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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

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The European Security and Defense Administration
Within the Context of the Global Legal Space

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

--J. H.H. Weiler

Director, Jean Monnet Center for International and Regional Economic Law & Justice

The European Security and Defense Administration Within the Context of the Global Legal Space

Edoardo Chiti

Abstract

This paper aims at reconstructing the largely unexplored administrative dimension of the European Security and Defence Policy (ESDP), with particular reference to the growing web of functional, organizational and procedural interconnections between the EU, the Nato and the United Nations. Based on the results of the two main lines of research of administrative law beyond the State, namely European administrative law studies and the more recent «global administrative law» studies, the analysis of such interconnections suggests four main conclusions. First of all, the ESDP administration contributes to the exercise of a function resulting from the ever stricter integration of the functional disciplines of several international regimes and finding its anchorage in the global legal order. Secondly, in the exercise of such function, the ESDP administration acts as a component of a global organization, made up of a plurality of national and non national offices reciprocally interconnected by means of a variety of cooperation and integration mechanisms and jointly responsible for the carrying out of the world community security function. Thirdly, as for the discipline governing its functioning, the ESDP administration is subject to a body of European administrative law constituting a component of a wider global regulation aimed at making the joined action of the various competent offices possible. Fourthly, the reconstructed developments are characterized by deep functional and normative ambivalences.

Summary:

1. Purpose. 2. Function. 3. Organization. 4. Way of functioning. 5. Ambivalences. 6. Conclusions.

1. Purpose

On 31 March 2003, at the request of the national government and as a follow-on to the *Allied Harmony* Nato operation, the European Union (EU) launched a military mission in the Former Yugoslav Republic of Macedonia. The mission, named *Concordia*, was carried out through the Nato assets and capabilities and aimed at contributing to the implementation of the 2001 Ohrid Framework Agreement¹. On 12 June 2003, the Council adopted the Operation Plan and the decision concerning a military operation in the Democratic Republic of Congo. The operation, named *Artemis*, was conducted by the EU through its own capabilities in accordance with the United Nations (UN) Security Council Resolution 1484 of 30 May 2003, with the purpose of contributing to the stabilisation of the security conditions and the improvement of the humanitarian situation in Bunia². On 12 July 2004, the European Council decided to conduct a EU military mission to Bosnia and Herzegovina. The operation, named *Eufor-Althea*, was led by the EU in strict cooperation with the Nato and in compliance with the relevant UN Security Council resolutions, with the purpose of monitoring the implementation of certain aspects of the General Framework Agreement for Peace in the region, as well as to support the process of EU integration³.

These examples of the EU activity under the European Security and Defense Policy (ESDP) pillar raise several questions. Is the EU sectorial administration exercising a function finding its anchorage in the EU legal order? Or is it contributing to the exercise of a function that is common to several regulatory systems beyond the State? If this is the case, in which legal order is such function anchored? And what are its distinguishing features? Moreover, how does the European administration contribute to its exercise? In particular, what organizational

¹ See Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia, O.J. 2003 L 34/26.

² See Council Common Position 2003/319/CFSP of 8 May 2003 concerning European Union support for the implementation of the Lusaka Ceasefire Agreement and the peace process in the Democratic Republic of Congo (DRC) and repealing Common Position 2002/203/CFSP, O.J. 2003 L 115/87.

³ See Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, O.J. 2004 L 252/10.

relationships are established between the EU, the Nato and the United Nations? Do such organizations operate as separate bodies? Or do they tend to be interconnected, if not in a genuinely unitary whole, at least in a relatively stable network of public power? If so, what are the distinguishing features of such polycentric but interconnected organization? And which rules and institutes govern its functioning?

The present paper aims at providing a preliminary response to this range of questions. The inquiry of such issues is relevant in two respects. Firstly, it could contribute to the reconstruction of the legal features of the ESDP. The emergence and consolidation of the latter are subject to an increasingly more in-dept legal discussion⁴. In particular, the participation of the Member States in the process whereby the EU defines its political orientation in the field gave rise to an abundant literature focusing on the features of the institutional layout defined by the Treaty on European Union (TEU) and its suitability to reaching the goals of the policy, as well as evaluating, with reference to the «Constitutional Treaty», whether the Masters of the EC Treaty have «finally agreed to overcome their past and present structural weaknesses or do they again reformulate provisions of soft cooperation without being able to leave the institutional trap they have constructed themselves since the early days of their political cooperation»⁵. The analysis that will be carried out in the paper could consent to develop such institutional reflection through a consideration of the largely unexplored administrative dimension of the ESDP, with particular reference to the growing web of functional, organizational and procedural interconnections between the EU and the other regulatory systems beyond the State that operate in the field of security and defense. Secondly, a reconstruction of such relationships might result to be relevant also beyond the borders of the studies devoted to the ESDP. More specifically, it might

⁴ Of course, it is impossible to provide full references of such literature here. For an overall introduction to this subject matter, however, see L. Hottiaux and J. Liponska-Laberou, *La politique européenne de défense*, Paris, 2000; L.N. Pneumaticou, *Aspects institutionnels de la politique européenne de sécurité et de défense*, in *Dir. UE.*, 2001, p. 605 ff.; P. Bonnen, *Towards a Common European Security and Defence Policy: the ways and means of making it a reality*, Münster, Hamburg, London, 2003; M.E. Smith, *Europe's Foreign and Security Policy, The institutionalization of the Cooperation*, Cambridge, 2004; A. Treacher, *From Civilian Power to Military Actor: the EU's Resistable Transformation*, in *Eur. Foreign Aff. Rev.*, 2004, p. 49 ff.; S. Duke, *CESDPD: Nice's Overtrumped Success?*, in *Eur. Foreign Aff. Rev.*, 2001, p. 155 ff.; A. Missiroli *The European Union: Just a Regional Peacekeeper?*, *ibidem*, 2003, p. 493 ff.; F. Pagani, *A new Gear in the CFSP Machinery: Integration of the Petesberg tasks in the Treaty on European Union*, in *Eur. Journal Intern. L.*, 1998, p. 737 ff.; K. Von Wogau (ed.), *The path to European Defence*, Antwerp, 2004; C. Novi, *La politica di sicurezza esterna dell'Unione europea*, Padova, Cedam, 2005.

⁵ W. Wessels, *A 'Saut constitutionnel' out of an intergovernmental trap? The provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy*, NYU School of Law, Jean Monnet Working Paper 5/04, p. 10.

contribute to the reflection on the characteristics of European administrative law, both by extending the exam of European administrative law beyond the scope of the Community pillar, to which legal inquiry has so far been devoted, and by illustrating the complex position of European administration and administrative law within the framework of the global legal space.

In order to attempt to provide an answer to the above-mentioned questions, this paper shall first analyze the relationships between the ESDP and the functional disciplines of the other competent non statal regulatory systems (§ 2); then, it will examine the organizational relationships linking the EU, the Nato and the United Nations both at the political and administrative level (§ 3), as well as the rules and legal institutes governing the joint exercise of their executive activities (§ 4). The main conclusions of the inquiry will be summarized and critically discussed in § 5, while a final paragraph will briefly consider their possible implications (§ 6).

Before proceeding, it would be appropriate to explicitate both the method and the difficulties underlying this study. As for the method, this inquiry will take as a starting point the results of the two main lines of research of administrative law beyond the State, namely European administrative law studies and the more recent but already well established «global administrative law» studies⁶. These two lines of research will also provide the relevant analytical

⁶ It seems superfluous to recall here the distinguishing features of European administrative law studies, to which the Italian scholarship has actively contributed (for an overall discussion of the Italian literature on European administrative law see E. Chiti, *La scienza del diritto amministrativo ed il diritto pubblico ultrastatale nella seconda metà del XX secolo*, in E. Chiti, R. Perez, A. Sandulli, L. Torchia (eds.), *La scienza del diritto amministrativo nella seconda metà del XX secolo*, Napoli, Editoriale Scientifica, 2007, forthcoming). As for «global administrative law», its existence is argued, as it is well known, by the two authors that most have engaged, in the last years, in the reconstruction of the features of administrative law beyond the State, Sabino Cassese and Richard Stewart. The first author, moving from the existence of a «global legal order», observes that many international regimes actually present the distinguishing features of administrative law (features that are partly typical of the national experience, partly peculiar) and explains such phenomena in terms of the development of a «global administrative law» («even though this qualification may seem unacceptable to those who believe that administrative law cannot be global by definition. Some believe that administrative law is always domestic par excellence and that if it is global, then it cannot be administrative law, since global law concerns the relations between states»; S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, in *New York University Journal of International Law and Politics*, vol. 37, n. 4, 2006, p. 663 ff., pp. 669-670). The second author, moving from the observation of the existence of a «global administrative space», defines global administrative law as the set of the «legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the *accountability* of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make»; see B. Kingsbury, N. Krisch, R.B. Stewart and J.B. Wiener, *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, in *Law and Contemporary Problems*, n. 3-4, 2005, p. 1 ff., p. 5. For an overall synthesis of the main results of the two research projects, see the monographic issues of the *European Journal of International Law* (2006, n. 1) and *Law and Contemporary Problems* (2005, n. 3-4), dedicated, respectively, to *Global Governance and Global Administrative*

tools and conceptual categories. Moreover, the purpose of the present paper is essentially empirical, in so far as the paper asks what function is actually carried out by the EU administration when acting in the field of the ESDP, and through which organizational and procedural administrative mechanisms. This should not be taken as an underestimation of the importance of the normative questions that are obviously raised by the empirical reconstruction. Such questions will be considered in the final part of this study, although admittedly they would require autonomous reflection in a specific piece of work. As for the difficulties underlying this study, a number of caveats should be provided. In order to avoid an excessively long list of warnings, however, one can limit to two remarks. First, the rapidly and sometimes unexpectedly evolving nature of the subject matter represents an inherent weakness of the inquiry, as the quality of the geographer's work largely depends on that of the explorer. Second, the inquiry cannot but establishing a balance between «fulls» and «empties»: the «fulls» indicate the possibility to reach some scientifically significant conclusions, that is to say to identify, if not proper legal institutes, at least certain elements of an emerging legal construction; the «empties» derive from the uncertainties of the investigated developments, their lack of consolidation, and their ambivalences.

2. Function

As a consequence of the gradual development of a ESDP, the military administrations of EU Member States are not only called to carry out the national defence and security function habitually assigned to them by national law. Rather, they are increasingly involved in the exercise of further activities regulated by European law and oriented towards the objective of military defense and security of the European «region».

The essential outline of such objective is provided by the Treaty on the European Union (TEU). According to its provisions, defense is a «common policy» in the making, which might be fully accomplished only if the European Council decides to do so by recommending to the Member States the adoption of such a decision in accordance with their respective constitutional

Law in the International Legal Order and to *The Emergence of Global Administrative Law*; see also the monographic issue of the *New York University Journal of International Law and Politics* (vol. 37, n. 4, 2006).

requirements⁷. As for security, this is already outlined in its essential features and, not differently from the North-Atlantic Treaty Alliance, is focused on preserving the integrity of the regional order by means of a military activity that not only restores peace by putting an end to any conflict beyond the European borders but also pursues the wider objectives of crisis management, reinstatement of violated law, and protection of fundamental rights⁸.

Far from being shaped as an autonomous discipline, however, the regulation of the EU activities in the field of defense and security is placed in a broader legal context.

Firstly, the European regulation establishes a number of «horizontal» links with the Nato regulation. Notably, the TEU refers to the Nato regulation, on the one hand, by stressing the «specific character of the security and defense policy of certain Member States», on the other hand, by explicitly referring to the obligations undertaken by certain member States within the Atlantic Alliance, and again by providing that the EU policy be compatible with the common security and defense policy adopted in the context of the North-Atlantic Treaty⁹. As to the Nato regulation, the «new strategic concept» highlights the compatibility of the EU common foreign and security policy with Nato's activities and the positive implications that this layout has for the development of the so-called «European Security and Defense Identity» (ESDI)¹⁰.

Secondly, the European discipline is «framed» by the United Nations regulation, which prevails over the former and is binding on its contents¹¹. The functional supremacy of the United

⁷ See Article 17/1 of the TEU where the Union competence is explicitly limited to a «progressive framing» of a common defence policy. This solution stems from the determination of some Member States to preserve their independence in the field of defence and is basically confirmed in the draft «Constitutional Treaty» (Articles I-41/2 and 7). As to the actual relevance of the common defence policy, see the opposite interpretations by S. Duke, *CESDPD: Nice's Overtrumped Success?*, in *European Foreign Affairs Review*, 2001, p. 155 ff., and A. Missiroli, *The European Union: Just a Regional Peacekeeper?*, *ibidem*, 2003, p. 493 ff.

