

# Security Council Control over Regional Action

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In recent years the participation of regional organizations<sup>1</sup> in the maintenance of international peace and security has been increasing considerably. The activities of the Economic Community of West African States (ECOWAS)<sup>2</sup> in Liberia, of the North Atlantic Treaty Organization (NATO)<sup>3</sup> and the Western European Union (WEU)<sup>4</sup> in former Yugoslavia as well as of the Organization of American States (OAS)<sup>5</sup> in Haiti are examples.

To some extent this development is the result of the precarious financial situation of the United Nations. The financial aspect is exemplified by the fact that recent Security Council authorizations for action by member states acting either nationally or through regional organizations were given "on the understanding that the costs of implementing the offer will be borne by the Member States concerned"<sup>6</sup>. More important than the financial aspect, however, is the fact that important United Nations missions failed to achieve their tasks. The replacement of the United Nations protection force (UNPROFOR) in Bosnia-Herzegovina by a multinational implementation force (IFOR), which is mainly composed of NATO troops<sup>7</sup>, bears a clear political message towards regionalization.

A political reason for inquiring into the relationship between United Nations and regional organizations may be seen in the Security Council's hesitation when it dealt with the African civil wars in Burundi, Rwanda

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<sup>1</sup> In the following context "regional organizations" is used for the term "regional arrangements and agencies" according to Article 52 para.1 of the Charter.

<sup>2</sup> UNTS Vol.1010 No.14843; *ILM* 14 (1975), 1200.

<sup>3</sup> UNTS Vol.34 No. 541; UNTS Vol.126 No.339.

<sup>4</sup> UNTS Vol.19 No. 304; UNTS Vol.211 No.186.

<sup>5</sup> The Interamerican System is composed of the Charter of the Organization of American States, UNTS Vol.119 No. 1609; (amended by the Protocol of Buenos Aires of 27 February 1967, *ILM* 6 (1967), 310, the Protocol of Cartagena de Indias of 26 February 1986, *ILM* 25 (1986), 529, the Protocol of Washington of 14 December 1992, *ILM* 33 (1994), 1005 and the Protocol of Managua of 10 June 1993, *ILM* 33 (1994), 1009), the Interamerican Treaty on Reciprocal Assistance of 2 September 1947, UNTS Vol.21 No. 324, (amended by the Protocol of San José of 26 July 1975, *ILM* 14 (1975), 1122) and the American Treaty on Peaceful Settlement of Disputes of 30 April 1948, UNTS Vol.30 No.449.

<sup>6</sup> S/RES/929 (1994) of 22 June 1994, concerning Rwanda and S/RES/940 (1994) of 31 July 1994 concerning Haiti; see also paragraph 9 of S/RES/1080 (1996) of 15 November 1996 concerning Eastern Zaire.

<sup>7</sup> See the Reports to the Security Council on IFOR Operations submitted by the Secretary-General of NATO, for instance Doc. S/1996/696, Appendix.

and Zaire from 1994 onwards. The dilemma is well illustrated by the delayed decisions on an intervention force for Zaire in autumn 1996. It took the Council more than two weeks after pressure for an intervention mounted from international humanitarian organizations and European officials<sup>8</sup> until it decided on a multinational humanitarian relief force<sup>9</sup>. The decisions on the organization of the force took another ten days<sup>10</sup>. However, the force was not set up, since — except for France — possible contributors considered the situation of the refugees to have ameliorated considerably. One may therefore ask under which conditions rapid regional mechanisms may be set up in order to fill the vacuum created on the universal level and thus avoid disastrous consequences of Security Council inaction in civil war situations.

### A. Possibilities of Regional Action — An Overview

In Chapter VIII of the Charter its founding fathers tried to integrate regional activities for the maintenance of international peace and security into the universal system of the United Nations. In doing so they intended to avoid some defaults of the system of the League of Nations. In particular, Article 52 paras. 2 to 4 and Article 53 para.1<sup>11</sup> were meant to define the respective competences of the United Nations and of regional organizations. Nevertheless, the scope of application of Chapter VIII of the Charter was to be rather broad. The delegates in San Francisco used the comprehensive formula “regional arrangements or agencies” in Article 52 para.1 in order to make the provisions applicable to a large number of regional organizations<sup>12</sup>. Thus, neither a specific internal structure nor a legally binding treaty under public international law are required. Organizations which are only based on political commitments, like the OSCE, are regional organizations in the sense of Chapter VIII of the Charter<sup>13</sup>.

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<sup>8</sup> Calls Mount for Zaire Intervention, *International Herald Tribune*, Wednesday 30 October 1996, 1.

<sup>9</sup> S/RES/ 1080 (1996) of 15 November 1996.

<sup>10</sup> Military Leaders Agree on Options for a Zaire Force, *International Herald Tribune*, Monday, 25 November 1996, 4.

<sup>11</sup> Articles mentioned refer to the Charter of the United Nations if not stated otherwise.

<sup>12</sup> UNCIO Vol.XII, 701 and 858.

<sup>13</sup> This view is largely shared in legal literature, see J.A. Frowein, “Regionale Sicherheitssysteme und nationales Recht”, *Sitzungsbericht Q zum 60. Deutschen Juristentag*, 23 (24 et seq.); D.J. Scheffer, “Commentary on Collective Security”, in: L.F. Damrosch/D.J. Scheffer (eds.), *Law and*

Organizations like NATO which were primarily designed to combat aggression from outside the organization may also be considered a regional organization if and when they contribute to the maintenance of international peace and security by means other than collective self-defence<sup>14</sup>. NATO has demonstrated in Bosnia and Herzegovina that organizations of collective self-defence may support the military enforcement of United Nation's non-military sanctions and may contribute to the protection of the civilian population<sup>15</sup>.

The recent practice of regional and universal interventions into internal conflicts gives ample material to inquire into the relationship between the United Nations and regional organizations when the maintenance of international peace and security in civil war situations is concerned. The question of whether and to what extent Security Council control over regional organizations was necessary has been a matter of interest for international lawyers since 1945<sup>16</sup>. In most regional interventions the

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*Force in the New International Order*, 1991, 101 (107 et seq). This view is confirmed by the practice of the OSCE and United Nations organs. The Security Council mentioned the (then) CSCE in connection with Chapter VIII of the Charter in its resolutions S/RES/743 (1992) of 21 February 1992 and S/RES/795 (1992) of 11 December 1992. In 1993 the General Assembly granted observer status to the OSCE starting with the 49th General Assembly in 1994 (A/RES/48/5 of 13 October 1993), a practice which has been applied to other regional organizations (see A/RES/ 253 (III) of 16 October 1948, concerning the OAS; A/RES/ 477 (V) of 1 November 1950 concerning the League of Arab States and A/RES/ 2011 (XX) of 11 October 1965 concerning the OAU). Furthermore, the OSCE declared itself to be a regional organization in the Helsinki Document of 1992 (para. 25 of the Helsinki Summit Declaration, reprinted in: A. Bloed (ed.), *The Challenges of Change. The Helsinki Summit of the CSCE and its Aftermath*, 1994, 385 (390)).

<sup>14</sup> The often mentioned problem of different reporting obligations under Article 51 and Article 54 of the Charter may easily be solved by applying reporting obligations under Article 51 only to measures related to collective self-defence. All other contributions to regional peace and security by regional organizations of collective self-defence have to be reported according to Article 54 of the Charter, see in detail C. Walter, *Vereinte Nationen und Regionalorganisationen*, 1996, 47 et seq. and 347 et seq.

<sup>15</sup> This holds true even though the concept of safe areas did not prove to be a successful means of protecting civilian population. The reasons of failure may rather be found in Bosnian Serb blackmailing of the United Nations (by kidnapping United Nations blue-helmets) than in lack of military effectiveness on the part of NATO.

<sup>16</sup> The question was intensively dealt with during the cold war, especially with respect to the OAS, see M. Akehurst, "Enforcement Action by

question was not raised by any of the parties to the conflict. Nevertheless, the way regional action was dealt with in the Security Council may cast some light upon the question of control. Before this question is addressed in more detail a short review of the possibilities for regional action under Chapter VIII of the Charter may be useful to highlight the problematic issues.

Regional organizations factually have several means to intervene in a civil war. Apart from methods of peaceful settlement of disputes, which shall not be discussed here<sup>17</sup>, non-military sanctions and military interventions are possible reactions. Non-military sanctions may include an arms embargo or economic sanctions. One of the measures taken by the ECOWAS<sup>18</sup> was the imposition of an arms embargo against the National Patriotic Front of Liberia (NPFL), which is one of the opposition groups fighting against the government of the country<sup>19</sup>. When the Government of President Aristide in Haiti was overthrown in a military coup in 1991 the OAS decided to impose economic sanctions against the new military regime<sup>20</sup>. These sanctions included the freezing of Haitian national funds and a trade embargo concerning all goods not destined to meet humanitarian needs.

Apart from such measures not involving the use of military force, regional organizations are capable of intervention by sending troops in order to redress the consequences of civil wars. Such military action is possible in the form of a peace-keeping force, or a regional military intervention against the will of the parties to the civil war may also be envisaged. Regional peace-keeping forces have a tradition which dates back to 1961.

From that year to 1963 the Arab League Security Forces were stationed in Kuwait<sup>21</sup>. From 1976 to 1982 the Arab Security Force (later renamed in Arab Deterrent Force) executed a peace-keeping mission in Lebanon<sup>22</sup> and

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Regional Agencies, with Special Reference to the Organization of American States", *BYIL* 42 (1967), 175 et seq.

<sup>17</sup> See in this respect, Walter, see note 14, 141 et seq.

<sup>18</sup> See note 2.

<sup>19</sup> Doc. S/24811 of 16 November 1992, Annex I; for general information on the legal issues arising from the Liberian civil war, see G. Nolte, "Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict", *ZaöRV* 53 (1993), 603 et seq.

<sup>20</sup> Doc. A/46/550-S/23127 of 9 October 1991, Annex.

<sup>21</sup> For details, see H. Hassouna, *The League of Arab States and Regional Disputes*, 1975, 102 et seq.

<sup>22</sup> For details, see J.P. Isselé, "The Arab Deterrent Force in Lebanon", in: A. Cassese (ed.), *The Current Regulation of the Use of Force*, 1986, 179

in 1982 the OAU sent a peace-keeping force into the civil war in Chad<sup>23</sup>. An example of regional military intervention may be seen in the sending of a ECOWAS cease-fire monitoring group (ECOMOG) into the Liberian civil war. ECOWAS received an invitation to intervene by President Doe but none of the other parties to the conflict consented. It is not quite clear whether such an intervention may be ranged within the scope of peace-keeping<sup>24</sup>. The participation of NATO forces in the protection of the safe areas established by Security Council resolutions 819 (1993) and 824 (1993) has demonstrated that regional military use of force is a means of reaction to civil wars. It is the purpose of this article to inquire into the legal foundations for these reactions by regional organizations. To what extent is Security Council control over regional action necessary and how is it ensured? The starting point for the analysis must be Article 53. This provision requires Security Council authorization for "enforcement action". Hence, the first item to be considered is which regional measures can be considered "enforcement action".

## B. The Meaning of "Enforcement Action" in Article 53 Para. 1

### I. Military Sanctions as Enforcement Action

It is generally admitted that regional military intervention requires Security Council authorization<sup>25</sup>. It should be noted, however, that during the Cuban missile crisis in 1962 American authors advanced an interpretation of Article 53 which considered as enforcement action measures which were the result of mandatory decisions of the respective regional organization<sup>26</sup>.

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(203 et seq.).

<sup>23</sup> See G.J. Naldi, "Peace-keeping Attempts by the Organization of African Unity", *ICLQ* 34 (1985), 593.

<sup>24</sup> See the analysis of Nolte, see note 19, 603 (626 et seq.).

<sup>25</sup> G. Ress, "On Article 53", 722 et seq., Mn. 16 and 19, in: B. Simma (ed.), *Charter of the United Nations. A Commentary*, 1994; R. Wolfrum, "Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeiten und Grenzen", *ZaöRV* 53 (1993), 576, (580 et seq.); see also M. Akehurst, "Enforcement Action by Regional Agencies", *BYIL* 42 (1967), 175, (194 et seq.), where only the question of non-military sanctions is discussed, while the author argues on the assumption that military action requires authorization.

<sup>26</sup> See L. C. Meeke, "Defensive Quarantine and the Law", *AJIL* 57 (1963), 515 (520 et seq.) and by A. Chayes, "Law and the Quarantine of Cuba",

According to them all regional measures which were not mandatory for the members of the regional organization did not need Security Council authorization. These authors stress the mandatory character of Security Council decisions under Chapter VII of the Charter as decisive criterion to determine enforcement action<sup>27</sup>. In this respect they refer to the following passage of the Advisory Opinion of the ICJ in the Certain Expenses Case:

“The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. [...] The word “action” must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38 because the General Assembly under Article 11 has a comparable power. The “action” which is solely within the province of the Security Council is that, which is indicated by the title of Chapter VII of the Charter, namely “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”<sup>28</sup>.

It is argued that the Court in its Advisory Opinion had refused to qualify recommendations by the General Assembly or the Security Council as enforcement action since these recommendations were not mandatory for the member states<sup>29</sup>. The argument by the Court concerning Article 11 para. 2, is then applied to the interpretation of the term “enforcement action” in Article 53. The result is that only mandatory decisions can be considered to constitute “enforcement action” under Article 53 para. 1. However, this transfer of the Court’s arguments concerning Article 11 para. 2, is not possible since Article 53 differs considerably from Article 11 para. 2. In Article 11 para. 2, “action” by the Security Council is contrasted with recommendations by the General Assembly. The only reasonable interpretation of this wording was to distinguish Security Council “action” by its mandatory character as opposed to the non-mandatory recommendations by the General Assembly. Article 53 para. 1, however, does not contain such a contrast between recommendations and Security Council action. Furthermore, the interpretation advanced by Chayes and Meeker does not take into account a second distinctive character of decisions under Chapter VII of the Charter, namely their

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*Foreign Aff.* 41 (1962/63), 550 (556) and L. Henkin, “International Law and the Behaviour of Nations”, *RdC* 114 (1965), 167 (259 et seq).

<sup>27</sup> Cf. Meeker, above.

<sup>28</sup> ICJ Reports 1962, 150, (164 et seq.).

<sup>29</sup> Meeker, see note 26, 521.

purpose of forcing an aggressor to alter its peace-endangering behaviour<sup>30</sup>. This element, however, is also present in regional sanctions. On a political level the interpretation deserves criticism for it allows for unauthorized use of military force by all regional organizations which merely recommend their members to participate in the action. This would leave it to the discretion of the competent organ of the regional organization whether to recommend and avoid the decision of the Council or to decide on a mandatory basis and seek an authorization. This discretion is not in line with the system of the Charter which concentrates decisions on use of force in the Security Council. In conclusion, it seems preferable to lay the emphasis on the perspective of the target state. From the perspective of that state any action taken against its will has enforcing character, whether mandatory or not. For this reason the proposition by Chayes and Meeker is not convincing<sup>31</sup> and it has not been taken up since it was advanced in the 1960s.

## II. Non-Military Sanctions as Enforcement Action?

The question of whether or not non-military sanctions fall within the scope of necessary authorization under Article 53 of the Charter has been a matter of debate since the discussions in the Security Council in the early 1960s when the OAS imposed such sanctions against the Dominican Republic<sup>32</sup>. Following these measures the Soviet Union tried to pass a resolution in the Security Council in which the Council would have authorized the OAS action retrospectively. This resolution was not agreed upon because the Western permanent members of the Council, especially the United States of the OAS, did not want to create a precedent with respect to non-military sanctions. Since then the question was not of practical relevance until the early 1990s when regional organizations increased their peace-keeping and peace-making efforts with respect to civil wars.

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<sup>30</sup> See U. Beyerlin, "Regional Arrangements", 1040, Mn. 6, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, 1995.

<sup>31</sup> See also O. Schachter, "Authorized Uses of Force by the United Nations and Regional Organizations", in: L. F. Damrosch/D. J. Scheffer (eds.), *Law and Force in the New International Order*, 1991, 65, (87 et seq.).

<sup>32</sup> Final Act of the Sixth Meeting of Consultation of Ministers of Foreign Affairs of 21 August 1960, Resolution I, OAS Official Records, OEA/Ser.D/III.12, 7 et seq.; see also M. Akehurst, "Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States", *BYIL* 42 (1967), 175 (188 et seq.).



In the literature on the subject there are mainly three positions as to the question of whether non-military measures are included in the term "enforcement action". A first interpretation requires Security Council authorization for all non-military sanctions. These authors argue that the wording "enforcement action" refers to the wording of Chapter VII and hence all measures possible under Article 40, Article 41 and Article 42 had to be considered enforcement action<sup>33</sup>. Furthermore, it is argued that Article 2 para. 7, required Security Council authorization also for non-military sanctions. Illegal interference was not only possible by use of force but also by non-military measures. The necessary justification required a Chapter VII decision by the Council<sup>34</sup>.

A second proposition shares the systematic arguments advanced by those authors who include all non-military sanctions into the requirement of Security Council authorization. However, these lawyers submit that it could not be correct to require an authorization by the Council for measures which are already lawful under general international law<sup>35</sup>. They argue that measures which could be lawfully applied by a single state without a decision of the Council should also be open for regional organizations without seeking an authorization<sup>36</sup>. Therefore regional organizations could enforce *erga omnes* obligations by applying non-military sanctions<sup>37</sup>.

The third interpretation restricts the requirement for an authorization to use of military force. This interpretation focuses on the ban on the use of force in Article 2 para. 4, and argues that no corresponding prohibition existed for non-military sanctions<sup>38</sup>.

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<sup>33</sup> R. A. Akindele, *The Organization and Promotion of World Peace*, 1976, 56.

