under which a UN peacekeeping mission can lawfully operate; and (ii) the competence of the UN General Assembly in authorizing peacekeeping operations in Eastern Ukraine, considering both its traditional function and the legal basis that supports a different interpretation of its role in maintaining international peace and security.

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1. Introduction

Since its beginning, the conflict in Eastern Ukraine¹ has raised legal issues that get to the core of International Law and international legal theory.² In particular, the debate among legal experts has focused on the question of secession, the right to self-determination of people, and the respect of the territorial integrity of States.³ The main concern of the scholarship has been to identify the political and legal consequences of a secession of Ukraine's eastern territories, and the possible violations of International Law that would occur in such a situation.⁴ A less investigated aspect of the conflict is the chance to find a legal solution to the hostilities, seeking to cease violence among the parties, and to settle the dispute under the aegis of the UN. This goal may be achieved with the deployment of UN peacekeeping forces.

The idea of a peacekeeping operation in Eastern Ukraine is advanced following the requests sent to the UN by the Ukrainian Government in the last two years. In particular, on 4 January 2016, the Permanent Representative of Ukraine to the UN has called for a UN peacekeeping mission in the region of Donbas.⁵ Previously, on 14 April 2014 and on 23 February 2015, other two requests were filed for the deployment of UN peacekeeping forces in the territory of Eastern Ukraine.⁶ In these last two requests reference was made to the possibility to involve the European Union as a mediator among the opposing parties and as a regional provider of peacekeeping operations under a UN mandate.⁷ The European

¹ In this article 'Eastern Ukraine' is referred to as including the 'oblasts' of Donetsk, Luhansk, and Kharkiv.

² R Müllerson, 'Ukraine: Victim of Geopolitics' (2014) 13(1) *Chinese Journal of International Law* 133; BR Roth, 'The Neglected Virtues of Bright Lines: International Law in the 2014 Ukraine Crises' (2015) 21(2) *ILSA Journal of International and Comparative Law* 317.

³ Y Shany, 'Does International Law Grant the People of Crimea and Donetsk a Right to Secede? Revisiting Self-Determination in Light of the 2014 Events in Ukraine' (2014) 21(1) *Brown Journal of World Affairs* 233; U Özsu, 'Ukraine, International Law, and the Political Economy of Self-Determination' (2015) 16(3) *German Law Journal* 434.

⁴ A Gilder, 'Ukrainian Sovereignty and Territorial Integrity – Has It Been Breached?' (2014) 3(2) *Legal Issues Journal* 23; O Korhonen, 'Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars' (2015) 16(3) *German Law Journal* 452.

⁵ See <<http://un.mfa.gov.ua/en/press-center/news/43644-postijnij-predstavnik-ukrajini-pri-oon-vruchiv-oficijn-i-povnovazhennya>> accessed 30 May 2016.

⁶ The first request came from Mr Oleksandr Turchynov, who became President of Ukraine in February 2014. 'Ukraine Wants U.N. Troops in Eastern Cities' *Time* (14 April 2014), <<http://time.com/61624/ukraine-united-nations-troops-east/>> accessed 30 May 2016. The second request was made by the new President Poroshenko during an emergency meeting of Ukraine's national security and defence council. 'Ukraine Conflict: Poroshenko Calls for UN Peacekeepers' *BBC News* (19 February 2015), <<http://www.bbc.co.uk/news/world-europe-31527414>> accessed 30 May 2016.

⁷ On European Union and peacekeeping, see T Tardy, 'EU-UN Cooperation in Peacekeeping: A Promising Relationship in A Constrained Environment' in M Ortega (ed), 'The European Union and the United Nations—Partners in Effective Multilateralism' (2005) 78 *Chaillot Papers* 49.

authorities, for their part, have declined any involvement, leaving the matter to the UN and the Security Council.⁸

Considering the request of the Ukrainian authorities, two questions arise about the possible deployment of UN peacekeeping forces in Eastern Ukraine. The first is whether the request is legitimate. Indeed, in order to have a UN peacekeeping operation in a civil war, some conditions must be met.⁹ When these conditions are not fulfilled, the request must be dismissed. Doing otherwise will have negative consequences for the lawfulness and the legitimacy of the operation and for the cooperation between the parties to the dispute and the UN forces.¹⁰ The second question is whether the UN General Assembly has decision-making powers on the matter. The traditional view holds that the UN Security Council has a monopoly over peacekeeping.¹¹ But when there is a deadlock because of the opposition of one or more Permanent Members of the Council, there is an urgency to find an alternative, effective solution. Therefore, the relevant question is to what extent the General Assembly can authorise a peacekeeping operation when the Security Council cannot because one of its permanent members vetoes the decision.

Departing from the traditional approach for the deployment of UN peacekeeping operations (i.e. to rely exclusively on the Security Council's authorization), in this article the author argues for the possibility to have a UN peacekeeping operation in Eastern Ukraine established by the UN General Assembly. Although in the past some scholars have focused on the General Assembly's involvement in peacekeeping,¹² the recent literature fails to engage with the topic of the competence of the General Assembly in deploying peacekeeping forces.¹³ Moreover, the scholarship does not consider the possibility to have a peacekeeping mission in Eastern Ukraine, neither authorized by the Security Council, nor by the General Assembly. This article seeks to fill these gaps and to propose a new understanding of the UN General Assembly role in peacekeeping, specifically focusing on the conflict in Eastern Ukraine.

To achieve its aim, this article is divided into two substantive parts. The first part focuses on the legitimacy of the request, and it recalls the requirements for having a lawful

⁸ 'EU Won't Send Armed Force to Ukraine Despite Clashes' *BBC News* (27 April 2015), <<http://www.bbc.co.uk/news/world-europe-32478933>> accessed 30 May 2016.

⁹ D Bratt, 'Explaining Peacekeeping Performance: the UN in Internal Conflicts' (1997) 4(3) *International Peacekeeping* 45, 62ff; H Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Martinus Nijhoff Publishers 2009) 17-27.

¹⁰ On the theory and law of peacekeeping operations, see Nasu (n 9).

¹¹ Nasu (n 9). Referring to regional peace operations, see R Durward, 'Security Council Authorization for Regional Peace Operations: A Critical Analysis' (2006) 13(3) *International Peacekeeping* 350.

¹² DW Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens and Sons 1964); F Seyersted, *United Nations Force in the Law of Peace and War* (AW Sijthoff 1966).

¹³ Exceptions are AJ Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18(3) *Journal of Conflict and Security Law* 453; K Hossain, 'The Complementary Role of the United Nations General Assembly in Peace Management' (2008) 13 *Uluslararası Hukuk Ve Politika* (Review of International Law and Politics) 77.

peacekeeping operation. In particular, the author takes into account the factual situation in Eastern Ukraine, considering the reasons for the deployment of peacekeeping forces in that territory, and the existence of an internal armed conflict. Then, the analysis centres on the required conditions of peacekeeping operations, specifically focusing on host state consent and examining the consent expressed by the Ukrainian Government. The second part of the article examines the role of the General Assembly in authorizing UN peacekeeping operations. First, attention is given to the division of roles and functions between the Security Council and the General Assembly in the field of peacekeeping. Second, the author argues that, taking into account the precedent of the ‘Uniting for Peace’ Resolution,¹⁴ there is a competence of the General Assembly on the matter, the Assembly can authorize a peacekeeping mission in Eastern Ukraine, and this avoids the deadlock of the Security Council (due to the Russian refusal to allow a peacekeeping operation in Ukraine). In concluding, the author offers some reflections about the impact of the proposed UN General Assembly’s involvement in Eastern Ukraine on the future deployment of peacekeeping operations worldwide.

2. The Legitimacy of A Request

In the international legal system, the UN can use different measures for the peaceful settlement of disputes: (i) conflict prevention; (ii) peacemaking; (iii) peacekeeping; (iv) peace enforcement; and (v) peacebuilding.¹⁵

As for peacekeeping operations,¹⁶ in order to be legitimate and overcome the criticisms of the last decades,¹⁷ they must conform to three core principles: (i) consent of the parties; (ii) impartiality; and (iii) non-use of force, except in the case of self-defence and defence of the mandate.¹⁸ The elements of particular concern for this analysis are the consent expressed by the ‘host state’ Ukraine, the need to gather the consent of all the

¹⁴ UN, GA Res 377 A (V) ‘Uniting for Peace’, 3 November 1950, UN Doc A/1775, 10.

¹⁵ This distinction results from the debate within the scholarship and from the practice of the UN. See UN DPKO, *United Nations Peacekeeping Operations: Principles and Guidelines* (Capstone Doctrine) (2008) 17-18; R Hatto, ‘From Peacekeeping to Peacebuilding: The Evolution of the Role of the United Nations in Peace Operations’ (2013) 95(891-892) *International Review of the Red Cross* 495.

¹⁶ AJ Bellamy, P Williams and S Griffin, *Understanding Peacekeeping* (2nd rev edn, Polity 2010); T Benner, S Mergenthaler and P Rotmann, *The New World of UN Peace Operations. Learning to Build Peace?* (OUP 2011); J Koops and others (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (OUP 2015).