⁸ This emerges not so much from an overt definition by the TEU but rather from a (non-exhaustive) listing of the types of actions that the European Union can take, i.e. humanitarian and rescue missions, peace-keeping missions, and missions of combat forces in crisis management, including peacemaking. This set-up is confirmed by some relevant soft law acts, notably the *A Secure Europe in a Better World* drafted by High Representative Solana and approved by the Brussels European Council in December 2003.

⁹ Article 17/1 of the TEU; Article I-41/2 of the Constitutional Treaty follows the same wording.

¹⁰ North Atlantic Council, *New strategic concept of the Atlantic Alliance*, §§ 17 and 30.

¹¹ The primacy of UN regulation over international conventional law is established by Article 103 of the Charter, which provides that «[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail». Moreover, with reference to «regional arrangements or agencies» operating in the field of maintenance of international peace and security, their power to undertake enforcement measures is subject to confirmation that the organization's charter and activities are consistent with the purposes and principles of the United Nations (see Article 52/1 of the Charter of the United Nations). As is well known, compliance should not be merely formal; therefore, the confirmation in the treaty of the UN supremacy in the field of peace and international

Nations is clearly recognized both in the Maastricht Treaty and in the documents adopted by the European institutions. The former provides that the goal of preserving peace and strengthening international security should be pursued «in accordance with the principles of the United Nations Charter»¹². The European institutions have reiterated and specified such commitment in several occasions. For instance, the conclusions drawn by the Swedish Presidency of the Göteborg Council held on 15th June 2001 confirmed the need for a close cooperation with the United Nations, whereas in *A Secure Europe in a Better World*, EU High Representative Solana identifies the UN Charter as the «fundamental framework» in which international relations should be placed and an «effective multilateral system»¹³ should be developed. Moreover, the communication of the Commission on the relationship between the EU and the United Nations reiterates the commitment of the Union and its Member States to contribute to reaching the UN goals concerning conflict prevention and crisis management¹⁴.

Thirdly, the EU, Nato and UN regulations are subject to the homogeneization capacity of some global institutions. The G8 represents the most notable example. On the one hand, it adopts specific decisions in the field of conflict prevention, management, and solution which are then directly or indirectly «implemented» by the United Nations, Nato, and the EU, in addition to several non national organizations and States. On the other hand, it is gradually developing a genuine strategy of global security which, overcoming the ordinary functional limitations of the organization, deepens and develops the framework provided by the United Nations for the actions by the various competent regulatory systems¹⁵. Next to the G8, other global institutions carry out an ordering function, although with a more limited effectiveness. For example, the Organization for Security and Cooperation in Europe (Osce) has performed, especially in the past, a significant unifying role, adopting measures that, though outside of the United Nations order and not rarely devoid of any binding effect, were often referred to by the States in order to

security, which is desirable in any case, is to be coupled with a substantial consistency of the actions taken by the regional agency with the UN goals.

¹² Article 11/1, third item. The Constitutional Treaty contains a reference to the principles of the Charter of the United Nations among the «specific provisions relating to the common security and defence policy»; see Articles I-41/1 and 7.

¹³ Among the relevant documents, see the conclusions of the General Council meeting of June 2001 and the communication of the Commission on conflict prevention (COM (2001) 211 def.).

¹⁴ COM (2003) 526 def., Communication from the Commission to the Council and the European Parliament, *The European Union and the United Nations: The choice of multilateralism*.

¹⁵ On the G8 as a global institution, M. Conticelli, *I vertici del G8. Governi e amministrazioni nell'ordine globale*, Milano, Giuffrè, 2006.

justify their military conduct in international relations. Among the less important institutions, one could mention the Ad Hoc Committee of Experts of Public International Law (Cahdi), which was set up within the Council of Europe as a discussion forum on the main issues of international public law including, most notably, those relating to the use of coercive power.

The relationships between the various functional regulations are rich of ambiguities. They are the result not so much of an organic design but rather of gradual adjustments and of the cooperative efforts made by regulatory systems beyond the State. Moreover, a latent competition characterizes the relationships between regional agencies and between them and the universal organization. At the regional level, the development of the European Security and Defense Identity, far from following a straight path towards an increasingly closer functional integration between the EU and the Nato, gives rise to several adjustment and reaction processes, involving mainly the Nato members that do not belong to the EU¹⁶. As for the interaction between the regional and the universal level, the Nato soft law and practice illustrate an orientation of the regional organization to operate independently and latently in competition with the UN, in spite of the formal consistency between the Nato and UN regulations¹⁷. And even the ESDP may be considered not to be fully consistent with the functional layout established by the United Nations. While the European discipline is undoubtedly an implementation of the UN regulation

¹⁶ See, though with reference mainly to organizational problems stemming from the connections between Nato and the EU, M. Clementi, *L'Europa e il mondo. La politica estera, di sicurezza e di difesa europea*, Bologna, Il Mulino, 2004, p. 135 ff. On the rationalizing potential of the European Security and Defence Identity see § 30 of the *New strategic concept of Atlantic Alliance*, stating that the Nato development process «will enable all European Allies to make a more coherent and effective contribution to the missions and activities of the Alliance as an expression of our shared responsibilities; it will reinforce the transatlantic partnership; and it will assist the European Allies to act by themselves as required through the readiness of the Alliance, on a case-by-case basis and by consensus, to make its assets and capabilities available for operations in which the Alliance is not engaged militarily under the political control and strategic direction either of the WEU or as otherwise agreed, taking into account the full participation of all European Allies if they were so to choose».

¹⁷ The soft law measures that develop the «new strategic concept» do not refer to the need that Nato actions be subject to an authorization by the UN Security Council, i.e. to a formal mandate confirming the compatibility of the regional organization's action with the goals of the universal organization, as required by Article 53/1 of the UN Charter (according to which, as is well known, «no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council»); see also the Declaration on strengthening the cooperation between the United Nations and the regional arrangements or agencies in maintaining international peace and security, adopted by the General Assembly of the United Nations with resolution No. 49/57 of 9th December 1994). As for Nato practice, with its 1999 action in the Federal Republic of Yugoslavia, the Atlantic Alliance showed that it is ready to act irrespectively of such mandate, although its action was justified by some scholars either as implicitly authorized by the Security Council, or as humanitarian intervention, in addition to being legitimized *ex post* by the universal organization (on the crisis in Kosovo and the possible justifications for the Nato intervention see, *ex multis*, (ed.) N. Ronzitti, *Nato, conflitto in Kosovo e Costituzione italiana*, Milano, Giuffrè, 2000; P. Picone, *La guerra del Kosovo e il diritto internazionale*, in *Rivista di diritto internazionale*, 2000, p. 309 ff.; (ed.) E. Sciso *L'intervento in Kosovo. Aspetti internazionalistici e interni*, Milan, Giuffrè, 2001).

on a regional scale, it would be wrong to underestimate the peculiarities of the institutional context where such implementation process takes place. In fact, the European military defense and security action is not only strictly connected with other activities focused on the political, diplomatic, and economic activity of the EU and its Member States, which tend to differentiate between the European experience and that of the United Nations system. It also falls within a functional architecture that remains unparalleled, in terms of development and articulation, in the field of regulatory systems beyond the State. In this respect, the European discipline tends to take on connotations that at the same time offer an added value compared to the UN regulation and an element of potential differentiation and autonomy.

And yet, the combination of the «horizontal» integration among the regional disciplines, the «vertical» framing of the latter by the UN regulation and the unifying capacity of some global institutions, determines a progressive interconnection of the functional disciplines of the various competent regulatory systems and their gradual convergence on a tendentially unitary functional framework.

Though on different levels and paying attention to different aspects, such functional disciplines are progressively orientated towards the same objective, defined in its overall terms by the UN regulation and practice and identifiable in the security of the world community, broadly meant as maintenance of the integrity and preservation of the global order through an enforcement activity implying the use of military means.

This is a wide definition, covering not only the interruption of hostilities between the fighting parties, but also the pursuing of further goals, specifically the restoration of international legality and the protection of fundamental rights. Here, protection of peace and safeguard of human rights are strictly related. Both issues, as is well known, are part, as separate and independent goals of the United Nations, of the original Charter layout¹⁸. However, in the recent practice of the General Assembly and the Security Council, maintenance of peace and promotion of fundamental rights appear to be stably correlated. Through a progressive definition of a broad interpretation of situations of «threat to the peace», «breach of the peace», and «act of

¹⁸ In the Preamble, the Charter reaffirms «faith in fundamental human rights, in the dignity and worth of the human person» and undertakes, among the ends of the Organization, to maintain international peace and security and to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; see Articles 1/1 and 3 of the Charter of the United Nations.

aggression» such as to include also cases of severe violation of human rights¹⁹, the United Nations have gradually assigned to the military intervention a goal that is not so much one of stopping a war situation, meant as armed fight among States for international interests, but rather one aimed at protecting human rights both in inter-state conflicts and in domestic crises and upheavals within an individual State. There results a representation of security of the world community that, far from developing in parallel with the protection of fundamental rights, as one would assume from the approach outlined by the Charter of the United Nations, incorporates such protection and defines itself through it. This implies, among other things, a shift to a merely negative approach focused on responding to specific crises, to a conception of security as an emerging public policy characterized by an active promotion of fundamental rights and by the taking on of a real supranational responsibility for the protection of individuals within the State borders and against any possible opposition by the States.

Besides the relevance attached to the protection of fundamental rights, the goal of the military security of the world community is also characterized by its multi-faceted nature. On the one hand, it is the expression of an interest, the maintenance of global order, that is referable to the world community as a whole. On the other hand, this does not mean that such goal disregards specific situations that might occur with reference to the single components of the global order as, at the present stage of development, the UN regulation does not exclude the existence of regional disciplines, provided that they are basically consistent with the discipline enforced by the universal organization. This leads to defining world security as an articulated goal. It meets a «global» need, but such a need is defined not so much as an interest that overrules the specific regional security objectives, but rather as an objective that shapes the contents of the latter, directing them to the interest of the world community as a whole and making them a tool for deepening and developing the global design²⁰.

¹⁹ Think, for instance, to the several resolutions of the 1990's in which the Security Council considered various humanitarian emergencies within a State as threats to peace: most recently, 1997 resolution No. 1101 and 1999 resolution No. 1264 concerning the actions in Albania and Timor Est respectively.

²⁰ It should also be noticed that the relationship between the UN regulation and the regional disciplines is not endangered by the fact that several regional agreements identify, among their ends, collective military defence in addition to security. As a matter of fact, in the regulatory scheme defined in the Charter of the United Nations, and implemented in the regulation of the main regional systems, collective self-defence is envisaged not as a separate end from security, but as a kind of action that may be pursued as a way to protect regional security on a temporary basis and with a view to taking further measures aimed at restoring peace.

Of course, this does not mean that the consistency between the global «plan» and the regional one can be taken for granted. Suffice it to think of the trend followed by the Atlantic Alliance – an obvious example of which is the 1999 action on the territory of the Federal Republic of Yugoslavia – to act virtually independently of the United Nations. On a general level, the problem of the relationship between regional and global experience stems from the circumstance that the actual definition of the security aim, once its content is extended from a mere interruption of the conflict or lack of war to the protection of human rights and restoration of the legal order existing before the violation of fundamental rights was perpetrated, necessarily requires making complex choices that are directly connected to geo-strategic, political, and economic interests. Therefore, the point is not just to identify and remove macro-violations of fundamental rights that occur in the global community, but rather to make much more complex evaluations, in which the regional variables come into play not only as developments of the global plan but also as potential causes of its disruption. From this viewpoint, it is necessary to admit that the functional pattern that is emerging is subject to an internal interplay of forces whose outcome cannot be defined *a priori* and once and for all.

