

The Security Council's Authorization of Enforcement Action by Regional Organizations

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I. The Relationship between the Security Council and Regional Organizations in the Maintenance of International Peace

Article 53 of the United Nations Charter, relating to regional arrangements and agencies (a term that may be considered as corresponding to organizations), confirms the primary responsibility of the Security Council in the maintenance of international peace and security which, in general terms, is conferred to it by Article 24. In fact, according to

Article 53 para. 1, the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority; but no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council¹.

As has been rightly pointed out², Article 53 does not widen the enforcement powers of the Security Council; those powers remain those laid down by Arts 41 and 42 of the Charter relating, respectively, to measures not involving the use of armed force and to those involving the use of such force. The formulation itself of Article 53 para. 1 declares that the Security Council may utilize regional arrangements or agencies, but for enforcement action “under its authority”, that is, within the scope of its powers and competence. Therefore, the powers laid down in Article 53 are also based on the prerequisites specified by Chapter VII for the action of the Security Council (a threat to peace, a breach of the peace, or an act of aggression) and are directed to the aim of maintaining or restoring international peace and security.

Article 53, however, widens the ways in which enforcement measures may be implemented, as it enables the Security Council to utilize regional arrangements or agencies; moreover, it recognizes that such arrangements and agencies may even play an autonomous role, thereby posing an exception to the general prohibition of the threat or use of force (Article 2 para. 4), but always ensuring full control over the situation by the Security Council through its authorization.

¹ Article 53 para. 1 declares that such an authorization is not necessary for measures against any “enemy state”, i.e. any state which, during the Second World War, has been an enemy of any signatory of the Charter (para. 2), directed against renewal of aggressive policy on the part of such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. However, this part of Article 53 would appear to be no longer applicable; in fact, all former enemy states have been admitted to the United Nations and thus considered as “peace-loving” by the competent organs of the Organization (Article 4). Article 53 has thus been rendered inoperative since the classification of a former enemy state has been replaced by its being defined as a “peace-loving state”, a judgement that is incompatible with the suspicion of aggression. In legal theory see, also for further references, G. Ress, “Article 53”, in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994, 722 et seq., (735 et seq.).

² Ress, see note 1, 730.

Within the scope of Article 53 regional organizations are in a complementary and subordinate position with respect to the Security Council in that they may operate only if they are utilized or authorized by the Security Council. This relation is confirmed in the preamble of the "Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security" (adopted by the General Assembly with A/RES/49/57 of 9 December 1994); this Declaration stresses "the primary responsibility of the Security Council, under Article 24 of the Charter, for the maintenance of international peace and security" and "that the efforts made by regional arrangements or agencies, in their respective fields of competence, in cooperation with the United Nations can usefully *complement* the work of the Organization in the maintenance of international peace and security"³.

The complementary and subordinate nature of the relationship between regional organizations and the Security Council laid down by Article 53 justifies the configuration of such organizations as "organs" of the United Nations (albeit not in a technical sense and only in an indirect manner)⁴. In fact, they are oriented towards the aim of the maintenance of international peace and security, according to the deliberations of the Security Council.

II. The Enforcement Measures Requiring the Security Council's Authorization

Article 53 para. 1 regulates two types of situations. In the first it is the Security Council which assumes the initiative of utilizing, where appropriate, the regional agencies or arrangements; in the second, on the contrary, the initiative to take an enforcement action derives from the regional agency, but such an action is only allowed on the basis of the Security Council's authorization.

Although, in practice, the difference between the two hypotheses is often attenuated so that it is sometimes difficult to place a Security Council resolution in one category or the other, they pose different interpretative questions. Here we shall be restricting our analysis to the

³ My italics.

⁴ H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems*, 1951, 145 et seq. and 326.

problems raised in interpreting the second part of Article 53 para. 1. Such problems (which have been raised once again with particular urgency in recent international practice) concern the identification of the enforcement measures for which authorization from the Security Council is necessary, the form that such authorization must take, the time within which it must intervene, and the possibility, according to Article 53 para. 1, of granting subsequent authorization to the action of a regional organization.

As regards the enforcement measures of a regional organization requiring the authorization of the Security Council, one wonders if they may consist of enforcement measures of any type, or whether such authorization is only necessary for those cases involving the use of armed force (or, at least, the threat of such force).

At first sight a wider interpretation might seem preferable, on the basis of which any regional enforcement action, whatever its nature (diplomatic, political, commercial, financial, economic etc.), should be subordinate to the Security Council's authorization. In this sense one might invoke the very breadth of the term "enforcement" which, in other provisions of the Charter, is used in its wide sense so as to include both measures involving the use of armed force and measures of a different nature.

Of these provisions it is worth remembering Article 2 para. 7 (which declares that the respect for the domestic jurisdiction of any state shall not prejudice the application of enforcement measures under Chapter VII), Article 5 (on the suspension of a member of the United Nations against which preventive or enforcement action has been taken by the Security Council) and Article 50 (concerning the solution of the special economic problems of any state arising from the carrying out of preventive or enforcement measures taken by the Security Council against another state); and even Article 53 para. 1, first sentence, which enables the Security Council to utilize regional agencies (or arrangements) for enforcement action under its authority would seem to require an interpretation whereby such action may include not only armed measures but also measures of a different character, i.e. not involving the use of force⁵.

⁵ U. Villani, "Il ruolo delle organizzazioni regionali per il mantenimento della pace nel sistema dell'ONU", in: *Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti*, Vol. I, *Diritto Internazionale*, 1999, 595 et seq., (611 et seq.).