¹⁷ For instance, regarding the efficacy of peacekeeping operations, the accountability of peacekeepers, and the standards for a successful peacekeeping operation. In order to ameliorate the system of peacekeeping, the UN has issued the ‘Brahimi Report’ in 2008. See ND White, ‘Commentary on the Report of the Panel on United Nations Peace Operations (The Brahimi Report)’ (2001) 6(1) *Journal of Conflict and Security Law* 127; C Gray, ‘Peacekeeping After the Brahimi Report: Is There a Crisis of Credibility for the UN?’ (2001) 6(2) *Journal of Conflict and Security Law* 267.

¹⁸ Capstone Doctrine (n 15) 31.

parties to the conflict, and the question of the impartiality of the UN mission. Indeed, given the complexity of the war in Eastern Ukraine, it is important to determine the legitimacy of the request of the UN operation, in order to have an effective mission and to avoid any possible objections to it.

Taking into account the factual, legal, and legitimacy conditions for a peacekeeping mission, in this section the author argues that the conflict in Eastern Ukraine, along with the Ukrainian request, permits the UN to consider the request legitimate and to deploy peacekeeping forces in that territory.

A. Conditions for Peacekeeping

In the analysis of peacekeeping operations, three important elements must be taken into account: (i) the factual conditions for their deployment; (ii) the legal conditions that trigger the intervention of the UN forces in a specific country; and (iii) the additional conditions that ensure the legitimacy of the operations.

A UN peacekeeping operation is deployed in a State when there is a situation of conflict and violence,¹⁹ and its general aim is to maintain peace through diplomatic means.²⁰ The mission can ‘facilitate an accommodation of conflict by diplomatic means’ (*traditional peacekeeping*), and it can guarantee ‘a minimal protection of a civilian population’s human rights’ (*strategic peacekeeping*).²¹ The reasons that underpin the use of peacekeeping forces must be checked at the beginning of the operation, and throughout its development.²² This helps to guarantee the maintenance of the legitimacy of the operation and to avoid an ‘abusive’ presence of the UN forces in a country.

Peacekeeping missions must be evaluated considering also their outcomes and the beneficial effects obtained in a conflict.²³ Indeed, they are used for short-term objectives (e.g. the end of a war), but also for the achievement of long-term goals, such as the reconstruction of the legal, political and economic system of a country,²⁴ or the protection and promotion of human rights.²⁵ Confronting the results achieved with the content of the

¹⁹ W Hansen, O Ramsbotham and T Woodhouse, ‘Hawks and Doves: Peacekeeping and Conflict Resolution’ in A Austin, M Fischer and N Ropers (eds), *Transforming Ethnopolitical Conflict: The Berghof Handbook* (Springer 2004).

²⁰ J Burk, ‘What Justifies Peacekeeping?’ (2000) 12(3) *Peace Review* 467; MJ Mullenbach, ‘Deciding to Keep Peace: An Analysis of International Influences on the Establishment of Third-Party Peacekeeping Missions’ (2005) 49(3) *International Studies Quarterly* 529; TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 136.

²¹ Burk (n 20) 468.

²² *ibid* 472.

²³ PF Diehl and D Druckman, ‘Evaluating Peace Operations’ in Koops and others (n 16).

²⁴ M Ndulo, ‘United Nations Peacekeeping Operations and Security and Reconstruction’ (2011) 44(3) *Akron Law Review* 769.

²⁵ A Murdie and DR Davis, ‘Problematic Potential: The Human Rights Consequences of Peacekeeping Interventions in Civil Wars’ (2010) 32(1) *Human Rights Quarterly* 49.

mandate of the peacekeeping mission, it is possible to determine its successes and failures.²⁶

Peacekeeping operations can be deployed: (i) when there is violence inter-states; or (ii) when the violence is intra-state.²⁷ The difference lies in the subjects giving consent to the peacekeeping mission. In inter-states conflicts, the States involved must give consent to the UN for a peacekeeping operation.²⁸ Instead, in intra-state conflicts, it is sufficient to have the consent of the State in which the dispute is ongoing.²⁹ In relation to this distinction, an additional interesting aspect is the influence that peacekeeping operations can have over the classification of the conflict.³⁰

When there is an internal conflict,³¹ a state may request a UN operation for various reasons.³² One example would be when it encounters difficulties in maintaining peace and security in its own territory and the Government decides to rely upon the help of the UN forces.³³ The request for UN intervention may be justified also because (i) there is a threat to the democratic life of the country and to its institutions, and (ii) there is an escalation of violence (e.g. a civil war or an internal armed conflict).³⁴ In other cases, the request for an intervention has been justified to fight terrorists or other non-state actors (e.g. insurgents and rebels) that represent a threat to the democratic life of a country and to the international community as a whole.³⁵

From the foregoing considerations, it can be posited that the factual conditions necessary for the deployment of a peacekeeping operation are: (i) the existence of an internal armed conflict; and (ii) the necessity to preserve peace and security, through the cessation of the hostilities and the disengagement of the opponents.

²⁶ *ibid.*

²⁷ Burk (n 20) 467.

²⁸ Koops and others (n 16) 48.

²⁹ On peacekeeping in intra-state conflicts, see R Weiner and CA Aguilera Ariza, 'War, the United Nations, and Peacekeeping' (2015) 27(1) *New England Journal of Public Policy* 1.

³⁰ E David and O Engdahl, 'How Does the Involvement of a Multinational Peacekeeping Force Affect the Classification of a Situation?' (2013) 95(891-892) *International Review of the Red Cross* 659.

³¹ LM Howard, *UN Peacekeeping in Civil Wars* (CUP 2008).

³² L Neack, 'UN Peace-keeping: In the Interest of the Community or Self?' (1995) 32(2) *Journal of Peace Research* 181.

³³ See the cases of Chad and Mali. On the effectiveness of peacekeeping operations in civil wars, see VP Fortna, 'Does Peacekeeping Keep Peace? International Intervention and the Duration of Peace After Civil War' (2004) 48(2) *International Studies Quarterly* 269.

³⁴ On the geography of peacekeeping missions, see M Gilligan and SJ Stedman, 'Where Do the Peacekeepers Go?' (2003) 5(4) *International Studies Review* 37; AA Townsen and BW Reeder, 'Where Do Peacekeepers Go When They Go? Explaining the Spatial Heterogeneity of Peacekeeping Deployments' (2014) 18(1-2) *Journal of International Peacekeeping* 69.

³⁵ A recent intervention for combating terrorism was in Mali, which followed a Government's submission of a request to the UN Security Council in 2013. K Bannelier and T Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26(4) *Leiden Journal of International Law* 855.

In order to have peacekeeping forces deployed in a territory, some legal and legitimacy conditions must also be met. These are linked to the ‘core principles’³⁶ underpinning peacekeeping operations: (i) the impartiality of the operation;³⁷ (ii) the non-use of force;³⁸ and (iii) the gathering of host state consent. In order to evaluate the request of the Ukrainian Government for peacekeeping, the author focuses on the consent given to the UN operation and the impartiality of the mission.

From a legal point of view, consent is a fundamental element of peacekeeping and it is required to avoid the violation of states’ sovereignty.³⁹ As it has been pointed out by the scholarship, consent is the requisite for the creation of international obligations and for the legal basis of peacekeeping operations.⁴⁰ It is a constitutive element of peacekeeping operations, and, without it, the UN would violate Article 2(7) of the UN Charter and the principles of sovereignty of states and non-intervention.⁴¹ Indeed, through the consent of the host State, the UN guarantees that the peacekeeping mission deployed is lawful and the country in which it operates welcomes it. With no consent, the mission would be negatively affected and it would lose credibility before the international and local community.⁴² Moreover, with no consent the UN forces deployed risk becoming a party to the conflict, losing their role as ‘peacekeepers’.⁴³

Consent is also the distinctive element between peace enforcement operations and peacekeeping operations.⁴⁴ When there is host state consent, the operation is of ‘peacekeeping’, and there is no imposition on the parties of the conflict and no coercive

³⁶ Bratt (n 9); Capstone Doctrine (n 15) 31ff.

³⁷ S Vohra, ‘Impartiality in United Nations Peace-Keeping’ (1996) 9(1) *Leiden Journal of International Law* 63; H Yamashita, ‘‘Impartial’ Use of Force in United Nations Peacekeeping’ (2008) 15(5) *International Peacekeeping* 615.

³⁸ R Murphy, ‘United Nations Peacekeeping in Lebanon and Somalia, and the Use of Force’ (2003) 8(1) *Journal of Conflict and Security Law* 71; D Stephens, ‘The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative’ (2005) 12(2) *International Peacekeeping* 157; J Sloan, ‘The Evolution of the Use of Force in UN Peacekeeping’ (2014) 37(5) *Journal of Strategic Studies* 674.