An even more complex dynamic governs the relationship between the emerging function of global military security and the specific defense and security functions of the individual States. The progressive definition of a military security function for the world community does not require a cancellation of the statal defense and security functions. However, far from being irrelevant to the latter, it influences and sets their subject matter and contents. Indeed, as the States participate to several regional organizations as well as to the universal organization, the national function can only take place within the limits allowed by the global law. The latter, on the one hand, erodes the scope of application of the national defense and security activity, while, on the other hand, directs such activities towards the higher needs of the global legal order. However, such a «framing» raises several problems. Instead of triggering a linear process whereby the national disciplines adjust to the supranational law, it has to come to terms with the centrifugal forces stemming from unilateral conducts that are often put in place by the States. Given its role of superpower, not just in economic and military terms, the most relevant example is obviously that of the United States and the prevention doctrine developed between December

1999 and September 2002 by the US administration²¹. A discussion of the distinctive traits and the key reasons for the new direction of the US foreign and military policy is obviously outside the scope of this paper. For the purposes of this paper, however, the approach that has followed since 1999 matters as a development that, over the next few years, is destined to test the strength of the architecture of the emerging global function and its overall soundness. This without simplifying the ambiguities of such development, that does not imply a mere opposition to the functional layout that was outlined here, but appears to be more complex, concurrent and at the same time complementary development. It is concurrent because it implies at least a partial equalization of international law with the US national public law; and it is complementary to the extent that security is defined on a global scale and in close connection with the protection of human rights.

The observations made so far raise also the problem of the legal order in which the function that is emerging from the integration of the different international regimes may find its own anchorage.

In this respect, it could be argued that such emerging function finds its foundations neither in the national order nor in the one defined by a single international regime, but rather in the legal order of an «international macro-organization»: the «United Nations system», meant as a legal order different from the broader global order and made up, from an organizational viewpoint, of a plurality of bodies at the same time differentiated and strictly connected with the United Nations Organization²².

²¹ Such a doctrine may be considered in compliance with Article 51 of the Charter of the United Nations only through a loose interpretation of the provisions of such article. The interpretation is justified in the light of the more permissive legal regime in force before the adoption of the Charter or of the mutated features of conflicts; see A.D. Sofaer, *On the Necessity of Pre-Emption*, in *European Journal of International Law*, 2003, p. 209 ff.; A.C. Arend, *International Law and Preemptive Use of Military Force*, in *The Washington Quarterly*, 2003, p. 93 ff.; for the second thesis see D.F. Vagts, *Hegemonic International Law*, in *American Journal of International Law*, 2001, p. 843 ff.; M.J. Glennon, *Why the Security Council Failed*, in *Foreign Affairs*, May-June 2003, p. 16 ff.; for a critical approach see, *ex multis*, M. Bothe, *Terrorism and the Legality of Pre-emptive Force*, in *European Journal of International Law*, 2003, p. 227 ff.; E. Cannizzaro, *La dottrina della guerra preventiva e la disciplina internazionale sull'uso della forza*, in *Rivista di diritto internazionale*, 2003, p. 171 ff.; P. Picone, *La guerra contro l'Iraq e le degenerazioni dell'unilateralismo*, in *Rivista di diritto internazionale*, 2003, p. 329 ff.; G. Monateri, «Giustizia globale» o diritto internazionale, in M. Deaglio, G.S. Frankel, G. Monateri and A. Caffarena (eds.), *Dopo l'Iraq*, Milan, Guerini e associati, 2003, p. 93 ff.; and A. Di Blase, *La «dottrina Bush» e il diritto internazionale*, in Aa. Vv., *Scritti in onore di G. Arangio Ruiz*, Naples, Editoriale Scientifica, 2004, p. 2063 ff.

²² As for the «international macro-organization» definition, see S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, p. 194, who observes that the UN represents a «structure of a second-degree universal nature, i.e. it is open to all international organizations of universal nature whatever the sector in which they are set up; even when they do not become members of the UN family, these organizations establish more or less strong forms of connection with the UN or some of its members».

However, such an interpretation lends itself to a number of objections.

Firstly, the aim of the emerging function is the expression of an interest that does not refer to a single entity in the global legal space, though having a universal vocation and variously connected with several other international regimes. In so far as it is aimed at ensuring global security, this function meets the needs of all the subjects of the world community as a whole, in contrast with the traditional representation of the international society as a legal space made up of several separate orders, each based on an independent conventional foundation and provided with a specific organization and regulation.

Secondly, similar considerations can be made with reference to the sources of the discipline of function, which exceed the boundaries of the UN system to refer to a broader legal reality. Indeed, the discipline stems not only from the relevant conventional and regulatory law (represented, on the one hand, by the Charter of the United Nations and the other applicable international treaties, on the other hand, by the regulation produced by the UN system), but also from customary international law, as well as from rules and decisions that, though adopted by bodies outside the UN system, circulate in the latter, thus conditioning its action in several ways. In other terms, this discipline is not exclusively established by the «United Nations system»: it is a more complex regulation, made up of rules that are both internal and external to the «international macro-organization».

Thirdly, the thesis does not duly account for the variety of subjects affected by the function. On the one hand, referring to the «United Nations system» offers the advantage of stressing the importance of States in this function. On the other hand, it tends to underestimate the position held by private parties. In line with the most common accounts of the legal features of the international community - according to which the latter preserves characteristics of a regulatory system aimed at regulating relations among States, despite the major changes occurred in the past fifty years -, such reference implies an aggregate of regulatory systems beyond the State, each being the expression of a set of States that participate in the agreement on a voluntary basis²³.

²³ For a particularly clear formulation of this prospective, see S. Marchisio, *L'Onu. Il diritto delle Nazioni Unite*, Bologna, Il Mulino, 2000, p. 24 ff., where it is stated that the UN has largely preserved its original nature of instrument for coordinating international cooperation, «without taking on the role of legal organization of the international community as a whole or global government, though in embryo» (p. 24); see also R. Seidelmann, *The Search for a New Global Order: Rehabilitating the Idea of the Global State*, in D. Bourantonis and M. Evriviades (eds.), *A United Nations for the Twenty-First Century*, The Hague, Boston, London, Kluwer, 1996, p. 41 ff.; Arangio-Ruiz, *Nazioni Unite e legalità internazionale*, in Sioi (ed.), *L'Onu: cinquant'anni di attività e prospettive*

However, such an interpretation ends up neglecting that the function is addressed not only to States but also to private parties, though the latter are not considered as individual citizens but rather as a world collectivity²⁴.

These objections suggest a different reconstruction, identifying the roots of the functions not so much in the legal order of one of the subjects of the world community (the United Nations system), but rather in the «global legal order» itself. More specifically, the reference to the global order would allow to overcome aporias deriving from anchoring the function to one of its subjects, replacing the interpretation of the world community as a legal space fragmented in a variety of legal orders corresponding to the various international organizations with a different representation, one that emphasizes the ordering nature of such legal space as well as the organizational – rather than subjective – relevance of international institutions²⁵.

To such a reconstruction it could be objected that the existence itself of a global legal order is questioned, if not excluded, by the lack of a government and of a stable political system. However, one can reply to this criticism by noting that there is any way an international community «in which the three elements of legal orders are all present: multiple subjects (mainly States), organization (mainly international organizations), regulation (mainly conventional, but also of regulatory nature)»²⁶. The thesis, after all, is not unknown in the most advanced studies in international law science, which have long been highlighting the character of legal order of the international community²⁷.

per il futuro, Rome, 1996, p. 387 ff.; K. Zemanek, *The Legal Foundation of the International System*, in *Recueil des Cours de l'Académie de droit international de la Haye*, 1997, p. 9 ff.

²⁴ On the role of private subjects in the international community, see S. Battini, *Organizzazioni internazionali e soggetti privati: verso un diritto amministrativo globale?*, in *Rivista trimestrale di diritto pubblico*, 2005, p. 359 ff. (published also in English under the title *International Organizations and Private Subjects: A Move Toward a Global Administrative Law?*, available on http://www.iilj.org/publications/wp_globadminlaw.htm).

²⁵ For this overall perspective see S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, cit., p. 194 ff. and p. 278 ff.

²⁶ See S. Cassese, *Lo spazio giuridico globale*, in *Rivista trimestrale di diritto pubblico*, 2002, p. 323 ff., p. 327, where the author observes that «the thesis whereby the international order is a legal order was already expressed by Santi Romano, *L'ordinamento giuridico* (1917-18), Florence, 1962, spec. 114 and 156, though resorting to the formula whereby State law is the necessary pre-requirement for international law» (n. 9); for this approach see also S. Romano, *Il diritto pubblico italiano*, 1914, Milano, Giuffrè, 1988, p. 414 on and p. 427 ff.

²⁷ As for the Italian legal science, reference should be made especially to A. Cassese, *Il diritto internazionale nel mondo contemporaneo*, Bologna, Il Mulino, 1984, whose first chapter is dedicated to the *Essential features of the international community* (p. 15 ff.), meant as a real legal order; it is worth noting that the title of this chapter was changed into *The key characteristics of the international legal order* in the second edition of the volume, published in 2004.

Even assuming that a global legal order does exist, one might doubt that it can be related to the function under examination. Far from having a universal character, such function only involves States operating in a limited geo-political area, i.e. the European and North Atlantic regions. This area in turn is not a consistent bloc, but rather a «divided» system²⁸, to the extent that the traditional Western legal internationalism is fading in the face of an increasingly stronger unilateralism of the present US politics²⁹. And yet, this perspective would imply an erroneous overlapping of the global and universal dimensions. As a matter of fact, the linkage to the global order does not derive from the voluntary involvement in the definition and exercise of the function of all States and non national regulatory systems operating in the field of collective defense and security. It rather stems from the fact that the elements of this function matter not so much for individual segments of the world community, but for the global order considered in its entirety, as the function fulfils needs that are referable to the whole of the subjects of the international society. Furthermore, even accepting that the global dimension of the function implies the voluntary involvement of competent public subjects, one should recognize how such situation occurs in the case in point. On the one side, the regulatory systems other than the United Nations can only improperly be defined as regional organizations: both the North-Atlantic Treaty Alliance and the EU are experiencing an enlargement process that extends their geopolitical reach well beyond the original boundaries³⁰ and have established several forms of cooperation with non-member States or other supranational regulatory systems³¹. On the other

²⁸ The expression is used by J. Habermas, *L'occidente diviso*, Bari, Laterza, 2005, notably p. 107 ff.

²⁹ Formalized in the new US doctrine on security, as defined in September 2002 and reiterated in January 2003. On this issue, which is the subject of a broad political literature, see the contributions published in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law*, New York, Cambridge University Press, 2003.

³⁰ As is well known, since the second half of the 1990's, the EU has been gradually opening up to central and eastern European countries, increasing the number of members to twenty-five. Nato, whose original treaty was subscribed by twelve States (Belgium, Canada, Denmark, France, Iceland, Italy, Luxemburg, Norway, Holland, Portugal, United Kingdom, United States), was later opened to Greece (1952), Turkey (1952), the Federal Republic of Germany (1955), and Spain (1982), and nowadays also includes ten States of the former Soviet bloc (Poland, Check Republic, and Hungary joined in 1999, while Bulgaria, Estonia, Latvia, Lithuania, Rumania, Slovakia, and Slovenia joined in 2004). This led to adding the Eastern European regions to the traditional regions of Western Europe and North America. However, the process is still under way as the 1999 Washington declaration states that the Alliance's goals imply a need to build a «stronger and larger Euro-Atlantic community of democracy» in which «all European democracies that, regardless of their geographical position, want and are able to take on the responsibilities deriving from their membership» can participate.

³¹ The EU, together with twelve Mediterranean countries, has set up a «partnership» that, in addition to economic integration and cultural dialogue, involves security, while *A Secure Europe in a Better World* recognizes the opportunity to establish a close cooperation with non-European regional organizations such as Asean, Mercosur, and the African Union. As to Nato, the key form of association is the 1994 «Partnership for Peace», involving the 26

side, the involvement of the competent public subjects is guaranteed by the fact that the core of the collective security system is the United Nations Organization, which in the early 1990's has gone through a remarkable universalization process whereby several States that were still excluded were admitted and strong links were established with several non national regulatory systems³².

3. Organization

The extension of the EU competences to the field of regional defense and security has been accompanied by the gradual development of an articulated European administration by sector.

This administration presents a number of characteristics. Firstly, it is hierarchically organized, as the Rapid Reaction Force is subject to the powers of the Commander of the operation and this is in turn subject to the direction of the Military Committee of the European Union and the Military Staff of the European Union, operating at the strategic level³³. Secondly, it is a multinational organization, provided that the various bodies are composed by representatives of the Member States. Thirdly, the multinational component is combined with the supranational one, in so far as the Commission participates to some bodies, such as in the case of the European

Nato member States and 20 other OSCE member States. Other cooperation mechanisms have also been put in place with the Russian Federation and Ukraine, followed by the «Mediterranean Dialogue», the «initiative for South-Eastern Europe», and the «Istanbul cooperation initiative» involving the States of the Middle-Eastern region.