Nevertheless, a different interpretation would seem preferable of enforcement action which, under Article 53 para. 1, second sentence, requires the authorization of the Security Council. In fact, if one bears in mind that a treaty shall be interpreted also in the light of its object and purpose⁶, it must be stressed that the purpose of that provision is to enable the Security Council to control the enforcement action of regional organizations through its authorization. Now, an authorization is only necessary to allow an action which, in the absence of such an authorization, would be prohibited: the purpose and function of the authorization are thus those of removing a prohibition, thereby making the authorized action lawful.

In the light of this purpose and function, it must be the case, in the present author's opinion, that the enforcement measures which are subordinate to the Security Council's authorization are only those involving the use (or the threat) of armed force. The Charter, indeed, establishes that all members shall refrain in their international relations from the threat or use of force, and it is unquestionable that the force prohibited is only *armed* force (Article 2 para. 4). Other enforcement measures, e.g. of a commercial, diplomatic or financial nature, are not forbidden by the Charter. The prohibition resulting from Article 2 para. 4 of the Charter holds for all Member States⁷, both when considered individually and when they act in the framework of regional (or international) organizations. In fact, such states cannot elude that prohibition on the basis of treaties constituting regional (or international) organizations since, on the one hand, Article 103 of the Charter lays down that, in the event of a conflict between the obligations of the members under the Charter and their obligations under any other agreement, the obligations under the Charter shall prevail; on the other hand, Article 52 para. 1 allows for the existence of regional agencies (or

⁶ Article 31 para. 1 of the Vienna Convention on the Law of Treaties of 23 May 1969, UNTS Vol. 1155 No. 18232, which corresponds to customary international law: see the judgement of 3 February 1994 of the ICJ in the case concerning the territorial dispute (Libyan Arab Jamahiriya/ Chad), ICJ Reports 1994, 3 et seq., (21 et seq.).

⁷ As is well known, the prohibition originally laid down by Article 2 para. 4 of the Charter must now be considered as provided for by a provision in customary international law: see the judgement of 27 June 1986 of the ICJ in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq., (99 et seq.).

arrangements), but provided that they and their activities are consistent with the purposes and principles of the United Nations.

In conclusion, if the purpose of the Security Council's authorization under Article 53 para. 1, second sentence, is to allow an enforcement action by a regional organization, which would be unlawful in the absence of such an authorization, then an authorization is only necessary for measures involving the use (or the threat) of *armed* force, because measures of a different nature are not unlawful under the Charter. As has been rightly pointed out, "there is nothing to stop a group of states from joining in the framework of a regional organization and to do what they are permitted to do under general international law, such as taking reprisals not involving the use of force"⁸.

After some initial hesitation, practice has also shown that regional organizations are ever more frequently adopting enforcement measures not involving the use of force without asking for authorization from the Security Council, and without this lack of authorization giving rise to protests or objections⁹.

⁸ C. Schreuer, "Regionalism v. Universalism", *EJIL* 6 (1995), 477 et seq., (491); in this sense see E. Jiménez de Aréchaga, "La coordination des systèmes de l'ONU et de l'Organisation des Etats Américains pour le règlement pacifique des différends et la sécurité collective", *RdC* 111 (1964), 446 et seq., (480 et seq.); J.A. Frowein, "Zwangsmassnahmen von Regionalorganisationen", in: U. Beyerlin et al. (eds), *Recht zwischen Umbruch und Bewahrung. Völkerrecht, Europarecht, Staatsrecht. Festschrift für Rudolf Bernhardt*, 1995, 57 et seq., (66 et seq.); for different opinions see D. Momtaz, "La délégation par le Conseil de Sécurité de l'exécution de ses actions coercitives aux organisations régionales", *A.F.D.I.* 43 (1997), 105 et seq., (112); R. Pernice, *Die Sicherung des Weltfriedens durch regionale Organisationen und die Vereinten Nationen. Eine Untersuchung zur Kompetenzverteilung nach Kapitel VIII der UN-Charta*, 1972, 114 et seq.; R. Wolfrum, "Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeiten und Grenzen", *ZaöRV* 53 (1993), 576 et seq., (582 et seq.).

⁹ See, among others, A. Gioia, "The United Nations and Regional Organizations in the Maintenance of Peace and Security", in: M. Bothe/ N. Ronzitti/ A. Rosas (eds), *The OSCE in the Maintenance of Peace and Security. Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes*, 1997, 191 et seq., (213 et seq.); C. Walter, "Security Council Control over Regional Action", *Max Planck UNYB* 1 (1997), 129 et seq., (136 et seq.).

III. The Necessity of the Security Council's Authorization Concerning the Recommendations of Regional Organizations Involving the Use of Force

Article 53 para. 1, second sentence, raises further interpretative questions.

First of all, there is the question of whether the Security Council's authorization is only necessary when the enforcement measures involving the use of armed force are the subject of a binding decision adopted by a regional organization, or also when such an organization limits itself to adopting a recommendation.

This question was raised in particular in 1962 in the case of the "quarantine" of Cuba following the installation of Soviet missiles. On 23 October 1962 the Organization of American States adopted a resolution with which it asked Cuba to dismantle the missiles and other offensive weapons and recommended to Member States to take all measures, individually and collectively, including the use of armed force, which they deemed necessary to ensure that Cuba could not continue to receive from the Sino-Soviet powers military and related supplies and to prevent the missiles in Cuba with offensive capability from becoming an active threat to the peace and security of the American Continent. The problem reappeared in 1983 when the United States justified the intervention in Grenada of 25 October on the basis of a resolution of the Organization of Eastern Caribbean States of 21 October.