³⁹ Nasu (n 9) 17ff; Koops and others (n 16) 48-50; MI Latif and RA Khan, ‘Peacekeeping Operations and State Sovereignty: Dilemma of Host State Consent’ (2010) 30(2) *Pakistan Journal of Social Sciences* 235. The maintenance of host State consent is also problematic. J Karlsrud and DF da Costa, ‘Invitation Withdrawn: Humanitarian Action, United Nations Peacekeeping, and State Sovereignty in Chad’ (2013) 37(2) *Disasters* 171.

⁴⁰ A Orakhelashvili, ‘The Legal Basis of the United Nations Peace-Keeping Operations’ (2003) 43(2) *Virginia Journal of International Law* 485, 518. The growing importance of this element is also recalled in the Capstone Doctrine (n 15), where it was affirmed that the lack of consent might challenge ‘the rationale for the United Nations peacekeeping operation and will likely alter the core assumptions and parameters underpinning the international community’s strategy to support the peace process’.

⁴¹ J Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Bloomsbury Publishing 2011) 76.

⁴² A lack of consent is admissible only when the Security Council ‘believes that the conflict presents a threat to international peace and security’ or ‘for humanitarian or protection purposes’: Capstone Doctrine (n 15) 43.

⁴³ *ibid* 32.

⁴⁴ Gill and Fleck (n 20) 137; L Müller, ‘The Force Intervention Brigade—United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement’ (2015) 20(3) *Journal of Conflict and Security Law* 359.

measure adopted by the UN. In the case of peace enforcement operations, instead, the UN imposes the application and respect of peace agreements over the parties with coercive measures, irrespective of the consent of the host State.⁴⁵

The consent of the host state must be analysed taking into account two aspects: the external and the internal.⁴⁶ Concerning the former, consent must be freely expressed and it cannot be subjected to any external influence.⁴⁷ The influence occurs when the Government of a country is under illicit pressures and it is subject to the threat of another state and/or of foreign forces.⁴⁸ If the government of a country is pushed to accept the presence of peacekeeping forces in its territory because of economic, political or legal pressure made upon it by the international community, the consent is altered and it is not genuine.⁴⁹ In this case, the UN cannot allow a peacekeeping intervention.

The internal aspect of host state consent requires that a lawful authority of the state shall express the consent and it must meet the *ratione personae* condition.⁵⁰ This second element is quite complex and it relates to the legitimacy of the authority requiring the intervention. First of all, the problem is to determine who can be regarded as a legitimate subject that can lawfully request a UN intervention.⁵¹ According to the literature, the Government that has the effective control over the territory and the population is deemed to be legitimate for this purpose.⁵² The legitimate national authority is that resulting from a democratic process in the society, in line with the rule of law and the principles of international law.⁵³ Second, a problem arises when there is an internal conflict and the state is divided into different factions. Here the political and social situation of a state is unstable and it is subject to flux.⁵⁴ In this sense, sometimes it is difficult to rely upon the consent of the parties in a country because the actors ‘may appear or disappear too quickly’ and ‘their

⁴⁵ Capstone Doctrine (n 15) 43.

⁴⁶ I Johnstone, ‘Managing Consent in Contemporary Peacekeeping Operations’ (2011) 18(2) *International Peacekeeping* 168. ‘Broadly speaking, consent to a peacekeeping mission is typically granted as an adjunct to a peace agreement, in the form of an invitation to the UN or other organization to support the implementation. Yet in practice, consent is often qualified in one of three ways: it is either unreliable, or brought about by external pressure, or open-ended’: *ibid* 170.

⁴⁷ Gill and Fleck (n 20) 230.

⁴⁸ Sloan (n 41) 119.

⁴⁹ As in the case of Sudan, where the consent to a hybrid AU/UN force in Darfur ‘came about only after government was subjected to considerable international pressure’: *ibid* 119.

⁵⁰ On the actors that can express consent, see I Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (OUP 2011) 144ff.

⁵¹ C Gray, ‘Host-State Consent and United Nations Peacekeeping in Yugoslavia’ (1996) 7(1) *Duke Journal of Comparative and International Law* 241. On the process of formation of consent and its democratic connotation, see DH Levine, *The Morality of Peacekeeping* (OUP 2014).

⁵² D Wippman, ‘Military Intervention, Regional Organizations, and Host-State Consent’ (1996) 7(1) *Duke Journal of Comparative and International Law* 209, 211-2.

⁵³ *ibid* 212.

⁵⁴ For instance, in Mali the consent to a UN operation was given by the interim President of the State. France considered it as a sufficient element to intervene in its support, even if the President was not recognised as the legitimate authority of the entire country. Bannelier and Christakis (n 35) 859.

interests may be too fluid'.⁵⁵ Third, another problem is when in theory an authority is entitled to give the consent, but in practice it might not, because it is challenged by other competing actors in the state.⁵⁶ In this case, the Government can be regarded as a legitimate interlocutor if it maintains a certain control over the territory of the country.⁵⁷

Finally, a peacekeeping operation must be not only legally justified, but also legitimate.⁵⁸ This means that when all the legal requirements have been met, the parties to the conflict have to accept the mission, legitimising its presence in the country.⁵⁹ In this regard, consent becomes a pivotal element for the legitimacy of peacekeeping operations,⁶⁰ and it is strictly related also to the determination of the impartiality of the UN mission.⁶¹ The core question here pertains the legitimacy of a request for a peacekeeping operation and the legitimacy of the operation itself when there is no consent of all the warring factions. Indeed, as it happened in previous UN operations, even if the legality of the mission is ascertained, there might be a problem for its legitimacy as not all the parties accept it.⁶² Looking at the precedents of the UN history of peacekeeping, the lack of consent of all the parties involved in a conflict has resulted in less effective operations and in a difficult relationship between the UN forces and the actors present in the country.⁶³ In particular, in the Suez crisis, Egypt has given its consent to a UN operation, but soon after it withdrew it.⁶⁴ This caused a harsh time for the UN forces deployed and for the international community that was trying to solve the conflict. In Congo, the withdrawal of the consent to the UN operation has created great uncertainty over the continuation of the mission, and it has undermined its actions.⁶⁵ Despite these experiences, the actual policy of the UN does not require necessarily the consent of all the parties for the deployment of peacekeeping forces, but focuses on the impartiality of the operation.⁶⁶ As it is underlined by the scholarship, in modern conflicts the UN cannot seek to gather the consent of all the parties to the war due to the diverse nature of the conflict (i.e. including a plurality of

⁵⁵ N Tzagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2006) 11(3) *Journal of Conflict and Security Law* 465, 474.

⁵⁶ *ibid* 475.

⁵⁷ *ibid*.

⁵⁸ M Mersiades, 'Peacekeeping and Legitimacy: Lessons from Cambodia and Somalia' (2005) 12(2) *International Peacekeeping* 205.

⁵⁹ *ibid*.

⁶⁰ 'The management of the peacekeeper's legitimacy is the best tool for maximizing local actor consent and preventing active opposition to peacekeeping operations': *ibid*.

⁶¹ JT O'Neill and N Rees, *United Nations Peacekeeping in the Post-Cold War Era* (Routledge 2005) 33-4; K Beck, 'The Challenges of Consent: Policy Recommendations for Maintaining Host State Consent for United Nations Peacekeeping Missions' (2011) DWA Student Scholarship.

⁶² For instance, in the case of the Suez crisis, Congo, and Somalia. Sloan (n 41) 20ff.

⁶³ O'Neill and Rees (n 61) 26-7.

⁶⁴ *ibid* 24.

⁶⁵ *ibid* 43ff.

⁶⁶ SAN Tshiband, 'Peacekeeping: A Civilian Perspective?' (2010) 1(2) *Journal of Conflictology* 1, 5.

actors).⁶⁷ For this reason, the UN operations need to receive only ‘the consent of the main or relevant parties’.⁶⁸ In this regard, there is a distinction between the consent given by the main party (i.e. the host state), called ‘strategic’, and the consent of the other parties (i.e. non-state actors), called ‘tactical’.⁶⁹ Whereas the strategic consent is always necessary, the tactical is not.⁷⁰ Therefore, even if in the past the consent of all the parties has shown to be quite relevant for the legitimacy of the operation, nowadays this element is not compulsory.

As a last remark, in relation to the legitimacy of the request of a UN peacekeeping operation, another relevant condition is the ‘impartiality’ of the operation.⁷¹ This must be distinguished from the ‘neutrality’⁷² of a UN mission: the first concerns the conduct of the operation; the second relates to its nature.⁷³ In this regard, the UN mission cannot favour any of the parties to the conflict and it cannot be biased. Nonetheless, the UN forces cannot admit any actions of the parties that will threaten or violate the peace agreements reached.⁷⁴ Impartiality is strictly linked to the consent expressed to the presence of peacekeeping forces in the territory of a state.⁷⁵ Indeed, if the UN mission lacks consent of the main parties, it might be seen as partial and acting in favour of one party. Once again, the element of consent gathers importance for the legitimacy of a UN peacekeeping request and of the mission itself as it permits the UN forces to be considered impartial.

