A Redistribution of Authority Between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security?

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Abstract: The UN Charter and customary law contain significant ambiguities concerning the prohibition of enforcement measures by regional organizations. This fact – coupled with practical necessity – appears to have been responsible for the failure of the UN to condemn the unauthorized use of force by regional organizations in Liberia and Sierra Leone. These cases and legal doctrine suggested increasing regional autonomy in this field. Although reactions to Operation Allied Force in Kosovo cooled the enthusiasm of those who wished for the legitimization of such actions, evidence suggests that under certain circumstances unauthorized regional enforcement measures may at least avoid condemnation.

1. INTRODUCTION

In the early 1990s requests for greater contribution by regional organizations were put forward by UN Secretaries-General Pérez de Cuéllar, Boutros–Ghali and Annan.[1] They emphasized the role and potentials of regional organizations and called for cooperation in the field of the peaceful resolution of conflicts as well as in peacekeeping. These requests demonstrated the increasing willingness of the Security Council to authorize enforcement actions to be carried out by – sometime also on the initiative of – regional organizations. However, the Secretaries-General or the Security Council have never suggested giving regional organizations the right to launch such operations without SC authorization.

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1. J. Pérez de Cuéllar, Report on the Secretary-General on the Work of the Organization 21 (1990). B. Boutros-Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277-S/24111 of 17 June 1992, paras. 60-65; B. Boutros–Ghali, A Supplement to An Agenda for Peace: Position paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1 of 3 January 1995, paras. 79-96; K. Annan, Renewing the United Nations: A Programme for Reform. Report of the Secretary-General, UN Doc. A/51/950 of 14 July 1997, para. 116.

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Yet, a few regional organizations took the liberty of undertaking enforcement action involving the use of force without prior authorization from the Security Council. The latest of these actions, NATO air attacks against Serbian targets, commenced on 24 March 1999. Although it is arguable that the operation was morally justifiable, in legal terms it has been one of the most controversial enforcement measures carried out by a regional organization since the end of the Cold War. The action intensified the discussions of the past half a century concerning the limits of the use of force by regional organizations. In a broader context it also demonstrated that the debates on the rights and functions of regional organizations in the UN system and on the distribution of authority between the UN and regional organizations remain unresolved.

Against this background, the present article aims at researching whether the law concerning enforcement actions by regional organizations has become more liberal and, in turn, whether there has been a move towards a redistribution of tasks between the UN and regional organizations since 1945. The search for answers to these questions starts with a discussion of the provisions of the UN Charter regulating the use of force by regional agencies and their possible modifications in customary law. The aim of the section is to identify and discuss ambiguities concerning the law of the Charter and relevant developments in international law concerning the limits of regional action. Section 3 contains a description of four enforcement actions undertaken by regional organizations without prior and explicit SC authorization. The selection of cases was determined by the availability of material and the failure of the UN to discuss certain interventions. The final selection includes the operation by the OAS force in the Dominican Republic in 1965, ECOWAS intervention in Liberia in 1990, ECOWAS action in Sierra Leone in 1997, and the NATO operation in Kosovo in 1999.[2] As these operations have attracted most international attention and most elaborate discussion it is hoped that their analysis makes it possible to draw at least tentative conclusions. Section 4, in turn, contains a comparison of legal arguments and practice. Based on this discussion the final section presents the conclusions of the study concerning potential new interpretations of the relevant provisions of the UN Charter and the implications of the findings for the distribution of authority between the UN and regional organizations.

Before entering into a discussion of the relevant legal provisions following the above scheme it is indispensable to specify what is meant by two contested terms, namely enforcement action and regional organizations, in the present study. While recognizing that some consider that the term 'enforcement action'

2. Other cases which could not be covered here due to limited availability of material or due to the fact that the issue never came to the agenda of the Security Council are the operations by the Commonwealth of Independent States in Tajikistan starting in 1993 and in Abkhazia from 1994 as well as the League of Arab States' operation in Lebanon in 1976. The peacekeeping operation by the Organization of African Unity in Chad in 1981 is not included as the peacekeepers did not resort to the use of force.

covers diplomatic and economic measures besides the use of force,[3] due to the special problems raised by the last category it was decided to limit the scope of this study to enforcement measures involving the use of armed force.