In the present author's opinion the authorization of the Security Council is indispensable also in the case of recommendations concerning measures involving the use of armed force. First of all – as has been rightly observed¹⁰ – it is not reasonable to consider that armed action by Member States of a regional organization, which would be prohibited if taken as the implementation of a decision made by that organization, should be allowed (and thus not require authorization under Arti-

¹⁰ G.I.A.D. Draper, "Regional Arrangements and Enforcement Action", *Revue égyptienne de droit international* 20 (1964), 1 et seq., (18 et seq.). In the sense that action merely recommended by a regional organization would not be an enforcement action and, therefore, would not be subordinate to the authorization of the Security Council, see A. Cheyes, "Law and the Quarantine of Cuba", *Foreign Aff.* 41 (1962-1963), 550 et seq., (556); L.C. Meeker, "Defensive Quarantine and the Law", *AJIL* 57 (1963), 515 et seq., (520 et seq.).

cle 53) that action were based on the spontaneous adherence to a recommendation.

Secondly, it must be remembered that Article 2 para. 4 of the Charter prohibits not only the *use* but also the *threat* of force; now, a recommendation to take armed measures necessarily implies a threat of force. Thus only the authorization of the Security Council under Article 53 para. 1 may make that threat lawful (as in the case of the use of force)¹¹.

Lastly, the *enforcement* character of armed measures, even if they are the subject of a recommendation, can clearly be seen from the point of view of the state against which they are directed: indeed, for such a state, it makes no difference whatsoever if the states acting against it do so voluntarily by adhering to a recommendation or if they are obliged to do so by virtue of a binding decision of a regional organization¹².

As regards practice, it should be remembered that, in the case of the United States' intervention in Grenada, the General Assembly of the United Nations, with A/RES/38/7 of 2 November 1983, adopted by a large majority, deeply deplored the intervention insofar as it "constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State".

IV. The Admissibility of an Implicit Authorization. The Practice of the Security Council in the Liberian Crisis

Another problem concerning the interpretation of Article 53 para. 1, second sentence, regards the form of authorization. In fact, one may wonder whether such authorization may also be given implicitly. Although the formulation of the provision in question seems to refer to an express authorization¹³, most scholars also consider an implicit authorization as admissible; indeed, according to some scholars, even a tacit

¹¹ Gioia, see note 9, 218 et seq.

¹² A. Eide, "Peace-keeping and Enforcement by Regional Organizations", *JPR* 3 (1966), 125 et seq., (140); Walter, see note 9, 136.

¹³ See J.A. Frowein, *Das Verhältnis zwischen der Vereinten Nationen und Regionalorganisationen bei Friedenssicherung und Friedenserhaltung*, 1996, 17; Walter, see note 9, 177; O. Corten/ F. Dubuisson, "L'hypothèse d'une règle émergente fondant une intervention militaire sur une 'autorisation implicite' du Conseil de Sécurité", *RGDIP* 104 (2000), 873 et seq., (876).

authorization is possible and may be manifested merely through silence or through inactivity on the part of the Security Council¹⁴.

In the present author's opinion, an implicit authorization is admissible, but it must be deduced with absolute certainty by the behaviour of the Security Council. In fact, Article 53 para. 1 does not prescribe any particular "formula" for the concession of its authorization; it is merely required, therefore, that the Security Council should give its consent, i.e. it must approve the enforcement action by a regional organization. However, as with all implicit declarations, the will of the Security Council must be seen as being unequivocal through its behaviour. This is all the more necessary in the case of Article 53 para. 1 since the Security Council's authorization entails an exception to the general rule of the prohibition of the use of armed force. The fact that the authorization of the Security Council determines an exception to this rule entails that the exception must be determined with absolute rigour and certainty.

One example of implicit but certain authorization may be found in the case of the Liberian crisis. In the summer of 1990 the Economic Community of West African States (ECOWAS) had set up a peace-keeping force in Liberia called the Military Observer Group (ECOMOG) which, however, had assumed an ever more coercive function, particularly against the faction of the Liberian Patriotic National Front under General Charles Taylor. This initiative had been taken without any authorization by the Security Council which, however, had been informed as to the developments in the situation.

The Security Council itself did not subsequently adopt any authorization. Nevertheless, with S/RES/788 (1992) of 19 November 1992, the Security Council clearly expressed its approval of the initiative undertaken by ECOWAS. In fact, in the resolution, "recalling the provisions of Chapter VIII of the Charter of the United Nations", the Security Council "commends ECOWAS for its efforts to restore peace, security and stability in Liberia" (para. 1), and expresses unequivocally its support for the military action of ECOWAS, specifically declaring that it "condemns the continuing armed attacks against the peace-keeping forces of ECOWAS in Liberia by one of the parties to the conflict" (para. 4); moreover, adhering to a request made by ECOWAS itself, the Security Council decided, under Chapter VII, that all states shall immediately implement "a general and complete embargo on all deliveries of weapons and military equipment to Liberia" (para. 8).

¹⁴ See, e.g., Cheyes, see note 10, 556 et seq.; Meeker, see note 10, 522.