B. Ascertaining the Conditions for Peacekeeping in Eastern Ukraine

In order to understand whether UN peacekeeping forces can be sent to Eastern Ukraine, the author makes here some considerations on the features of the conflict, and on the consent to peacekeeping expressed by the Ukrainian Government.

⁶⁷ K Nsia-Pepira, *UN Robust Peacekeeping: Civilian Protection in Violent Civil Wars* (Palgrave Macmillan 2014) 62.

⁶⁸ *ibid.*

⁶⁹ E Paddon Rhoads, *Taking Sides in Peacekeeping: Impartiality and the Future of the United Nations* (OUP 2016) 76.

⁷⁰ *ibid.*

⁷¹ Tsagourias (n 55) 478ff.

⁷² D Donald, ‘Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century’ (2002) 9(4) *International Peacekeeping* 21.

⁷³ Tsagourias (n 55) 478ff.

⁷⁴ Capstone Doctrine (n 15)

⁷⁵ Paddon Rhoads (n 69) 77ff.



Fig. 1. Eastern Ukraine territories

The conflict in Eastern Ukraine finds its origins in 2014, but the contrasts between the central Government and the local authorities have been evident already in previous years.⁷⁶ After a popular insurrection in February 2014, President Janukovyč was forced to leave the country, and a period of internal instability began. The conflict is between the forces of the central Government in Kiev and the pro-Russian insurgents of Eastern Ukraine that want to achieve independence.⁷⁷ The separatists are in control of the region of Donbas and there is evidence that they have been supported financially and militarily by Russia.⁷⁸

As for the nature of the conflict, it is necessary to determine whether the conflict is intra-state or inter-states: as already recalled, this classification has consequences also for the operation of peacekeeping forces in the territory concerned.⁷⁹ In this regard, in internal conflicts peacekeeping missions would operate within the domestic jurisdiction of states.⁸⁰ Therefore, in this case there is the necessity to gain the host state's consent. In the case of Eastern Ukraine, many scholars consider the conflict as internal, between the Ukrainian

⁷⁶ S Pifer, 'Crisis Between Ukraine and Russia' (2009) 3 Contingency Planning Memorandum, Center For Preventive Action, Council on Foreign Relations USA; JP Himka, 'The History behind the Regional Conflict in Ukraine' (2015) 16(1) *Kritika: Explorations in Russian and Eurasian History* 129.

⁷⁷ For an analysis of the conflict, see <<http://www.summer.harvard.edu/blog-news-events/conflict-ukraine-historical-perspective>> accessed 30 May 2016.

⁷⁸ A Scrinic, 'Humanitarian Aid and Political Aims in Eastern Ukraine: Russian Involvement and European Response' (2014) 5(2) *Eastern Journal of European Studies* 77.

⁷⁹ R Khan, 'United Nations Peace-keeping in Internal Conflicts: Problems and Perspectives' in JA Frowein and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International 2000); ME Yilmaz, 'Resolving Internal Conflicts in the Post-Cold War Era: Is Peacekeeping Enough?' (2006) 8(2) *Journal of Economic and Social Research* 27.

⁸⁰ Nasu (n 9) 138.

central authorities and the separatists.⁸¹ In support of this interpretation, in July 2014 the ICRC has defined it as a ‘non-international armed conflict’ calling the parties to respect the norms of International Humanitarian Law governing these types of cases.⁸²

On 5 September 2014, the opposing parties signed a cease-fire agreement in Belarus known as the ‘Minsk Protocol’, trying to come to a peaceful settlement of the dispute, without any further engagement of military actions.⁸³ The cease-fire has not lasted long and it has been breached by a series of military actions of the pro-Russia separatists against governmental units. On 12 February 2015, another peace agreement (called ‘Minsk II’) was signed,⁸⁴ but the region continues to live in a situation that is ‘tense and volatile’, as described in one of the last Security Council briefings.⁸⁵

Regarding the international community’s reaction to the conflict, soon after the war begun, the Security Council held a meeting to discuss the situation in Ukraine, based on a request of the Ukrainian representative to the UN.⁸⁶ This was later followed by a series of meetings between 2014 and the beginning of 2015 and by the adoption of two resolutions: one concerning the shooting down of the civil flight MH17; the other in support of the Minsk peace agreements signed in February 2015.⁸⁷ At the beginning of 2014, the General Assembly adopted a resolution calling for an end to the conflict and for the respect of the territorial integrity of Ukraine.⁸⁸ Neither the Security Council meetings nor the resolutions adopted have taken into consideration the deployment of peacekeeping forces in Eastern Ukraine, and the focus has been more on the violations of International Law occurring in these territories (in terms of respect for the territorial integrity of Ukraine and the indirect intervention of Russia), rather than on adopting a concrete plan for pacifying the area. The international community has been divided between those supporting the position of Ukraine and those adopting a more careful approach, due to the direct involvement of Russia in the conflict.⁸⁹

Only recently the UN has taken concrete action and there has been the creation of a ‘Mine Action Needs Assessment Mission’ that has worked in Eastern Ukraine from 23 January until 5 February 2016. The task of the Mission has been to assess the presence of

⁸¹ A Bellal (ed), *The War Report: Armed Conflict in 2014* (OUP 2015); R Heinsch, ‘Conflict Classification in Ukraine: The Return of the “Proxy War”?’ (2015) 91(1) *International Law Studies* 323.

⁸² See <<https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>> accessed 30 May 2016.

⁸³ See the text of the Protocol <<http://uk.reuters.com/article/ukraine-crisis-summit-idUKL5N0VK2C520150210>> accessed 30 May 2016.

⁸⁴ See the analysis of the European Parliament <http://www.europarl.europa.eu/EPRS/EPRSBrief_ing-548991-Minsk-peace-summit-FINAL.pdf> 30 May 2016.

⁸⁵ See <<http://www.un.org/press/en/2015/sc12154.doc.htm>> accessed 30 May 2016.

⁸⁶ See <http://www.un.org/ga/search/view_doc.asp?symbol=s/2014/136> accessed 30 May 2016.

⁸⁷ For a summary of the events, see Dag Hammarskjöld Library Research Guides <<http://research.un.org/en/ukraine>> accessed 30 May 2016.

⁸⁸ UN, GA Res. A/68/L.39, 24 March 2014.

⁸⁹ Müllerson (n 2); NK Arbatova and AA Dynkin, ‘World Order After Ukraine’ (2016) 58(1) *Survival* 71.

mines and explosive munitions in the territory and make recommendations for further action to be taken as part of a humanitarian intervention.⁹⁰ This is a first step in the path towards peace and reconciliation and it might be a useful tool for laying the foundations of a future peacekeeping mission in Eastern Ukraine. Indeed, despite the specific mandate of the Mission, this is the first time that the UN sends a Mission to Eastern Ukraine to determine the status of the conflict, even if just from a ‘technical’ point of view. The question arising from the end of this Mission is what further action the UN is willing to take, considering the reiterated requests by the Ukrainian Government for the deployment of peacekeeping forces in that territory.

Following these reflections, since the failure of the peace agreements signed in 2015, a peacekeeping mission in Eastern Ukraine is even more urgent. Indeed, ‘peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers’.⁹¹ A UN peacekeeping operation might be a good choice to preserve peace and security in Eastern Ukraine and to find a diplomatic solution to the crisis.⁹² In particular, peacekeeping forces would guarantee at least ‘short term’ effects,⁹³ preventing a further escalation of violence between the opponents and a better protection of the civilian population involved in the conflict.⁹⁴ In this sense, peacekeeping is a useful conflict management tool and it helps the international community to prevent the breaking out of civil wars in war-torn states.⁹⁵

Turning to the condition of host state consent, in the Ukrainian case this is a core element of the peacekeeping mission that would act in the territory. This is true not only for fulfilling the legal requirements underpinning a peacekeeping operation, but also for guaranteeing the legitimacy of the mission and its success.⁹⁶

Concerning the external and internal aspects of the Ukrainian consent, some points must be underlined. First, the consent expressed is free from any external influence and it reflects the will of the state to maintain the control over the national territory and to avoid further conflicts with the insurgents. Indeed, the Ukrainian Government has asked for a peacekeeping mission on various occasions, at various stages of the conflict, and through

⁹⁰ For further details, see <<http://www.un.org.ua/en/information-centre/news/2059>> accessed 30 May 2016.

⁹¹ Capstone Doctrine (n 15) 18.

⁹² On the necessity to have peace building operations in Eastern Ukraine, see N Mirimanova, ‘Peacebuilding and Conflict Prevention in the EU’s Neighbourhood: The Case of Ukraine’ (2011) paper prepared for the Civil Society Dialogue Network (CSDN). On the involvement of OSCE in peacekeeping, see O Tytarchuk, ‘Strengthening the OSCE Special Monitoring Mission to Ukraine: A Way to Peacekeeping?’ (April 2015) paper prepared for the East European Security Research Initiative (EESRI).