<sup>34</sup> J. M. Ruda, "Relaciones de la O.E.A. y la U.N. en cuanto al mantenimiento de la paz y la seguridad internacionales", *Rev. Jurídica de Buenos Aires*, 1961, 15, (59 et seq.); R. Pernice, *Die Sicherung des Weltfriedens durch regionale Organisationen und die Vereinten Nationen*, 1972, 114.

<sup>35</sup> R. Wolfrum, "Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeiten und Grenzen", *ZaöRV* 53 (1993), 576, (582).

<sup>36</sup> E. Jiménez de Aréchaga, "La coordination des systèmes de l'ONU et de l'OEA", *RdC* 111 (1964), 419, (481); R. Gerold, *Die Sicherung des Friedens durch die OAS*, 1971, 131.

<sup>37</sup> Wolfrum, see note 35, 581 et seq.

<sup>38</sup> J. A. Frowein, "Zwangsmaßnahmen von Regionalorganisationen", in: U. Beyerlin/ M. Bothe/ R. Hofmann/ E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, 1995, 57 et seq., (66); J. A. Frowein, "Legal Consequences for International Law Enforcement in Case of Security Council Inaction", in: J. Delbrück (ed.),

Any interpretation should start with the wording of the Charter. However, the use of the term "enforcement action" in Article 53 gives as such no indication as to the question of exactly which kind of measures it covers. From the heading of Chapter VII, in which the term is also used, one might conclude that it comprises both military and non-military measures<sup>39</sup>. This interpretation is supported by systematic considerations. It is argued that the structure of Chapter VIII was parallel to the structure of the Charter as a whole. Article 52 corresponded to Chapter VI in covering peaceful settlement of disputes. In the same way, therefore, Article 53 should apply to all measures possible under Chapter VII<sup>40</sup>. Hence, the authorization requirement also covered non-military sanctions<sup>41</sup>. Additionally, some authors maintain that because of the military force involved in peace-keeping measures, the latter should also be considered to constitute enforcement action in the sense of Article 53 para. 1<sup>42</sup>.

### 1. The San Francisco Discussions

To start the inquiry into the interpretation of Article 53 para.1, a look at the original drafters intentions might prove helpful. The text of the Charter is identical to Chapter VIII, Section C, para. 2, of the Dumbarton Oaks proposals<sup>43</sup>. The provision was dealt with in Subcommittee A of Committee III/4. The discussions in the Subcommittee, however, did not address

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*The Future of International Law Enforcement. New Scenarios — New Law?*, 1993, 111, (121 et seq.); M.G. Goldman, "Action by the Organization of American States: When is Security Council Authorization Required under Article 53 of the United Nations Charter?", *UCLA Law Review* 10 (1962/63), 837 et seq., (855).

<sup>39</sup> The heading reads as follows: "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression".

<sup>40</sup> R. Pernice, *Die Sicherung des Weltfriedens durch regionale Organisationen und die Vereinten Nationen*, 1972, 114.

<sup>41</sup> See also F. L. Morrison, "The Role of Regional Organizations in the Enforcement of International Law", in: J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System*, 1995, 39 (43 et seq.), who argues that "enforcement action" is action requiring specific justification. According to this proposal measures under Chapter VII would frequently involve specific justification and hence be qualified as "enforcement action".

<sup>42</sup> A. Eide, "Peace-Keeping and Enforcement by Regional Organizations", *JPR* 3 (1966), 125 (141 et seq.); see also O. Kimminich, "Peace-keeping on a Universal or Regional Level", in: R. Wolfrum (ed.), *Strengthening the World Order: Universalism v. Regionalism*, 1990, 37 (47).

<sup>43</sup> UNCIO Vol.XII, 765.

at all the question of which measures were to be considered as “enforcement action”. This lack of discussion may be due to the fact that the Subcommittee had to deal with two other important issues. One comprised a number of amendments proposed by different delegations, varying from the request for express authorization<sup>44</sup> over the requirement of a mere notification to the Security Council in case of self-defence<sup>45</sup>, to the Australian position of complete independence for regional organizations in case of Security Council inactivity<sup>46</sup>. The second issue of debate in the Subcommittee was the question of the so-called “enemy-state clause” in Article 53 para. 1, in the second part of the second sentence. The amendment issue was solved by the proposition of a new provision dealing with the right to self-defence which became Article 51 in the final version of the Charter. This provision dealt with the concern of many delegations as to what the Charter could foresee in case of Security Council inaction. The wording took into account the proposed French and Turkish amendments and the new provision was agreed upon rather quickly<sup>47</sup>. With the Subcommittee still facing the issue of the enemy state clause, the question of a definition of “enforcement action” does not seem to have caught the attention of the delegates. The records of the San Francisco Conference, therefore, do not contain any guidance for the interpretation.

## 2. The Use of the Term “Enforcement Action” or “Action” in the Charter

A literal interpretation of the term “enforcement action” remains inconclusive since both military and non-military sanctions are designed to force a state or a faction of a civil war to alter its peace-endangering behaviour. It is interesting to note, however, that the Charter uses the wording “enforcement action” or “action” in some provisions, while others speak of “enforcement measures” or “measures”. Article 41 provides for “*measures* not involving the use of armed force”<sup>48</sup>. Article 42 takes up that terminology and continues as follows:

“Should the Security Council consider that *measures* provided for in Article 41 would be inadequate or have proved to be inadequate, it may

<sup>44</sup> Bolivia, UNCIO Vol.XII, 767.

<sup>45</sup> France, UNCIO Vol.XII, 777; Turkey, UNCIO Vol.XII, 781.

<sup>46</sup> UNCIO Vol.XII, 766.

<sup>47</sup> See M. Akehurst, “Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States”, *BYIL* 42 (1967), 175 (187).

<sup>48</sup> Italics added by the author.

take such *action* by air, sea or land forces as may be necessary to maintain or restore international peace and security"<sup>49</sup>.

One might be tempted to conclude from the contrast between "measures" and "action" in Article 42 that "action" may be confined to military enforcement. The term "measures" might then apply to both military and non-military sanctions. A look at the other authentic versions of the Charter<sup>50</sup> reveals, however, that the distinction between "measures" and "action" is not maintained consistently. In the Spanish version Article 42 speaks of "medidas" instead of "acción", although generally also the Spanish text distinguishes between "medidas" and "acción". Furthermore Article 2 para. 5, and Article 5 use the term "enforcement action" although both provisions are generally considered to apply to military and non-military measures<sup>51</sup>. In summary, no conclusions may be drawn from the distinction between "action" and "measures", because the wording is not consistently used throughout the Charter<sup>52</sup>. In the light of this result the terms "action" and "measures" do not permit any specific conclusions as to the interpretation of Article 53. Hence the term "enforcement action" in Article 53 has to be interpreted as an autonomous legal term, taking into account the function of the authorization by the Security Council which the provision requires. It may be helpful in this respect to take as a starting point the functions of Security Council decisions under Chapter VII of the Charter.

### 3. Functions of Decisions by the Security Council under Chapter VII of the Charter

Article 41 foresees measures not involving the use of military force. The measures decided under Article 41 are to be implemented by the member states of the United Nations. Decisions under Article 41 are mandatory for all members. A first function of Article 41, therefore, is to ensure that non-military enforcement measures be implemented by all member states.

A second important function of the provision is to provide a legal basis for the implementation of the measures in cases where otherwise international law would stand against such execution. Non-military sanctions

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<sup>49</sup> Italics added by the author.

<sup>50</sup> See Article 111 of the Charter.

<sup>51</sup> H. Kelsen, *The Law of the United Nations*, 1950, 92; J. A. Frowein, "On Article 2 (5)", 129 et seq. Mn. 2, in: Simma, see note 25; H.J. Schütz, "On Article 5", 175 et seq., Mn. 12, in: Simma, *ibid*.

<sup>52</sup> For further different use of the terms cf. Walter, see note 14, 191 et seq.

may contravene the prohibition of interference into internal affairs<sup>53</sup>. Also, in some cases states are under treaty obligations vis-à-vis the addressee of the measures under Article 41. In both situations Article 41 provides the justification for either enforcing measures in contravention of the prohibition of interference into internal affairs or violating bilateral trade agreements. A second important function of Article 41, therefore, is the justification of non-military sanctions with respect to general international law or bilateral agreements.

Article 42, in the same way as Article 41, allows for decisions which are mandatory for all member states of the United Nations. Also, the decisions under Article 42 provide for justification with respect to the addressee of the measures. By contrast to decisions under Article 41, action according to Article 42 is not only justified with respect to the prohibition of intervention into internal affairs, but, most important, it constitutes a lawful exception to the universal prohibition of the use of force contained in Article 2 para. 4. It is characteristic of the system established by the Charter of the United Nations that — apart from the right to self-defence contained in Article 51 — all decisions on the use of military force are to be concentrated in the Security Council. This distinction between the functions of decisions under Article 41 and Article 42 may prove helpful for the interpretation of Article 53.

#### 4. Consequences for the Interpretation of Article 53

The justification of the use of force which is inherent in Security Council decisions under Article 42 has to be kept in mind when interpreting Article 53. By contrast to the functions of Article 41 of the Charter, the justification with respect to Article 2 para. 4, which is inherent in an Article 42 decision of the Council may not be established in a regional treaty. The functions of decisions under Article 41 could be fulfilled in a regional treaty. The decisions of the competent organ could be mandatory for all members and non-military sanctions could be justified vis-à-vis the addressee if the latter is a member state of the organization<sup>54</sup>. Any use of

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<sup>53</sup> The possibility of such a violation is not contested. The difficult issue with respect to non-military sanctions and the illegal interference into internal affairs is to determine where legal counter-measures end and where illegal interference begins, see in this respect, R. Jennings/A. Watts, *Oppenheim's International Law*, 9th edition Vol. I/1, 1992, 432 et seq.; W. Kewenig, "Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht", *Reports DGVR* 22 (1982), 7 (15 et seq.); K. Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen*, 1987, 82 et seq. and 92 et seq.

military force, however, may only be justified by a decision of the Security Council.

Article 53 has to be interpreted as part of this system of the Charter which concentrates the use of military force within the Security Council. The requirement for authorization must be seen as an instrument to ensure Security Council control over use of military force. It follows from this analysis that it is only military enforcement action which requires Security Council authorization under Article 53. Non-military sanctions do not fall under the same rigid system as military action does. Therefore, an interpretation of the term "enforcement action" in Article 53, which takes into account the system of maintenance of international peace and security established by the Charter and the role of the Security Council within that system, leads to the conclusion that the term only refers to military enforcement action. Non-military sanctions are not subject to an authorization by the Security Council.

## 5. Recent State Practice

The interpretation of Article 53 which confines the requirement for authorization to regional military action is supported by recent state practice. When the government of President Aristide in Haiti was overthrown the OAS decided to impose economic sanctions on the new military government<sup>55</sup>. The sanctions included a freezing of Haitian funds abroad and an embargo on all goods which were not serving humanitarian needs. These sanctions were considered to be ineffective because of their regional limitation. Therefore, the Security Council was asked to make the sanctions mandatory for all members of the United Nations by imposing them under Article 41<sup>56</sup>. The Council followed that suggestion in resolution 841 of 16 June 1993. In this resolution the previous OAS measures are expressly referred to. The Council stresses that the UN sanctions are consistent with the trade embargo recommended by the OAS<sup>57</sup>. There are no indications in the resolution that the Council had doubts concerning the legality of the previous unauthorized OAS sanctions. Nor, in the debates, did any of the delegates question the legality of the regional sanctions. Even the Cuban Government which did not consider the situation in Haiti to constitute a threat to the peace and hence qualified the measures adopted by the Security Council as illegal under the law of the

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<sup>54</sup> The necessity of justification is also stressed by Morrison, see note 41.

<sup>55</sup> The decision is reproduced in Doc. A/46/550=S/23127 of 9 October 1991, Annex.

<sup>56</sup> Doc S/25958 of 16 June 1993.

<sup>57</sup> Resolution 841 (1993), para.3.

Charter, did not criticize the OAS sanctions, but rather qualified them as “imposed by the appropriate regional organization”<sup>58</sup>.

A similar procedure had already been applied in the Liberian crisis in 1992. In this case ECOWAS had decided to impose an arms embargo against one of the factions to the civil war<sup>59</sup>. The Security Council was asked by ECOWAS to extend the embargo to the universal level<sup>60</sup>. The Council did that in resolution 788 of 19 November 1992. In the debates preceding the adoption of the resolution, once again, none of the members questioned the previous regional practice<sup>61</sup>. The tacit acceptance of the regional non-military sanctions by the members of the Council may be assessed as expressing their view that non-military sanctions are not subject to an authorization by the Council according to Article 53.

### III. Enforcement Action in Civil War Situations

Since the end of the Cold War in 1989/1990 the number of civil wars with ethnic and nationalistic background has been increasing. During the Cold War the question of outside intervention into civil wars was of particular interest since the two superpowers were more or less openly involved as supporters of one of the factions in a specific civil war<sup>62</sup>. With the end of the Cold War the issue of outside intervention into civil wars has lost some of its political relevance. Nevertheless, the question of whether and when Article 2 para.4 applies to internal conflicts remains a difficult legal problem<sup>63</sup>, also in the context of regional enforcement action. The main issue is whether Article 2 para.4 prohibits outside intervention into internal

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<sup>58</sup> Doc. S/25942 of 14 June 1993.

<sup>59</sup> The decision is reproduced in Doc. S/24811 of 16 November 1992, Annex I.

<sup>60</sup> Doc. S/24735 of 29 October 1992.

<sup>61</sup> See Doc. S/PV.3138 of 19 November 1992.

<sup>62</sup> See J. N. Moore, “The Control of Foreign Intervention in Internal Conflict”, *Va.J.Int’l L.* 9 (1968/69), 205 (233 et seq.); see also H. Neuhold, *Internationale Konflikte — Verbotene und erlaubte Mittel ihrer Austragung*, 1977, 96 et seq.

<sup>63</sup> As to the question of whether and when Article 2 para.4, may be applied between the different factions in a civil war, see A. Randelzhofer, “On Article 2 (4)”, 106 et seq., Mn. 29 - 33, in: Simma, see note 25; D. Rauschnig, “Die Geltung des völkerrechtlichen Gewaltverbots in Bürgerkriegssituationen”, in: W. Schaumann (ed.), *Völkerrechtliches Gewaltverbot und Friedenssicherung*, 1971, 75 (76 et seq.); see also J.A. Frowein, *Das de-facto Regime im Völkerrecht*, 1968, 35 et seq. and 69.

conflicts. Could the consent of a government<sup>64</sup> overcome the character of enforcement?

Intervention by regional organizations may, to some extent, be comparable to intervention by third states. It is therefore appropriate to analyse the legal regime of unilateral intervention into civil wars. In doing so it is necessary to distinguish between interventions with and without consent of the parties to the conflict. If both parties have consented, the “intervention” acquires the character of a peace-keeping operation and cannot be qualified as enforcement action<sup>65</sup>. It is difficult, however, to assess the current regulations of international law concerning unilateral invitations for intervention into internal conflicts. Such invitations may come from the government or from a rebel group in an internal conflict.

### 1. Request by the Government for Unilateral Intervention

The traditional position of international law is that the recognized government may invite foreign forces for assistance in combatting rebels<sup>66</sup>. The ICJ referred to this principle in an obiter dictum in its Nicaragua decision:

“[...] the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request of assistance made by an opposition group in another State [...]. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition”<sup>67</sup>.

An analysis of state practice concerning interventions by invitation faces some difficulties. Firstly, the validity of invitations issued during the Cold War may reasonably be questioned because of the influence of the respective superpower in the situation. With respect to the Soviet Union, the

<sup>64</sup> See the comprehensive study by A. Tanca, *Foreign Armed Intervention in Internal Conflict*, 1994, 13 et seq.

<sup>65</sup> See in detail *infra*, p. 171 et seq.

<sup>66</sup> Jennings/Watts, see note 53, 437 with further references; R. Higgins, “Internal War and International Law”, in: C.E. Black/R. Falk, *The Future of International Legal Order*, Vol. III (1971), 81 (94 et seq.); Ranzelzhofer, see note 63, Mn. 30.

<sup>67</sup> Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 (126), para. 246; Italics added by the author.



invitation of Hungary in 1956 may be used as reference<sup>68</sup> and on the American side, the invitation to intervene in the Dominican Republic in 1965 is an example, where even the existence of the invitation was unclear<sup>69</sup>. A second reason for the limited value of state practice is that intervening states tend to give a number of reasons for their action which are sometimes intertwined. Among these justifications the invitation by the government is mentioned. The problem may be illustrated by the American justification for the country's intervention in Lebanon in 1958. President Eisenhower gave the following message to the Congress:

"On July 14, 1958, I received an urgent request from the President of the Republic of Lebanon that some United States forces be stationed in Lebanon. President Chamoun stated that without immediate showing of United States support, the Government of Lebanon would be unable to survive. This request by President Chamoun was made with the concurrence of all the members of the Lebanese Cabinet. I have replied that we would do this and a contingent of United States marines has now arrived in Lebanon. [...]"

After the most detailed consideration, I have concluded that, given the developments in Iraq, the measures taken by the United Nations Security Council are not sufficient to preserve the independence and integrity of Lebanon. I have considered, furthermore, the question of our responsibility to protect and safeguard American citizens in Lebanon of whom there are about 2,500. Pending the taking of adequate measures by the United Nations, the United States will be acting pursuant to what the United Nations Charter recognizes is an inherent right — the right of all nations to work together and to seek help when necessary to preserve their independence"<sup>70</sup>.

The statement combines the invitation by President Chamoun with arguments of collective self-defence and a right to protect a country's own nationals in a way that makes it difficult to assess whether each of the given justifications would have been sufficient as sole reason for the intervention. In the same way the French interventions in Northern Africa, which are often quoted as examples for interventions on request<sup>71</sup>, are not entirely

<sup>68</sup> For details see L. Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government", *BYIL* 56 (1985), 189 (222 et seq.).