The question of what constitutes a regional organization – or using the Charter phrase 'regional arrangements or agencies' – is also a controversial and complex issue.[4] The present article will not deal with this question in detail. Instead it accepts the widely cited definition presented by former UN Secretary-General Boutros-Ghali in his *An Agenda for Peace*:

> Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.[5]

As the question whether the intervening group of states constituted a regional organization in the sense of Chapter VIII of the UN Charter was not raised during the SC discussion in the context of any of the interventions presented below, it is arguable that the cases involving ECOWAS, the OAS and NATO support this broad definition.

2. THE REGULATION IN INTERNATIONAL LAW OF ENFORCEMENT ACTION BY REGIONAL ORGANIZATIONS

2.1. The provisions of the UN Charter

Some of the most relevant general rules of the Charter are the prohibition of "the threat or use of force against the territorial integrity or political independence of

3. For arguments on both sides *see* A. Eide, *Peace-keeping and Enforcement by Regional Organizations: Its Place in the United Nations System*, 3 Journal of Peace Research 127-129 (1966), C. Schreuer, *Regionalism v. Universalism*, 6 EJIL 492 (1995); J. N. Moore, *The Role of Regional Arrangements in the Maintenance of World Order, in* C. E. Black & R. A. Falk (Eds.), The Future of the International Legal Order, Vol. III, Conflict Management 156 *et seq.* (1971); M. Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BYIL 185 *et seq.* (1967); J. W. Halderman, *Regional Enforcement Measures and the United Nations*, 52 Georgetown Law Journal 94 *et seq.* (1964); I. L. Claude, Jr., *The OAS, the UN and the United States, in* R. A. Falk & S. H. Mendlovitz (Eds.), Regional Politics and World Order 290-291 (1973).
4. For various definitions and related arguments *see* H. Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems 319-320 (1966) (Hereinafter Kelsen, Law); H. Kelsen, *Is the North Atlantic Treaty a Regional Arrangement?*, 45 AJIL 162-165 (1951) (Hereinafter Kelsen, NATO); W. Hummer & M. Schweitzer, *Article 52, in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 689-691, 694, 699 (1994); E. N. van Kleffens, *Regionalism and Political Pacts: with special reference to the North Atlantic Treaty*, 43 AJIL 668-669 (1949); Akehurst, *supra* note 3, at 177-180.
5. Boutros-Ghali, *supra* note 1, para. 61.

any state, or in any other manner inconsistent with the Purposes of the United Nations" under Article 2(4) and the principle of non-intervention with the exception of SC action under Chapter VII stated in Article 2(7). Moreover, Article 24 gives the Security Council "the primary responsibility for the maintenance of international peace and security", and Article 103 provides for the superiority of obligations under the Charter over any other treaty obligations.

The Charter also contains a separate chapter, Chapter VIII, dealing with regional organizations. This provides, among others, that

> [n]othing in the [...] Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations[6]

and even more importantly that the Security Council

> shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.[7]

As will be shown below, these provisions contain significant ambiguities concerning regional enforcement actions. First of all, despite it being a crucial determinant of the freedom of action by a regional organization in many situations, the meaning of enforcement action is not specified. Secondly, it is unclear whether Article 53(1) requires prior SC authorization of regional enforcement actions, or whether this can be gained *ex post facto*. Nor is it stated whether the authorization or approval needs to be express or tacit. Thirdly, the scope of legitimate regional action is not sufficiently specified.