⁹³ On the distinction between short term and long term effects of peacekeeping, see JM Greig and PF Diehl, ‘Peacekeeping a Barrier to Durable Peace?’ (2012) 7(1) *Yale Journal of International Affairs* 46.

⁹⁴ On the effectiveness of peacekeeping operations in the case of internal conflicts, see Fortna (n 33).

⁹⁵ *ibid* 288.

⁹⁶ *ibid*.

its different Presidents, without being forced to do so by the international community or by external forces.

Second, in Ukraine the consent has been expressed by a new Government that has not been democratically elected and that is the result of a popular insurrection against the previous regime, involving only a part of the territory and of the population. Nevertheless, from a political and juridical point of view, the Government controls the majority of Ukraine and it is recognised by other international actors as representative of the country.⁹⁷ Therefore, in the light of the principles above mentioned, it can be considered as legitimate. Moreover, as the scholarship underlines, the consent is requested from a state that has not only the effective control, but also the juridical sovereignty over a territory.⁹⁸ In Ukraine, the Government exercises the jurisdictional control when it acts through the political, social and administrative institutions of the country. The legitimacy of the authorities in Kiev is confirmed also by the fact that on 17 April 2014 the Ukrainian Government submitted a declaration to the International Criminal Court (ICC) in which it accepts the Court's jurisdiction with respect to the alleged crimes committed in Ukraine during the so-called 'Maidan protests'.⁹⁹ The ICC has accepted it¹⁰⁰ and this fact can be regarded as the confirmation of the recognition of the Government in Kiev as the legitimate representative of the country and as being able to express the will of the Ukrainian people. Indeed, from a legal point of view, when a State decides to accept the jurisdiction of the ICC it does it in its official functions, as a legitimate authority of a country.¹⁰¹ Thus, the ICC's acceptance of the Ukrainian decision is in line with the recognition of the Ukrainian Government as the national authority of reference.

Some final considerations must be made on the additional element of whether, for a legitimate peacekeeping operation, it is also required to have the consent of other parties than the host State, such as the non-state actors active in the national territory.¹⁰² Indeed, when there is an internal conflict, some scholars think that it is necessary to have the consent of all the parties involved, despite the fact that they are rebels or separatists.¹⁰³ For

⁹⁷ For instance, the post-revolution government of Ukraine is recognised by the UN and its representatives have been allowed to participate in the Security Council's meetings as non-permanent members of the Council. On the legal status of Ukraine, see P Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History' (2015) 14(2) Chinese Journal of International Law 237, 256-8.

⁹⁸ Orakhelashvili (n 40) 520.

⁹⁹ See the declaration <<http://www.icc-cpi.int/en/menus/icc/press%20and%20media/press%20releases/Documents/997/declarationVerkhovnaRadaEng.pdf>> accessed 30 May 2016

¹⁰⁰ See <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx> accessed 30 May 2016.

¹⁰¹ Art. 12 and 13 of the Rome Statute refer to the concept of 'States' as legitimate actors to accept the Court's jurisdiction.

¹⁰² Gray (n 51) 241.

¹⁰³ Johnstone (n 46).

the supporters of this position, ‘sustainable peace requires inclusive politics’,¹⁰⁴ thus the involvement of a plurality of subjects is necessary. Indeed, it would strengthen the legitimacy and efficiency of the UN operation, and facilitate its actions.¹⁰⁵ However, as already underlined, this condition is not compulsory, and it is only a factor that can help the peace process and can be sought for the expediency of the operation.¹⁰⁶ In Ukraine, it is uncertain whether the consent to a peacekeeping operation will be given by all the parties involved, because of the nature of the conflict and of the different interests at stake. Moreover, considering the strong opposition between the parties, and the failure of the cease-fire, it seems unlikely that they would all come to an agreement on the deployment of peacekeeping forces. In this case, the Ukrainian Government’s consent is sufficient as it is expressed by the party representing ‘officially’ the state. Therefore, the consent expressed is that of the ‘main actor’ in the conflict and it is adequate to guarantee the legitimacy of the request and a ‘robust’ peacekeeping operation.¹⁰⁷ Even if it would be desirable to gather the consent of all the parties involved in the conflict, a peacekeeping operation can be deployed when there is only the host state government’s consent.¹⁰⁸

From the foregoing considerations, it is posited that the request of the Ukrainian Government is legitimate.

3. The Competence of the UN General Assembly

Once the legitimacy of the request of a UN peacekeeping operation in Eastern Ukraine is established, it is necessary to determine which organ has the competence to deploy UN peacekeepers. UN peacekeeping operations are usually authorised by the Security Council under Chapter VI or VII of the UN Charter. As indicated in Article 24 of the Charter, the Security Council has the primary responsibility for the maintenance of international peace and security. This means that it has a pivotal role in dealing with peacekeeping operations and it can decide to authorise them with a resolution, after the host State has given its consent. The problem arises when the Security Council experiences a deadlock that impedes any decision.¹⁰⁹ A possible solution can come from the involvement of the UN General Assembly as the alternative subject that can authorise peacekeeping operations. This would guarantee the achievement of the goals of the UN, despite the difficulties faced by the Security Council. Notwithstanding the traditional division of functions between the

¹⁰⁴ *ibid* 175.

¹⁰⁵ Tsagourias (n 55) 475.

¹⁰⁶ Orakhelashvili (n 40) 521.

¹⁰⁷ Nsia-Pepira (n 67) 62.

¹⁰⁸ Koops and others (n 16) 49.

¹⁰⁹ On the Security Council ‘political’ decisions about peacekeeping, see SH Allen and AT Yuen, ‘The Politics of Peacekeeping: UN Security Council Oversight Across Peacekeeping Missions’ (2014) 58(3) *International Studies Quarterly* 621.

Security Council and the General Assembly, in various occasions the Charter has been interpreted broadly in order to fulfil the exigencies of the international community.¹¹⁰ In this sense, there might be a case for a different interpretation of the Charter.¹¹¹

A. A New Understanding of Peacekeeping Authorisation

(i) Security Council and General Assembly in peacekeeping: between traditional roles and new functions

In the analysis of the UN General Assembly competence for peacekeeping, a relevant element is the relationship between the Security Council and the General Assembly and their division of powers on the matter.¹¹² It must be underlined that there is no normative definition of ‘peacekeeping’, the UN Charter does not regulate expressly peacekeeping operations, and there are no specific norms that indicate the functions of the Security Council or the General Assembly in this regard.¹¹³ Nevertheless, peacekeeping operations are traditionally considered part of the UN actions to solve conflicts and to cease hostilities.¹¹⁴

The Security Council and the General Assembly have clear, distinct functions and powers in the context of international peace and security.¹¹⁵ According to art. 24(1) of the Charter, the members of the UN ‘confer on the Security Council *primary responsibility* for the maintenance of international peace and security’.¹¹⁶ Therefore, the Security Council is the organ in charge of guaranteeing that peace and security are preserved worldwide and it performs this duty with the powers granted under Chapter VI, VII, and VIII of the Charter.¹¹⁷ The Security Council can refer to a range of measures, including peacekeeping. The interventions authorized by the Security Council can include the use of force, but in the specific case of peacekeeping, no use of force is permitted except for self-defence. The General Assembly plays a different role regarding peacekeeping: it can make recommendations (except when the Council is already involved in the matter) and it can

¹¹⁰ N Schrijver, ‘The Future of the Charter of the United Nations’ (2006) 10(1) Max Planck Yearbook of United Nations Law 1, 13.

¹¹¹ *ibid.*

¹¹² ND White, *The United Nations and the Maintenance of International Peace and Security* (Manchester University Press 1990); Koops and others (n 16) 47.

¹¹³ Bellamy, Williams and Griffin (n 16) 49.

¹¹⁴ *ibid.*

¹¹⁵ As recalled, according to art. 1 para 1 of the UN Charter, the maintenance of international peace and security is one of the purposes of the UN.

¹¹⁶ UN, Charter, art. 24 para 1 (emphasis added).