<sup>69</sup> For details see W. Friedman, "United States Policy and the Crisis of International Law", *AJIL* 59 (1965), 857 (868).

<sup>70</sup> Department of State Bulletin 39 (1958 II), 182 et seq.

<sup>71</sup> Cf. Jennings/ Watts, see note 53, 435 et seq.

conclusive. The intervention in Zaire in 1978 was a reaction to save the lives of European nationals<sup>72</sup> and the French Prime Minister and President justified the intervention in Chad in 1983 expressly by citing Article 51 and the Libyan activities in the border area. The French Minister of Foreign Affairs referred also to previous interventions when he stated in Parliament on 27 September 1978:

“Si la France a été amenée à intervenir sur le continent africain, elle l’a toujours fait à la demande du gouvernement reconnu du pays intéressé, et en limitant le volume et la durée de son assistance aux nécessités de la situation. Dans chaque cas, il s’est agi de répondre à l’appel d’Etats victimes d’une agression extérieure”<sup>73</sup>.

The statements show that an intervention based solely on the invitation by the government is rare. Rather, additional reasons are invoked and it is the combination of these reasons on which governments rely. It should also be kept in mind that there is a difference between, on the one hand, an invitation by a government which is in overall control over its country and merely requests assistance in a police action and, on the other hand, the desperate cry for help by a government in a situation where it has almost been defeated by opposition forces. While in the first case the pure invitation might suffice, in the second the necessity to give additional reasons, such as foreign intervention on the rebel side, increases.

The Institut de Droit International adopted at its 1975 session in Wiesbaden a resolution in which supporting either side in a civil war was considered illegal<sup>74</sup>. This position is shared to some extent in the literature<sup>75</sup>. The main argument advanced is that third party military intervention was contrary to Article 2 para. 4<sup>76</sup>. The prohibition of the use of force was also protecting the right of a country to solve a civil war without military intervention from outside<sup>77</sup>. Apart from protecting potential

<sup>72</sup> C. Rousseau, “Chronique des faits internationaux”, *RGDIP* 83 (1979), 126 (204).

<sup>73</sup> Quoted from Rousseau, *ibid.*, 171.

<sup>74</sup> *Annuaire de l’Institut de Droit International* 56 (1975), 544 et seq.

<sup>75</sup> See the references in Randelzhofer, see note 63, Mn. 31; M. Bothe, “Das Gewaltverbot im allgemeinen”, in: W. Schaumann, *Völkerrechtliches Gewaltverbot und Friedenssicherung*, 1971, 11 (26); U. Beyerlin, *Die humanitäre Aktion zur Gewährleistung eines Mindeststandards in nicht-internationalen Konflikten*, 1975, 60 et seq.

<sup>76</sup> O. Schachter, *Annuaire de l’Institut de Droit International* 56 (1975), 418.

<sup>77</sup> O. Schachter, “The Right of States to Use Armed Force”, *Mich.L.Rev.* 82 (1983/84), 1620 (1641).

victim states, the provision was also designed to ensure international relations which are free from use of force<sup>78</sup>. This was a common interest of the community of states which could not be at the disposal of a single state<sup>79</sup>. The 9th edition of Oppenheim's International Law suggests that the mere fact that a civil war is going on deprives the government of its capacity to issue invitations:

“So long as the government is in overall control of the state and internal disturbances are essentially limited to matters of local law and order or isolated guerrilla or terrorist activities, it may seek assistance from other states which are entitled to provide it. But when there exists a civil war and control of a state is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law. In such a case the authority of any party to the conflict to be the government entitled to speak (and to seek assistance) on behalf of the state will be doubtful; and assistance to any party will prejudice the right of the state to decide for itself its form of government and political system. It is, however, widely accepted that if there is outside interference in favour of one party to the struggle, other states may assist the other party”<sup>80</sup>.

The conclusion that governmental power to invite foreign military forces is limited to effective governments is supported by the wording of Article 2 para.4, according to which not only territorial integrity but also political independence are protected. Once the government has lost effective control, any assistance from the outside interferes in the balance of power in that country. The conclusion is further supported by the way in which the United Nations acted during the Congo crisis. Although the Congolese central government had supported direct military action against the rebel province of Katanga, the United Nations did not directly attack the rebel forces. Instead they relied on the concept of “active self-defence” and the Secretary-General declined demands for direct action against Katanga arguing that such action would violate the principle of non-intervention<sup>81</sup>. The Secretary-General's position was shared by a majority in the Security Council against the Soviet and Polish position according to which direct

<sup>78</sup> As to this argument cf. Tanca, see note 64, 19 et seq.

<sup>79</sup> W. Wengler, *Das völkerrechtliche Gewaltverbot*, 1967, 49 et seq.

<sup>80</sup> Jennings/ Watts, see note 53, 437 et seq. (footnotes omitted); a similar position is advanced by A. Thomas/A.J. Thomas, *Non-Intervention, the Law and its impact in the Americas*, 1956, 94.

<sup>81</sup> Doc. S/4417 Add. 6 of 12 August 1960.

action against Katanga would have been possible<sup>82</sup>. With respect to invitations by the government, the prohibition of the use of force and the principle of non-intervention are closely interrelated with the right to self-determination. The latter has an internal protective dimension<sup>83</sup> which prohibits interventions from outside<sup>84</sup>. The interrelation between the principles is expressed in the so called Friendly-Relations Declaration (Declaration on Principles of International Law Concerning Friendly Relations) of the General Assembly of the United Nations.

“By virtue of the principle of equal rights of and self-determination of peoples enshrined in the Charter, all peoples have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter”<sup>85</sup>.

The principle of self-determination has mainly been invoked in the context of decolonization<sup>86</sup>. Nevertheless, the wording of the Friendly-Relations Declaration and other international documents reveals that it is a right of all peoples<sup>87</sup>. It is doubtful whether the right to self-determination includes a right to secession<sup>88</sup>. A right to secession would render support for a government which is suppressing a people striving for independence even more difficult. But even, without including a right to secession, the Friendly-Relations Declaration is evidence of the negative attitude of the international community towards unilateral external interference<sup>89</sup>.

The Turkish intervention in Cyprus was based on a contractual agreement in the Treaty of Guarantee signed at Nicosia on 16 August 1960<sup>90</sup>.

<sup>82</sup> SCOR, 15 Year, 1960, Suppl. July, August, September 1960, 64 et seq.

<sup>83</sup> M. Pomerance, *Self-Determination in Law and Practice*, 1982, 37 et seq.; J.H. Leurdijk, “Civil War and Intervention in International Law”, *NILR* 24 (1977), 143 (150); A. Rosas, “Internal Self-Determination”, in: C. Tomuschat (ed.), *The Modern Law of Self-Determination*, 1993, 225 (232 et seq.).

<sup>84</sup> D. Thürer, *Das Selbstbestimmungsrecht der Völker*, 1976, 184.

<sup>85</sup> A/RES/2625 (XXV) of 24 October 1970.

<sup>86</sup> K. J. Partsch, “Self-Determination”, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 1995, Vol. 2, 1171 et seq.

<sup>87</sup> C. Tomuschat, “Self-Determination in a Post-Colonial World”, in: Tomuschat, see note 83, 1 (2 et seq.) with references of state practice.

<sup>88</sup> See in this respect D. Murswiek, “The Issue of Secession — Reconsidered”, in: Tomuschat, see note 83, 21 (32 et seq.).

<sup>89</sup> Doswald-Beck, see note 68, 189 (243).

Parties to the treaty are Cyprus on the one part and Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland on the other. The treaty was signed when Cyprus became independent and it contains a clause which reserves for each of the guaranteeing powers the right to intervene in the event of a breach of the treaty<sup>91</sup>. In 1974 the government of Archbishop Makarios was overthrown in a coup. The new government was mainly composed of people who were in favour of a union with Greece and suspicions arose that the Greek government was behind the coup. In this situation Turkey invaded Cyprus and in doing so it relied on the Treaty of Guarantee. The Security Council passed several resolutions on the matter, two of which condemned the Turkish intervention<sup>92</sup>.

The Turkish intervention is of interest because it was based on the consent of a government which was not given ad-hoc in a situation of crisis but years before in a treaty. In fact, the Cypriot government at the time of the intervention was opposed to the intervention. Although the previous breach of the treaty was not disputed, the international reactions to the Turkish intervention were largely negative<sup>93</sup>. It has been argued that the negative international reaction to the Turkish intervention created a presumption against the legality of an intervention based upon governmental consent in a treaty<sup>94</sup>. Whether or not this far-reaching conclusion may be drawn is a question which does not have to be answered in this context. With respect to the issue of intervention into civil wars it is sufficient to note that Turkey was not simply relying on a Cypriot violation of the treaty but was accusing Greece of having interfered in the matter. For this reason the case of Cyprus cannot be cited as an example for intervention solely on the grounds of governmental invitation. Apart from that, the negative international reactions cast some doubt on the legality of intervention treaties.

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<sup>90</sup> UNTS Vol.382 No.5475.

<sup>91</sup> Article IV: "In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.

In so far as common or concerted action may not prove possible, each of the three guaranteeing powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty."

<sup>92</sup> S/RES/353 (1974) of 20 July 1974 and S/RES/360 (1974) of 16 August 1974.

<sup>93</sup> Cf. the thorough analysis by Doswald-Beck, see note 68, 189 (247 et seq.).

<sup>94</sup> Doswald-Beck, *ibid.*, 250.

In summary, the invitation by the government may only be considered as justification for military intervention in situations where the government retains effective control over the country. Interventions based on the consent of an ineffective government — in contrast — violate Article 2 para.4. As for the question of previous consent to military interference on the basis of a treaty the same standard has to be applied. The government may only give a contractual consent to military intervention for situations in which it could give ad-hoc consent, i.e. in situations of effective governmental control. It is not possible to enhance the legalizing effect of requests by the government merely by giving the consent at an earlier stage<sup>95</sup>.

## 2. Consequences for Intervention by Regional Organizations on Request by the Government

The result that an invitation by an ineffective government does not justify military intervention against the prohibition of use of force in Article 2 para.4 may serve as a starting point for discussing invitations for intervention by regional organizations. The main argument when interpreting the meaning of “enforcement action” in Article 53 of the Charter was that authorization by the Security Council was necessary where otherwise a violation of Article 2 para. 4 would occur. This rationale implies that if the request emanates from an ineffective government Security Council authorization would be necessary to justify regional intervention. The following analysis of practice by regional organizations may serve as a test as to whether this tentative conclusion is supported in practice. Relevant practice is the intervention by the Organization of East Caribbean States (OECS)<sup>96</sup> and the United States of America in Grenada in October 1983 and the sending of ECOMOG by ECOWAS into the Liberian Civil War.

In Grenada, which became independent in 1974, the British Crown was Head of State. She was represented by a Governor-General with mainly representative functions, while the executive power was in the hands of a prime minister<sup>97</sup>. In 1979 the Government was overthrown in a coup led by Maurice Bishop. Since then a communist “People’s Revolutionary Government” under Bishop had been in charge, which was supported by the communist New Jewel Movement. In 1983 tension arose within the Central Committee of the New Jewel Movement, which led to the killing

<sup>95</sup> For a different view of the role of self-determination in this context see J. A. Frowein, “Self-Determination as a Limit to Obligations”, in: Tomuschat, see note 83, 211 (221 et seq.).

<sup>96</sup> *ILM* 20 (1981), 1166.

<sup>97</sup> As to the Constitutional Questions, see W. C. Gilmore, *The Grenada Intervention*, 1984, 65 et seq.

of Bishop and military fighting between the different factions. The OECS discussed the matter on 21 October 1983 and decided to intervene with the help of the United States of America<sup>98</sup>. One of the justifications for the intervention was an invitation which the then Governor-General, Sir Paul Scoon, had issued. The exact circumstances of the invitation are unclear. In an interview with the BBC on 31 October Sir Paul said he "thought" that he decided to ask for help on 23 October<sup>99</sup>. On 27 October, the text of a written invitation dated 24 October was presented by the Government of Barbados<sup>100</sup>. In this invitation Sir Paul asks for a peace-keeping force and confirms that he was also seeking help from the United States, Jamaica and the OECS. The circumstances of the invitation are dubious in two respects. Firstly, Sir Paul does not seem to exactly remember in his interview of 31 October 1983 when he decided to ask for help. And secondly, there is some doubt as to when the written request was sent. According to the documentation edited by Gilmore the invitation is undated<sup>101</sup> and there is some suspicion that it was produced after the invasion took place<sup>102</sup>.

The United States justified the intervention on three legal grounds: the invitation by the lawful government of Grenada, the 1981 Treaty Establishing the OECS and the protection of United States citizens in Grenada<sup>103</sup>. The reactions of the international community to the intervention were negative. In the Security Council and in the General Assembly of the

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<sup>98</sup> As to the factual background of the events in Grenada, see S. Davidson, *Grenada*, 1987, 17 et seq. and 53 et seq.; see also L. Doswald-Beck, "The Legality of the United States' Intervention in Grenada", *NILR* 31 (1984), 355 (356 et seq.).

<sup>99</sup> "I think I decided so on Sunday the 23rd, late Sunday Evening... Later on, as things deteriorated, I thought, because people were scared, you know. I had several calls from responsible people in Grenada that something should be done. "Mr. Governor-General, we are depending on you [that] something be done. People in Grenada cannot do it, you must get help from outside." What I did ask for was not an invasion but help from outside... I asked for help from the OECS countries. I also asked the OECS to ask America whether they can help, and then I confirmed this in writing myself to the President of the U.S.A.", quoted from J.N. Moore, "Grenada and the International Double Standard", *AJIL* 78 (1984), 145 (148).

<sup>100</sup> The text of the invitation is reprinted in Moore, *ibid.*

<sup>101</sup> Gilmore, see note 97, 95.

<sup>102</sup> S. Davidson, *Grenada*, 1987, 100 et seq.

<sup>103</sup> See the statement by Deputy Secretary of State K.W. Dam, reprinted in M.N. Leich, "Contemporary Practice of the United States Relating to International Law", *AJIL* 78 (1984), 200 (203 et seq.).

United Nations most states condemned the action on the grounds that it was contrary to the principle of non-intervention<sup>104</sup>. The intervention by the OECS and the United States therefore provides no arguments that would indicate that interventions by regional organizations be treated differently from unilateral interventions.

The Liberian civil war started at the end of the year 1989. By July 1990 President Doe had lost control over the country except for a small part of Monrovia including the presidential palace<sup>105</sup>. In this situation Doe addressed ECOWAS and asked for an "ECOWAS peace-keeping force". ECOWAS accepted the request and sent a "Cease-Fire Monitoring Group (ECOMOG)". The invitation has been viewed as justifying the intervention by ECOMOG<sup>106</sup>. There seems to be some doubt as to the justifying effect of the request since at the time the invitation was issued Doe was only in control of a small area in Monrovia including the presidential palace and its immediate surroundings. Furthermore the wording of the invitation was not very explicit:

"It is therefore my sincere hope that in order to avert the wanton destruction of lives and properties and further forestall the reign of terror, I wish to call on your Honorable Body to take note of my personal concerns and the collective wishes of the people of Liberia, and to assist in finding a constitutional and reasonable solution to the crisis in our country as early as possible. Particularly, it would seem most expedient at this time to introduce an ECOWAS Peace-keeping Force into Liberia to forestall increasing terror and tension and to assure a peaceful transitional environment"<sup>107</sup>.

Apart from the fact that the letter does not explicitly demand an intervention<sup>108</sup> it is interesting to note that ECOWAS did not invoke the letter as

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<sup>104</sup> SCOR 2489th Mtg. of 26 October 1983; 2491th Mtg. of 27 October 1983; GAOR 1983, 43rd Plenary Mtg. of 2 November 1983, 689 et seq.; see also F.Boyle et al., "International Lawlessness in Grenada", *AJIL* 78 (1984), 172 (174).

<sup>105</sup> For details of the developments see Nolte, see note 19, 603 et seq.

<sup>106</sup> Nolte, *ibid.*, 633 et seq.

<sup>107</sup> The text of the invitation is reprinted in M. Weller (ed.), *Regional Peacekeeping and International Enforcement: The Liberian Crisis*, 1994, 60 et seq.

<sup>108</sup> This point is raised by K. O. Kufuor, "The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States", *Revue africaine de Droit International et Comparé* 5 (1993), 525 (537).



a justification but instead stressed the humanitarian and impartial character of the intervention<sup>109</sup>. The situation in Liberia has been compared to the complete breakdown of governmental authority in Somalia<sup>110</sup>. There may be seen some difference in so far as the number of contenders for government were limited to three factions in the Liberian war. But apart from that difference the analysis is quite correct in that the governmental structures in both states were completely dissolved. Under such circumstances it is difficult to see why the invitation by the President should have more legal value than that of any other faction.

It is interesting to focus on the Somali case in some detail. The first United Nations mission to Somalia (UNOSOM — United Nations Operation in Somalia) was established with S/RES/751 (1992) of 24 April 1992. This resolution is not based on Chapter VII of the Charter, instead the Council refers to the signing of cease-fire agreements in Mogadishu. This mission proved unable to fulfill its task although it was enhanced in size<sup>111</sup>. In S/RES/794 (1992) of 3 December 1992 a multinational force under the lead of the United States of America was established and received under Chapter VII the authorization “to establish a secure environment for humanitarian relief operations in Somalia”. The multinational force was later replaced by a UNOSOM II mission which was also established under Chapter VII of the Charter<sup>112</sup>. It is interesting to note that the Council did not rely on Chapter VII when the first UNOSOM mission was set up. The most plausible reason for this is that cease-fire agreed on between the factions in Mogadishu was considered to constitute a sufficient legal basis. Only when there was no consent on a cease-fire and a peace-keeping force to monitor it did the Council resort to Chapter VII of the Charter<sup>113</sup>. It is therefore submitted that the reason for applying Chapter VII in the Somali case was not so much that Somalia lacked governmental structures<sup>114</sup>, but that when the United Nations forces

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<sup>109</sup> “I must emphasize that the ECOWAS Monitoring Group (ECOMOG) is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions. ECOWAS intervention is in no way designed to save one part or punish another.” Doc. S/21485 of 10 August 1990 (Annex), 3.