The Security Council's approval of military action by ECOWAS which, in the present author's opinion, emerges unequivocally from this resolution, is confirmed by the subsequent S/RES/866 (1993) of 22 September 1993. Here the Security Council, on the basis of the Peace Agreement signed in Cotonou on 25 July 1993 by the three Liberian parties, as well as by representatives of ECOWAS, the United Nations, and the Organization of African Unity¹⁵, decided to establish a United Nations Observer Mission in Liberia (UNOMIL) to cooperate with the peace-keeping mission already set up by ECOWAS. In the same resolution the Security Council defines the UNOMIL mandate by laying down that, among other things, it is to be "without participation in enforcement operations, to coordinate with ECOMOG in the discharge of ECOMOG's separate responsibilities". The reference to *enforcement* operations shows that the Security Council was well aware of the fact that the mechanism set up for solving the Liberian crisis entailed enforcement action by ECOMOG¹⁶. The direct participation of the United Nations in this mechanism by means of the Observer Mission (UNOMIL) can only imply full support by the Security Council for the use of force on the part of ECOWAS. It cannot be doubted, therefore, that the Security Council fully approved the use of force by that regional organization in a manner that would satisfy the terms of authorization required under Article 53 para. 1¹⁷.

V. The Kosovo Crisis and the Intervention of NATO

The debate over the admissibility of an implicit authorization by the Security Council was taken up again in a lively discussion concerning NATO's military intervention of 1999 against the Federal Republic of Yugoslavia in the Kosovo crisis. As is well known, the Security Council had never expressly authorized NATO's intervention which thus appeared as clashing with the provision contained in Article 53 para. 1 and, consequently, as constituting a serious breach of the prohibition of

¹⁵ For the text of that agreement see M. Weller, *Regional Peace-keeping and International Enforcement: the Liberian Crisis*, 1994, 343 et seq.

¹⁶ Walter, see note 9, 185; for a different interpretation see Corten/ Dubuisson, note 13, 894 et seq.

¹⁷ The approval of the Security Council raises, moreover, the problem of admissibility of an approbation following the intervention of a regional organization. On this question, see also Section VII.

the use of force as laid down by Article 2 para. 4 of the Charter and by the corresponding rule of customary international law. Various attempts were made, however, to legitimize NATO's intervention through resolutions (or even through the inactivity) of the Security Council, which were considered as being equivalent to the authorization laid down in Article 53 para. 1.

To this end reference was made above all to the Security Council's resolutions prior to the bombings which countries belonging to NATO began to carry out on the night between 23 and 24 February 1999¹⁸. With these resolutions the Security Council had, among other things, condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army (KLA) or any other group or individual, and had decided an embargo of arms and related material of all types towards the Federal Republic of Yugoslavia, including Kosovo¹⁹; moreover, it had affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region and, acting under Chapter VII of the Charter, it had reserved the possibility to consider further action and additional measures to maintain or restore peace and stability in that region²⁰. The Security Council had also endorsed and supported the agreements signed in Belgrade on 16 October 1998 between the Federal Republic of Yugoslavia and the OSCE, and on 15 October 1998 between the Federal Republic of Yugoslavia and NATO²¹, concerning the verification of compliance by the Federal Republic of Yugoslavia and all others concerned in Kosovo with the requirements of its previous S/RES/1199 (1998) of 23 September 1998.

Given the deterioration of the situation in Kosovo, the intervention by NATO would be consistent with the orientation of the Security Council, resulting from the determination of a threat to the peace, and

¹⁸ For the declarations by NATO and the positions of the Member States' governments, see B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 10 (1999), 1 et seq., (6 et seq.); Corten/ Dubuisson, see note 13, 884 et seq.; P. Picone, "La 'guerra del Kosovo' e il diritto internazionale generale", *Riv. Dir. Int.* 83 (2000), 309 et seq., (313 et seq.).

¹⁹ S/RES/1160 (1998) of 31 March 1998.

²⁰ S/RES/1199 (1998) of 23 September 1998.

²¹ S/RES/1203 (1998) of 24 October 1998.

with the clearly-expressed will of the Council itself to prevent “the impending humanitarian catastrophe” from happening²².

In the present author’s opinion, however, the above-mentioned resolutions of the Security Council cannot be interpreted as entailing an implicit authorization of the use of force by NATO. In this regard it is worth recalling, first of all, that the Security Council had condemned not only the use of excessive force by the Serbian police, but also all acts of terrorism by the KLA²³: this “equidistance” by the Security Council with respect to the parties to the conflict cannot be interpreted as authorizing the “one-way” use of force against the Serbian party alone. Secondly, the Security Council, in S/RES/1199 (1998) of 23 September 1998, had clearly stated that, should the measures demanded in the same resolution and in S/RES/1160 (1998) of 31 March 1998 not be taken, it would have considered further action and additional measures to maintain or restore peace and stability in the region. In this way the Security Council had clearly manifested its own intention of retaining full responsibility for the Kosovo crisis by adopting *itself*, if necessary, further measures (not necessarily of a military nature), thus implicitly excluding any delegation of the use of force to NATO (or to its Member States). Lastly, it should be borne in mind that, in its resolutions, the Security Council has constantly reaffirmed the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia: this commitment is clearly incompatible with an authorization of massive and prolonged bombings against Yugoslavia which no artifice could possibly reconcile with the principle of respect for the sovereignty and territorial integrity of the stricken state²⁴. In actual fact, in the resolutions of the Security Council, rather, one can perceive an implicit but clear will to prohibit any unilateral use of armed force against the Federal Republic of Yugoslavia.

Furthermore, as regards the question of an implicit authorization by the Security Council, the indictment of President Milosevic by the International Criminal Tribunal for the Former Yugoslavia is totally ir-

²² See again S/RES/1199 (1998) of 23 September 1998.

²³ See M. Spinedi, “Uso della forza da parte della NATO in Jugoslavia e diritto internazionale”, *Quaderni Forum* 12 (1998), No. 3, *Guerra e pace in Kosovo. Questioni etiche, politiche e giuridiche*, 23 et seq., (28).