¹¹⁷ *ibid* para 2.

call the attention of the Security Council to situations that might endanger international peace and security.¹¹⁸

At first blush, the two organs seem to have completely different roles and functions in the field of international peace and security, and it seems that there is a hierarchy between them, with the Security Council at the top. This interpretation has received wide endorsement throughout the years,¹¹⁹ but despite its appealing guise, it lacks argumentative strength when it conceives the UN as a pyramidal system. Indeed, it can be contested on the basis of three arguments. First, the Security Council's 'primary' responsibility for international peace and security is not 'exclusive'. In this sense, in the *Certain Expenses Advisory Opinion*,¹²⁰ the International Court of Justice (ICJ) underlined that there is room also for the action of the General Assembly.¹²¹ The Security Council has an exclusive role when the UN operation to be authorised involves the use of force or coercive measures.¹²² As already recalled, peacekeeping operations are authorised under Chapter VI of the UN Charter, and they qualify as peaceful measures. Therefore, the Security Council has no exclusive role in this field.¹²³ In this sense, 'primacy' for peace and security means that the Security Council should be consulted first, but there is no automatic exclusion of other organs that can be involved in the field. Other subjects can act in substitution, especially when the Security Council encounters difficulties in taking decisions. Under certain conditions, the responsibility for international peace and security can be attributed to the General Assembly, which can play an important role in the authorization of peacekeeping operations.¹²⁴ The role of the General Assembly is not 'subsidiary', but it is 'complementary'¹²⁵ and the two organs of the UN are not competing with each other, but they work in cooperation, seeking to facilitate their work mutually.¹²⁶ Therefore, in achieving the goals of peace and security, they work in tandem. This unity of action is a core element for guaranteeing an effective response to the threats that endanger the stability of the international community and the peace and security of states. In this sense, the reinterpretation of the powers of the Security Council regarding peacekeeping missions permits the UN to be more effective, avoiding unnecessary hierarchical predominance of one organ over the other, and answering the urgent needs for peacekeeping operations around the world.

¹¹⁸ UN, Charter, art. 11 para 1, 2 and 3, and art. 12 para 1.

¹¹⁹ Nasu (n 9) 208ff.

¹²⁰ ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports 1962, 151.

¹²¹ *ibid* 163.

¹²² *ibid* 165.

¹²³ 'The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter': *ibid*.

¹²⁴ Carswell (n 13) 455.

¹²⁵ Hossain (n 13).

¹²⁶ *ibid* 80.

Second, it is possible to expand the scope of the mandate of the General Assembly, allowing its involvement in the decisions about the use of peacekeeping forces. From a general perspective, the General Assembly does not have binding powers and it can act under Chapter VI of the UN Charter with recommendations.¹²⁷ According to Articles 10 and 14, the General Assembly's powers are not mandatory, and they only have a 'recommendatory' function.¹²⁸ Moreover, as recalled, the General Assembly cannot make recommendations on matters that are under the current analysis of the Security Council.¹²⁹ Therefore, apparently the General Assembly cannot have any role in the authorization of peacekeeping operations, apart from budgetary matters.¹³⁰ Despite these limits, in the last decades, the norms recalled have been interpreted differently and they have experienced an 'erosion process'.¹³¹ The General Assembly has been granted the powers to initiate an action for peacekeeping and to promote the creation of such missions, when reasons of peace and security so require.¹³² The ICJ has stressed this new interpretation of the General Assembly's role in the *Certain Expenses* Advisory Opinion, affirming that 'the function and powers conferred by the Charter on the General Assembly [...] are not merely hortatory',¹³³ and that the General Assembly has the power 'to organize peacekeeping operations, at the request, or with the consent, of the States concerned'.¹³⁴

Third, another step in the recognition of the role of the General Assembly in peacekeeping can be made considering Article 14 of the UN Charter. This norm states that the General Assembly may recommend measures for the peaceful adjustment of any situation that results in a violation of the provisions of the Charter.¹³⁵ The term 'measures' has been interpreted broadly, meaning that the General Assembly might engage in some actions, although not involving force.¹³⁶ Indeed, for operations involving force the competence still relies on the Security Council, but for the other possible actions, including peacekeeping operations under Chapter VI of the Charter, the General Assembly can have competence. Thus, the General Assembly can play an important role in the deployment of peacekeeping forces in order to avoid the escalation of a situation that could pose a threat to peace.¹³⁷ It might be argued that the recommendatory nature of the General Assembly's

¹²⁷ On the nature of the powers of the General Assembly and of the Security Council, see MD Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16(5) *European Journal of International Law* 879.

¹²⁸ UN, Charter, art. 10 and 14.

¹²⁹ UN, Charter, art. 11 and 12.

¹³⁰ UN, Charter, art. 17.

¹³¹ C Tomuschat, "'Uniting for Peace' (2008) Comment on GA Resolution 377 A (V) 1950' Audiovisual Library of International Law.

¹³² M Pugh (ed), *The UN, Peace and Force* (Routledge 2013) 49-51.

¹³³ *Certain Expenses* (n 120) 163.

¹³⁴ *ibid* 164.

¹³⁵ UN, Charter, art. 14.

¹³⁶ Hossain (n 13) 88.

¹³⁷ *ibid* 90.

action requires the collaboration of the states willing to comply with it, and thus that it is still not so efficient. Nonetheless, when the states (as in the Ukrainian case) are willing to act, even if they are not permanent members of the Security Council, the problem does not arise. Indeed, the action can be implemented with the deployment of UN forces. In support of this argument, one can recall the ICJ Advisory Opinion *Construction of a Wall*,¹³⁸ where the Court affirmed that it is possible to have a simultaneous action of the two organs of the UN in peacekeeping. Indeed, the General Assembly can make recommendations on a matter that is already subject to the scrutiny of the Security Council, in the light of the principle of cooperation for the preservation of peace and security.¹³⁹ Once again, it is recognised that the pursuit of international peace and security overrides the traditional roles of the Security Council and the General Assembly, allowing a more flexible application of the Charter's provisions.

(ii) Alternative methods in peacekeeping: a case for the General Assembly competence

The situation in Ukraine has shown a dead point to which the Security Council has arrived when dealing with matters that affect the interests of one of its permanent members. The veto power granted to the permanent members of the Council has become a threat to the proper functioning of the organ and it has raised many concerns about the need for reform of the Security Council.¹⁴⁰ The crisis emerged within the Security Council in relation to the conflict in Eastern Ukraine is just the last example of the many occasions in which the organ has found itself unable and/or unwilling to take decisions and to act in the pursuit of the aims indicated in the Charter, as the pinnacle of the mandate of the UN. In the last years, the Security Council has proven weak in overtaking the internal oppositions advanced by some of its permanent members, and this has resulted in a de facto stagnation of the organ and of the UN as a whole. An example is the case of Syria, where the Security Council has proven to be unable to take action in order to cope with the conflict ongoing in the country.¹⁴¹ Moreover, in deciding whether to send or not peacekeeping forces in an internal conflict, the Security Council has been influenced by not just political but also

¹³⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136.

¹³⁹ *ibid* 150.

¹⁴⁰ B Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Martinus Nijhoff Publishers 1998); N Schrijver, 'Reforming the UN Security Council in Pursuance of Collective Security' (2007) 12(1) *Journal of Conflict and Security Law* 127.

¹⁴¹ P Webb, 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19(3) *Journal of Conflict and Security Law* 471.

economic interests of its permanent members, determining a biased policy of selection of the conflicts where to intervene.¹⁴²

Given the restraints experienced by the Security Council in its action, one might ask what the alternatives available in the international legal order to overcome the deadlock and to seek a solution for conflicts such the one in Eastern Ukraine are.¹⁴³ The issue is to find valid alternatives to the involvement of the Security Council in the deployment of peacekeeping missions, for instance recognising similar powers to other organs of the UN able to represent the willingness of the majority of the States in the world. In this sense, some commentators propose alternative means for authorizing the use of force or humanitarian interventions, bypassing the authorization of the Security Council.¹⁴⁴ This author argues for a shift in the competences between the Security Council and the General Assembly when dealing with peacekeeping operations and when the latter faces insuperable oppositions within. Indeed, the Security Council should act in the matter of international peace and security ‘in order to ensure prompt and effective action’.¹⁴⁵ When this does not happen, the United Nations has a responsibility to act, adopting through other methods. This change does not mean a loss of functions by the Security Council, but the recognition to the General Assembly of a parallel competence on the matter, when the Security Council cannot act due to the link between the conflict and the interests of one of the permanent members.¹⁴⁶

A step in favour of a competence of the General Assembly in peacekeeping was made in 1950 with the Resolution ‘Uniting for Peace’.¹⁴⁷ Generally speaking, this Resolution is an important development of the law regulating the UN system, as, through the Charter framework, it would allow overcoming the political challenges experienced by the UN in the past.¹⁴⁸ The Resolution dates back to the Fifties, when the Security Council experienced a deadlock as the Soviet Union refused to cooperate in authorizing UN peacekeeping forces in the Republic of Korea.¹⁴⁹ The General Assembly was persuaded to

¹⁴² SM Stojek and J Tir, ‘The Supply Side of United Nations Peacekeeping Operations: Trade Ties and United Nations-led Deployments to Civil War States’ (2015) 21(2) *European Journal of International Relations* 352.

¹⁴³ S Hassler, *Reforming the UN Security Council Membership: The Illusion of Representativeness* (Routledge 2013) 226ff.

¹⁴⁴ BMJ Szewczyk, ‘Variable Multipolarity and U.N. Security Council Reform’ (2012) 53(2) *Harvard International Law Journal* 449; MD Niemetz, *Reforming UN Decision-Making Procedures: Promoting a Deliberative System for Global Peace and Security* (Routledge 2015).

¹⁴⁵ UN, Charter, art. 24 para 1.

¹⁴⁶ Carswell (n 13) 455.

¹⁴⁷ *Uniting for Peace* (n 14).