2.2. What is (not) an "enforcement action"?

The Charter does not contain a definition of this term, nor do the *travaux préparatoires* provide any guidance on the issue, giving rise to different interpretations. One issue of prolonged contention concerns the relationship between the nature of the decision and the nature of the action. Based on the advisory opinion of the ICJ in the *Certain Expenses Case*, US Department of State lawyers

6. Art. 52(1) of the Charter of the United Nations.
7. Art. 53(1) of the UN Charter. The rest of the article deals with action directed against enemy states. As a consequence of changes in the political environment and the role played by these former enemy states in the UN, the General Assembly suggested in subsequent resolutions the deletion of the enemy state clauses from the Charter. (*See*, for instance, UN Docs. A/Res/49/58 (1995) and A/Res/50/52 (1995).) Due to this and to the fact that the enemy states clause has never been invoked, the remaining part of the provision is considered irrelevant.

argued that a measure authorized in the form of a recommendation of a regional organization was not binding on the members of the organization and could, therefore, not be considered an enforcement action.[8] However, critics demonstrated in a convincing manner that this argument is untenable. It has been shown that the parallel taken from the ICJ opinion concerning the practice of the General Assembly is not perfectly in place. The Court dealt with the question whether peacekeeping with the consent of the host state (i.e. without coercion) constituted enforcement action. Although it is true that the ICJ came to the conclusion that such operations should not be seen as enforcement measures, even if the decision would be applicable also to regional organizations it must be noted that "the coercive element is relevant primarily in relation to the State which is the object of the sanctions and not in relation to States participating in them."[9] Furthermore, the argument has been criticized for being illogical, and it has been submitted that such interpretation would not be compatible with the intentions of the drafters of the UN Charter.[10]

Another relevant issue concerns the relationship between peacekeeping[11] and enforcement action. The legal basis of peacekeeping and its relation to the provisions of the Charter is still unclear. The precise scope of functions covered by the term is also undetermined. These issues triggered intense debates in the SC already in the early days of the UN system.[12] The USA and others in favor of free regional action argued that peacekeeping was not directed against a state and was, thus, not enforcement action. Alternatively they claimed that when its aim is to restore normal conditions an operation could not be considered enforcement. Cuba, in turn, replied that military presence of foreign troops on the territory of a state would constitute enforcement in any case. The Soviet Union claimed that peacekeeping and enforcement action were indistinguishable from each other.[13] On this issue it has been submitted that although a more liberal interpretation might be appealing, as that would not provide sufficient safeguards

8. L. C. Meeker, *Defensive Quarantine and the Law*, 57 AJIL 521 (1963).
9. Schreuer, *supra* note 3, at 492, *see also* T. J. Farer, *The Role of Regional Organizations in International Peacemaking and Peace-keeping: Legal, Political and Military Problems, in* W. Kühne (Ed.), Blauhelme in einer turbulenten Welt 278 (1993) and J. Wolf, *Regional Arrangements and the UN Charter*, 6 Encyclopedia of Public International Law 293.
10. Akehurst, *supra* note 3, at 202–203 and Eide, *supra* note 3, at 140, respectively. *See also* Halderman, *supra* note 3, at 99-101.
11. According to a rather widely accepted definition, peacekeeping is "an operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation." (Blue Helmets: A Review of United Nations Peace-keeping 4 (1990)). While accepting most components of this definition, as it is one of the aims of this paper to find out whether regional peacekeeping is covered by Article 53(1), the present article does not make it an explicit criteria of the recognition of an operation as peacekeeping that it does not have enforcement powers.
12. Wolf, *supra* note 9, at 293.
13. Moore, *supra* note 3, at 153 and Akehurst, *supra* note 3, at 211, 213.

against the likely bias of the regional action, the classification of peacekeeping as enforcement and the requirement of prior SC authorization are desirable.[14]

As mentioned above, the ICJ concluded in the *Certain Expenses Case* that peacekeeping operations conducted with the purpose of the maintenance of peace and security, and based on the consent of the parties concerned or clearly not directed against the sovereignty and territorial integrity of any state should not be considered enforcement measures.[15] According to some, this argument should apply not only to measures authorized by the GA in the Uniting for Peace resolution but also in the context of regional organizations.[16] Following a similar way of reasoning it has also been claimed that the cases where armed force has been used based on invitation – or consent – by the government could not be regarded as "enforcement".[17] The corollary of these arguments is that such operations would not require SC authorization.[18] Writing about peacekeeping, Higgins[19] saw the confirmation of this thesis by the GA in its 1994 Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements and Agencies in the Maintenance of Peace.[20]