<sup>110</sup> T. Farer, “A Paradigm of Legitimate Intervention”, in: L. F. Damrosch (ed.), *Enforcing Restraint*, 1993, 316 (336).

<sup>111</sup> S/RES/775 (1992) of 28 August 1992.

<sup>112</sup> S/RES/814 (1993) of 26 March 1993.

<sup>113</sup> S/RES/794 (1992) and S/RES/814 (1993).

<sup>114</sup> This fact was stressed very much during the debates in the Security Council, see H. Freudenschuß, “Article 39 of the UN Charter Revisited:

where sent not all of the parties to the conflict consented. This implies that the sending of UNOSOM II had enforcement character in allowing for action against some of the factions to the civil war. The Council considered the Chapter VII mandate necessary in order to overcome the prohibition of use of force in Article 2 para.4. In doing so the Council was not merely substituting a request by a non-existing government, but relied on Chapter VII of the Charter because the measures envisaged had enforcement character.

In conclusion, the standards applicable to regional organizations when intervening into civil wars are very much the same as the standards for unilateral interventions. The civil wars of recent years, especially the atrocities committed in Burundi and Rwanda, and since October 1995 also in the Zairian area bordering these countries, have again raised the question of whether and under which circumstances intervention for humanitarian reasons may be justified.

#### **IV. Humanitarian Intervention as Enforcement Action under Article 53?**

Humanitarian interventions may be thought of as taking place unilaterally by single states, as a matter of Security Council decisions under Chapter VII of the Charter and they may also be conceived on a regional collective level, i.e. being planned and executed by regional organizations. The legality of regional humanitarian interventions is a question of Article 53. If they must be considered "enforcement action" in the sense of that provision, a Security Council authorization is required. In search of an answer to this question, it is necessary to analyse the legality of the different forms of humanitarian intervention. If unilateral humanitarian intervention were already possible under the law of the Charter there are no reasons why regional organizations should be barred from similar action. If, on the other hand, even decisions of the Council under Chapter VII could not justify collective humanitarian interventions, then it is difficult to see how an authorization according to Article 53 could justify regional humanitarian interventions. Therefore, a short summary of the

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Threats to the Peace and the Recent Practice of the UN Security Council", *Austrian J. Publ. Int. Law* 46 (1993/94), 1 (21); P. C. Szacz, "Centralized and Decentralized Law Enforcement: The Security Council and the General Assembly Acting under Chapters VII and VIII", in: J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System*, 1995, 17 (23).

law and practice of unilateral and collective humanitarian interventions by the United Nations is necessary.

### 1. Illegality of Unilateral Humanitarian Intervention

During the Cold War, American international lawyers in particular argued that, in view of the potential or actual veto dead-lock in the Security Council, a right to unilateral humanitarian intervention had to be acknowledged<sup>115</sup>. The question has been intensely analysed in literature<sup>116</sup>. For the purposes of this article only the main arguments need to be presented.

Those authors who are arguing in favour of a right to humanitarian intervention refer to the wording of Article 2 para.4 of the Charter. According to them, the provision was only prohibiting use of force directed against the territorial integrity or political independence of another state. Neither the political independence nor the territorial integrity of a state were violated in a humanitarian intervention, since it was not directed at changing international borders or questioning the political independence of a state<sup>117</sup>. This argument could only be accepted if the qualification "against the territorial integrity or political independence" in Article 2 para.4 was meant to limit the prohibition of use of force. However, the drafting history shows that the terms were not designed as a limitation but with the intention to stress certain extraordinarily important aspects<sup>118</sup>. Consequently, the provision is understood to constitute a

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<sup>115</sup> F. R. Tesón, *Humanitarian Intervention*, 1988, 127 and 246 et seq.; R. B. Lillich, "Forcible Self-Help by States to Protect Human Rights", *Iowa L. Rev.* 53 (1967), 325 (344 et seq.); R. B. Lillich, "Intervention to Protect Human Rights", *McGill L. J.* 15 (1969), 205 et seq.; see also A. D'Amato, "The Invasion in Panama was a Lawful Response to Tyranny", *AJIL* 84 (1990), 516 et seq.

<sup>116</sup> A. Pauer, *Die humanitäre Intervention*, 1985; Tesón, see above; P. Malanczuk, *Humanitarian Intervention and the Use of Force*, 1993, with a comprehensive documentation of the existing literature.

<sup>117</sup> M. Reisman/M. S. McDougal, "Humanitarian Intervention to Protect the Ibos", in: R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations*, 1973, 167 (177); Tesón, see note 115, 131; K. Doehring, "Die humanitäre Intervention — Überlegungen zu ihrer Rechtfertigung", in: *The Modern World of Human Rights. Essays in Honour of Thomas Buergenthal*, 1996, 549 et seq., (551).

<sup>118</sup> UNCIO Vol. VI, 304, 335; for further references see I. Brownlie, *International Law and the Use of Force by States*, 1963, 265 et seq.; see also U. Beyerlin, "Humanitarian Intervention", in: R. Bernhardt (ed.), *EPIL*, 2nd edition, Vol. II, 1995, 926 (927).

comprehensive ban on the use of force in international relations<sup>119</sup>. Additionally, there are good reasons to argue that any humanitarian intervention interferes with the political independence of the state concerned and must therefore be considered to contravene Article 2 para. 4<sup>120</sup>. For these reasons it is not possible to hold that the wording of Article 2 para. 4 allows for humanitarian interventions.

A second argument in favour of unilateral humanitarian intervention is that the collective system established in Chapters VI and VII of the Charter of the United Nations had failed to meet its objectives. It is argued that the comprehensive ban on the use of force in Article 2 para. 4 was subject to a functioning collective system. The failure of the Security Council to meet its tasks under Chapter VII required a search for alternative means of ensuring international peace and security<sup>121</sup>. This argument neglects two important considerations. Firstly, the delegates at the San Francisco Conference had seen the danger of malfunction of the collective system. As a remedy they included the right to individual or collective self-defence in Article 51<sup>122</sup>. And secondly, the argument presupposes that the mechanism of Chapter VII was designed to be used against internal violations of human rights, since that is the sole purpose of a humanitarian intervention. The application of Chapter VII of the Charter in order to stop violations of human rights is a rather recent development by the practice of the Council in Somalia and Iraq<sup>123</sup>. For this reason the conclusion from the malfunction of the Charter system during the Cold War to a right to humanitarian intervention is not compelling<sup>124</sup>.

<sup>119</sup> D. W. Bowett, *Self-Defence in International Law*, 1958, 151 et seq.; T. Farer, "The Regulation of Foreign Intervention in Civil Armed Conflict", *RdC* 142 (1974), 291 (388); D. Schindler, "Die Grenzen des völkerrechtlichen Gewaltverbots", *Reports DGVR* 26 (1986), 11 (14); U. Beyerlin, "Die israelische Befreiungsaktion von Entebbe aus völkerrechtlicher Sicht", *ZaöRV* 37 (1977), 213 (217); I. Brownlie, *International Law and the Use of Force by States*, 1963, 265 et seq.; R. M. Derpa, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nicht-militärischer Gewalt*, 1970, 30 et seq.; A. Randelzhofer, "Use of Force", in: R. Bernhardt (ed.), *EPIL* 4 (1982), 265 (269 et seq.); A. Randelzhofer, "On Article 2 (4)", 106 et seq., Mn. 34 et seq.; in Simma, see note 25; B. V. Röling, "Aspects of the Ban on Force", *NILR* 24 (1977), 242 (246 et seq.).

<sup>120</sup> M. Akehurst, "Humanitarian Intervention", in: H. Bull (ed.), *Intervention in World Politics*, 1984, 95 (105).

<sup>121</sup> M. Reisman, "Coercion and Self-determination. Construing Charter Article 2 (4)", *AJIL* 78 (1984), 642 et seq. (643).

<sup>122</sup> See UNCIO Vol. XII, 682, 688 (Australia), 777 (France) and 781 (Turkey).

<sup>123</sup> For details see *infra*, p. 158 et seq.

A third argument for the legality of humanitarian intervention is that it could be considered a customary law exception to the universal prohibition of the use of force<sup>125</sup>. With respect to the customary law argument it is important to note that the pre-Charter practice is of only limited value since the treaty based prohibition of the use of force in Article 2 para. 4 must be given priority over the pre-Charter practice<sup>126</sup>. Furthermore, even for the time before the Charter of the United Nations entered into force, the existence of a customary law foundation for the doctrine of humanitarian intervention was not free from doubts<sup>127</sup>. In any event, under the Charter of the United Nations no cases may be found which would clearly support a customary law exception for humanitarian interventions<sup>128</sup>.

The main argument advanced against unilateral humanitarian intervention is the danger of abuse<sup>129</sup>. The opponents to a humanitarian exception to the prohibition of use of force argue that it would be difficult to restrict such an exception to situations where the humanitarian aspect is obvious<sup>130</sup>. The argument of possible abuse is all the more important since it is hard to imagine that potential unilateral intervenors could be bound to the criteria developed by international lawyers in order to limit the scope of a humanitarian exception to the prohibition of the use of force<sup>131</sup>. For

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<sup>124</sup> As to some modifications to this assessment in the light of the recent practice of the Security Council to protect human rights also under Chapter VII of the Charter, see *infra*, p. 163 et seq.

<sup>125</sup> J. P. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN-Charter", *Cal. W.Int'l L.J.* 4 (1974), 203 (232 et seq.); see also M. Reisman, "Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions and Prospects", in: L.F. Damrosch/D. Scheffer (eds.), *Law and Force in the New International Order*, 1991, 26 (35).

<sup>126</sup> P. Malanczuk, *Humanitarian Intervention*, 1993, 27.

<sup>127</sup> Malanczuk, *ibid.*, 10.

<sup>128</sup> T. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention", in: Damrosch/Scheffer, see note 125, 185 (193); O. Schachter, *International Law in Theory and Practice*, 1991, 124.

<sup>129</sup> See for instance, J. Zourek, *L'interdiction de l'emploi de la force en droit international*, 1974, 124.

<sup>130</sup> Malanczuk, see note 126, 30; K. Hailbronner, "Die Grenzen des völkerrechtlichen Gewaltverbots", *Reports DGVR* 26 (1986), 49 (100); U. Beyerlin, *Die humanitäre Aktion zur Gewährleistung eines Mindeststandards in nicht-internationalen Konflikten*, 1975, 66.

<sup>131</sup> R. B. Lillich, "Humanitarian Intervention through the United Nations: Towards the Development of Criteria", *ZaöRV* 53 (1993), 557 (562 et seq.); J. P. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN-Char-

this reason unilateral humanitarian interventions have to be considered as constituting a violation of Article 2 para.4 and hence illegal under current international law<sup>132</sup>.

## 2. Collective Humanitarian Intervention by the United Nations

On the level of the United Nations, the legal question presented by collective intervention for humanitarian purposes is whether and under which circumstances violations of human rights may be considered to constitute a threat to the peace according to Article 39. There is an older, restrictive interpretation of Article 39 which views the provision closely interrelated with the prohibition of use of force in Article 2 para.4, the prohibition of intervention into internal affairs and with the right to individual and collective self-defence in Article 51. This interpretation comes to the conclusion that only military force with massive cross-border effects can meet the requirement of "threat to the peace"<sup>133</sup>. It is also argued that the term had to be seen in connection with preventing or stopping military hostilities or genocide, otherwise everything could be said to serve the maintenance or restoration of peace<sup>134</sup>.

According to most authors, by contrast, the Security Council possesses a large margin of appreciation as far as the conditions laid down in Article 39 are concerned<sup>135</sup>. Following the recent practice<sup>136</sup> of the Council in

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ter", *Cal.W.Int'l L.J.* 4 (1974), 203 (235); W. D. Verwey, "Humanitarian Intervention", in: A. Cassese (ed.), *The Current Regulation of the Use of Force*, 1986, 57 (74 et seq.); Pauer, see note 116, 197 et seq.

<sup>132</sup> Schachter, see note 128, 123 et seq.; T. Farer, "Human Rights in Law's Empire: The Jurisprudence of War", *AJIL* 85 (1991), 117 (126); Malanczuk, see note 126, 26 et seq.; Beyerlin, see note 130, 64 et seq.

<sup>133</sup> J. Arntz, *Der Begriff der Friedensbedrohung in der Satzung der Vereinten Nationen*, 1975, 64 et seq.; for further references see Pauer, see note 116, 82 (footnote 6).

<sup>134</sup> B. Graefrath, "Iraqi Reparations and the Security Council", *ZaöRV* 55 (1995), 1 (15).

<sup>135</sup> J. A. Frowein, "On Article 39", 605 et seq., Mn. 16 et seq., in: Simma, see note 25; H. Kelsen, *The Law of the United Nations*, 1950, 727 et seq.; R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, 1963, 173 and 176.

<sup>136</sup> For earlier cases see T. M. Franck, "The Security Council and 'Threats to the Peace': Some Remarks on Remarkable Recent Developments", in: R.-J. Dupuy (ed.), *Le Développement du rôle du Conseil de Sécurité*, 1993, 83 (89 et seq.).

Iraq<sup>137</sup>, Yugoslavia<sup>138</sup>, Somalia<sup>139</sup>, and Rwanda<sup>140</sup> there seems to be consent that massive internal use of force may fulfill the criterion of "threat to the peace" in cases where such use of force has cross-border effects, for instance where refugees flee to neighbouring countries<sup>141</sup>.

A further step towards collective humanitarian intervention may be seen in the actions taken by the Security Council following the coup against President Aristide of Haiti in September 1991<sup>142</sup>. Jean-Bertrand Aristide took over the office as President of Haiti in February 1991. His government was overthrown only eight months later and President Aristide was forced to leave the country<sup>143</sup>. The OAS reacted firstly by imposing a trade embargo<sup>144</sup>. As already mentioned, the trade embargo was later made universally mandatory by the Security Council in S/RES/841 (1993) of 16 June 1993 at the request of the exile government set up by President Aristide<sup>145</sup>. In July 1993 an agreement was reached between the new junta and President Aristide according to which President Aristide would be allowed to return to the country and a government supported by a majority in Parliament would be reinstated<sup>146</sup>. When the military government in Haiti did not implement these commitments the Security Council authorized member states of the United Nations in S/RES/ 940 (1994) of 31 July 1994 to "form a multinational force under unified command and control and, in this framework, to use all necessary

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<sup>137</sup> S/RES/ 688 (1991) of 5 April 1991.

<sup>138</sup> Even the first resolution in the Yugoslav crisis, S/RES/ 713 (1991) of 25 September 1991, which was adopted before the declaration of independence by Croatia and Slovenia on 8 October 1991, qualifies the continuation of the situation as a threat to the peace because of its cross-border effects.

<sup>139</sup> S/RES/ 794 (1992) of 3 December 1992.

<sup>140</sup> S/RES/ 929 (1994) of 22 June 1994.

<sup>141</sup> Frowein, see note 135, Mn. 19; R.B. Lillich, "Humanitarian Intervention through the United Nations: Towards the Development of Criteria", *ZaöRV* 53 (1993), 557 et seq. (574); Malanczuk, see note 126, 25.

<sup>142</sup> R. B. Lillich, "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World", *Tul.J.Int'l & Comp.L.* 3 (1995), 1 (9 et seq.).

<sup>143</sup> For details of the events in Haiti, see D. E. Acevedo, "The Haitian Crisis and the OAS response", in: L.F. Damrosch (ed.), *Enforcing Restraint*, 1993, 119 et seq.

<sup>144</sup> MRE/RES.1/91 and 2/91, reprinted in Doc. A/47/975=S/26063 of 12 July 1993.

<sup>145</sup> Doc. S/25958 of 16 July 1993.

<sup>146</sup> Governors Island Agreement, Doc. A/47/975=S/26063 of 12 July 1993, 2 et seq.

means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti [...]". The situation in Haiti was different from the collective interventions referred to above in so far as the cross-border consequences of the military coup were rather limited and the new military leaders managed to consolidate their power quickly. A difference which is also visible in the wording of resolution 940 where the military government is referred to as "illegal de-facto regime". The main reasons for the intervention therefore have to be seen in the serious violations of human rights committed by the new military rulers. This motivation is evidenced in the text of Resolution 940:

"The Security Council,

Gravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission (MICIVIH), which was condemned in its Presidential statement of 12 July 1994 (S/PRST/1994/32)".

It is interesting to note that with the formula "civil liberties" instead of "human rights" the Council not only mentions the basic rights of freedom of the human person, but also includes rights of participation in a democratic society<sup>147</sup>. Furthermore, S/RES/748 (1992) of 31 March 1992 concerning Libya may be referred to in this context. In this resolution the term "threat to the peace" was interpreted in a particularly broad manner<sup>148</sup>. The Council applied under Chapter VII of the Charter non-military sanctions against Libya since the latter did not honour the obligations created in S/RES/731 (1992) of 21 January 1992. Therefore Libya was ordered to extradite two of its nationals who were suspected of being involved in the terrorist bombing of Pan Am flight 103 over Lockerbie (Scotland) on 21 December 1988<sup>149</sup>. In resolution 748 the Council determines the threat to the peace created by the situation in the following way:

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<sup>147</sup> Rather critical towards such an extensive interpretation of the term "threat to the peace", M. Glennon, "Sovereignty and Community after Haiti: Rethinking the Collective Use of Force", *AJIL* 89 (1995), 70 et seq.