³² So, for instance, several international organizations, including OSCE (1993), the Association of Caribbean States (1998), and the Organization for Economic Cooperation and Development (1998), received the status of observers. Then, a framework was set up with a view to improving the cooperation between the United Nations and the Organization of African Unity (OAU). Furthermore, closer relationships have been established with the League of Arab States, which obtained the status of observer back in 1950, the Association of South Eastern Asian Nations (Asean), and the Economic Community of West African States (Ecowas).

³³ On the first stages of the process of setting up of the Rapid Reaction Force, see Z. Lachowski, *The military dimension of the European Union*, in *SIPRI Yearbook 2002: Armaments, Disarmament and International Security*, 2002, p. 151 ff.; H.-C. Hagman, *European Crisis Management and Defence: the Search for Capabilities*, Adelphi Paper n. 353, International Institute for Strategic Studies, Oxford, 2002; R. Circelli, *La difficile costruzione di una politica di difesa comune*, in G. Bonvicini and G.L. Tosato (eds.), *Le relazioni internazionali dell'Unione europea dopo i Trattati di Amsterdam e Nizza*, Torino, Giappichelli, 2003, p. 101 ff.; for a detailed analysis of the elements of strength and weakness of the current military capabilities of the EU, see R. Ferretti, *Capacità operative e impiego delle forze di pace*, in N. Ronzitti (ed.), *Le forze di pace dell'Unione europea*, Soneria Mannelli, Rubbettino, 2005, p. 81 ff., p. 90 ff.; on the so called *EU Battlegroups*, J. Lindley-French, *Headline Goal 2010 and the Concept of the EU Battle Groups: an Assessment of the Build-Up of a European Defence Capability*, available at www.cicerofoundation.org/pdf/lecture_lindleyfrench_dec05.pdf, observing that «[w]hichever way one cuts it Headline Goal 2010 is a retreat from the Helsinki Headline Goal and that is to be regretted. Moreover, there are only ever likely to be 7-9 real Battle Groups, because at least four of the proposed paper groupings reflect the desire of states to generate political influence rather than military effect. Headline Goal 2010 is, therefore, like politics – the art of the possible, as opposed to the science of the required».

Union Satellite Centre and of the European Defense Agency. Fourthly, the various multinational bodies have not always a plenary composition: for example, the military forces responsible for the carrying out of specific operations are constituted by national and multinational contingents made available only by the States or groups of States opting for the participation to the mission on a case by case basis.

Such administrative organization operates within the context of a thick pattern of relationships linking the EU to the other regulatory systems operating in the field of defense and security.

As for the relations with the United Nations, the latter is posed in a position of prevalence *vis-à-vis* the EU and the other regional organizations as far as the adoption of a political decision on a military mission is concerned. This is clear with reference to a decision on the use of coercive force. Differently from genuine peace-keeping operations, in fact, the coercive military action of regional organizations is legitimate only if it is required or authorized by the UN Security Council, as prescribed by Article 53 of the UN Charter; and the same applies to regional peace-keeping operations taking on a clear coercive connotation, as is the case in the so-called third-generation peace-keeping. The preminence of the UN over the EU and the other regional organizations is clear also in the case of a decision by the Security Council to confer to a regional organisation the task to carry out a peace-keeping operation decided by the United Nations³⁴, which binds the regional organisation to implement the measure, by virtue of the obligations deriving from the UN Charter for the Member States. The result is a «two-layer» decision-making process: one taking place at the level of the United Nations, subject to the Charter provisions only, and one taking place at the level of the regional organization, aimed at implementing a previous decision of the Security Council. The EU and the other regional organizations are free only with relation to the establishment of genuinely peace keeping operations, i.e. regional peace keeping operations without any coercive dimension. Such autonomy, in any case, should not be over-rated, provided that the non coercive character of the operation does not exclude the possibility of an authorization by the Security Council and that this would become necessary if the peace-keeping operation takes a coercive dimension.

³⁴ See Article 53 of the Charter of the United Nations, pursuant to which the Security Council can use, if necessary, the regional arrangements or agencies for enforcement actions under its authority. Article 53 itself, together with the evolution of the UN practices, seems to admit that the Security Council may entrust peace-keeping operations to regional organizations.

Far from operating in a straightforward manner, however, such a system shows a number of obvious difficulties in the actual practice. On the one hand, some regional organizations have showed a clear inclination to put in place coercive actions also without an explicit authorization of the Security Council, an obvious example of which is the controversial Nato decision to attack the Federal Republic of Yugoslavia to protect the Albanian population in Kosovo. On the other hand, the circumstance that regional organizations do not participate directly in the UN decision-making process increases the gap between the universal and the regional levels and makes their interaction less effective³⁵. Moreover, any inability on the part of the Security Council to decide coercive measures, which under the present operating rules of this institution may stem from the opposition of one or more permanent members, would become an insurmountable obstacle banning any action by regional agencies³⁶.

As to the phase of administrative execution of the adopted political decision, the same organizational scheme applies to all hypotheses of military intervention authorized by the Security Council, be it a coercive action or a «reinforced peace-keeping» operation, as well as to the cases of intervention upon request of the Security Council: a relationship of control and direction is established between the latter and the regional organization. A punctual definition of the content of such relationship is made impossible, at least in this paper, by the different degrees of intensity of the powers reserved to the Security Council by its authorizations and by the circumstance that intervention upon request of the Security Council has never occurred in practice. Yet, the functional features of the activity performed suggest that such control and direction mechanism should imply a tendential division of tasks between the Security Council, responsible for the political-strategic evaluation, and the regional organization, responsible for a

³⁵ Quite instructive here is the communication from the Commission to the Council and the European Parliament, *The European Union and the United Nations: The choice of multilateralism*, cit., in which the Commission suggests some mechanisms in order to strengthen the promotion of «the EU's values and interests in the UN system» (§ 3). Such mechanisms include a better coordination of the positions of the EU Member States in the areas subject to UN regulation, an increased ability of the EU to establish a dialogue with other subjects on the global level, and full participation in the works of the UN organizations when areas of EU competence are involved. For a general discussion on the possible introduction in the United Nations of mechanisms for consultation of regional organizations, see A. Tanzi, *Il ruolo delle organizzazioni regionali nel dibattito alle Nazioni Unite*, in F. Lattanzi and M. Spinedi (eds.), *Le organizzazioni regionali e il mantenimento della pace nella prassi di fine XX secolo*, Napoli, Editoriale Scientifica, 2004, p. 1 ff., p. 24 ff.

³⁶ An extreme case would obviously be one in which the Security Council has established a threat to peace but, due to the opposition of a permanent member, cannot take any enforcement action. On the debate presently under way on the revision of the Council's decision-making procedure and on the veto power discipline, which is strictly connected to the issue of the Council membership, see I. Winkelmann, *Bringing the Security Council into a New Era*, in *Max Planck Yearbook of United Nations Law*, 1997, vol. I, p. 63 ff., p. 75 ff.

technical-operational assessment³⁷. Also with reference to the phase of administrative execution of the adopted political decisions, however, the overall design is all but free of ambiguities, as the authorization system does not always allow for a suitable control by the universal organization on the activity of the regional organization³⁸, and no practice is established to test the functionality of the powers of the Security Council in case of intervention upon request of the latter.

The relationships between the UN and the regional organizations are complemented by the connections between the regional organizations themselves.

At the level of political institutions and bodies, a practice of cross-participations and joint meetings has developed. Thus, for example, Nato's Secretary General participates in some sessions of the General Council of the EU; the EU Presidency and the High Representative participate in some sessions of the Atlantic Council; joint meetings occur with the EU Political and Security Committee and the Atlantic Council; and joint meetings are held at a ministerial and diplomatic level following to the 2001 agreement between the Nato Secretary General and the Swedish Presidency of the EU. Furthermore, the «strategic partnership» between the EU and Nato has established the principle of an effective consultation, cooperation, and mutual transparency³⁹. These are coordination mechanisms aimed at facilitating a complementary and orderly action by the political authorities of the two regulatory systems. The latter, however, are not on a perfectly equal foot. Though asserting that the two organizations are autonomous and their decision-making processes equal, the «strategic partnership» provides that a EU military action is possible only if Nato is not already involved, thus placing the latter in a position of functional prevalence over the former⁴⁰.

³⁷ For a slightly different approach see A. Gioia, *The United Nations and Regional Organizations in the Maintenance of Peace and Security*, in M. Bothe, N. Ronzitti and A. Rosas (eds.), *The Osce in the Maintenance of Peace and Security. Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes*, The Hague, London, Boston, Kluwer Law International, 1997, p. 191 ff., p. 210.

³⁸ Suffice it to think of the Deliberate Force operation started by Nato on 30th August during the conflict in former Yugoslavia, on which see Dekker e Myier, *Air Strikes on Bosnian Positions: Is Nato Also Legally the Proper Instrument of the UN?*, in *Leiden Journal of International Law*, 2002, p. 391 ff.; for a summary of other operations performed by Nato under the authorization of the Security Council but outside of its actual control, see M. Odoni, *La partecipazione della Nato ad azioni per il mantenimento della pace realizzate "under the authority" del Consiglio di sicurezza*, cit., p. 332 ff.

³⁹ See the report of the EU Presidency on the ESDP approved by the European Council meeting held in Göteborg in June 2001 and the EU-Nato declaration on the ESDP policy dated 16th December 2002.

⁴⁰ See paragraph 3 of the Saint Malo declaration dated 3rd and 4th December 1998 as well as the later above-mentioned EU-Nato declaration on the ESDP of 16th December 2002 where the two organizations «welcome the ongoing important role of Nato in crisis management and conflict prevention, and reaffirm that Nato remains the

At the administrative level, there is a clear tendency toward the interconnection of the executive bodies of both regional organizations. The EU and Nato offices often establish permanent relations, as demonstrated by the agreements between the European Defense Agency and the corresponding Nato offices, as well as by the relationships that the EU Military Staff is obliged to establish with Nato in compliance with the «permanent agreements» between the two regulatory systems. Moreover, several joint bodies have been established, such as the so-called Nato-EU Ad Hoc Working Groups, aimed at discussing security issues, modalities for EU access to Nato facilities, and the operating capability of both organizations. There are also several cases of extended participation in the meetings of the competent offices, exemplified by the possibility that the Steering Board of the European Defense Agency invites Nato's Secretary General when issues of common interest are in the agenda for discussion. Yet, the most significant example of the increasingly tight interconnection between the executive bodies of the EU and Nato is the possibility for the latter, upon request of the EU and as a result of negotiations between the two organizations, to make its resources available to the EU, which takes on the political and strategic leadership of the operation⁴¹. In such case, the EU provides for implementation of its resolutions not only or not so much through the armed forces of its Member States listed in the «catalogue of forces», but rather «borrowing» the facilities of the Alliance. Seen as a whole, this and the other instruments referred to above allow the two regional organization to «make a system». On the one side, the thick net that is now emerging consents to develop a cooperation between the administrative bodies of both the EU and Nato. On the other side, the two regulatory systems increase their power and strengthen each other: the EU makes its action effective thanks to the higher efficiency of the technical-operational facilities of Nato; the latter consolidates and extends its sphere of influence beyond the Alliance's borders. A closer analysis of the practice, however, shows that the mutual strengthening process is not devoid of some inconsistencies. In

foundation of the collective defence of its members». The principle, however, lends itself to multiple interpretations; for a reconstruction in favor of the European Union, see Hagman, *European Crisis Management and Defence: the Search for Capabilities*, Adelphi Paper n. 353, International Institute for Strategic Studies, Oxford, 2002, p. 21; for the thesis of Nato's pre-eminence, though only in those cases where Nato is actually engaged in field actions, see Andréani, *L'Europe de la défense: y a-t-il encore une ambition française?*, in *Politique étrangère*, 2002, p. 983 ff., p. 992.

⁴¹ This procedure is envisaged in the so-called *Berlin plus* provisions included in agreements that are quite cautiously defined as «full sets of provisions», which are developments of the previous agreements stipulated by UEO and Nato in Berlin in 1996; for the legal nature of such understandings, whose full texts are unknown, see Reichard, *Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement*, in *Nordic Journal of International Law*, 2004, p. 37 ff.

fact, it hides a latent conflict between the two regulatory systems, that have so far found it difficult to reach a really satisfactory point of balance, as illustrated by the circumstance that the operations executed so far appear to be not so much an implementation activity of the EU decisions through Nato's means but rather an implementation through Nato's means of Nato's decisions, whose overall effects, however, are attributed to the EU⁴².