²⁴ See U. Villani, “La guerra del Kosovo: una guerra umanitaria o un crimine internazionale?”, *Volontari e terzo mondo* 27 (1999), No. 1-2, 26 et seq., (29 et seq.).

relevant²⁵. In fact, on the one hand, the indictment of a Head of State certainly cannot entail an authorization to bombard that state; on the other, the Tribunal has no competence to express the will of the Security Council.

On the contrary, a resolution which could appear as an implicit manifestation of will by the Security Council, if not of authorization, at least of subsequent approval of NATO's action against the Federal Republic of Yugoslavia, is S/RES/1244 (1999) of 10 June 1999. With this resolution the Security Council substantially accepted the conditions for the cessation of hostilities decided by the G-8 Member States on 6 May 1999 which were "accepted" by the Federal Republic of Yugoslavia: in so doing the Security Council could be said to have ratified NATO's action, albeit implicitly²⁶. Approval by the Security Council would seem to be manifest especially in annex 2 to S/RES/1244 (1999), containing the peace plan by Ahtisaari-Chernomyrdin presented to the Yugoslav authorities on 2 June 1999²⁷. In this annex it is established that "Suspension of military activity will require acceptance of the principles set forth above" (para. 10). The Security Council's resolution might therefore imply an approval of military activity until acceptance of the peace conditions by the Federal Republic of Yugoslavia.

In the present author's opinion, however, one must exclude the interpretation that the Security Council approved the military intervention by NATO. In fact, one need merely consider that, in the debate in the Security Council concerning the approval of S/RES/1244 (1999), some permanent members, i.e. Russia and China, resolutely condemned NATO's action, even if the former voted in favour of the resolution and the latter abstained. The Russian delegate clearly affirmed that his government "has strongly condemned the NATO aggression against a sovereign state. This action on the part of the Alliance, which was under-

²⁵ See, for references, Picone, see note 18, 351.

²⁶ See A. Pellet, "La guerre du Kosovo – Le fait rattrapé par le droit", *International Law Forum* 1 (1999), 160 et seq., (164); L. Henkin, "Kosovo and the Law of 'Humanitarian Intervention'", *AJIL* 93 (1999), 824 et seq., (826 et seq.); L. Condorelli, "La risoluzione 1244 (1999) del Consiglio di Sicurezza e l'intervento NATO contro la Repubblica Federale di Jugoslavia", in: N. Ronzitti (ed.), *NATO, conflitto in Kosovo e Costituzione italiana*, 2000, 31 et seq., (39 et seq.); for a different view F. Francioni, "Of War, Humanity and Justice: International Law After Kosovo", *Max Planck UNYB* 4 (2000), 107 et seq., (116); see also H. Neuhold, "Collective Security After Operation Allied Force", *Max Planck UNYB* 4 (2000), 73 et seq.

²⁷ Condorelli, see above, 40.

taken in violation of the United Nations Charter and in circumvention of the Security Council, has severely destabilized the entire system of international relations based on the primacy of international law".²⁸

The condemnation of NATO's intervention was reaffirmed in equally clear and explicit terms by China's delegate who declared: "More than two months ago, without authorization from the Security Council, the United States-led North Atlantic Treaty Organization (NATO) blatantly launched military strikes against the sovereign State of the Federal Republic of Yugoslavia. In taking this action, NATO seriously violated the Charter of the United Nations and norms of international law, and undermined the authority of the Security Council, thus setting an extremely dangerous precedent in the history of international relations"²⁹.

It is evident that these states, which have the right of veto, would never have allowed the Security Council to adopt a resolution whose meaning could be interpreted as approving NATO's action. In actual fact, S/RES/1244 (1999) does not intend to give any juridical judgement, either positive or negative, regarding the intervention in Yugoslavia. It simply aims at ending the serious crisis in Kosovo through a *political* solution, without in any way facing the legal problem concerning the lawfulness of NATO's action. Indeed, in S/RES/1244 (1999) itself, the Security Council expressly declares that it "Decides that a *political* solution to the Kosovo crisis shall be based on the general principles in annex 1³⁰ and as further elaborated in the principles and other required elements in annex 2" (para. 1)³¹.

Even some of the NATO states have clearly shown that they believe that the Security Council never authorized or approved the military action against Yugoslavia. It is worth recalling the speech by the Foreign Minister of the Federal Republic of Germany, Fischer, on 22 September 1999 in the General Assembly of the United Nations. On that occasion Fischer declared that NATO's action, "only justified in this special situation, must not set a precedent for weakening the UN Security Council's monopoly on authorizing the use of international force. Nor must it be a licence to use external force under the pretext of humani-

²⁸ See Doc. S/PV. 4011, 7.

²⁹ See Doc. S/PV. 4011, 8.

³⁰ Annex 1 contains the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 by the G-8 Foreign Ministers at the Petersberg Centre.

³¹ My italics.

tarian assistance. This would open the door to the arbitrary use of power and anarchy, and throw the world back to the 19th century³². It is clear that, while justifying NATO's intervention, Germany considers that the competence of the Security Council has been eluded and that, consequently, authorization was not given by S/RES/1244 (1999).

VI. The Impossibility of Deducing an Implicit Authorization from the Silence or the Inaction of the Security Council

While it is possible to envisage an implicit authorization as long as it is both clear and unequivocal, such an authorization cannot be gleaned merely through the silence or inactivity of the Security Council.

Some authors have tried to argue that authorization may, in certain conditions, derive also from the inactive behaviour of the Security Council. For example, in the case of the "quarantine" imposed by the Organization of American States against Cuba in 1962, during the missiles crisis, some scholars affirmed that the attitude of the Security Council, which did not condemn the measures taken by the OAS (indeed, it encouraged negotiations between the United States and the Soviet Union), was the equivalent of an implicit authorization of such measures³³. Recently a similar hypothesis has been upheld as regards NATO's intervention in the Kosovo crisis.