<sup>148</sup> See Frowein, see note 135, Mn. 19.

<sup>149</sup> As to the factual background of the terrorist attack, see the introductory note in K. C. Wellens, *Resolutions and Statements of the United Nations Security Council (1946–1992) — A Thematic Guide*, 1993, 292.



“Determining, in this context, that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security, [...]”.

The legality of that resolution is still in dispute before the ICJ in two parallel proceedings instituted by Libya against the United States of America and against the United Kingdom, in which Libya asked the Court, inter alia, to state that it had fully complied with all its obligations arising out of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 23 September 1971<sup>150</sup>. Libya also asked for the consideration of interim measures in which the United States and the United Kingdom should have been ordered not to apply coercive measures against Libya. Libya maintained that there was no threat to the peace and hence resolution 748, which had been adopted while the proceedings were pending, was in contravention to the provisions of the Charter<sup>151</sup>. In its decision on interim measures the Court declined to consider such an order, arguing that there was prima facie a presumption that Security Council decisions were lawfully taken under the Charter<sup>152</sup>. While not deciding the question of the legality of the resolution, the decision may be seen as a tendency to accept the extensive interpretation of Article 39<sup>153</sup> which is prevailing, not only in the cited practice of the Council, but also largely accepted in literature<sup>154</sup>.

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<sup>150</sup> *ILM* 10 (1971), 1151 et seq.

<sup>151</sup> ICJ Reports 1992, 114 et seq. (126), para.39.

<sup>152</sup> *Ibid.*, para.41 et seq.

<sup>153</sup> T. Franck, “The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?”, *AJIL* 86 (1992), 519 (521 et seq.).

<sup>154</sup> J. A. Frowein, “On Article 39”, 605 et seq., Mn. 19, in: Simma, see note 25; J. Delbrück, “A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations”, *Ind. L. J.* 67 (1992), 887 (899); J. Delbrück, “A More Effective International Law or a New ‘World Law’? — Some Aspects of the Development of International Law in a Changing International System”, *Ind. L. J.* 68 (1993), 705 (711); A. Roberts, “Humanitarian war: Military Intervention and Human Rights”, *Int’l Aff.* 69 (1993), 429 (444 et seq.); P. Malanczuk, *Humanitarian Intervention*, 1993, 25; K.-K. Pease/D. P. Forsythe, “Humanitarian Intervention and International Law”, *Austrian J. Publ. Int. Law* 45 (1993), 1 (11 et seq.); D. P. Forsythe/K.-K. Pease, “Human rights, Humanitarian Intervention and World Politics”, *HRQ* 15 (1993), 290 (308); M. R. Hutchinson, “Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention”, *Harv. Int’l. L. J.* 34

Interestingly, in the context of collective humanitarian interventions by the United Nations only few authors raise the argument of danger of abuse which is frequently referred to in respect of unilateral humanitarian intervention<sup>155</sup>. The reason may be seen in the procedural requirements for decisions by the Security Council. For a collective humanitarian intervention by the United Nations unanimity of the permanent members and a majority in the Council are required. This collective decision-making is obviously viewed as presenting a procedural guarantee against abusive interventions by the United Nations. Recent developments are largely seen as establishing a right to collective humanitarian intervention through the United Nations<sup>156</sup>.

### 3. Collective Humanitarian Intervention by Regional Organizations

The practical possibilities of protecting human rights by regional interventions are evidenced by the ECOWAS action in Liberia, which was officially justified by massive violations of human rights which had occurred because of the particularly atrocious civil war in the country<sup>157</sup>. The idea of setting up a regional intervention force (African Crisis Response Force) to cope with the desperate situation of refugees in the Great Lakes Re-

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(1993), 624 (636 et seq.); O. Corten/P. Klein, "L'autorisation de recourir à la force à des fins humanitaires: droit d'ingérence ou retour au sources?", *EJIL* 4 (1993), 506 (531).

<sup>155</sup> But see L. F. Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights", in: L.F.Damrosch/ D.Scheffer (eds.), *Law and Force in the New International Order*, 1991, 215 (220).

<sup>156</sup> R. B. Lillich, "Humanitarian Intervention through the United Nations", *ZaöRV* 53 (1993), 557 et seq. (574); D. Eisner, "Humanitarian Intervention in the Post-Cold War Era", *B.U.Int'l L.J.* 11 (1993), 195 (220); T. Marauhn, "Humanitär motivierte militärische Aktionen", *Humanitäres Völkerrecht – Informationsschriften*, 1993, 20 (21); see also C. Greenwood, "Gibt es ein Recht auf humanitäre Intervention?", *EA* 4 (1993), 93 et seq.; W. Kühne, "Völkerrecht und Friedenssicherung in einer turbulenten Welt: Eine analytische Zusammenfassung der Grundprobleme und Entwicklungsperspektiven", in: W. Kühne (ed.), *Blauhelme in einer turbulenten Welt*, 1993, 17 et seq.; with some doubts Malanczuk, see note 126, 30; H. Freudenschuß, "The Changing Role of the U.N. Security Council: Trends and Perspectives", in: Kühne, see above, 151 (157 et seq. and 161).

<sup>157</sup> D. Wippman, "Enforcing the Peace: ECOWAS and the Liberian Civil War", in: L. F. Damrosch (ed.), *Enforcing Restraint*, 1993, 157 (179 et seq.).

gion<sup>158</sup> may also be seen as a regional approach to humanitarian intervention. Furthermore, the OAS indicated the possibility of regional humanitarian interventions in its Santiago Commitment to Democracy and the Renewal of the Inter-American System<sup>159</sup>. Under the law of the Charter of the United Nations the question has to be answered whether regional humanitarian intervention would constitute “enforcement action” under Article 53 and hence requires Security Council authorization.

First of all, one has to focus on the legality of collective humanitarian intervention through the United Nations. The analysis in the previous section has shown that humanitarian action by the United Nations is based on Chapter VII of the Charter. This legal basis implies that it is the decision under Chapter VII which justifies the collective humanitarian action with respect to the prohibition of the use of force in Article 2 para. 4. The interpretation of the term “enforcement action” in Article 53 resulted in the conclusion that the possible violation of Article 2 para. 4, must be considered as the decisive criterion to qualify regional action as “enforcement action”. Hence, all regional measures which need a justification with respect to the prohibition of the use of force must be authorized by the Council<sup>160</sup>. This interpretation of Article 53 leads to the conclusion that a humanitarian intervention by a regional organization is only possible under the condition that it is authorized by the Council under Article 53.

However, the delayed decision on a multinational force for humanitarian purposes in the Great Lakes Region and Eastern Zaire<sup>161</sup> revealed that in cases of urgent need alternative mechanisms are necessary to provide for rapid reaction. Therefore, the question may be asked whether some of

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<sup>158</sup> *Africa Confidential* 37 (1996), 8.

<sup>159</sup> This is most explicitly expressed in resolution AG/RES. 1080 (XXI-2/91) of 5 June 1991: “1. Instruir al Secretario General que solicite la convocación inmediata del Consejo Permanente en caso de que produzcan hechos que ocasionen una interrupción abrupta o irregular del proceso político institucional democrático o del legítimo ejercicio del poder por un gobierno democráticamente electo en cualquiera de los Estados miembros de la Organización para, en el marco de la Carta, examinar la situación, decidir y convocar una reunión ad hoc de ministros de relaciones exteriores, o un período extraordinario de sesiones de la Asamblea General, todo ello de un plazo de 10 días.

2. Expresar que la reunión ad hoc de ministros de relaciones exteriores o el período extraordinario de sesiones de la Asamblea General tenga por objeto analizar colectivamente los hechos y adoptar las decisiones que se estime apropiadas, conforme a la Carta y al derecho internacional.” (Italics added by the author).

<sup>160</sup> See supra, p. 141 et seq.

<sup>161</sup> S/RES/1080 (1996) of 15 November 1996.

the arguments advanced by the proponents of a unilateral right to humanitarian intervention may be applied to justify collective humanitarian interventions by regional organizations. One of the arguments for the legality of unilateral humanitarian intervention was that the collective system of the Charter might not work properly and alternative solutions for such failure were necessary<sup>162</sup>. The main reason why this argument was considered inconclusive was that Chapter VII of the Charter originally was not designed to ensure international protection of human rights. However, the Council has used Chapter VII for collective humanitarian intervention in recent years and one might ask whether this practice also allows for new arguments in case of inaction by the Council.

If the Security Council is competent to intervene under Chapter VII against violations of human rights, the question arises what the law is if the Council is unable to act because it is blocked by a veto. Is the answer then that no action against massive violation of human rights is lawfully possible? The question may seem somewhat theoretical in a situation where the Council is generally operating reasonably well. But the hesitations on the American side against intervening in the Great Lakes Region and the delay caused by these hesitations show that the question is of practical relevance. Furthermore, it is not self-evident that China and Russia keep their positive or at least neutral position as to humanitarian interventions through the United Nations. In the Haitian case China abstained from the vote but gave a statement which was very critical of collective use of force<sup>163</sup>. In fact, the statement could easily have been used to explain a veto. The Chinese veto in January 1997 when the Council decided on an observer mission for Guatemala further underlines this observation<sup>164</sup>.

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<sup>162</sup> See the reference in note 121.

<sup>163</sup> "However, we cannot agree to the provision in the draft resolution before us concerning the authorization for Member States to adopt mandatory means under Chapter VII of the United Nations Charter to resolve the problem of Haiti. As always, China advocates a peaceful solution to any international disputes or conflicts through patient negotiations. China does not agree with the adoption of any means of solution based on the resort to pressure at will or even use of force. [...] the practice of the Council's authorizing certain Member States to use force is even more disconcerting because this would obviously create a dangerous precedent.[...]", Doc. S/PV.3413 of 31 July 1994, 10.

<sup>164</sup> See the reference in Press Release SC 6314 of 20 January 1997, which was issued when the Council finally decided to establish the mission with S/RES/1094 (1997) of 20 January 1997.

Professor Reisman starts his argument on the premise that the collective mechanism established in Chapter VII of the Charter and the prohibition of the use of force are closely interrelated. According to him, the member states of the United Nations only accepted the ban on the use of force under the condition that the collective system was working<sup>165</sup>. This argument faces the objection that the delegates in San Francisco saw the problem and included the right to individual and collective self-defence into the Charter<sup>166</sup>. The relationship between Article 2 para.4, Article 39 to 42 and Article 51 may be described as follows. The normal reaction to a threat to the peace would be a decision under the collective system under Chapter VII of the Charter. In the absence of collective measures, states may use self-help in accordance with Article 51. It is important to note, however, that the conditions of Article 51 are more difficult to meet than those of Article 39. A "threat to the peace" in the sense of Article 39 is possible without the use of military force, while the "armed attack" necessary under Article 51 requires the cross-border use of military force<sup>167</sup>. In its Nicaragua decision the ICJ even came to the conclusion that not all measures prohibited as use of force under Article 2 para.4 could be qualified as armed attack in the sense of Article 51<sup>168</sup>. It follows from this analysis that the right to individual and collective self-defence has to be understood as a last resort in case of emergency created by Security Council inactivity.

This character of Article 51 is important with respect to the recent Security Council applications of Chapter VII to situations of humanitarian emergencies. When the Charter was framed in 1945 Chapter VII was viewed as allowing for collective measures in classical international conflicts. Hence, the emergency solution of Article 51 was only designed to meet such situations. With the wording "armed attack" it requires a military cross-border activity of some intensity<sup>169</sup>. The situation of a

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<sup>165</sup> M.Reisman, "Coercion and Self-determination. Construing Charter Article 2 (4)", *AJIL* 78 (1984), 642 et seq. (643).

<sup>166</sup> See the references in note 122.

<sup>167</sup> A. Randelzhofer, "On Article 51", 661 et seq., Mn. 16, in: Simma, see note 25.

<sup>168</sup> "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces." Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986,14 et seq. (103), para.195.

<sup>169</sup> See the quotation from the Nicaragua-Judgment above.

humanitarian intervention, however, is characterized by the fact that massive violations of human rights, not necessarily with military cross-border effects, constitute the reason for intervening. Sometimes a cross-border effect may be seen in refugee fluxes from one country to another, but these consequences do not amount to an "armed attack". The conclusion is that with respect to the protection of human rights under Chapter VII of the Charter no individual or collective emergency solution is envisaged in the Charter. This lacuna is a result of the extensive practice of the Security Council under Chapter VII of the Charter. With respect to Security Council inaction in case of humanitarian need we are today facing a situation comparable to that of the founding fathers of the Charter before they agreed on the right to self-defence in Article 51. However, we are not framing the Charter but remain subject to its provisions and there is no provision similar to the right of self-defence which could be applied to humanitarian interventions. Hence, the conclusion would be that no humanitarian action is possible if it is not decided on by the Security Council. Nevertheless, the desperate need of the refugees in the Great Lakes Region in October 1996 and the situations in Burundi and Rwanda in 1994 reveal that there is a necessity for alternative action. Could it be possible to develop criteria with which a humanitarian intervention in case of an inactive Security Council might be justified?

A first idea on how to fill the lacuna created by Security Council inaction might be to substitute the decision of the Security Council by a decision of the General Assembly. This would mean applying the "Uniting for Peace" Resolution of the General Assembly<sup>170</sup> to the problem of a blocked humanitarian intervention by the Council. There are good reasons to argue that no enforcement action may be taken following a recommendation by the General Assembly under the Uniting for Peace Resolution<sup>171</sup>. But even apart from these doubts concerning the legality of such

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<sup>170</sup> A/RES/377 (V) of 3 November 1950.

<sup>171</sup> "Although the Uniting for Peace resolution enables the Assembly to act in situations in which Article 12 would ordinarily prohibit it, so as not to interfere with the Security Council's handling of a situation under consideration by the Council, the Assembly under that resolution can only take the types of actions that are within its normal competence. If the Security Council fails for any reason to take any action that is within its special competence, the Assembly cannot substitute itself — even by adopting a resolution that could be interpreted as granting itself such powers." P. Szacs, "Centralized and Decentralized Law Enforcement: The Security Council and the General Assembly Acting under Chapters VII and VIII", in: J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System. Proceedings of an International*

course of action, it seems obvious from a political point of view that General Assembly decisions are far too difficult to reach and the process would undoubtedly be too slow to be considered as an effective emergency solution. An alternative might be to consider regional organizations as emergency actors<sup>172</sup>.

Another possibility might be to take up the idea which may be found behind Article 51<sup>173</sup>. The right to self-defence is designed as an emergency solution in situations where the collective system does not fulfill its peace-preserving or peace-restoring functions. An analogous application of the emergency function of Article 51 would have to take into account the limited applicability of the provision. As already pointed out, the possibilities of the Security Council under Chapter VII of the Charter are much broader than the right to self-defence according to Article 51. The Charter requires states to accept a larger degree of illegal interference before reacting independently of the Security Council. Self-help is limited to the minimum necessary to protect the integrity of the state. This qualification of emergency action under Article 51 would have to be respected when developing an emergency solution for the protection of human rights in cases of Security Council inaction. Hence a regional right to humanitarian intervention would have to face a number of restrictions.

Firstly, it would have to be restricted to situations in which the Security Council is unable to decide on a universal intervention. This is the necessary consequence of the emergency character. Secondly, the conditions under which recourse to the emergency right could be possible would require qualified violations of human rights, just as Article 51 requires a qualified violation of Article 2 para. 4. This raises the question of criteria

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*Symposium of the Kiel Institute of International Law, March 23 to 25 1994*, 1995, 17, 34 et seq.; see generally E. Stein/R.C. Morrissey, "Uniting for Peace Resolution", in: R. Bernhardt (ed.), *EPIL* 5 (1983), 379 et seq. (380); M. Akehurst, "Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States", *BYIL* 42 (1967), 175 et seq. (215).

<sup>172</sup> See in this respect J. Delbrück, "Wirksames Völkerrecht oder neues "Weltinnenrecht"? Perspektiven der Völkerrechtsordnung in einem sich wandelnden internationalen System", in: Kühne, see note 156, 101 (26 et seq.).

<sup>173</sup> The following suggestion does not mean applying Article 51 to the individuals or groups subject to human rights violations, but rather makes use of the function fulfilled by Article 51 within the system established by the Charter. For an interesting argument on the basis of the rights to self-defence and self-help by the persons concerned, see Doehring, see note 117, 562 et seq.

for the qualified violations of human rights. Such criteria could be developed from the jurisprudence of the ICJ in the Barcelona-Traction Judgment, where the Court qualified "basic rights of the human person" as obligations erga omnes<sup>174</sup>. The Court expressly mentioned in this context the prohibition of genocide and the prohibition of racial discrimination. Apart from that, the question of which rights may be considered as the most basic human rights is difficult to answer. The examples given by the ICJ stress the fact that the core rights of the human person form part of the erga omnes concept<sup>175</sup>, while civil liberties of democratic participation, which are also protected in international instruments, would not be included<sup>176</sup>. Another area from which criteria could be adopted is the so-called 1503-procedure of the UN Commission on Human Rights<sup>177</sup>. ECOSOC invented this procedure for dealing with individual communications concerning violations of human rights in Resolution 1503 (XLVIII) of 27 May 1970. The procedure provides for the establishment of a Working Group of the Sub-Commission, which meets for a maximum of ten days immediately before the sessions of the Sub-Commission. Its

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<sup>174</sup> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951, 15 (23)); others are conferred by international instruments of a universal or quasi-universal character." Barcelona Traction, Light and Power Company, Limited, ICJ Reports 1970, 3 et seq. (32, paras. 33 et seq.).