All in all, the data highlighted so far permit to register a progressive organizational interconnection of the EU, the Nato and the UN. At the level of the political decision-making, this interconnection stems from the provision of a position of preminence of the United Nations over the North-Atlantic Treaty Organization and the EU, as well as from the establishment of coordination mechanisms among Nato and the EU that allow for their complementary and orderly action. At the level of the execution of the political decisions, such interconnection derives from the functional preminence given to the Security Council over the regional organizations and from the tendency developed by the latters to integrate one with the other. In this way, the European security and defense administration operates as a component of a wider organization, at the same time polycentric but interconnected, founded on the various mechanisms of cooperation and integration among the different bodies involved in the exercise of the global function of world security.

These observations are to be developed in several directions, the first of which concerns the anchorage of the emerging organization.

The issue might appear to be easily solvable by noting that what has been outlined appears to be an organization made up of a variety of different bodies closely connected with the United Nations, which takes on a functionally preminent position over the other offices. Thus, the anchoring of such a polycentric but interconnected organization should be identified neither in the legal orders defined by the single regulatory systems, nor in the national order, but rather in the order of the «United Nations system», meant, as it has already been clarified, as an international macro-organization gathering a number of separate international regimes.

⁴² The most interesting example of this trend is the Concordia operation started in March 2003 as a follow-up to the previous Allied Harmony Nato operation and aimed at establishing a stable and safe context in Macedonia. On this operation, which represents the first implementation of the Berlin Plus agreements, see ICG International Crisis Group, *Macedonia: no Room for Complacency*, Europe Report n. 149, 23rd October 2003, Skopje e Brussels. On the ability of Nato to actually maintain a significant control on the management of EU operations see C. Novi, *La politica di sicurezza esterna dell'Unione europea*, cit., p. 360 ff.

However, a similar interpretation is not fully satisfactory. First, although it accounts for an overcoming of the original fragmentation of the various international organizations and the trend toward the setting up of a common institutional framework, it is based on an uncertain legal representation of the «United Nations system», which is alternatively outlined as an «open space» where different relationships are established among the subjects of the international community, or as a «world organization» with characteristics that resemble those typical of States. For different reasons, both representations appear to be unable to provide a proper explanation. The former does not consent to identify the typical legal features of the United Nations system, while the latter forces legal elements into an artificially unitary interpretation of the relationships between the universal organization and the other non national organizations⁴³. Furthermore and foremost, the thesis mentioned above postulates an interpretation of the United Nations system as a specific legal order, separate from the general international order, in clear contrast with the increasingly stronger trend to the penetration of general international law into the UN system. The most obvious example of this is the practice whereby the Security Council authorizes behaviours that the States put into place as a reaction to international crimes, such as a severe violation of human rights, and as a way to protect *erga omnes* obligations that the States can sanction collectively or individually. In these cases, as was correctly pointed out, the measure of the Security Council connects the UN activity with general international law, under which *erga omnes* obligations are protected, thus «allowing the whole Organization to operate as an instrumental entity body [...] at the service of the international Community itself»⁴⁴.

These aporias suggest to adopt a different perspective, focused on the order-related nature of the global legal space. Specifically, the outlined organization might be viewed as referable not so much to the legal order of the United Nations system, but rather to the global order itself. To such thesis one might object the lack of a constitutional basis corresponding to the one that is typical of national legal orders. As a matter of fact, the organization that is emerging appears to be a sectorial «sub-government» aimed at guaranteeing the military security of the world

⁴³ For an analogous approach, though without specific reference to the global security sector, see S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, cit., p. 232.

⁴⁴ P. Picone, *Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale*, in *Rivista di diritto internazionale*, 2005, p. 5 ff., p. 29; the point is developed in other works by the same author: see, in particular, *Nazioni Unite e obblighi «erga omnes»*, in *La Comunità internazionale*, 1993, p. 723 ff., *passim*, *Interventi delle Nazioni Unite e obblighi erga omnes*, in P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, Padova, Cedam, 1995, p. 552 ff., and *Valori fondamentali della Comunità internazionale e Nazioni Unite*, in *La Comunità internazionale*, 1995, p. 433 ff., p. 446 ff.

community outside of an institutional relationship with a (missing) global government or with a higher global institution having sovereignty features. However, in the perspective of a legal reconstruction, the existence of a higher authority is definitely not a *sine qua non* condition for sectorial sub-governments to be recognized in a specific legal order, given the large variety of legal orders and the possibility that they are governed by different forms of cooperation among their members, rather than through the activity of a superior authority. Against the anchorage to the global legal order, one might also claim that the emerging organization does not replace the national bodies. Quite the opposite, it is based on them and can be seen as a vertical and horizontal chain among national and non national offices. And yet, also in this case it is worth noting that the global anchoring of an organization does not imply in any way a properly supranational layout. Referring a sectorial organization to the global legal order does not mean, *per se*, identifying in such organization a unitary and uniform system, capable of overruling the domestic legal orders. Rather, as it is widely recognized by global administrative law studies⁴⁵, global organizations are usually based not on the separation but on the continuity between the national and the non national «levels», through techniques that establish connections, overlapping, and balances⁴⁶.

The recognition of the emergence of a polycentric but interconnected organization should also be developed through a discussion of its distinguishing features.

The challenge is not to reconstruct an organic and detailed organizational model, hampered by the limited consolidation of the relevant discipline and its ambivalences, but rather to identify an overall trend toward a possible organizational arrangement.

⁴⁵ S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, cit., p. 674 ff.; B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, n. 3-4 del 2005, p. 15 ff., p. 18 ff.

⁴⁶ Also the claim that the organization described above mainly reflects the position and interests of States operating in the European and North-Atlantic regions seems misleading. As noted above, this objection mixes up the global and the universal dimensions, given that the anchoring to the global order does not stem from the participation to the sectorial system of all States and all non national regulatory systems operating in the collective defence and security sector, but from the fact that the organizations identified operate as institutions and offices of the world community. In any case, even assuming that the global dimension of the organization requires a voluntary involvement of the competent public powers, one needs to recognize that this condition is gradually being fulfilled in the organization discussed so far. On the one hand, as noted above, both the North-Atlantic Treaty Organization and the EU have been subject to an enlargement process. On the other hand, the involvement of the various competent public subjects is guaranteed by the fact that the «hub» of the collective security system is the United Nations Organization, which not only has increased the number of its Member States, but has also established increasingly closer relationships with several regional regulatory systems. However, this involvement remains imperfect, due to the restricted composition of the Security Council.

In this perspective, a number of elements seem to characterize the political level of the described organization. Firstly, the tasks related with the objective of the military protection of the world community security are allocated to the universal organization as well as to the regional organizations: the former proceeds with the discussion and adoption of the coercive measures within the limits established by the UN Charter; the latter are bound to the decisions taken by the United Nations and can operate as complementary and coordinated mechanisms both for proposal to the universal organization and for the definition and adjustment to the regional reality of the choices made by the UN. If compared with the cold war experience, the system relies on a strengthened role of the regional component. Yet, the Security Council is still placed at the top of the organization responsible for the adoption of the relevant political choices and the only autonomy granted to regional agencies concerns the establishment of peace keeping operations without any coercive character. Secondly, the various competent regulatory systems (the UN, the EU and the Nato) act as associations of States, which undoubtedly are subject to several limitations, while at the same time maintain a central role in intergovernmental or multinational decision-making process. Thirdly, though lacking an institutional relationship with a higher institution provided with the attributes of sovereignty, the emerging organization is not completely devoid of a constitutional basis. On the one hand, the close relationship with the States ensures an indirect source of legitimacy to the extent that the democratic constitutional States are based on inclusive political decision-making processes. On the other hand, the procedural regulation of the use of military power implies a process of «legalization» and limitation of power that might contribute to a more general process of constitutionalization of international law on a different basis than what is typical in the contemporary national constitutionalism.

At the administrative level, the emerging asset is characterized by the great variety of the organizational solutions adopted in the different schemes of execution of a political decision, from a coercive operation authorized by the Security Council to the cases of coercive or peace keeping intervention upon request of the Security Council, to the establishment of regional or UN peace keeping forces. Even at this level, however, one is not precluded the possibility to identify a process of gradual convergence of the various hypotheses. Firstly, the tasks necessary for the performance of the emerging function of global and regional security are in all cases distributed amongst a plurality of bodies, including national military administrations, having

different legal natures and belonging to different legal systems, but jointly responsible for the administrative exercise of the function. Secondly, such a distribution of tasks always implies the involvement of two orders of public powers: on the one hand, the Security Council, provided in all cases with more or less significant powers of direction and control; on the other hand, the national administrations, that may operate either directly or within the framework of multinational apparatuses of regulatory systems beyond the State (the universal organization in the case, for example, of a UN peace keeping operation; or regional organizations, in the case, for example, of an authorization to make recourse to coercive force granted to Nato). The only exception to such an allocation of attributions is represented by regional peace-keeping without any coercive dimension, that does not necessarily imply the conferral of powers to the Security Council. Thirdly, the distribution of administrative tasks among a plurality of bodies, including the Security Council and national military administrations, responds in all the various hypotheses to the same general criterion, based on the distinction, well known in the national experience, between political-strategic assessment and technical-operative evaluation. Finally, the different competent bodies are made interdependent through a number of organisational instruments, mainly the provision of hierarchical relationships and the recourse to coordination mechanisms, such as the extension of the participation to the decision-making process of a single office: through these organizational instruments, the various competent offices are integrated in a unitary administration, consisting in the totality of the public authorities responsible for the exercise of the function.

The possibility to identify certain elements which are common to all the different hypotheses of execution of a political decision concerning the use of military force, however, should not lead to an artificially unitary representation of the legal reality under exam. A balanced reconstruction, in fact, should not omit to give account of the great deal of variations among the various hypotheses, exemplified by the different degree of elaboration of the organizational architecture: thus, for example, in the case of a Security Council authorization to one or more States to make recourse to coercion in order to eliminate a «threat or breach to the peace» or to set up a peace-keeping or nation-building operation, the organization is characterized by a limited fragmentation, being composed by the Security Council and by the military administrations of the States involved in the authorized operation; while in the case of a coercive action or of a peace-keeping operation carried out by a regional organization in execution of a

decision by the Security Council, the involvement of the complex multinational administrative apparatuses of the relevant regional organizations determines a remarkable increase in the degree of organizational polycentrism and differentiation.

4. Way of functioning

The extension of the EU competences to the field of regional defense and security has implied the gradual development not only of a sectorial administration, but also of a body of administrative law governing its functioning.

Such a body of administrative law presents some distinguishing features. In the first place, it has a marked conventional character, which reflects the overall intergovernmental design of the common foreign and security policy and expresses the will of the totality of the Member States which decided to participate to the European security and defense policy. Secondly, it serves a dual purpose: on the one side, the provision of mechanisms of connection and integration among the several competent authorities; on the other hand, the realization of an indirect intervention in the economy. Under the first profile, which is here more directly relevant, the European discipline aims at organizing in an organic framework the action of the various EU bodies as well as of the national and multinational armies involved in the operation. The integration techniques vary from case to case, but the European regulation tends to converge on a recurring legal scheme. This consists in the provision of hierarchical relationships between the various levels of command, from the bodies responsible of the political-strategic assessment (the EU Political and Security Committee, assisted by the EU Military Committee and the EU Military Staff) to the offices responsible of the technical-operative command (the Commander of the operation and Commandant of the armed force). Besides, the EU commanders are granted only the powers concerning the operational and tactical command and control, while the national commanders are left the powers concerning the various profiles of the service relationship of the soldiers. In such a way, European law «leans on» national law, to which the regulation of the disciplinary and service aspects is reserved. Thirdly, the law governing the EU military administration does not present the authoritative dimension that is traditionally characteristic of national administrative laws. Not granting the EU commanders the powers of full command, European law does not entrust European authorities with prerogatives comparable to those

recognized to the military administrations of the Member States vis-à-vis the individuals entering in a service relationship with the public power. Rather, European law places such European authorities at the top of a «common system»⁴⁷ which is based on the utilization of the coercive capacities of national administrations for the purpose of reaching the aims of the Union. Hence, specularly, the lacked development of European mechanisms of individual protection.