Authorization of the intervention is said to be deducible from the fact that the Security Council, on 26 March 1999, did not adopt a resolution proposal presented by a few states (including Russia) which asked the Council itself to condemn the intervention and, "acting under Chapters VII and VIII of the Charter, demands an immediate cessation of the use of force against the Federal Republic of Yugoslavia and urgent resumption of negotiations"³⁴. The inaction of the Security Coun-

³² On the intervention of the German Foreign Minister and, more generally, on the debate in the General Assembly, see Corten/ Dubuisson, see note 13, 889 et seq.; N. Ronzitti, "Uso della forza e intervento di umanità", in: Ronzitti, see note 26, 1 et seq., (21 et seq.).

³³ Cf. Cheyes, see note 10, 556 et seq.; Meeker, see note 10, 522.

³⁴ Doc. S/1999/328.

cil could thus be taken as signifying approval for NATO's intervention³⁵.

As we have already intimated, such a hypothesis cannot be upheld³⁶. On a general level, it should be observed that, in itself, silence has no meaning: "*Qui tacet neque negat, neque utique fatetur*". It is therefore not possible to uphold that silence entails clear and unequivocal behaviour, an indispensable feature if it is to be taken as implicit authorization.

Particularly as regards the Security Council, the impossibility of qualifying its silence or inaction as an authorization should be affirmed also in the light of this body's voting rules. As is well known, decisions of the Security Council on non procedural matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members (Article 27 para. 3). This rule prescribes that Security Council resolutions be adopted with the consensus of all its permanent members, as well as by the majority of nine votes. In order to form the will of the Security Council a *positive* act is therefore necessary because it is only with reference to such an act that one can verify with absolute certainty the consensus of all the permanent members as well as the majority of nine votes. On the contrary, mere silence or inaction on the part of the Security Council may be (and generally *is*) due to the absence of the prescribed majority and even to the *dissent* of the permanent members. Thus, silence or inaction can only give the appearance of an implicit authorization, but in fact they do not express any will on the part of the Security Council.

The case of the rejection of the proposal, which was aimed at asking for the immediate cessation of the bombings against the Federal Republic of Yugoslavia, is exemplary. The proposal, which was rejected by 12 votes, obtained favourable votes from China, Russia and Namibia:

³⁵ See, e.g., M. Bettati, "Les premières leçons du Kosovo", *Le Courrier de l'UNESCO*, juillet-août 1999, 60; Henkin, see note 26, 826.

³⁶ See, in this sense, Jiménez de Aréchaga, see note 8, 497 et seq.; Ress, see note 1, 734; Schreuer, see note 8, 492; Gioia, see note 9, 221; Walter, see note 9, 183 et seq.; and, as regards the case of Kosovo, M.G. Kohen, "L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international", *RBDI* 32 (1999), 122 et seq., (136); N. Ronzitti, "Lessons of International Law from NATO's Armed Intervention Against the Federal Republic of Yugoslavia", *The International Spectator* 34 (1999), No. 3, 45 et seq., (48 et seq.); Spinedi, see note 23, 28 et seq.; Corten/ Du-buisson, see note 13, 900 et seq.

thus two permanent members of the Security Council condemned the military intervention by NATO and demanded its immediate cessation. Under these conditions considering the "inaction" of the Security Council as an implicit authorization would be incompatible with the opposite will expressed by two permanent members with the right of veto, and would actually result in a violation of the voting rule of Article 27 para. 3.

VII. The Problem of the Admissibility of an Authorization Subsequent to Regional Action

A further problem concerns the admissibility of an authorization of the Security Council following enforcement action undertaken by a regional organization.

Seen literally, there can be no doubt that the resolution of the Security Council should precede the enforcement action of the regional organization. In fact, a subsequent resolution could not be defined as an "authorization" but, if anything, as an approval or ratification etc. However, one must verify as to whether a subsequent authorization is admissible in the light of the rationale of Article 53 para. 1, of its object and its purpose, and of the role of the Security Council in the maintenance of international peace.

According to some authors it would be quite possible for the Security Council to judge a regional enforcement action already carried out as necessary to maintain or restore international peace and security; on the other hand, if the Security Council may authorize an enforcement action by a regional organization Article 53 para. 1 there would be no reason for preventing the Council itself from legitimizing an action *a posteriori* which it might authorize *a priori*³⁷.

However, in the present author's opinion, one must exclude the admissibility of a subsequent authorization³⁸. In fact, under Article 53

³⁷ In this sense, see, e.g., Walter, see note 9, 177 et seq.; Condorelli, see note 26, 39 et seq.

³⁸ See Jiménez de Aréchaga, see note 8, 497 et seq.; Eide, see note 12, 139 et seq.; M. Akehurst, "Enforcement Action by Regional Organizations, with Special Reference to the Organization of American States", *BYIL* 42 (1967), 175 et seq., (210 et seq.); J. Wolf, "Regional Arrangements and the

para. 1 the Security Council does not limit itself to issuing preventive authorizations or approvals to regional organizations by delegating to the latter responsibility for carrying out enforcement actions. The Security Council, in accordance with Article 24, still remains the organ of the United Nations on which members confer primary responsibility for the maintenance of international peace and security and which, to this end, keeps a kind of monopoly over the use of force. This responsibility may be exercised through the authorization of an enforcement action by regional organizations under Article 53 para. 1; but the Security Council cannot abdicate its own responsibility in favour of organizations that are external to the United Nations. Thus, also when it authorizes an enforcement action by regional organizations, the Security Council must keep effective control over such an action³⁹ and evidently this control cannot be exercised in relation to a regional action that has already terminated.