<sup>175</sup> As to the legal structure of erga omnes norms, see C. Annacker, "The Legal Régime of Erga Omnes Obligations in International Law", *Austrian J. Publ. Int. Law* 46 (1993/94), 131 et seq.

<sup>176</sup> See J. A. Frowein, "Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung", in: R. Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung — Internationale Gerichtsbarkeit — Menschenrechte. Festschrift für Hermann Mosler*, 1983, 241 (244).

<sup>177</sup> The 1503-procedure is also discussed with respect to humanitarian intervention in: C. Tomuschat, "Gewalt und Gewaltverbot als Bestimmungsfaktoren der Weltordnung", *EA* 36 (1981), 325 (332 et seq.).



task is to determine which communications reveal “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” and to place them before the Sub-Commission. The Sub-Commission has to determine which communications should be referred to the Commission on Human Rights<sup>178</sup>.

A combination of the two criteria could allow to formulate conditions for a regional emergency intervention corresponding to the qualification of an “armed attack” in Article 51. A regional humanitarian intervention in case of Security Council inaction would then be possible if the human rights violations may be considered as a “consistent pattern of gross and reliably attested violations of basic rights of the human person”. In contrast to the 1503-procedure a regional humanitarian intervention would involve the use of military force. Against this background, and in view of the qualification in Article 51, a further criterion could be seen in the internal use of military force resulting in the violations of human rights. The regional humanitarian intervention, therefore, would require that the above-mentioned consistent pattern of violations was due to massive use of organized military force resulting in numerous losses of human lives<sup>179</sup>. If these criteria are applied to the recent interventions, a regional intervention would not have been possible in a situation comparable to the one in Haiti in 1991/1992. But they could have justified a regional intervention in a situation of genocidal character such as in Rwanda in 1994.

If regional humanitarian intervention was viewed as an emergency solution comparable to the right to individual and collective self-defence in Article 51, the question of structural inability to act in the Security Council would lose its importance. The emphasis then shifts to the existence of an emergency situation. In the same way as collective self-defence under Article 51 does not require a general paralysis of the Council as it occurred during the Cold War, regional humanitarian interventions would not require structural inability to act on the Council's part either. The criteria just developed would simply correspond to the necessity of an “armed attack” in Article 51. If they are fulfilled regional action could be justified, such action would have to cease in analogous application of Article 51 sentence 2 once the Council has taken the necessary measures.

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<sup>178</sup> See C. Tomuschat, “Human Rights, Petitions and Individual Complaints”, 619 et seq., (621), Mn. 6, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. I, 1995, 619 (621); as to the effectiveness of the procedure see P. Alston, “The Commission on Human Rights”, in: P. Alston (ed.), *The United Nations and Human Rights*, 1992, 126 (145 et seq.).

<sup>179</sup> See J. N. Moore, “The Control of Foreign Intervention in Internal Conflict”, *Va.J.Int'l L.* 9 (1968/69), 205 (264).

A further argument for an emergency right of regional organizations in case of Security Council inaction may be seen in the procedural guarantees against abuse which are ensured by means of the collective decision-making within the regional organization concerned. The necessity to find the majority required in the founding treaty of the organization — in most cases unanimity is necessary<sup>180</sup> — reduces the danger of abusive interventions using humanitarian necessity as a pretext<sup>181</sup>.

One should seriously take into account the possible counter-argument that the collective procedure may reduce the danger of abuse but it may not eliminate it. It is obvious that allowing for regional use of military force would create a dangerous loop-hole in the universal prohibition on the use of force. On the other hand, it has to be seen that the question may not be solved by a clear cut answer. What is required is a reasonable balance between the danger of abuse, which is inherent in any transfer of competence, and the urgent need for action in situations where violations of human rights of genocidal character are taking place. In striking this balance a number of factors may be taken into account. Firstly, the character of an emergency solution implies that all other means of peaceful protection of human rights have to be exhausted before a regional organization may resort to the use of force<sup>182</sup>. Secondly, the intervention has to be kept strictly to the minimum necessary to ensure the safety of the population of the country concerned. And thirdly, it should not be overlooked that abuse is also possible on the universal level of the Security Council of the United Nations. The discussions concerning the economic sanctions against Libya because of the failure to extradite the suspected terrorists demonstrate that even the Security Council may be criticized for extensive action. The danger of abuse can only be minimized, it cannot be banned completely.

The consequence of a strict application of the prohibition of the use of force would be that in case of Security Council inactivity no emergency solution would be possible. This would leave the system of the Charter as it was originally established, but in some cases at a high humanitarian price.

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<sup>180</sup> Article 6 para. 2, of the League of Arab States (if the aggressor forms part of the League his vote is not counted); Article V WEU-Treaty; Article 5 NATO-Treaty; Article 20 Inter-American Treaty on Reciprocal Assistance requires a 2/3-majority.

<sup>181</sup> This argument is also admitted by those who argue against regional humanitarian intervention, see L. F. Damrosch, "Commentary on Collective Security", in: Damrosch/ Scheffer, see note 155, 215 (221).

<sup>182</sup> See in this respect R.B. Lillich, "Humanitarian Intervention through the United Nations: Towards the Development of Criteria", *ZaöRV* 53 (1993), 557 (562 et seq.).

On a line between complete inaction on the one side and unilateral humanitarian intervention on the other, collective regional action under the conditions developed above would seem to present an alternative with some merits. In any case, collective action is preferable to unilateral interventionism.

## C. The Question of Control over Regional Action

### I. Control over Regional Peace-Keeping

#### 1. The Distinction between Classical Peace-Keeping and Robust Peace-Keeping

In its original concept peace-keeping is designed to provide for neutral forces that were able to assist parties to a conflict in keeping a cease-fire to which they had previously consented<sup>183</sup>. Peace-keeping basically takes place in two forms, either unarmed observers or armed military units are deployed. There is no express legal basis in the Charter for the establishment of peace-keeping forces by the Security Council. However, since a peace-keeping force requires consent by the parties, there is no doubt that it may not be established without the Council deciding under Chapter VII of the Charter if the parties consent to the force<sup>184</sup>.

Some doubt has arisen as to the legal basis of peace-keeping forces in situations of civil strife. The question became relevant for the first time during the Congo crisis. While the *Opération des Nations Unies au Congo* (ONUC) originally was stationed in the rebel province of Katanga with the consent of the local government, the enlargement of ONUC's mandate<sup>185</sup> led to increasing fighting between the peace-keeping force and local military units. The United Nations invoked a right to "active self-defence" which was characterized by military action against anyone trying to dis-

<sup>183</sup> M. Bothe, "Peace-keeping", 565 et seq. Mn. 58 et seq., in: Simma, see note 25; see also M. Goulding, "The Evolution of United Nations Peacekeeping", *Int. Aff.* 69 (1993), 451 (453 et seq.).

<sup>184</sup> Bothe, see above, Mn. 68 et seq.

<sup>185</sup> "The Security Council [...],

1. urges that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary in the last resort [...]", S/RES/161 (1961) of 21 February 1961.

turb the force in achieving its mandate<sup>186</sup>. It was conceived as a right to defend the mandate and thus it created a grey zone between peace-keeping and peace-enforcement<sup>187</sup>. The model of active self-defence was also applied in Somalia and Bosnia-Herzegovina where Chapter VII mandates were given to peace-keeping forces which were already in place<sup>188</sup>. These mandates included the use of force, if necessary, to protect the civilian population. In the UNPROFOR case the mandate included the use of force to protect the "safe areas" established by S/RES/824 (1993) of 6 May 1993. In Somalia UNOSOM was given the mandate to "assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia"<sup>189</sup>. Both mandates conflict with the original concept of peace-keeping forces according to which consent of the parties is the basis of their mission<sup>190</sup>. Since the original concept only includes use of military force in self-defence<sup>191</sup>, peace-keeping forces are not equipped with the weapons necessary for enforcement action. With the Chapter VII mandate requiring action against the Bosnian Serbs, UNPROFOR became in turn the target of Bosnian Serb military activities. This resulted in a number of blue-helmets being held hostages at important military points and under humiliating circumstances in May and June 1995<sup>192</sup>. Since a number of these hostages were nationals of NATO-countries, NATO air-strikes, which would have been possible under S/RES/836 (1993) of 4 June 1993, were not used in order to save the lives of the hostages. Thus the attempt to introduce a "robust" peace-keeping prevented effective enforcement action. This negative political record of UNPROFOR is a confirmation of an analysis previously given by the

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<sup>186</sup> As to the definition of "active self-defence" see Bothe, see note 183, Mn. 65.

<sup>187</sup> See the criticism by O. Schachter, "Authorized Uses of Force by the United Nations and Regional Organizations", in: L.F. Damrosch/ D. Scheffer, (eds.), *Law and Force in the New International Order*, 1991, 65 (84 et seq.).

<sup>188</sup> S/RES/814 (1993) of 26 March 1993, para. 14, and S/RES/837 (1993) of 6 June 1993, para. 5, concerning UNOSOM and S/RES/836 (1993) of 4 June 1993, para. 9 concerning UNPROFOR.

<sup>189</sup> S/RES/814 (1993) of 26 March 1993, para. 14.

<sup>190</sup> See generally Bothe, see note 183, Mn. 58 et seq.; E. Suy, "United Nations Peace-Keeping System", in: R. Bernhardt (ed.), *EPIL* 4 (1982), 258 et seq. (261).

<sup>191</sup> R. Siekmann, *National Contingents in United Nations Peace-Keeping Forces*, 1992, 6.

<sup>192</sup> Report of the Secretary-General pursuant to S/RES/ 982 (1995) of 31 March 1995 and S/RES/987 (1995) of 19 April 1995, Doc. S/1995/444 of 30 May 1995, paras. 6, 55, 58, 59 and 62.

Secretary-General in his 1995 Addendum to “An Agenda for Peace”<sup>193</sup>. In this Addendum the Secretary-General criticizes the idea of enforcement mandates for peace-keeping forces. He argues that the “logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement”<sup>194</sup>. Therefore peace-keeping and peace-enforcement should be treated as distinct concepts<sup>195</sup>.

The conclusions drawn by the Secretary-General are compelling from a political point of view. Avoiding the tendency to disguise enforcement action as peace-keeping brings peace-keeping back to its consensual basis and it allows enforcement action to be perceived as what it really is. It also avoids the United Nations being drawn into enforcement operations without being sufficiently equipped. From a legal point of view, the limits of the power of a government to invite foreign troops may also be referred to. If there is only the consent by the government to establish a peace-keeping force the legal issue arising is very much the same as the question of whether a government may invite foreign military forces for its support. This has been answered above in the negative for situations in which the government may not be seen to represent the whole country anymore because of lost authority<sup>196</sup>. The same argument applies for unilateral consent to peace-keeping by the government in situations of civil war. In such situation the consent of the rebel faction or factions is necessary to establish a peace-keeping force in the traditional sense<sup>197</sup>.

## 2. Consequences for the Application of Article 53 Para.1 to Regional Peace-Keeping Missions

Some authors argue that regional peace-keeping generally requires Security Council authorization under Article 53. This would imply a comprehensive control of the Security Council over regional peace-keeping. The main argument for including regional peace-keeping in the term “enforcement action” mentioned in Article 53 is that any use of military force creates a danger of enforcement. According to these authors, the possible escalation which is inherent in the sending of troops, made it necessary that regional peace-keeping be authorized by the Security Council. Bear-

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<sup>193</sup> Doc. A/47/277=S/24111 of 17 June 1992.

<sup>194</sup> Doc. A/50/60=S/1995/1 of 3 January 1995, para. 35.

<sup>195</sup> Doc. A/50/60=S/1995/1 of 3 January 1995, para.33 et seq.

<sup>196</sup> See *supra*, p. 149 et seq.

<sup>197</sup> See M. Bothe, *Streitkräfte internationaler Organisationen*, 1968, 122 et seq., arguing that in civil wars the consent of factions with consolidated control over part of the territory was necessary to render an intervening force a peace-keeping force.

ing in mind the experiences of the United Nations “peace-keeping” forces in Somalia and Bosnia-Herzegovina it is indeed important to stress the potential danger that goes along with military involvement, especially in internal conflicts. Nevertheless, the principle “volenti non fit iniuria” remains applicable in this context. For classical regional peace-keeping missions which are carried out with the consent of the parties a Security Council authorization, therefore, is not necessary. Measures to which all parties consented lack the character of enforcement. This interpretation is supported by a number of regional peace-keeping missions which were carried out without Security Council authorization<sup>198</sup>. Furthermore the CSCE in its Helsinki Document of 1992 “The Challenges of Change” considered peace-keeping not to constitute enforcement action<sup>199</sup>. The CSCE/OSCE carries out several observer missions in Eastern Europe without Security Council authorization<sup>200</sup>.

If traditional peace-keeping does not constitute enforcement action in the sense of Article 53 one may raise the question whether this conclusion also applies to regional “robust peace-keeping”. Does the enforcement character which may be seen in the lack of consent by at least one of the parties to the civil war render such operations “enforcement action”? Up to now “robust peace-keeping” has been limited to civil wars. In that particular context “robust peace-keeping” is linked with the question of the legality of invitations by the government. Where the government may lawfully invite foreign forces to combat internal rebellion the consent by the government deprives the action of its enforcement character and hence in such a situation no authorization by the Security Council is required.

For those situations in which the consent by the government cannot justify the regional military measures because the government lacks effective control the question of “enforcement action” arises. The “robust peace-keeping” missions established by the United Nations were under-

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<sup>198</sup> Reference may be made to the Arab League Security Forces in Kuwait (for details see H. A. Hassouna, *The League of Arab States and Regional Disputes*, 1975, 102 et seq. and Doc. A/37/536 of 25 October 1982, 20), the Arab Security Force in Lebanon (for details see I. Pogany, “The Arab League and Regional Peacekeeping”, *NILR* 34 (1987), 54 (61 et seq.)), and the OAU force in Chad (for details see, G. J. Naldi, “Peace-keeping attempts by the Organization of African Unity”, *ICLQ* 34 (1985), 593 (593)).

<sup>199</sup> Helsinki Decisions, paragraph III.22 and 23, reprinted in: A. Bloed (ed.), *The Challenges of Change. The Helsinki Summit of the CSCE and its Aftermath*, 1994, 385 (400).

<sup>200</sup> See G. Scheltema, “CSCE Peacekeeping Operations”, in: Bloed, above, 23, (41 et seq.).

taken with a Chapter VII mandate<sup>201</sup>. Even the new humanitarian mission to Eastern Zaire, the task of which is to facilitate the immediate return of humanitarian organizations to the region, is authorized under Chapter VII of the Charter<sup>202</sup>. This qualification of the use of military force by the Council is indicative for the application of Article 53 para. 1, to such measures. If the Council considers it necessary to decide under Chapter VII in order to adopt a United Nations “robust peace-keeping” mandate then regional “robust peace-keeping” has to be qualified as enforcement action under Article 53 para. 1, and hence requires Security Council authorization.

This conclusion is of particular relevance for the new Statute on Collective Peace-keeping Forces in the Commonwealth of Independent States, which was adopted on 19 January 1996<sup>203</sup>. The previous 1992 Peacekeeping Agreement<sup>204</sup> stressed the necessity of consent by all conflicting parties and required the adoption of a cease-fire agreement as well as the cessation of hostilities before the arrival of the peace-keeping force. However, apart from excluding participation in “combat action” the 1992 Agreement did not address the question of under which circumstances CIS peace-keeping forces may use their weapons. In this respect the new 1996 Statute contains the following interesting provision:

“28. When performing their functions, the personnel of the Collective Peace-keeping Forces shall, by way of exception, have the right to use weapons:

- To ensure their security and protection against any endangerment of their life and health in exercise of their inalienable right to self-defence;
- In the event of attempts to prevent them by force from carrying out the functions entrusted to them;
- To repel an overt armed attack by groups or bands of terrorists or saboteurs, and also in order to arrest them;
- To protect the civilian population from violent endangerment of their

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<sup>201</sup> For Somalia S/RES/814 (1993) of 26 March 1993, for Yugoslavia S/RES/807 (1993) of 19 February 1993 was already adopted under Chapter VII of the Charter; the creation of the “safe areas” in S/RES/824 (1993) of 6 May 1993 and their protection by use of military force in S/RES/836 (1993) of 4 June 1993 were also decided under Chapter VII of the Charter.

<sup>202</sup> S/RES/1080 (1996) of 15 November 1996.

<sup>203</sup> *ILM* 35 (1996), 783 et seq.; Kazakstan, Turkmenistan and the Ukraine are not parties to that Statute.

<sup>204</sup> The Agreement is reproduced in a non-official English translation in *International Peacekeeping* 1 (1994), 23 et seq.

life and health. Weapons may also be used to give an alarm signal or call for assistance”.

In allowing the use of force for the protection of the civilian population and in order to repel attempts to prevent the peace-keeping force from carrying out its mandate the Statute corresponds to the concept of “robust peace-keeping” applied by the United Nations in Somalia and Bosnia and Herzegovina. The quoted provision of the 1996 CIS Statute must therefore be viewed as envisaging “robust peace-keeping” by CIS forces. According to the conclusions drawn above the CIS needs a Security Council authorization under Article 53 for this kind of peace-keeping.

In para. 3 the CIS Statute on peace-keeping forces mentions itself the possibility of taking action under an authorization by the Security Council. However, it does not specify under which circumstances the CIS would seek such an authorization. The CIS Statute could be brought in line with the requirements of the Charter if para. 3 was interpreted as foreseeing Security Council authorizations for peace-keeping measures which go beyond the traditional concept of peace-keeping and imply the use of armed force in situations other than self-defence. Hence, the reference to Security Council authorization in para. 3 of the CIS Peace-keeping Statute should be interpreted as envisaging such authorization for “robust peace-keeping” by CIS forces.