In the perspective adopted in the present study, it has to be noticed that the EU regulation establishes a number of relations with the regulation governing the functioning of the other regulatory systems operating in the field of defense and security.

As for the relationships between EU and UN regulations, the former complements the latter in the cases of authorization by the Security Council to the use of coercive force by regional organizations. The UN regulation, in fact, has an essentially organizational character: it identifies the offices called to take part in the process of execution of the adopted political decision, determines their attributions and proceeds to their integration in an overall framework. In case of UN peace keeping operations, the strategic and operational responsibility are habitually assigned to the universal Organization itself, while tactical responsibility is conferred to the national Commanders of the statal contingents. In the hypothesis of a Security Council authorization to States or regional organisations to the use of coercive force, instead, only the political responsibility is normally attributed to a body of the United Nations (the Security Council, sometimes assisted by the General Secretary), while the strategic, operational and tactical responsibilities are conferred to a State, to an ad hoc coalition or a regional organization of States, which autonomously proceed to the punctual definition of the competent authorities and not rarely exercise such responsibilities beyond an effective control of the Security Council⁴⁸. As a consequence of such solution, moreover, the whole range of command powers is attributed to the State, to the ad hoc coalition or the regional organization, which can organize their exercise without any influence coming from the UN regulation.

A different arrangement governs the relations between the regional organizations. As a matter of fact, EU and Nato have gradually elaborated a common discipline of their reciprocal

⁴⁷ To use the notion worked out, with reference to Community administrative law, by da S. Cassese, *European Administrative Proceedings*, in F. Bignami e S. Cassese (eds.), *Law and Contemporary Problems*, vol. 68, 2004, n. 1, *The Administrative Law of the European Union*, p. 21 ff.

⁴⁸ On the issue of the effective control capacities of the Security Council, deriving from the different content given by the various authorizations to the formula of «overall authority and control», see R. Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix*, Bâle, Helbing & Lichtenhahn, 2003, p. 96 ff.; and P. Picone, *Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale*, cit., *passim*.

administrative relationships. This discipline complements the regulation governing, in each of the two regional organization, the functioning of its administrative apparatus and the relations between the regional organization and its Member States. Such common discipline has two main characteristics. Firstly, it finds its source in a dual order of measures: on the one side, international agreements stipulated by the two bodies, exemplified by the agreements containing the so-called *Berlin plus* provisions⁴⁹; on the other side, Nato and EU measures having an identical content and adopted in parallel, as in the case of the procedures of reciprocal consultation that were formally defined by a report of the French Presidency attached to the conclusions of the Nice European Council of December 2000 and confirmed in the same terms from the Nato Council a week later. Secondly, the regulation of the EU-Nato relationships is essentially aimed at stabilizing the cooperation between the two regional organizations, both through the institution of common bodies (such as the Nato-EU ad hoc Working Groups) and through the discipline of the modality of the recourse by the EU to the capabilities of the Alliance. As a consequence of the elaboration of this common EU-Nato discipline, the regulation of the regional organizations takes a complex shape. On the one hand, it is articulated in specific regimes, as the regional disciplines are not obliged to converge in any way and on the contrary tend to maintain many specificities. On the other hand, such specific regimes coexist with a common level, aimed at governing the ever closer interaction between the two regional systems. It should be noticed that this common level is constituted by a regulation expressing and stabilizing the will of two formally equal organizations. Yet, this does not necessarily amount to a composition of the latent tension which nestles, as already highlighted, in the process of the progressive organizational interconnection between Nato and EU.

EU regulation, therefore, does not exist in a *vacuum*. Rather, it tends to combine itself, through different legal techniques, with Nato and UN regulations. The combination of EU, Nato and UN regulations gives rise to a functionally unitary discipline, aimed at making it possible the joined action of the three regulatory systems.

⁴⁹ For a detailed reconstruction of the process of definition of the *Berlin plus* agreements, see M. Comelli, *Gli interventi dell'Ue e la cooperazione con la Nato*, in N. Ronzitti (ed.), *Le forze di pace dell'Unione europea*, cit., p. 137 ff.; see also Doumolin, Mathieu e Sarlet, *La politique européenne de sécurité et de défense (PESD). De l'opérateur à l'identitaire. Genèse, structuration, ambitions, limites*, Bruxelles, 2003, p. 709 ff.; Walch, *Les relations entre l'Union européenne et l'Otan après le Conseil européen de Laeken (décembre 2001)*, in Le Morzellec et Philip (eds.), *La défense européenne*, Bruxelles, 2003, p. 23 ff.; and Reichard, *Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement*, cit.; for a historical reconstruction, Hunter, *The European Security and Defence Policy: Nato's Companion or Competitor?*, Santa Monica, Rand Publication, 2002.

It is now necessary to add that such non statal discipline is strictly connected to domestic law. The former regulates the organization and functioning of the relevant non national public powers and the relationships among the various administrations involved in the carrying out of the military mission and their interconnection in an overall framework. Domestic law, on its side, constitutes the only source of regulation of the authoritative powers of national administrations participating in the global composite administration of world security. Non statal and domestic regulations, therefore, are strictly inter-twined, as the exercise of the authoritative powers of national administrations takes place within the context of a regulatory scheme that is defined, at least in his general contours, by non statal regulation.

The above observations suggest that a unitary discipline is emerging, as a result of the interconnection among the various components of non statal law and among these components and domestic law. In functional terms, such discipline aims at making it possible the functioning of the polycentric but interconnected administration responsible for the execution of a specific operation, i.e. the joined action of the various national and non national offices that act as components of this composite global administration. In structural terms, the emerging discipline may be represented as a «binary» regime, in which a common level, established by non statal administrative law, coexists with a specific level, characterized by the variety of the national regimes. The overall design, however, is complicated by the circumstance that non statal administrative law may take different forms. It can be represented by UN regulation only, as in case of UN peace-keeping operations or of authorization to the use of coercive force by a State. But it can also be a composite regulation, deriving from the combination of the UN and regional disciplines. In this last hypothesis, the UN regulation outlines the overall framework of the regulatory scheme concerning the operation to be placed in being, while the definition of all the necessary details is due to the regional regulation.

Considered as a whole, the discipline resulting from the interconnection among the various components of non statal law and among these components and domestic law could be reconstructed according to the traditional interpretative schemes of international public law. This in consideration of several aspects, such as the combination of national and non national regulation, the genuinely administrative character of the former and the function of coordination of interstate action performed by the latter, and the use of conventional intergovernmental measures as the primary source of the discipline.

Yet, such conclusion would not be completely satisfactory. Firstly, the recourse to the habitual schemes of international law would presuppose a clear line of separation between

national and non national law that does not fully correspond to the legal reality under exam: actually, non national law is not aimed at regulating exclusively States' behavior with regard to other States; rather, it penetrates in the domestic sphere, both exercising an indirect influence on national law and keeping under control the national apparatuses responsible for its implementation. Secondly, the reference to international law would result scarcely consistent with the features of the global organization forming the object of the regulation under exam, as such global organization is characterized not so much for the distinction as for the continuity between the national and the international «level», connected through a plurality of cooperation mechanisms and legally relevant as elements of a wider global administration by sector.

A reconstruction of the nature of the regulation under exam, therefore, has to follow a different line of reasoning, taking into consideration the essentially unitary character of the discipline, its not exclusively conventional source and its main function, consisting in the regulation, by means of administrative tools, of the joint action of a plurality of different public powers, both national and non national, in a specific sector of the global legal order. In line with the approach followed in the previous paragraphs, then, it seems preferable to construct such regulation as a segment of the emergent «global administrative law», here meant not in the generic sense of an administrative law beyond the State, but as a regulation of a global legal space which differs from the traditional representation of the world community in several regards: as for the subjects, because the classical construction of States as the only subjects of international law is substituted by a more complex understanding, based on the recognition that the subjects of global administrative regimes are, on the side of regulators, a rich variety of global public powers as well as private bodies⁵⁰, on the side of regulatees, not only States but also individuals, firms, market actors and NGOs⁵¹; as for legal institutes, because the regulation of the action of the various global regulatory systems and the other subjects of the global legal

⁵⁰ On the «spread of global regulatory systems», see S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, cit., p. 670 ff. See also the taxonomy proposed by B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, cit., who distinguish among *international administration, transnational networks and coordination arrangements, distributed administration, hybrid intergovernmental-private administration and private bodies* (p. 20 ff.).

⁵¹ See in particular B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, cit., observing that «[i]n classical theory the domestic regulatory measures are the implementation by states of their international obligations. Private actors are formally addressed only in the implementation stage, and that is solely a domestic matter. But the real addressees of such global regulatory regimes are now increasingly the same as in domestic law: namely, individuals (as both moral agents and economic and social actors) and collective entities like corporations and, in some cases, NGOs» (pp. 23-24).

space, contrary to the traditional assumptions of international law science, frequently makes recourse to instruments of administrative decision and management (exemplified by the rules governing participation to decision-making proceedings); as for the sources, because global administrative law cannot be conflated in the classical sources of public international law, but it extensively relies on measures of different type⁵².

Its qualification as a segment of the emergent «global administrative law», yet, should not hide the specificities of the regulation of the world security composite administration. Actually, such regulation differs from the traditional patterns of international law in a less evident and marked way than the regulatory regimes usually considered by global administrative law studies that allow a more powerful characterization of private actors as subject of global regulation and of «non-standard forms of rulemaking» as regulatory techniques of global governance⁵³. Besides, the discipline under exam confirms a consolidated tendency of global administrative law, that to the establishment of executive processes in which the level of national administration and that of the non national administration, far from being separated, depend on each other, giving rise to a «mixture of global and national» sometimes «particularly strong and complex»⁵⁴. However, while in the most well known hypotheses the executive process begins at the global level and concludes at the national one, either with a decision based on a preliminary examination carried out by the international organization or with the implementation of a decision adopted by the international organization itself⁵⁵, in the present case the executive process is designed in a peculiar way. On the one side, the articulation of the process in the phases of examination and inquiry, decision-making and execution is replaced by the identification of different levels of

⁵² Such as institutional practices, intrainstitutional rules and private regulation; on the complication of the sources of international law, in general terms, see N. Krisch and B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, in *The European Journal of International Law*, 2006, p. 1 ff., p. 12; more extensively, B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, cit., p. 29 ff.

⁵³ For a synthesis of the peculiarities of global regulation vis-à-vis traditional international law, see N. Krisch and B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, cit., p. 10 ff. For a discussion of the possibility to redefine the notion itself of international law, see B. Kingsbury, *The International Legal Order*, IILJ Working Paper 2003/1 (History and Theory of International Law Series) (www.iilj.org), as well as P. Schiff Berman, *From International Law to Law and Globalisation*, in *Columbia Journal of Transnational Law*, 2005, p. 100 ff.; P. Schiff Berman, *Seeing Beyond the Limits of International Law*, cit.; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, University of Connecticut School of Law Working Paper Series, 2005, n. 39; and O.A. Hathaway, *Between Power and Principle: an Integrated Theory of International Law*, in *University of Chicago Law Review*, 2005, p. 469 ff.

⁵⁴ S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, cit., p. 683.

⁵⁵ *Ibidem*, p. 682 ff.

responsibility (strategic, operational and tactical), each of which involving a non proceduralized activity of examination and decision. On the other side, these levels of responsibility are reciprocally interdependent, as the execution of the decisions taken at a certain level depends on the action taken at the lower one. Moreover, the lowest level does not necessarily coincide with the domestic system, since States are always granted powers consenting the exercise of tactical command in the chain of command and control of the relevant operation, but the overall tactical responsibility is not necessarily conferred to States.

Finally, the global regulation governing the functioning of the world security composite administration presents a thick pattern of continuities and discontinuities with the experience of domestic military administrative law. In the latter, administration and individuals interact within the framework of a bilateral relationship in which the public power is granted a number of prerogatives over individuals that are aimed at ensuring the protection of the national collectivity and find their essential rationale in the status of individuals as citizens of a statal polity. This reflects the «fundamental paradigm»⁵⁶ of the statal public law, traditionally based on the opposition between authority and freedom and on the preminence of the former over the latter⁵⁷. The global regulation that is here considered reproduces in the global legal space the general design of the authority-freedom relationship. Yet, its various elements are declined in a way that is not equalizeable to that characterizing the experience of domestic military administrative law. In the regulatory scheme for the exercise of the function of military security of the world community, in fact, the relationship between authority and freedom is not a bilateral but a polycentric relationship, given that the pole of the authority is represented both by the statal administration and by the overall global organization, and the pole of freedom is represented both by the citizens towards which the statal administration exercises its prerogatives and by the States or collectivities within a statal territory to which the exercise of force by the global organization is addressed. The relationship between authority and freedom, moreover, does not necessarily correspond to the relationship public power and private sphere, as the States may

⁵⁶ S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Rivista trimestrale di diritto pubblico*, 2001, p. 601 ss., p. 604.