It must be added that admitting an authorization of the Security Council subsequent to the enforcement action of regional organizations might encourage such organizations to use armed force in the hope of a subsequent authorization by the Security Council which accepts the *fait accompli*; and this would go against the very goal of the United Nations of maintaining international peace and security.

The only possibility that would seem to be compatible with the primary responsibility and with the function of effective control of the Security Council is that of an authorization given after the *beginning* of regional action which has not yet terminated but is still in progress⁴⁰. Insofar as a situation of this kind allows the Security Council to exercise its effective control by orienting in one direction or the other the action of the regional organization, an authorization by the Security Council, even when not coming prior to the initiative of the regional organization, would seem to be compatible with the rationale of Article

UN Charter”, *EPIL* 4 (2000), 91 et seq., (95); Ress, see note 1, 734; Gioia, see note 9, 220 et seq.; Corten/ Dubuisson, see note 13, 906.

³⁹ Various authors have insisted on this point; besides those cited above, see J.N. Moore, “The Role of Regional Arrangements in the Maintenance of World Order”, in: C.E. Black/ R.A. Falk (eds), *The Future of the International Legal Order*, Vol. 3, 1971, 122 et seq., (160); Schreuer, see note 8, 492; A. Del Vecchio, “Consiglio di Sicurezza ed Organizzazioni internazionali regionali nel mantenimento della pace”, *Comunità Internazionale* 50 (1995), 229 et seq., (241 et seq.); Picone, see note 18, 352 et seq.

⁴⁰ In this sense Picone, see note 18, 352 et seq.

53 para. 1 and with the primary role of the Security Council for the maintenance of international peace and security.

VIII. The Practice of the Security Council

Practice would seem to confirm the interpretation outlined above of Article 53 para. 1. In fact, there are numerous resolutions of the Security Council which authorize anteriorly regional organizations, or Member States acting also through regional organizations, to take enforcement measures. It is worth noting, in relation to the crisis in Yugoslavia, S/RES/816 (1993) of 31 March 1993, whereby the Security Council authorized Member States, acting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council, all necessary measures to ensure the ban of flights in the airspace of the Republic of Bosnia and Herzegovina (para. 4); S/RES/836 (1993) of 4 June 1993, which decided that Member States, acting nationally or through regional organizations or arrangements, may take all necessary measures, through the use of air power, to support the United Nations Protection Force (UNPROFOR) in the performance of its mandate, consisting in guaranteeing respect of the safe areas set up in Bosnia and Herzegovina (para. 10); S/RES/958 (1994) of 19 November 1994, which declared that the authorization given in para. 10 of the previous resolution shall apply also to such measures taken in the Republic of Croatia; S/RES/981 (1995) of 31 March 1995, relating to support for the United Nations Confidence Restoration Operation in Croatia (UNCRO) (para. 6); S/RES/1037 (1996) of 15 January 1996, whereby the Security Council established a United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and decided that Member States, acting nationally or through regional organizations or arrangements may, at the request of UNTAES and on the basis of procedures communicated to the United Nations, take all necessary measures, including close air support, in defence of UNTAES (para. 14).

Such resolutions show not only that, as a rule, the authorization of the Security Council is prior to the regional enforcement action; they testify also that the Security Council, in authorizing such actions, does not shed its own responsibility, but continues to exercise it through an active control over the regional action. In fact, in the above-mentioned resolutions it is affirmed that the measures authorized through regional organizations must be taken under the authority of the Security Coun-

and subject to close coordination with the Secretary General and UNPROFOR, or at the request of UNTAES. Moreover, they prescribe that the measures taken on a regional level on the basis of the authorization be notified to the Secretary General and that the latter regularly keep the Security Council informed; and the Security Council declares that it shall remain actively seized of the matter.

It should be underlined that the references to the authority of the Security Council and to the close coordination with the Secretary General and the peace-keeping forces of the United Nations cannot be reduced to empty formulae. For example, after the resolutions of 1993, NATO, at the request of the Secretary General of the United Nations, worked on plans for intervention which were then examined by the Secretary General and the UNPROFOR Force Commander, and NATO accepted that the Secretary General should have political leadership for the operations. Later, on 10 August 1995, the UNPROFOR Commander and NATO reached an agreement; following that agreement NATO carried out aerial bombings in order to protect the safe areas in Bosnia and Herzegovina, an action which turned out to be decisive for the subsequent adoption of a peace plan and for the cessation of hostilities in that state⁴¹.

On the contrary, in practice there have been no cases of authorizations "subsequent" to the conclusion of an enforcement action by a regional organization; however, there exist authorizations given by the Security Council after the beginning of an enforcement action, but in such a way as to guarantee control by the Security Council. In this regard we have already mentioned S/RES/788 (1992) of 19 November 1992, whereby the Security Council expressed its approval concerning the action of ECOWAS in Liberia⁴². It is true that such action had already begun in the summer of 1990; but the Security Council did not limit itself to "giving its blessing" *a posteriori* to an action that had already terminated; it took part in the handling of the crisis while the action undertaken by ECOWAS was still in its early stages and the Secu-

⁴¹ See E. Cannizzaro, "Sull'attuazione di risoluzioni del Consiglio di Sicurezza da parte di organizzazioni regionali", *Riv. Dir. Int.* 76 (1993), 408 et seq.; I.F. Dekker/ E.P.J. Myjer, "Air Strikes on Bosnian Positions: Is NATO also Legally the Proper Instrument of the UN?", *LJIL* 9 (1996), 411 et seq., (415 et seq.); R. Higgins, "Some thoughts on the evolving relationship between the Security Council and NATO", in: *Boutros-Ghali Amicorum Discipulorumque Liber*, 1998, Vol. I, 511 et seq., (522 et seq.).