## II. Control over Regional Military Enforcement Action

Military action by regional organizations is envisaged with two alternatives in Article 53 : The Security Council may utilize regional organizations for enforcement action under its authority (Article 53 para.1, clause 1) or it may authorize regional enforcement action according to Article 53 para.1 clause 2 first part. The two alternatives lead to the same result, namely that military action is taken by a regional organization. But they differ with respect to the political initiative. While with the first alternative the Security Council initiates the action and the regional organization merely constitutes an executive organ, with the second alternative political initiative and execution remain with the regional organization. The Security Council’s role is reduced to the authorization of the action. It should be noted, however, that this theoretically clear distinction may lose its preciseness in practice. The Security Council may require certain changes in the concept proposed by the regional organization before the authorization is given. Furthermore, it is quite probable that some states are members both of the Security Council and of the regional organization concerned. This leads to early coordination in and with the Council.



Security Council control over regional enforcement action is guaranteed with both alternatives. With the first one, the action is taken under the authority of the Council which implies its control. With the second alternative, the control is exercised through the authorization. In this respect one may ask how the authorization has to be given. Need it be explicit and prior to the enforcement action or may the Security Council authorize regional enforcement action implicitly and/or ex post?

### 1. Prior and Explicit Authorization

The Charter envisages prior and explicit authorization as a rule<sup>205</sup>. Under the aspect of Security Council control over regional action a prior and explicit authorization would constitute the most effective way of ensuring such control. The regional organization would present its concept to the Security Council and receive the authorization before using military force. The wording of Article 53, however, seems to be indifferent as to the form of the authorization<sup>206</sup>. The wording "authorization" does not exclude at first sight that an authorization be given ex-post or implicitly. Are there other reasons why the authorization should be given explicitly and prior to the action? Viewed from the purpose of the requirement for an authorization, it must be asked whether an implicit or ex-post authorization could ensure Security Council control over regional action. For both, implicit and ex-post authorizations there is little state practice.

### 2. Authorization Ex-Post

The issue of ex post authorizations arose in the 1960s when the Security Council dealt with OAS sanctions against the Dominican Republic. The OAS had decided to break off diplomatic relations with the Dominican Republic and to impose economic sanctions on the country<sup>207</sup>. Following this decision the Soviet Union presented a draft resolution in the Security Council which had the following wording:

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<sup>205</sup> J.A. Frowein, *Das Verhältnis zwischen den Vereinten Nationen und Regionalorganisationen bei der Friedenssicherung und Friedenserhaltung*, 1996, 17.

<sup>206</sup> A. Verdross, *Völkerrecht*, 5th edition, 1964, 654.

<sup>207</sup> Final Act of the Sixth Meeting of Consultation of Ministers of Foreign Affairs of 21 August 1960, Resolution I, OAS Official Records, OEA/Ser.C/II.6.; see also the report according to Article 54 of the Charter in Doc. S/4476 of 1 September 1960.

“The Security Council,  
Being guided by Article 53 of the Charter of the United Nations,  
Approves the said resolution of the Meeting of Consultation of Ministers  
of Foreign Affairs of the American States, dated 20 August 1960  
[...].”

When interpreting these developments it should be kept in mind that the main concern of the Soviet Union was to create a precedent with respect to the necessity of authorizing non-military sanctions<sup>208</sup>. Since the other members of the Council wanted to avoid such a precedent, the Council did not adopt the Soviet draft but decided only to take note of the measures<sup>209</sup>. The draft resolution shows that the Soviet Union and Poland<sup>210</sup>, for whatever political reasons, considered ex-post authorizations to be possible under Article 53. It should also be noted that the Soviet draft was not rejected because it gave an ex-post authorization but only because the other members did not want non-military sanctions to be qualified as enforcement action requiring authorization under Article 53<sup>211</sup>.

The main argument advanced against ex-post authorizations is that the Security Council would lose control over regional actions. The Council would be faced with *faits accomplis*<sup>212</sup> and regional organizations would start enforcement action hoping for approval by the Council<sup>213</sup>. This could lead to increased regional military actions without Security Council con-

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<sup>208</sup> See *supra*.

<sup>209</sup> S/RES/156 (1960) of 9 September 1960: “The Security Council, Having received the report from the Secretary General of the Organization of American States transmitting the Final Act of the Sixth meeting of Consultation of Ministers of Foreign Affairs of the American Republics, takes note of that report and especially of resolution I approved at the aforesaid Meeting, whereby agreement was reached on the application of measures regarding the Dominican Republic.” The resolution was adopted by nine votes to none with two abstentions (Soviet Union and Poland).

<sup>210</sup> See the debates preceding the resolution, SCOR, 894th Mtg. of 9 September 1960, 6 et seq.

<sup>211</sup> The French delegate, however, argued that the authorization had to be given in advance (SCOR 15th Year 893rd Mtg. of 8 September 1960, 15). But even this statement may be seen as part of the Western States’ interest not to include non-military sanctions into the scope of Article 53.

<sup>212</sup> L. Henkin, “International Law and the Behaviour of Nations”, *RdC* 114 (1965), 167 et seq., 261.

<sup>213</sup> M. Akehurst, “Enforcement Action by Regional Agencies with Special Reference to the Organization of American States”, *BYIL* 42 (1967), 175, 214.

trol. Hence, ex-post authorization could not be accepted under Article 53. Are these reasons really convincing?

In looking for an answer one has to bear in mind the function of an authorization under Article 53. Its main task certainly is to ensure Security Council control over regional military action. As already mentioned the authorization forms part of the system of the Charter which concentrates the decision on lawful use of force within the Security Council. An authorization is necessary to ensure that it is the Security Council, which — leaving apart the right to self-defence under Article 51 — decides on the legality of using military force. Nevertheless, the interpretation of Article 53 has also to consider that the control by authorization is rather limited. In fact the necessity of an authorization cannot prevent the actual use of military force without such an authorization. This consideration reveals that Article 53 is the procedural solution of a problem to which material criteria are difficult to formulate and to enforce. In other words, since states may not easily be bound to certain criteria under which the use of force may be considered lawful, the Charter requires a Security Council authorization in order to legalize the use of force. The Charter thus vests the power to authorize use of force in the Security Council and in doing so it avoids the necessity to define lawful use of force in an abstract manner. Instead, it is up to the Security Council to decide on a case by case basis on the legality of the use of military force. It is hard to see why this function of the authorization should not be fulfilled in an ex-post authorization. Without approval the regional use of military force would remain illegal from the beginning. Hence the Security Council would still maintain the decision on the lawfulness of use of force.

Furthermore, in case of an approval by the Security Council it seems hard to imagine that such a decision of the Council should remain without legal consequences. Surely the Council itself would be estopped from invoking the illegality of the use of force<sup>214</sup>. Even if the matter was brought before the ICJ it does not seem possible that the latter would be able to decide on the legality of the use of force in question without taking into account the fact that the Security Council gave its approval<sup>215</sup>.

Nevertheless, the argument of a danger of increased regional interventionism should be seriously taken into account. It cannot be neglected that the possibility of an ex post authorization might be a motivation to act first and ask later for an approval. A second function of the authorization

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<sup>214</sup> J.A. Frowein, "Zwangsmaßnahmen von Regionalorganisationen", in: U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt*, 1995, 57 (65).

<sup>215</sup> Frowein, see note 205, 20.

might, therefore, be seen in helping to reduce the number of military interventions. Without prior Security Council consent their illegality would be manifest. However, the deterring effect of the consequences of intervention without authorization is already put into question by the number of regional interventions during the Cold War, none of which was authorized by the Council. But more important is to keep in mind that the emphasis which has been put into that argument was largely due to the specific danger of outside interventions into internal conflicts during the Cold War. It has already been pointed out that the political circumstances of civil wars have changed considerably. Of course it is still necessary to ensure Security Council control over regional use of military force. But the emphasis has been moving from containing super-power dominated regional hyperactivity to opening possibilities for a controlled but rapid redress for the devastating consequences of civil wars on the civilian population.

The way in which the Security Council dealt with the Liberian crisis may illustrate the practical advantages of ex-post authorizations. As already described, the Liberian civil war started at the end of the year 1989 and by July 1990 President Doe had lost control over the country except for a small part of Monrovia including the presidential palace<sup>216</sup>. ECOWAS accepted President Doe's request for an "ECOWAS peace-keeping force" and sent a Cease-Fire Monitoring Group (ECOMOG). One of the rebel groups, the National Patriotic Front of Liberia (NPFL), which controlled most parts of the country including Monrovia, did not accept ECOMOG as impartial and "declared war" on the force<sup>217</sup>. It was only after several weeks of fighting that ECOMOG gained control over Monrovia<sup>218</sup>.

The Security Council did not immediately react to the sending of ECOMOG. The first reaction is a statement by the President of the Council dated 22 January 1991<sup>219</sup> in which the members of the Council "commend the efforts made by the ECOWAS heads of State and Government to promote peace and normalcy in Liberia". A second statement, quite similar in wording, is dated 7 May 1992<sup>220</sup>. These statements have been read as falling within the Council's power of appreciation to determine whether or not an authorization is necessary<sup>221</sup>. It is argued that the

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<sup>216</sup> For details of the developments see G. Nolte, "Restoring Peace by Regional Action", *ZaöRV* 53 (1993), 603 et seq.

<sup>217</sup> Nolte, see above, 603 (608).

<sup>218</sup> *Ibid.*, 608 et seq.

<sup>219</sup> Doc. S/22133 of 22 January 1991.

<sup>220</sup> Doc. S/23886 of 7 May 1992.

<sup>221</sup> Nolte, see note 216, 633; Frowein, see note 205, 17.

statements express the Council's view that the intervention did not require an authorization under Article 53. Since the statements do not give any indication as to the reason why an authorization was not necessary this question has to be answered in view of the circumstances of the Liberian crisis. Two possibilities are mentioned: either the intervention could be legally based on the invitation by President Doe<sup>222</sup> or an authorization was unnecessary because ECOMOG could be qualified as a peace-keeping force<sup>223</sup>. However, both alternatives are not entirely convincing. The qualification as a peace-keeping force faces the objection that ECOMOG was to a large extent involved in combat operations against the NPFL<sup>224</sup> and the validity of the invitation must be questioned with respect to the limited effectiveness of President Doe's government<sup>225</sup>.

In view of doubts which remain with respect to the legality of ECOMOG's intervention a third possibility may be taken into account. The reactions by the Security Council may be considered as an ex-post authorization. Before analyzing these reactions the further developments of the crisis have to be taken into account. The two presidential statements of 22 January 1991 and 7 May 1992 were issued during a phase of relative stability in Liberia. On 24 October 1990 an armistice came into force<sup>226</sup> and on 31 October 1991 the Agreement Yamoussoukro IV<sup>227</sup> was concluded. By summer 1992 the situation had deteriorated considerably. Although the NPFL signed the Yamoussoukro IV Agreement it did not honour its commitments. ECOWAS reacted by imposing an arms embargo<sup>228</sup>. Heavy fighting was the consequence of an attack on Monrovia by NPFL rebels in October 1992<sup>229</sup>.

Following these events, the Security Council for the first time during the crisis, reacted by adopting a formal resolution. In it the Council commended ECOWAS "for its efforts to restore peace, security and stability in Liberia"<sup>230</sup>. Similar wording was used in the following resolu-

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<sup>222</sup> Nolte, see note 216, 633 et seq.

<sup>223</sup> Frowein, see note 205, 15; Frowein, see note 214, 63 et seq.

<sup>224</sup> See the detailed descriptions by Nolte, see note 216, 608 et seq. and 611 et seq.

<sup>225</sup> See supra, p. 152.

<sup>226</sup> Conference of Banjul, Doc. A/45/984=S/22025 of 20 December 1990, Annex.

<sup>227</sup> Doc. S/24815 of 17 November 1991 (Annex).

<sup>228</sup> Doc. S/24811 of 16 November 1992, Annex I; see also the report of the Secretary-General of the United Nations, Doc. S/25402 of 12 March 1993, 7.

<sup>229</sup> For details see Nolte, see note 216, 611.

<sup>230</sup> S/RES/788 (1992) of 19 November 1992.

tions S/RES/813 (1993) of 26 March 1993, S/RES/856 (1993) of 10 August 1993 and S/RES/866 (1993) of 22 September 1993. When analyzing this wording one should keep in mind the wording of resolution 678 (1990) which authorized the use of force to drive the Iraqi forces out of Kuwait. In this resolution the Council inter alia authorized member states to “use all necessary means to restore international peace and security in the area” (italics added by the author). This authorization clearly implied enforcement action against the Iraqi forces in Kuwait. For this reason the difference in wording in the resolution dealing with the Liberian conflict compared to the relevant presidential statements is significant. While the statements commended efforts to “promote” peace, the resolutions commend efforts to “restore” peace and in doing so used the wording of the Kuwait resolution. While the statements applied to a situation of consent on all sides in the civil war, the resolutions refer to the use of force against one rebel group. Against this background it seems hard to argue that the Security Council was not in favour of the enforcement measures taken<sup>231</sup>.

Admittedly, the reactions by the Security Council in the Liberian case are no clear example for an ex post authorization. But they demonstrate that the political circumstances within the Council, as well as in a particular region of the world, may create conditions in which an ex post authorization can help the Security Council in fulfilling its task to maintain international peace and security. The example also underlines a further political advantage of an ex post authorization. ECOMOG had intervened without authorization, but — as the reactions of the Council reveal — the members of the Security Council considered the intervention as a positive element in a process towards the restoration of peace. The way the Council reacted allowed it to commend the intervention and to remain actively engaged in the matter by sending its own observer mission. Had it condemned the intervention for lack of authorization it is difficult to see how further peace-keeping contributions of the United Nations in collaboration with ECOMOG could have been possible.

### 3. Implicit Authorization

Closely linked to the discussion of an ex-post authorization in the Liberian case arises the question of implicit or tacit authorizations. Again the discussions in the Security Council on the sanctions of the OAS against

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<sup>231</sup> The enforcement character of ECOMOG’s tasks is further underlined in the Abuja-Agreement of 19 August 1995 which supplements the Cotonou Agreement. The Abuja-Agreement contains a provision (Art. 8) which is headed “Peace enforcement powers” and which refers to ECOMOG’s responsibilities under the Cotonou-Agreement.

the Dominican Republic in 1960 may be a useful starting point. The Council had two draft resolutions to consider: the already mentioned Soviet draft with an ex-post approval of the sanctions and a three-power draft in which the breach of diplomatic relations was merely taken note of. During the discussions the delegate of Ceylon gave the following statement:

“My point is that, in reality, I find very little difference, except in wording between the draft resolution submitted by the Soviet Union and the draft resolution submitted by Argentina, Ecuador and the United States of America, because the meaning one attaches to the three-power draft is that we are asked to take note of the resolution which had been adopted at the Sixth Meeting of Consultation of Ministers of Foreign Affairs of the American Republics. If we take note of the acceptance of a resolution and take note of it in the very terms of that resolution, it implies that we are not opposed to it. It is not difficult to argue that if one is not opposed to a thing, one more or less concurs in that position”<sup>232</sup>.

The statement suggests the possibility of an implicit authorization. Where the question of an implicit authorization is discussed in the literature on Article 53 this notion is mostly rejected<sup>233</sup>. It is feared that unclear resolutions or statements by the Council may be abused as justification for interventions the Council did not intend to authorize. However, the dangers inherent in implicit authorizations may be reduced to some extent if the procedural rules concerning voting and majorities in the Council are transferred to implicit authorizations. A first important clarification should be made with respect to the notion of tacit authorization, i.e. the idea that silence on part of the Council could be interpreted as an authorization. This view, which was presented by American authors in the 1960s<sup>234</sup>, has to be rejected. It overruns the checks which are inherent in the voting rights, especially in the veto right of the five permanent mem-

<sup>232</sup> SCOR 894th Mtg. of 9 September 1960, 5.

<sup>233</sup> C. Schreuer, “Regionalism v. Universalism”, *EJIL* 6 (1995), 477 (492); C. Schreuer, “Comment”, in: J. Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios — New Law?*, 1993, 147 (151); R. Pernice, *Die Sicherung des Weltfriedens durch regionale Organisationen und die Vereinten Nationen. Eine Untersuchung zur Kompetenzverteilung nach Kapitel VIII der UN-Charta*, 1972, 135.

<sup>234</sup> L. C. Meeker, “Defensive Quarantine and the Law”, *AJIL* 57 (1963), 515 (522); A. Chayes, “Law and the Quarantine of Cuba”, *Foreign Aff.* 41 (1962/63), 550 (556 et seq.).

bers of the Council. According to the Charter a majority decision including the permanent members is necessary to render the use of military force lawful. A tacit authorization would amount to the requirement of a majority decision including the five permanent members in order to render a specific use of force illegal. This shift of the burden of finding a majority in the Council runs against the wording of Article 27 para. 3, and cannot be accepted. But the requirements of the Charter may be met if the voting procedure in the Council is transferred to implicit authorizations. An implicit authorization would then require a positive decision in the Council on the use of force in question. This positive decision would have to be supported by a majority of the members of the Council including all permanent members.

If these principles are applied to the statement of the delegate of Ceylon, one has to come to the conclusion that the fact that the Council took note of the sanctions cannot be interpreted as a positive decision on the sanctions. Taking note does not include any qualification of the measures whatsoever. They are neither viewed positively nor negatively. Therefore the resolution submitted by the three American powers cannot be seen as an implicit authorization of the diplomatic sanctions applied by the OAS. In the Liberian case, however, the situation is fundamentally different. Apart from the wording of the resolutions which commended ECOWAS for its efforts to "restore" peace, resolution 866 (1993) of 22 September 1993 provides for further indications that the Council was in fact authorizing the use of force by ECOMOG. Resolution 866 established a United Nations Observer Mission in Liberia (UNOMIL). In doing so the Council for the first time sent parallel to a regional peace-keeping mission a United Nations observer mission<sup>235</sup>. The respective competences of the two missions had to be defined. The ideas of the parties as to the distribution of competences were included in the Cotonou-Agreement of 25 July 1993<sup>236</sup>:

"1. It is also agreed that ECOMOG shall have the right to self-defence where it has been physically attacked by any warring faction thereto.