⁵⁷ In the Italian literature, this interpretative model has been elaborated mainly by Santi Romano and Massimo Severo Giannini; see, in particular, S. Romano, *Corso di diritto amministrativo. Principii generali*, III ed., Padova, Cedam, 1930, p. 81, and M.S. Giannini, *Lezioni di diritto amministrativo*, Milano, Giuffrè, 1950, p. 71 ff. (on which see also the reflections by S. Cassese, *Cultura e politica del diritto amministrativo*, Bologna, Il Mulino, 1974, p. 120 ff., and B.G. Mattarella, *L'imperatività del provvedimento amministrativo*, Padova, Cedam, 2000, p. 165 ff.). For a critical discussion of such interpretative model, S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, cit.

play, depending on the situation, the role of the authority and that of the addressee of the measure adopted. Lastly, the relationship between authority and freedom tends to break the traditional nexus with the institute of citizenship. On the one side, as it has just been observed, the authority-freedom relation in the field under exam does not necessarily correspond to the relationship public power and private sphere. On the other side, the new competencies assumed by the national military administrations within the context of the global organization for the security of the world community could represent a factor of attenuation of the link between military duties and citizenship. The carrying out of operations of regional and global security, such as, for example, peace-keeping and peace-enforcement, requires a degree of specialization that cannot be easily satisfied by citizens occasionally serving as military servants, but postulates specific professional figures. This is confirmed, after all, by the recent suspension of obligatory conscription in some European countries, such as Italy, as well as by the tendency, following the USA example, to proceed to a privatization of some military activities traditionally carried out by public powers⁵⁸.

5. Ambivalences

The analysis carried out so far allows to formulate three main conclusions.

Firstly, the European security and defense administration contributes to the exercise of a function stemming from the progressive integration of the functional disciplines of a variety of international regimes, aimed at protecting the security of the world community through military means and finding its anchorage in the global legal order.

Secondly, the European security and defense administration contributes to the exercise of such emerging function as a component of a global organization, made up of a plurality of national and non national offices reciprocally interconnected by means of a number of cooperation and integration mechanisms and jointly responsible for the carrying out of the world community security function.

⁵⁸ On this phenomenon, P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, in *Columbia Journal of Transnational Law*, 2004, p. 521 ff.; P.W. Singer, *Corporale Warriors. The Rise of the Privatized Military Industry*, New York, Cornell University Press, 2003; A. Leander, *Conditional Legitimacy, Reinterpreted Monopolies: Globalisation and the Evolving State Monopoly on Legitimate Violence*, Copri Working paper 2002/10, available at <http://www.ciaonet.org/wps/lea04.pdf>.

Thirdly, the European security and defense administration is subject to a body of European administrative law constituting a component of a wider global regulation aimed at making the joined action of the various competent offices possible.

These conclusions are obviously to be meant as highly problematic. This is so not only by reason of the limited consolidation of the legal reality under exam, which has been highlighted several times throughout the analysis, but also by reason of its functional and normative ambivalences.

This would suggest a critical discussion of the proposed conclusions. In particular, a systematic reflection on the functional and normative foundations of the tendencies registered in the present paper should be carried out. Such reflection should explore, first, the deep ambiguities inherent to the global security function, second, the tensions underlying the global decision-making process concerning the political decision to carry out a military operation, third, the uncertain functionality and accountability of the polycentric but interconnected administration responsible for its execution.

However, although obviously inescapable in a wide-scope research on global security, questions such as whether the emerging function of global military security includes the possibility to export democracy and whether the Security Council is fit to govern the use of military force in the global legal order go well beyond the limits of this paper. On the one hand, their complexity suggests they deserve autonomous consideration. On the other hand, an articulated reflection on such issues would require methods of inquiry essentially different from that followed so far, such as the methods of political science, international relations and political philosophy, as well as an accurate discussion of the theses proposed by the scholars working in those disciplines.

For the purpose of this study, therefore, it seems preferable to focus only on the main ambivalences connected to the process of administrative execution of the adopted political decision.

In this perspective, one should first of all highlight three functional ambiguities of the legal reality whose emergence has been registered in the previous pages.

Firstly, the European security and defense administration operates as a component of a global organization whose great complexity represents at the same time a weakness and a point of strength. On the one hand, the architecture of such global organization, based on the

identification of an articulated «chain of command and control» and reflecting the uncertain political balance among the actors operating in this sector of the global legal space, presents several obvious shortcomings: among them, the difficulty to translate a variety of different actions in a genuinely unitary military operation; the frequent interferences among the various levels of responsibility (strategic, operational and tactical) and the weakness of the «unity of command»; the difficulties connected to the variety of the methods and procedures followed by the different participating forces⁵⁹. As examples, one may refer to the second UN operation in Somalia (Unosom II, 1993-1995), where the involved national governments have directly intervened in the chain of command and control, thus jeopardizing the effectiveness of the unitary command of the various national forces⁶⁰; and to the UN mission in Cambodia (Untac, 1992-1993), where the involvement of more than 40 States has determined several uncertainties in the working methods so as to compromise the carrying out of complex actions⁶¹. On the other hand, in the perspective of institutional realism, these should be taken not only as physiological but perhaps even as desirable shortcomings. An example is provided by the proliferation, in multinational forces, of bodies allowing the control of national governments over their contingents, such as the coordinating officer representing the national command and control authority of each involved Member State (Ucrain) in the Nato command and control chain: while it certainly conflicts with the exigency of the unity of military command, the provision of such bodies at the same time facilitates the acceptance of the operation by the participating States and sustains its effective carrying out. Analogously, if command and control mechanisms are undoubtedly to be made as unambiguous as possible, it should be recognized that there is a strict relationship between the multinational composition of a military force and its capacity to receive

⁵⁹ These problems are highlighted and discussed by an abundant literature on military organization; see, for example, W.H. Lewis (ed.), *Military Implications of United Nations Peacekeeping Operations*, McNair Paper Seventeen, Institute for National Strategic Studies, National Defense University, Washington DC, 1993; e R.H. Palin, *Multinational Military Forces: Problems and Prospects*, Oxford, Oxford University Press for the International Institute for Strategic Studies, 1995. Specifically on the EU system of command and control from the point of view of its efficiency and possible adjustments, see R. Romano, *Comando e controllo delle Forze di Pace dell'Ue*, in N. Ronzitti (ed.), *Le forze di pace dell'Unione europea*, cit., p. 113 ff.

⁶⁰ For a detailed synthesis of the carrying out of such operation, http://www.un.org/Depts/dpko/dpko/co_mission/unosom2backgr2.html, where in any case the national interferences on the chain of command and control are not highlighted.

⁶¹ See the synthesis provided at http://www.un.org/Depts/dpko/dpko/co_mission/untacbackgr2.html#six, even in this case without any indication of the difficulties of the operation.

the necessary consensus⁶².

Secondly, the European security and defense administration is subject to a global regulation based on a functionally ambivalent combination of domestic and non statal law. As it has been argued in the previous pages, non statal administrative law regulates the organization and functioning of the relevant non national public powers, as well as the interconnection in an overall framework of the various administrations involved in the carrying out of the military mission, while domestic law constitutes the only source of regulation of the authoritative powers of national administrations participating in the global composite administration of world security⁶³. On the one hand, such combination is not only the result of a difficult compromise among the conflicting exigencies of identifying coordinated solutions to global problems and of preserving strong national control in a typically statal sector. It is also instrumental to the ordered exercise of administrative action by the composite global administration called to give execution to the relevant political choices. The distinction among the objects of domestic and non statal law and the combination of the two bodies of law in a functionally unitary discipline, in fact, permits to exploit their traditional features, i.e. the authoritative force of national administrative law and the coordination potentialities of international administrative law. On the other hand, the described arrangement presents a number of shortcomings. In particular, it gives place to a system of command and control of the relevant military operation whose coherence and effectiveness cannot be taken for granted. The autonomy of the national administration in the exercise of the authoritative powers connected to tactical command may actually operate in such a way to weaken the strategic and operational command or to affect its substantial content. Among the various possible examples, one may recall the *Allied Force* Nato operation (Kosovo, 1999), where the United States have included within the powers reserved to national commanders the power to regularly address to the US contingents involved in the operation a specific Air Tasking Order, different from that addressed by the Nato commands to all the Allied forces, with the obvious result of setting up a parallel chain of military command⁶⁴. Moreover, it

⁶² In this perspective, in general terms, C. Jean, *Il controllo degli Stati sulla partecipazione delle loro Forze Armate alle operazioni di pace*, in N. Ronzitti (ed.), *Comando e controllo nelle forze di pace e nelle coalizioni militari. Contributo alla riforma della Carta delle Nazioni Unite*, Milano, Franco Angeli, 1999, p. 129 ff.

⁶³ See *supra*, § 3.

⁶⁴ See P.E. Gallis, *Kosovo: Lessons Learned From Operation Allied Force*, Washington D.C., Congressional Research Service, Library of Congress, 1999, available at <http://www.au.af.mil/au/awc/awcgate/crs/r130374.pdf>; F.E. Peters, S. Johnson, N. Bensahel, T. Liston, T. Williams, *European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation*, Santa Monica, RAND Corporation, 2001, p. 41 ff.

has to be recognized that the capacity of non statal administrative law to exploit effectively its coordination task is far from being demonstrated. Non statal administrative law identifies the various administrations involved in the carrying out of the military mission and establishes among them a thick pattern of hierarchical relations. But the good functioning of the composite global administration and the effective exercise of the strategic, operational and tactical command powers essentially depend not as much on the provision of hierarchical relations as on the capacity of non statal law to govern the negotiation processes inevitably inherent to the relationships among the competent public powers and to facilitate their convergence and agreement⁶⁵.

Thirdly, the European security and defense administration contributes to the exercise of a function which on the hand opens many possibilities to the global administration, on the other hand multiplies and sharpens the possible conflicts with the addressees of the administrative action. The latter may be either public powers (typically, a State) or private powers, that is to say private parties which become capable of prevailing on other private parties, violating their fundamental rights and breaching international law (typically, a collectivity within a statal territory). In both cases, the relationship between the administration and the addressees of administrative action does not reflect a simple opposition between two forces that tend to compress each other, but a well more articulated relation of control of one power over another. Such relation might appear relatively unproblematic, in so far as it is governed by the principle according to which the global organization responsible for control may envisage an intervention only where the controlled power becomes unlawful (for example, in case of inter-State conflict or of violation of human rights within the territory of a State). Yet, it is doubtful that this principle may define in a stable way the boundaries within which the power of control may be lawfully exercised. Actually, the emerging function of global security may be declined in a variety of different ways, reflecting deeply diverse visions of the objectives of global peace and stability. The point of balance between controlling and controlled power, thus, is somehow

⁶⁵ On such processes, see, *ex multis*, H.E. Bullock, *Peace By Committee Command and Control Issues in Multinational Peace Enforcement Operations*, School Of Advanced Airpower Studies, Air University, Maxwell AFB, AL, 1995; H. Mc Coubrey e N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Aldershot etc., Dartmouth Publishing Company Limited, 1996, p. 132, who qualify the activities of the Commander of the UN *peace-keeping* force as *command by negotiation*; D.F. Davis, *The Policy Implications of Command and Control in Multinational Peace Support Operations*, in L.F. Mokhtari, *Peacemaking, Peacekeeping, and Coalition Warfare: The Future Role of the United Nations*, Washington, DC, National Defense University Press, 1994, p. 95 ff.

mobile and its concrete identification derives not only from the characters of the single political choices, but also from the specific modalities of their administrative execution. Moreover, the global administration is composed not only by regulatory systems beyond the States, but also by States, which therefore occupy at times the position of administrators, at times the position of the addressees of the administrative action. This means that a complex web of multilateral interactions may take place between the power responsible for control and the power that is subject to that control: suffice it to think, just to make the simplest example, to the situation in which a State or a coalition of States leads against another State an operation authorized by the UN Security Council. Hence an opportunity and a risk for the global administration called to exercise the function of military security of the world community. The opportunity is that of exploit the double role of the States, both controllers and controlled subjects, to widen its own capacity of intervention and optimize the interest to global security. The risk is that of opening the way, not only at the level of the political decision but also and especially at the level of its administrative execution, to interventions hiding national objectives under the appearance of cosmopolitan missions, fading the distinction between domestic and global interests and determining barriers and conflicts among States themselves.