¹⁴⁸ G Wilson, *The United Nations and Collective Security* (Routledge 2014) 50.

¹⁴⁹ The Soviet Union adopted the policy so called of the ‘empty chair’: its representatives refused to participate in the meetings of the Security Council. This was done ‘in reaction to western refusal to grant the permanent seat on the Council to the newly established People’s Republic of China’: Schrijver (n 110) 14. On the procedural history of the Resolution, see the document of the UN Audio Visual Library of International Law <http://legal.un.org/avl/pdf/ha/ufp/ufp_ph_e.pdf> accessed 30 May 2016.

act nonetheless, bypassing the Security Council with a historical decision.¹⁵⁰ For the first time, the General Assembly could adopt resolutions for the maintenance and promotion of international peace and security.¹⁵¹ As for its content, first, the Resolution recognizes that even if the Security Council was unable or unwilling to act and to decide on the matter, nevertheless the Member States and the UN had a duty to act in order to maintain international peace and security.¹⁵² Despite the ‘failure’ of the Security Council, this does not undermine the role of the General Assembly, and it does not relieve it from its responsibility to maintain international peace and security.¹⁵³ Therefore, the lack of decisions by the Security Council would not diminish the role of the General Assembly and the need to find a solution to the threat to the international community. Second, it is said that when there is no agreement between the Security Council’s members, this brings to a failure to exercise its primary responsibility; therefore, the General Assembly can act instead of it.¹⁵⁴ Specifically, the General Assembly may recommend ‘collective measures’ that include not only the imposition of peaceful means, but also the use of force.¹⁵⁵ The debate on the use of the Resolution 377 has considered mainly this last possibility, with less attention given to the peaceful measures that the General Assembly would implement.¹⁵⁶ This implementation of the General Assembly’s powers is relevant because its competence was broader by the Resolution. In this regard, there has been a different interpretation of the General Assembly’s functions, permitting it to work for the maintenance of peace and security along with the Security Council.¹⁵⁷ Third, in order to perform its newly recognised function, the General Assembly needs to follow a specific procedure that consists of an ‘emergency special session’ that meets within twenty-four hours from the request formulated either by the Security Council (with a majority of seven votes in favour), or by the majority of the Member States of the UN.¹⁵⁸ The provision of a precise procedure with qualified majorities permits the UN to guarantee the transparency of the process and its legitimacy in terms of acceptance by the Member States. Moreover, it is interesting to notice that the process can be triggered in two ways: (i) one that involves the Security Council; and (ii) another that relies only on the vote in the General Assembly. This means that the procedure is still careful in including the organ that is going to be bypassed (i.e. the Security Council), at least as a possibility.

¹⁵⁰ D Zaum, ‘The Security Council, The General Assembly, and War: The Uniting for Peace Resolution’ in V Lowe and others (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (OUP 2010); Carswell (n 13).

¹⁵¹ Hossain (n 13) 79.

¹⁵² *Uniting for Peace* (n 14) Preamble.

¹⁵³ *ibid.*

¹⁵⁴ *ibid* para A.1.

¹⁵⁵ *ibid.*

¹⁵⁶ Carswell (n 13).

¹⁵⁷ Schrijver (n 110) 15.

¹⁵⁸ *Uniting for Peace* (n 14) para A.1.

Despite the innovations brought by the Resolution into the UN system and into the context of international peace and security, the decision has been highly contested and it remains debated.¹⁵⁹ Some criticisms are advanced on the understanding that Resolution 377 ‘could subvert the well-equilibrated balance of power within the United Nations’.¹⁶⁰ In this author’s view, Resolution 377 represents a fundamental step in the development of international law and in the implementation of the relationship between the Security Council and the General Assembly. Indeed, the fact that the latter can have more powers in the field of UN peacekeeping furthers the achievement of the objectives and purposes of international law, in particular concerning the cessation of ongoing conflicts. In this sense, the Resolution is fundamental as it is the ‘safety valve’ that overcomes the difficulties emerging from the Council’s deadlock, relying on a wider participation of states.¹⁶¹

Another interesting aspect of the present analysis is represented by the precedents in the history of the UN in which the General Assembly took the decision of recommending collective actions with peacekeeping operations.¹⁶² In this regard, the first peacekeeping operation in the history of the UN was deployed in 1956.¹⁶³ Moreover, the General Assembly has used its extended powers in other occasions to overcome the Security Council deadlock:¹⁶⁴ for instance, peacekeeping forces have been sent by the General Assembly to Congo.¹⁶⁵ The Congo case shows many similarities with the Ukrainian crisis as it experienced a dramatic clash between the Soviet Union and western countries, respectively supporting different parties to the conflict. In Congo, there was a disagreement between the UN forces and the Congolese government, and the Security Council was blocked by the veto of the Soviet Union: to overcome the deadlock, the issue was passed to the General Assembly that took the decision to use its powers according to Resolution 377.¹⁶⁶ Instead, there is only one case recorded in which the use of force was authorised.¹⁶⁷ This was the case of the crisis in the Republic of Korea in which the General Assembly decided to act with the deployment of UN forces, by-passing the deadlock of the Security Council. After this episode, there have not been other cases of a direct intervention of the General Assembly for the use of force, but only a series of recommendations directed to put pressure on the Security Council, in order to respond properly to the request for

¹⁵⁹ ‘The Security Council has, at least since 1982, lost all faith in the General Assembly’s authority to exercise a residual responsibility for maintaining the peace’: Carswell (n 13) 455.

¹⁶⁰ Tomuschat (n 131) 4.

¹⁶¹ Carswell (n 13) 456.

¹⁶² Carswell (n 13) 456-9; Zaum (n 150).

¹⁶³ This was the UNEF mission sent to Middle East and authorised by the General Assembly with the Resolution 1000 (ES-I).

¹⁶⁴ Schrijver (n 110) 14.

¹⁶⁵ UN, GA Res 1474 (ES-IV) confirming the operation ONUC.

¹⁶⁶ Zaum (n 150).

¹⁶⁷ UN Security Council Report, factsheet ‘Security Council Deadlocks and Uniting for Peace: An Abridged History’ (October 2013).

peacekeeping operations. In general, after the Korean crisis, the number of cases in which the General Assembly has been directly involved has been limited, but the non-use of a power does not mean that the General Assembly loses its competence for future situations.¹⁶⁸

Recently, there have been other situations similar to the case of Eastern Ukraine, in which the Security Council has been unable to take any decision in relation to the use of force or the deployment of UN peacekeeping forces. In this sense, the scholarship has considered the situation in Syria and the conflict between Israel and Palestine.¹⁶⁹ It is said that, in order to avoid any incapacity to act within the Security Council due to the use of the veto power by the permanent members, one possibility might be the action of the General Assembly.¹⁷⁰ But the problems arising would include: (i) the fact that the recommendations of the General Assembly would have no binding effect; and (ii) the fact that the Resolution ‘Uniting for Peace’ has only been invoked once.¹⁷¹ Other authors, instead, affirm the possibility for the General Assembly to be involved in the decision-making process regarding the use of force or the deployment of UN peacekeeping forces, considering its role as a substitute institution in the context of the UN. In particular, it is said that the General Assembly might provoke a debate on the topic and it might recommend certain actions to the member states.¹⁷² Another solution is to involve the General Assembly in the moment in which one of the permanent members abuses its veto power blocking the action of the Security Council.¹⁷³ In this case, the nine non-permanent members of the Security Council might refer the question to the General Assembly that could vote by a two-third majority for adopting specific measures in the case concerned.¹⁷⁴

B. General Assembly Authorisation of Peacekeeping in Eastern Ukraine

Following the new understanding of peacekeeping authorization, the General Assembly can have a competence in the deployment of UN forces also in the case of Eastern Ukraine. The author argues that this involvement is not only possible, but also necessary.

Concerning the ‘possibility’ of such a competence, two points are relevant. First, the Security Council is blocked and unable to fulfil its mandate in ceasing the hostilities in

¹⁶⁸ This is also the position of Professor José Alvarez as expressed in a recent interview <<https://www.justsecurity.org/9391/jose-alvarez-ukraine-peacekeepers-security-council-general-assembly-authorization/>> accessed 30 May 2016.

¹⁶⁹ Webb (n 141).

¹⁷⁰ *ibid* 15-16.

¹⁷¹ *ibid* 16.

¹⁷² C Henderson, ‘Authority without Accountability? The UN Security Council’s Authorization Method and Institutional Mechanisms of Accountability’ (2014) 19(3) *Journal of Conflict and Security Law* 489.

¹⁷³ Carswell (n 13) 466ff.

¹⁷⁴ *ibid*.