2. There shall be established, upon deployment of ECOMOG and the full contingent of the United Nations Observer Mission, a Violation Committee consisting of one person from each of the parties hereto and

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<sup>235</sup> For a detailed analysis see G. Nolte, "Combined Peace-keeping: ECOMOG and UNOMIL in Liberia", *International Peacekeeping* 1 (1994), 42 et seq.

<sup>236</sup> Doc. S/26272 of 9 August 1993 (Annex).



ECOMOG and the United Nations Observer Mission, chaired by a member of the United Nations Observer Mission.

3. All violations of the cease-fire shall be reported to the United Nations observer mission/observers who shall, immediately upon receipt of the information of violation, commence an investigation and make findings thereof. In the event the violations can be cured by the United Nations observers, they shall pursue such a course. However, should such a course not be possible, the United Nations observers shall submit their findings to the Violation Committee. The Violation Committee shall invite the violating party/(ies) for the purpose of having such a party/(ies) take corrective measures to cure the violations within such time frame as may be stipulated by the Committee. Should the violating party not take the required corrective measures, *ECOMOG shall be informed thereof and shall thereupon resort to the use of its peace-enforcement powers against the violator*<sup>237</sup>.

In resolution 866 the Council defined the respective competences of ECOMOG and UNOMIL as follows:

“UNOMIL shall have the following mandate:

[...] h) *without participation in enforcement operation*, to coordinate with ECOMOG in the discharge of ECOMOG’s separate responsibilities, [...]”<sup>238</sup>.

This part of the resolution refers to a report by the Secretary-General in which the separate responsibilities are set out more in detail:

“It was agreed that the following elements would underlie the relationship between UNOMIL and ECOMOG: [...] d) *should ECOMOG enter into planned peace enforcement involving combat operations*, UNOMIL observers would not participate in such actions and would, along with other United Nations staff, be temporarily withdrawn from the area”<sup>239</sup>.

It seems to result quite clearly from these references to the use of force by ECOMOG in resolution 866 and in the Secretary-General’s report that the Security Council was well aware of the fact that the mechanism set up for managing the Liberian crisis included use of force by ECOMOG.

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<sup>237</sup> Italics added by the author.

<sup>238</sup> Italics added by the author.

<sup>239</sup> Doc. S/26422 of 9 September 1993 (Italics added by the author).

There are two solutions as to the justification of such use of force. One could be seen in the consent of the parties to the Cotonou-Agreement, which provided for peace-enforcement against a violator of the cease-fire. This raises the question of limits of party consent to use of military force; the second interpretation could be that the Council was implicitly authorizing use of force by ECOMOG for the purposes defined in the resolution and the Cotonou-Agreement.

#### 4. General Authorization

The American delegation to the San Francisco Conference discussed the question of a general authorization with respect to the OAS. Most delegates were of the opinion that a general authorization would be possible<sup>240</sup>. There are no indications in the practice of the United Nations that a general authorization would be in line with Article 53. In the literature the question of a general authorization has only recently been addressed. The notion is rejected<sup>241</sup>. It is argued that the Security Council would be unable to keep control over regional enforcement action if a general authorization were given to a regional organization, because the Council would not be in a position to block specific decisions of the organization since the latter could rely on the general authorization.

The problem about a general authorization is that it would shift the burden to find a majority in the Council. Presumably, the Council as the organ carrying primary responsibility for the maintenance of international peace and security (Article 24) could decide that a specific decision under the general authorization should not be executed. Such a decision would require a decision in the Council to block the regional action and hence be subject to the veto of the five permanent members. It can easily be seen that the consequence of a general authorization would be that the majority in the Council would not be necessary to render a specific use of force legal, but rather to render illegal in a specific case a use of force which in principle would be legal under the general authorization.

One might ask the question whether the fact that the state, against which the military action is executed, consented to such action in the founding treaty of the regional organization, can be seen as an equivalent for the loss of control which is implied in the shift of the veto effect. While the

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<sup>240</sup> Foreign Relations of the United States, Diplomatic Papers, 1945, Vol. I, General: The United Nations, 305.

<sup>241</sup> J. A. Frowein, "Legal Consequences for International Law Enforcement in Case of Security Council Inaction", in: Delbrück, see note 233, 119; R. Wolfrum, "Der Beitrag regionaler Abmachungen zur Friedenssicherung", *ZaöRV* 53 (1993), 576 (580).

argument of consent has some merit, it should be kept in mind that the consent to enforcement action in the treaty establishing the regional organization is a necessary prerequisite for any regional measures, irrespective whether they are authorized generally or individually. For this reason the consent is no additional equivalent for the control lost by the shifted veto effect in case of a general authorization. Another way of ensuring control might be to include precise descriptions into the general authorization, defining specific cases in which regional military enforcement action is possible. Whether or not such descriptions are possible in practice remains doubtful. Until now there is no practice of the Council which might point in that direction. From a political point of view it is preferable to keep the action, as far as possible, in the hands of the Council. This is ensured by the possibility of implicit and ex-post authorizations. In cases of inactivity of the Security Council where action is needed for urgent humanitarian reasons there is the possibility of a regional humanitarian intervention, subject to the conditions developed above. In view of the lacking practice by the Council, and the difficulty to abstractly define cases in which enforcement action may be generally authorized, it is preferable to restrict authorizations under Article 53 to specific cases.

The necessity to clearly define the conditions of the authorization may also be illustrated by the authorization in the Kuwait crisis. When Saddam Hussein, after the invasion of Kuwait, did not comply with the demands by the Council to withdraw immediately from the country<sup>242</sup>, the Security Council authorized the member states of the United Nations in resolution 678 (1990) "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and Security in the area". When the Iraqi forces were driven out of Kuwait the question arose whether and to what extent the resolution allowed for military actions on Iraqi territory. Could it be read as justifying military action to remove Saddam Hussein from office? The allied forces stopped their actions at a point where they could be sure that a second invasion of Kuwait shortly afterwards was excluded. The authorization was criticized for its imprecision in literature<sup>243</sup>. The reasoning of the criticism also applies to authorizations for regional organizations. It is hard

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<sup>242</sup> S/RES/660 (1990) of 2 August 1990.

<sup>243</sup> B. H. Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy", *AJIL* 85 (1991), 516 (525 et seq.); Y. Le Bouthillier/M. Morin, "Réflexions sur la validité des opérations entreprises contre l'Iraq en regard de la Charte des Nations Unies et du droit canadien", *CYL* 29 (1991), 142 (155 et seq.); H. Freudenschuß, "Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council", *EJIL* 5 (1994), 492 (524).

to imagine that a general authorization could be drafted in a way that misunderstandings are excluded and the authorization remains applicable to an indefinite number of different cases without the Security Council losing control over the possible actions.

## 5. Control on the Field

The above-mentioned example of the authorization in the second Gulf War also raises the question of United Nations control on the field. Chapter VIII does not explicitly require such control. It could be argued that control in this respect is exercised through the necessity of reporting all measures to the United Nations under Article 54. However, it is obvious that these reports may not provide first-hand information. They are presented by the regional organization concerned and hence questions as to their objectivity might arise. In this respect the combined approach taken by the United Nations and ECOWAS in Liberia<sup>244</sup> might serve as a new model of ensuring control on the field. On 25 July 1993 the parties had agreed to a new peace agreement (Cotonou Peace Agreement<sup>245</sup>) in which earlier agreements were reaffirmed and a peace-keeping operation by the United Nations was asked for<sup>246</sup>. This United Nations Mission was to be charged with supervising the application of the agreement not only by the parties but also by ECOMOG<sup>247</sup>. In resolution 866 of 22 September 1993 the Security Council *inter alia* gave the following mandate to UNOMIL:

“b) to monitor compliance with other elements of the Peace Agreement, [...] and to verify its impartial application”.

The reference to impartial application contains the control of UNOMIL over the actions taken by ECOMOG. The combined approach taken in Liberia allows for United Nations monitoring of regional action on the field. This provides the Council with first-hand information on the developments and may be viewed as a new means of United Nations controlling regional organizations.

Since the sending of UNOMIL into the Liberian civil war in 1993, in Georgia and in Tajikistan parallel missions of United Nations and the Commonwealth of Independent States (CIS) are in place. While the

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<sup>244</sup> See in detail, Nolte, see note 235, 42 et seq.

<sup>245</sup> Doc. S/26272 of 9 August 1993.

<sup>246</sup> The Cotonou Agreement was supplemented by the Abuja Agreement of 19 August 1995, Doc. S/1995/742 of 28 August 1995.

<sup>247</sup> Nolte, see note 244, 44.

mandate of UNMOT<sup>248</sup> does not contain any reference to monitoring the CIS forces in Tajikistan<sup>249</sup>, the UN Mission UNOMIG in Georgia was expressly given the mandate to control the CIS peace-keeping force in resolution 937 (1994) of 21 July 1994:

“The Security Council, [...]

decides also that the mandate of an expanded UNOMIG, based upon the recommendations in the Secretary-General’s report, shall be as follows: [...] b) to observe the operation of the CIS peace-keeping force within the framework of the Agreement [...]”.

Reports of the Secretary-General in the time after the resolution reveal that UNOMIG was fulfilling the task of control. In a report of 6 January 1995 the Secretary-General reported the following results of UNOMIG’s observations of the CIS-Forces:

“37. The CIS peace-keeping force has been conducting its operations within the framework of implementation of the 14 May agreement. Any variation from its agreed tasks has been made in consultation with the parties”<sup>250</sup>.

UNOMIG has witnessed difficult developments which endanger the proper fulfillment of its monitoring functions. Its freedom of movement is restricted by dangerous landmines. Because of its limited demining capacity UNOMIG is compelled to use only roads which have previously been declared to be mine-free by the CIS peace-keeping force<sup>251</sup>. It is obvious that this dependence on the CIS force limits UNOMIG’s ability to control that force. Nevertheless, the developments demonstrate that United Nations observers may serve as a useful source of information for controlling regional action on the field. In both cases, in Liberia as well as in Georgia, they are perceived as a parallel sending of peace-keeping forces by the United Nations and a regional organization. But the Liberian example, in particular, where the regional force fulfills peace-enforcement functions reveals that a transfer of the combined approach to enforcement

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<sup>248</sup> S/RES/968 (1994) of 16 December 1994.

<sup>249</sup> See in this respect the critical statement by the representative of the Czech Republic in the Security Council, Doc. S/PV. 3482 of 16 December 1994, 8.

<sup>250</sup> Doc. S/1995/10 of 6 January 1995, para. 37.

<sup>251</sup> See the report of the Secretary-General of 15 April 1996, Doc. S/1996/284.

action might provide the United Nations with a new means of control over regional peace enforcement.

### III. Control over Regional Non-Military Measures

Following the interpretation of “enforcement action” in Article 53 para.1, developed above, the term does not comprise non-military measures. Hence, such measures do not require an authorization by the Council. But how are such measures then controlled by the Council. At first sight it is not obvious how universal and regional non-military sanctions might conflict with each other. But the issue is of potential practical relevance. This may be demonstrated by the following hypothetical example.

In contrast to the current practice of unlimited non-military sanctions there is good cause to assume that in future non-military sanctions under Article 41 might be limited in time. Those members of the Council which accepted such sanctions rather hesitatingly might realize that their influence increases with a time limit. A precedent of a limitation in time has already been set with respect to military measures in resolution 929 of 22 June 1994 concerning Rwanda. In this resolution the Security Council authorized the member states cooperating with the Secretary-General to use all necessary means to achieve the humanitarian objectives set out in the resolution. This authorization, however, was limited to a period of two months following the adoption of the resolution<sup>252</sup>. Furthermore, the General Assembly is putting pressure on the Council to set time limits on Chapter VII decisions. A time limit would require a majority in the Council to prolong the measures once the date of expiration approaches. Could it be legally possible that in a given case, where the majority for prolonging the universal measures is not reached in the Council, a regional organization decides to apply similar or even identical sanctions?

A second example where a regional organization might be tempted to substitute universal measures by regional sanctions could be seen in a case where the Council lifted its sanctions under Article 41 stating expressly that the conditions of Article 39 were not met any more. Could, in such a situation, a regional organization decide to apply sanctions because, in the understanding of its members, there was still a threat to the peace in the region?

In both cases the interpretation of “enforcement action” in Article 53 leads to the conclusion that the regional measures are lawful under the Charter of the United Nations. For the first example of expiring universal

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<sup>252</sup> S/RES/ 929 (1994), para. 4.

sanctions the result is rather obvious. The Council did not decide on the legality of regional sanctions and hence the situation is quite similar to one where no universal sanctions had been applied before the regional measures came into force. It is in the logic of the restrictive interpretation of "enforcement action" in Article 53 that regional organizations may decide on regional sanctions if the Council is unable to decide on universal measures, irrespective of whether or not such universal measures had been in place before.

The second example, where the universal sanctions are lifted because the Council considered the threat to the peace to have ceased, is more difficult to argue. Can it be correct that regional sanctions may be applied where no threat to the peace exists? This points to the relationship between Article 53 and the conditions for the application of Chapter VII laid down in Article 39. Article 53 does not contain any conditions under which regional enforcement action may take place. Therefore, the preconditions of Chapter VII have to be applied to activities under Article 53<sup>253</sup>. Such an interpretation is all the more conclusive since it is difficult to see how the authorization by the Council which is required in Article 53 should be obtained in the absence of at least a threat to the peace. However, the interpretation of Article 53 resulted in excluding non-military-enforcement action from its scope of application. Hence, for such measures the reference to Article 39 is not applicable.

Does this solution imply that there is no Security Council control over regional non-military sanctions? A certain control can be seen in the possibility that the regional measures might themselves be qualified as threat to the peace by the Council. This would open the possibility for the Security Council to enforce the lifting of the regional sanctions under Chapter VII. However, such a way of controlling regional non-military measures will be difficult to proceed in a case where one of the permanent members of the Council is also member of the regional organization concerned. The veto would seem inevitable in such a case.

The result may seem somewhat surprising at first sight. However, it fits perfectly well into the general principles applicable to non-military sanctions. Non-military sanctions are not subject to the same rigid system as military enforcement action is. Customary international law is applicable to non-military measures even when they are applied by regional organizations. The result underlines the distinction between measures according to Article 41 and action under Article 42. Military action has to stop when the Council so decides. In contrast to this no member of the United Nations is under an obligation to restart bilateral trade with the addressee

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<sup>253</sup> G. Ress, "On Art. 53", 722 et seq., Mn. 10, in: Simma, see note 25.

of a trade embargo once the Security Council has lifted that embargo. In conclusion, measures under Article 41 may be applied unilaterally after the embargo has ended. Even in cases where bilateral or multilateral trade agreements are in place and the refusal to restart trade violates these treaties there is no competence of the Security Council to enforce those obligations. An exception may again be made when the Council considers the unilateral measures to constitute a threat to the peace and requires that they be lifted.

## D. Conclusion

The end of the Cold War allowed the reopening of Chapter VIII of the Charter, the provisions of which had remained without application for a considerable period of time. The practice since the beginning of the 1990s shows several possibilities of sharing the burden of maintenance of international peace and security between the universal and the regional level.

1. The activities of NATO in the Yugoslav crisis could be described in management terms as "outsourcing". While the overall crisis management rests with the Security Council the military part is given to a regional organization. From a political point of view this describes the "utilization" of regional organizations envisaged by Article 53 para. 1. Legally speaking, the mandate for NATO may rather be seen as an application of Chapter VII, especially of Article 48, since neither the former Yugoslavia nor the successor republics were members of NATO<sup>254</sup>. But the case may be viewed as an example for leaving the military part of an operation to a regional organization.

2. The Yugoslav experience may also be interpreted as an example for substituting an unsuccessful universal mission by a regional operation. The political implications of the failure of UNPROFOR certainly included that a new United Nations mission would have faced serious problems of authority. The regional option provided for a new start and IFOR was therefore able to act without the political handicap which a direct United Nations successor operation to UNPROFOR would have faced.

3. The cooperation between the United Nations and ECOWAS in Liberia may be seen to represent a slightly different type of burden sharing. In the eyes of some factions to the civil war in Liberia the regional intervention through ECOMOG cast some doubt on the neutrality of ECOWAS. Therefore, the parties to the conflict asked for a United

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<sup>254</sup> For further references as to Article 48 as a basis for IFOR, see C. Walter, *Vereinte Nationen und Regionalorganisationen*, 1996, 278 et seq.



Nations observer mission which had inter alia the task to monitor the activities of ECOMOG. In doing so, enforcement operations (if they were necessary) could be left to ECOMOG, while the United Nations mission was charged with monitoring that ECOMOG did not use its enforcement competences excessively. In addition to that both missions jointly were asked to supervise the maintenance of the Cotonou-Agreement<sup>255</sup>. The possibility of combined peace-keeping with the United Nations mission, not only monitoring the activities of the parties to the conflict, but also those of the respective regional organization is also evidenced by the UN observers in Georgia and in Tajikistan.

4. Finally, the Liberian civil war highlights the dilemma which may be created by an inactive Security Council. Had ECOWAS not intervened in the civil war, the disastrous situation for the civilian population would certainly have continued since action on part of the Council was not very probable. After an active phase in the beginning 1990s the Council seems to become more and more reluctant towards military involvement in civil wars. The option of filling a possible lacuna created by Security Council inaction by collective regional humanitarian action should be taken into serious consideration as an alternative.

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<sup>255</sup> Supplemented by the Abuja Agreement of 19 August 1995, Doc. S/1995/742 of 28 August 1995.