To the functional ambivalences mentioned so far one should add the uncertain legitimacy of the sectorial global administration to which the European security and defense administration participates. Such issue may be discussed by considering two different although interconnected profiles: firstly, the position of the sectorial global administration towards individuals serving as military officials; secondly, the position of the global administration towards the addressees of its activity.

In its position towards individuals serving as military officials, the global administration is legitimated through mechanisms concerning its national components, that is to say the components of the global administration called to exercise authoritative powers *vis-à-vis* individuals serving as military officials in the national forces. And yet, such factors of legitimation present lights and shadows.

This is the case of the rule of law institutes. The experience of the European States in the second half of the XXth century has shown a clear tendency to their establishment in the sector of military administrative law. Such mechanisms may be seen as a source of legitimacy of the national military administration in so far as they limit its traditionally marked prerogatives and

strengthen individuals' position, within the context of a gradual reduction of the speciality of the military administration and its replacement in the legal order⁶⁶. At the same time, however, the rule of law mechanisms may prove inadequate to effectively guarantee the position of individual's *vis-à-vis* the public power. As a matter of fact, they apply only to the national components of the global administration by sector, on the basis of the assumption that the relationship between individuals and administration takes place exclusively in the domestic legal order and is regulated by national law only. But one cannot exclude that individuals' position becomes legally relevant even *vis-à-vis* the non national components of the global administration by sector. An example is provided by the operation Unosom II in Somalia, where the UN commands requested to the Italian government relief from command of the commander of the Italian contingent for insubordination. In this case, what is at stake is an inter-institutional relation between the UN command and the Italian government, but the essentially organizational powers connected to strategic and operational command have been meant so as to include a request of a national officer's relief for insubordination. This shows the potential relevance of individuals' position before non national administrations and raises the question of the provision of mechanisms capable of guaranteeing a degree of accountability of the non national components of the sectorial global administration at least functionally equivalent to that which is ensured with respect of the domestic components⁶⁷.

On a more general level, the traditional nexus between the special prerogatives of the domestic military administration and the institute of citizenship becomes increasingly problematic. In European democracies, the obligations of individuals before the military administrations are constructed as elements of a bilateral relationship between public power and

⁶⁶ We are here following the perspective according to which the rule of law institutes may operate as factors of legitimation and should be accordingly developed in the discussion on post-national democracy. For such perspective, rather common in global administrative law studies, see S. Cassese, *Un giusto procedimento globale?*, in S. Cassese, *Oltre lo Stato*, Bari, Roma, Laterza, 2006, p. 120 ff., p. 177); W.E. Scheuerman, *Cosmopolitan Democracy and the Rule of Law*, in *Ratio Juris*, 2002, p. 454 ss.

⁶⁷ On the establishment of adequate instruments, with particular attentino to the risks deriving from the transplant in global regimes of institutes strictly connected to the experience of national administrative law, B. Kingsbury, N. Krisch, R.B. Stewart and J.B. Wiener, *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, cit., p. 6, where the authors ask: «[t]o what extent is it feasible to transplant domestic models of administrative law to global regimes that are often characterized by strong informality, diffuse responsibilities, decisions based on consent or consensus, plural authority structures, powerful private actors, independent courts? Can Global Administrative Law prosper in global regimes that generally lack the conventional binding features of national legal institutions, including majority rule and compulsory dispute resolution before an independent judiciary?»; for a first answer to such questions, in a tendentially critical perspective, B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, cit., p. 55 ff.

individuals, on the basis of which the significant prerogatives of the former over the latter are instrumental to the safeguard of the national community and find their justification in the belonging of citizens to the statal community. The obligation to serve in the army and the overall preeminence of the military administration over individuals, therefore, are strictly connected to the process of emergence and maturation of the democratic form of government. Despite the legacies of the paradigm of the liberal State, they represent a substantial move away from the experience of continental Europe before the half of the XXth century, where military activities found their necessary and exclusive foundation in the State itself, as a manifestation of its «originary» force⁶⁸ and preeminence over individuals. In the democratic order, the anchorage of military activities does not lie in the State, but in the Constitution, where its essential principles are laid down; and citizens are called to contribute to the exercise of military activities not by reason of the sovereignty of the State, but by virtue of the civic solidarity through which they commit themselves to reciprocal responsibility. Such a link between the preeminence of the military administration over individuals, however, is complicated by the participation of national military administrations to the exercise of the function of global security. On the one side, it could be argued that such process of complication of the objectives of the national military activity implies a potential extension beyond the boundaries of national communities of the civic solidarity on which citizenship duties are based. If national military administrations pursue also the objective of regional and global security as members of the European Union, the North Atlantic Alliance and the United Nations, citizens are called to assume a responsibility not only towards the other citizens of their national community, but also towards the citizens of the other Member States of those organizations. In this sense, the preeminence of the national military administrations still finds its justification in the institute of national citizenship. But the latter should be reconstructed in the wider context of legal order characterized by the ever stricter interconnection among systems operating as associations of States, according to a design essentially inspired to «inter-State solidarism»⁶⁹. On the other side, the peculiar features of the

⁶⁸ For a punctual formulation of the thesis of the originary, non derivative nature of the coercive capacities of the State, see, in the Italian legal scholarship, S. Romano, *Il diritto pubblico italiano*, 1914 (published in 1988, Milano, Giuffrè), p. 49 ff.; see also the reflections of the same author on the nature of the constituent power presented in *Costituente*, in *Il digesto italiano*, VIII, Torino, Utet, 1899-1903, *ad vocem*, and *L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*, 1901, now in *Scritti minori*, I, Giuffrè, Milano, 1950, p. 107 ff.

⁶⁹ A. Hurrell, *International Law and the Making and Unmaking of Boundaries*, in A. Buchanan and M. Moore (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries*, Cambridge, Cambridge University Press,

new competencies gradually assumed by national military administrations determine some sort of attenuation of the traditional nexus between military duties and the institute of citizenship. Such attenuation derives both from the difficulty to argue in a convincing way the redefinition of citizenship duties in the global context and from the high degree of specialization required to carry out the global security missions. Operations such as, for example, peace-keeping and peace-enforcement call for a degree of specialization that cannot be easily satisfied by citizens occasionally serving as military servants, but postulates specific professional figures. This is confirmed, after all, by the recent suspension of obligatory conscription in some European countries, such as Italy, as well as by the tendency, following the USA example, to proceed to a privatization of some military activities traditionally carried out by public powers⁷⁰. Hence the observation that the new global tasks open the way to an erosion of the content of citizenship duties, thus weakening a significant mechanism of justification of the position of preeminence of the domestic military administrations.

The legitimacy of the global administration is even more uncertain when one considers its position towards the addressees of the administrative activity. The most remarkable lacuna is the absence of mechanisms of democratic control. The progressive construction of a global administration for the military security of the world community is not paralleled by the development of instruments of democratic control over the institutions politically responsible of the administrative action. Control over such institutions, *in primis* the UN Security Council, still passes through the traditional mediated legitimation of States. Moreover, differently from what happens in other fields of global administrative law⁷¹, the absence of adequate means of democratic control is not compensated by the provision of rule of law instruments of legitimation. Admittedly, such instruments are not fully developed even in the domestic legal systems, with respect to the administrations responsible for national public order: by virtue of the peculiar features of the administrative action, which in this field has an essentially executive and

2003, p. 275 ff.; B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, cit., p. 43 ff. and p. 47 ff.

⁷⁰ On this phenomenon, P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, in *Columbia Journal of Transnational Law*, 2004, p. 521 ff.; P.W. Singer, *Corporate Warriors. The Rise of the Privatized Military Industry*, New York, Cornell University Press, 2003; A. Leander, *Conditional Legitimacy, Reinterpreted Monopolies: Globalisation and the Evolving State Monopoly on Legitimate Violence*, Copri Working paper 2002/10, available at <http://www.ciaonet.org/wps/lea04.pdf>.

⁷¹ Sul punto S. Cassese, *Globalizzazione e «rule of law»*. *Esiste uno «Stato di diritto» oltre lo Stato?*, in S. Cassese, *Oltre lo Stato*, cit., p. 109 ff. p. 116.

material nature, the procedural guarantees are rather limited and the rule of law institutes is essentially circumscribed to judicial control. In the case of the global administration responsible for the military security of the world community, however, administrative actions tend to escape even judicial control. As a matter of fact, judicial control over the activities of the various non-statal components of global administration is extremely weak: the UN and the Nato legal orders lack a court genuinely competent to assess the legitimacy of the relevant regulation and conduct of the bodies of the two systems, while the European Court of Justice cannot assess the content of the measures adopted under title V of the Treaty on the European Union only to verify whether they jeopardize the Community prerogatives. Judicial protection, thus, is confined to the system of international criminal courts that is composed, as it is well known, of ad hoc courts set up by the Security Council and of the International Criminal Court⁷². But such a judicial system presents evident shortcomings, as the jurisdiction of international criminal courts, although covering in principle also the criminal conduct of the global administration, finds its rationale essentially in the repression of severe violations of international law perpetrated in the context of inter-State conflicts or conflicts internal to a State. And it should be recognized that international criminal courts have been so far reluctant to control the conduct of global administrations.

6. Conclusions

The answers to the questions put at the centre of this study may be summed up as follows. Firstly, the European security and defense administration contributes to the exercise of a function resulting from the ever stricter integration of the functional disciplines of several international regimes, aimed at protecting the security of the world community through military means and finding its anchorage in the global legal order. Secondly, in the exercise of such function, the European security and defense administration acts as a component of a global organization, made up of a plurality of national and non national offices reciprocally interconnected by means of a variety of cooperation and integration mechanisms and jointly responsible for the carrying out of the world community security function. Thirdly, as for the discipline governing its functioning, the European security and defense administration is subject to a body of European administrative

⁷² See P. Mori, *L'istituzionalizzazione della giurisdizione penale internazionale*, Torino, Giappichelli, 2001; and W. Shabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2001.

law constituting a component of a wider global regulation aimed at making the joined action of the various competent offices possible. Fourthly, in its participation to the exercise of the function of global military security, the European security and defense administration operates in a field of the global administrative space characterized by deep functional and normative ambivalences.

Such conclusions are relevant in several respects.

First of all, they represent a contribution to the legal reconstruction of the ESDP, in so far as the analysis allows to identify the distinguishing organizational and regulatory features of the European security and defense administration as well as the thick pattern of functional, organizational and procedural interconnections between the ESDP administration and the other regulatory systems beyond the State that operate in the field of security and defense.

Secondly, the proposed conclusions are relevant also beyond the borders of the studies dedicated to the ESDP. In particular, they might contribute to the reflection on the overall characteristics of European administrative law. This paper has essentially sought to measure the degree of integration between the EU and the national public powers, as well as the integration among the European administration and the other relevant systems beyond the State, leaving aside the comparison between the ESDP and other sectors of EU administrative law. And yet, the conclusions reached in the present inquiry could be developed and incorporated in a wider discussion of the legal features of European administration and European administrative law. Such discussion has been so far essentially devoted to the Community pillar and has highlighted the emergence in the Community legal order of an «integrated» administrative system part original, part in line with the tradition of statal administrative law. The ESDP case provides a significant example of a branch of EU administration and administrative law where the distance with the tradition of statal administrative law is more evident and the interaction between national, European and global law is more complex than it is usually assumed. If this does not reduce the importance and the explicatory power of the studies on Community administrative law, it could certainly contribute to recognize the composite and differentiated character of EU administrative law.

Finally, the reached conclusions may represent a contribution to the studies of global administrative law. At an empirical level, the analysis carried out in this study seems relevant in two senses: it provides an example of «capture» of the EU by or within a global administration

by sector; and it extends global administrative law research beyond the scope of economic and social regulation, although admittedly the inquiry simply represents a first sketch of the subject-matter, which could be detailed and specified, for example through a number of case-studies. At a conceptual level, this paper suggests to exploit the possibilities opened by the notion of global legal order, moving towards the recognition of the existence of genuinely global functions and global composite administrations.