Eastern Ukraine. As already recalled, the Security Council is significantly divided on the matter and this impedes any decision on the use of peacekeeping in the Ukrainian territory. The Russian interests in the conflict block the Council in its ‘primary’ role in the maintenance of international peace and security, and the entire system of the UN is undermined by the veto power of one of its members.¹⁷⁵ Second, the conditions indicated in the ‘Uniting for Peace’ Resolution are met. Indeed, as in the case of Korea in 1950, the Security Council cannot act and this renders the international community’s response to the Ukrainian war ineffective. In this sense, the pre-conditions for a General Assembly intervention in the case of Eastern Ukraine are fulfilled because (i) in Eastern Ukraine the conflict shows ‘that international tension exists on a dangerous scale’¹⁷⁶ and this affects the relationships between States within the international community;¹⁷⁷ and (ii) there is ‘a lack of unanimity of the permanent members’ of the Security Council, as requested by the Resolution 377.¹⁷⁸ It is then the responsibility of the other organ of the UN, i.e. the General Assembly, to take action and to decide on the possible deployment of peacekeeping forces in Eastern Ukraine. In this regard, the creation of the UN Assessment Mission recalled above, shows the willingness of the General Assembly to take responsibility for the peaceful settlement of the conflict and to provide an answer to the request of the Ukrainian Government for being involved in the matter.

The General Assembly involvement in Eastern Ukraine is also necessary. Despite the attempts made to reach a peaceful settlement of the dispute (i.e. through the Minsk Agreements), the conflict is still ongoing, to the detriment of the civilian population and of the credibility of the UN as able to put an end to the war. In Resolution 377 one of the most important elements for having a peacekeeping mission was the need to fulfil the purposes of the UN in terms of guaranteeing international peace and security, and developing friendly relations among nations.¹⁷⁹ These purposes are relevant also in the conflict in Eastern Ukraine, because of the nature of the war (i.e. internal armed conflict), and of the increasing tension between Ukraine and Russia.¹⁸⁰ Moreover, as underlined in the reports of the UN Human Rights Monitoring Mission in Eastern Ukraine, the humanitarian situation in the territory is extremely serious, and human rights violations occur on a daily basis.¹⁸¹ In this sense, the conflict has a detrimental impact on the economic and social rights of the civilian population, and ‘the interruption of access to basic services is life threatening and

¹⁷⁵ For instance, in the case of the UN SC Res 562/2015 establishing an international tribunal for the prosecution of those responsible for the downing of the flight MH17.

¹⁷⁶ *Uniting for Peace* (n 14) Preamble.

¹⁷⁷ Arbatova and Dynkin (n 89).

¹⁷⁸ *Uniting for Peace* (n 14) para A.1.

¹⁷⁹ *ibid* Preamble.

¹⁸⁰ In this sense, see UN, GA Res 68/262, A/RES/68/262 (2014) 27 March 2014; UN, SC Res 2202, S/RES/2202 (2015) 17 February 2015.

¹⁸¹ See the last report, UNHCR, ‘Report on the Human Rights Situation in Ukraine: 16 August to 15 November 2015’ (9 December 2015).

can have a life-long impact on the affected population, hindering the post-conflict recovery'.¹⁸² Therefore, a peacekeeping mission deployed by the General Assembly is necessary to avoid further violence, to protect the rights of the population involved, and to secure an effective post-conflict restoration of the Ukrainian society.

From the foregoing considerations, the author argues that the intervention of UN peacekeeping forces in Eastern Ukraine can be authorised by the UN General Assembly, following the approach adopted in Resolution 377.

4. Concluding Remarks

This article has pointed out that there is an urgent need to send peacekeeping forces in Eastern Ukraine in order to promote a peaceful settlement of the conflict and decrease the violence between the parties. The attempts made to have a cease-fire have failed and the UN is left as the more authoritative subject to address the question and to take action.¹⁸³ Nonetheless, the UN has proved to be unable (or unwilling) to do so when the Security Council has been involved in the discussion on finding solutions for Eastern Ukraine. The interests of Russia specifically, and of the permanent members generally, have impeded any decision of the Council about the deployment of peacekeeping forces in Ukraine. The deadlock of the Security Council has determined more instability in the region and it has exposed the weakness of the UN system when dealing with peacekeeping in civil wars. This situation might be improved with different solutions. In this sense, a major involvement of the General Assembly and a new interpretation of its powers in peacekeeping can be an alternative method. Indeed, through its action, the Security Council's deadlock can be bypassed and a peacekeeping mission can be deployed in Eastern Ukraine, following the several requests of the Ukrainian authorities. This argument is advanced the understanding of the UN Charter as a 'living instrument'.¹⁸⁴ This means that the Charter indicates the general principles and rules governing the UN system, but then these can be interpreted and applied in a way that guarantees the UN to achieve its goals, despite the difficulties encountered by one of its organs. Moreover, given the peculiar nature of peacekeeping missions that operate within the context of international peace and security, but that are not specifically regulated by any Charter provisions, the interpretation of the role and function of the Security Council and of the General Assembly on the matter can be more flexible than traditionally indicated. In this sense, the 'Uniting for Peace' Resolution 'demonstrated a willingness on the part of member states to develop

¹⁸² *ibid* para 181.

¹⁸³ A Foxall, 'The Ceasefire Illusion: An Assessment of the Minsk II Agreement Between Ukraine and Russia' (2015) 8 *Russia Studies Centre Policy Paper* 1.

¹⁸⁴ Fassbender (n 140) 130.

a flexible approach to the interpretation of UN Charter provisions'.¹⁸⁵ Therefore, when the Security Council cannot decide, peacekeeping missions can be authorised even without its approval, and the General Assembly can intervene. This substitution does not mean a permanent set-aside of the Security Council, but only a temporary answer to a pressing need for the protection and the maintenance of international peace and security.

For these reasons, and according to the arguments presented in this article, the conditions for having a UN peacekeeping operation in Eastern Ukraine are met. In particular, the request made by the Ukrainian Government is legitimate, and the General Assembly is in charge of authorizing a UN operation.

In concluding, some additional remarks must be made about the legal consequences that this fact will have for future UN peacekeeping operations, and for the role of the General Assembly in this field. The recognition to the General Assembly of the power to intervene directly and to authorise peacekeeping missions is undoubtedly a strong development of international law. This fact is not only pivotal for the situation of Ukraine, but for all the future situations in which the Security Council will encounter a deadlock and it will be unable to act for the deployment of peacekeeping forces. The doctrine of the alternative role recognised to the General Assembly can have huge effects on the balance of powers between the two organs of the UN, and also on the relationship between member states of the UN. In particular, through a 'soft' mechanism, the international community might be able to by-pass the difficulties encountered in the Security Council's decision-making process, providing a new way of dealing with international conflicts.

The Ukrainian situation could be a good starting point for the UN system to use a new method of work for achieving the goals of international peace and security. Indeed, these two purposes are common to the UN system as a whole, including the Security Council and the General Assembly. In this regard, first of all, the deployment of UN peacekeeping forces in Eastern Ukraine by the General Assembly will be an important step towards a renovation of the UN framework, in terms of working methods and ways of authorizing peacekeeping missions.¹⁸⁶ Many have underlined the necessity to reform the UN system, especially regarding peacekeeping, but the oppositions are still numerous.¹⁸⁷ In this sense, this author argues that the involvement of the General Assembly in authorizing peacekeeping operations in Eastern Ukraine would open the path for a more efficient and effective system within the UN. Moreover, it would be a good occasion to establish a

¹⁸⁵ Wilson (n 148) 50.

¹⁸⁶ A Morrison, 'UN Peacekeeping Reform: Something Permanent and Stronger' (1996) 3(1) *Brown Journal of World Affairs* 95; DM Malone and R Thakur, 'UN Peacekeeping: Lessons Learned?' (2001) 7(1) *Global Governance* 11; L Fréchette, 'UN Peacekeeping: 20 Years of Reform' (2012) 2 *CIGI Papers*.

¹⁸⁷ EU Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations' (1997) 10(3) *Leiden Journal of International Law* 421; AM Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99(3) *American Journal of International Law* 619.

synergetic mechanism involving the Security Council and the General Assembly, in order to have cooperation and to avoid conflicts between the two organs.¹⁸⁸ In this sense, the principles expressed by the ICJ in the *Certain Expenses* Advisory Opinion would find a concrete implementation. As it has been pointed out, this will ensure the ‘complementarity role of the General Assembly in peace management’¹⁸⁹ and it will give new capabilities to the UN system, despite the opposing internal pressures of powerful states.

In the words of the late UN Secretary-General Dag Hammarskjöld: ‘the pursuit of peace and progress, with its trials and its errors, its successes and its setbacks, can never be relaxed and never abandoned’.¹⁹⁰ This is exactly what a UN peacekeeping operation in Eastern Ukraine is about, and what the involvement of the UN General Assembly in the deployment of peacekeeping forces would seek to achieve, now and in the future.

¹⁸⁸ On the relationship between the two organs, see L Sievers and S Daws, *The Procedure of the UN Security Council* (4th edn, OUP 2014) 572-92.

¹⁸⁹ Hossain (n 13) 93.

¹⁹⁰ D Hammarskjöld, UN Bulletin Vol. XVI, No. 4 (15 February 1954).