⁴² See above, Section IV.

riety Council itself was still capable of controlling the operation. Indeed, the Security Council was able to take part in the operation through its own United Nations Observer Mission in Liberia (UNOMIL), established by S/RES/866 (1993) of 22 September 1993 "under its authority and under the direction of the Secretary-General through his Special Representative" (para. 2). The Security Council was thus able to ensure direct control of the operation.

Also in the Sierra Leone crisis, which began on 25 March 1997 with a coup overthrowing President Kabbah, the intervention of the Security Council was subsequent to that of ECOWAS. Ever since 29 August 1997 the latter had established commercial and economic measures against Sierra Leone as well as personal measures against members of the military junta which had come to power; moreover, it had authorized the Military Observer Group (ECOMOG) to use all necessary means in order to ensure respect for such measures and had entrusted to it the task of ensuring peace in Sierra Leone. The reference to all necessary means and to the goal of ensuring peace in Sierra Leone clearly entailed the possibility of using military force.

With S/RES/1132 (1997) of 8 October 1997, the Security Council, acting under Chapter VIII of the Charter, "authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related matériel of all types, including, where necessary, and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations, and calls upon all States to cooperate with ECOWAS in this regard" (para. 8). Again, in this case, even if the resolution of the Security Council came after the ECOWAS initiative, it would appear that the authorization even of the use of force (within the limits specified by the resolution itself), intervening when the action of ECOWAS was still in progress, is substantially in accordance with Article 53 para. 1.

Also in the subsequent phases of the bloody crisis in Sierra Leone, the Security Council often intervened after ECOWAS had acted on its own military initiative. Nevertheless, several resolutions by the Security Council show that it intervened in crucial moments by approving military action and by cooperating with ECOWAS through its own missions (firstly the United Nations Observer Mission in Sierra Leone - UNOMSIL - and later the United Nations Mission in Sierra Leone - UNAMSIL), progressively replacing ECOMOG with its own mis-

sion⁴³. It must be upheld that also in this case the provision of Article 53 para. 1 was respected and that the Security Council has never been lacking in its primary responsibility for the maintenance of international peace and security.

IX. Observations on the Admissibility of an Authorization Subsequent to the Beginning of Coercive Action by a Regional Organization

The admissibility of an authorization by the Security Council in the course of an enforcement action taken by a regional organization requires further observations.

First of all, it should be noted that, in the absence of any prior authorization, the regional organization, or its Member States, which undertake an enforcement action involving the use of armed force assume the risk of committing a wrongful act consisting in the breach of the obligation to refrain from the use of force; and they certainly commit a wrongful act if the Security Council does not give its authorization. On the contrary, in the case of authorization (under the conditions outlined above) this determines an *ex post* regularization which excludes the possibility of committing a wrongful act.

Secondly, it is possible that certain actions by a regional organization do not come within the approval of the Security Council and that they therefore remain wrongful. For example, for some authors certain military operations carried out by ECOMOG in Sierra Leone were never ratified by the resolutions of the Security Council and thus constitute wrongful acts⁴⁴. Now, it is true that even in the case of prior authorization the military action of a regional organization may not be

⁴³ See S/RES/1156 (1998) of 16 March 1998, S/RES/1162 (1998) of 17 April 1998, S/RES/1181 (1998) of 13 July 1998, S/RES/1231 (1999) of 11 March 1999, S/RES/1270 (1999) of 22 October 1999, S/RES/1313 (2000) of 4 August 2000, S/RES/1346 (2001) of 30 March 2001, S/RES/1370 (2001) of 18 September 2001, S/RES/1385 (2001) of 19 December 2001, S/RES/1389 (2002) of 16 January 2002.

⁴⁴ See V. Grado, "Il ristabilimento della democrazia in Sierra Leone", *Riv. Dir. Int.* 83 (2000), 361 et seq., (385 et seq.); on the crisis in Sierra Leone see also S. Szurek, "Sierra Leone: un état en attente de 'paix durable' – la communauté internationale dans l'enclenchement de la paix en Afrique de l'Ouest", *A.F.D.I.* 46 (2000), 176 et seq.

in accordance with the authorization of the Security Council. Nevertheless, in the present author's opinion, when the authorization is a preventive one, the regional action must be considered *prima facie* lawful and the single acts which may not be in accordance with that authorization must be demonstrably shown to be not in accordance with it. On the contrary, if the regional action begins without the authorization of the Security Council, it must be presumed that it is wrongful; if, in the course of the action, there is a resolution from the Security Council, it is necessary to prove that this entails the approval of such an action. And when approval is implicit it is necessary to interpret the Security Council's resolution with particular attention and rigour in order to ascertain whether it has really approved the regional initiative and whether *all* the acts of the regional organization are covered by the resolution.

In other words, it may be said that in the two hypotheses considered (prior authorization or authorization subsequent to the beginning of regional action) there is a reversal of the burden of proof: in the presence of a prior authorization it may be presumed that the regional action is lawful and individual acts which may not be in accordance with the resolution must be proved; in the second case the regional action is presumed to be wrongful and it is the approval of the Security Council that must be proved. This difference in treatment would seem to be in accordance with the role of control and of primary responsibility which the Security Council maintains even when it makes use, by means of an authorization, of regional organizations for the maintenance of international peace and security.