Critics submitted, however, that "the constitutionality of an act does not depend on the consent of any State, but on the United Nations Charter stipulations",[21] and that consent could not provide any conclusive evidence of legality. A further problem with these arguments is that the definition of peacekeeping has gone through significant changes. By the time of the birth of the second generation peacekeeping, consent – or impartiality – were hardly relevant. Due to this and the potential of further change it could be dangerous to classify every instance of peacekeeping as non-enforcement and make it exempt from the requirement of prior SC authorization. Therefore, in the view of the present author only the consent of all major parties and an impartial mandate rather than the mere classification of the operation as peacekeeping – by the regional organization or by others – could be a convincing argument for classifying the operation as non-enforcement and/or exempting it from the requirement of prior authorization.

14. Eide, *supra* note 3, at 141-142. Kourula shares this opinion limited to civil wars. *See* E. Kourula, *Peace-keeping and Regional Arrangements, in* A. Cassese (Ed.), United Nations Peace-keeping: Legal Essays 119 (1978).
15. Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151, at 170-175. (Hereinafter *Certain Expenses Case*.)
16. Moore, *supra* note 3, at 154. *See also* the Uniting for Peace Resolution, UN Doc. A/Res/5/377 (1950).
17. G. Nolte, *Regional Peace by Regional Action: International Legal Aspects of the Liberian Conflict,* 53 ZaöVR 621 (1993).
18. Wolf, *supra* note 9, at 293.
19. R. Higgins, *Some thoughts on the Evolving relationship between the Security Council and NATO, in* Boutros Boutros-Ghali amicorum discipulorumque liber: Peace, Development, Democracy, 529 (1998).
20. UN Doc. A/Res/49/57 (1995), Ann.
21. Kourula, *supra* note 14, at 118.

Another exception recognized by some scholars concerns unauthorized collective humanitarian interventions by regional organizations. Common arguments in favor of the right of humanitarian intervention include among other factors the existence of customary law not affected by the UN Charter or which developed after the entry into force of the Charter, the *erga omnes* nature of human rights and the corresponding rights of the community of states or individual states to act, and practical necessity to stop human suffering of an exceptionally large scale when the Security Council is unable to do so.[22]

It has, however, been argued that even if a customary right of humanitarian intervention had existed, it could not have survived the prohibition in the UN Charter. Article 2(7) sets as a precondition of intervention in the internal affairs of a state the determination by the SC that the situation constitutes a threat to the peace. Any subsequent measure requires SC authorization.[23] In a similar vein, Simma and others contended that according to both its teleological and historical interpretations, Article 2(4) of the UN Charter contains a watertight prohibition of the use of force also for regional agencies with the exception of self-defense and enforcement action ordered by the SC. Consequently, unauthorized humanitarian interventions cannot be legal.[24]

It should also be noted that it is at best questionable whether state practice and *opinio juris* support the existence or emergence of a customary right of humanitarian intervention.[25] The only region where there is reasonable support in practice and opinion is Europe. However, the non-use of force has been accepted by the international community as a *jus cogens* norm. As universal *jus cogens* norms are binding on states individually and as members of organizations as well as on the organizations themselves, the prohibition of the use of force cannot be contracted out of on the regional level. This means that a regional right of humanitarian intervention cannot exist.[26]

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22. For arguments in favor of the right of humanitarian intervention *see*, for instance, F. R. Tesón, Humanitarian Intervention: An Inquiry into Law and Morality (1988); J.P. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter*, 4 California Western International Law Journal 203 (1974); D. Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 Michigan Journal of International Law 1005 (1998); J. Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 Temple Int'l and Comp. L. J. 340-341, 351(1998); K. O. Kufour, *The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States*, 5 African J. Int'l and Comp. Law 539-542 (1993). *See also* A. Cassese, *Ex iniuria oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EJIL 26-29 (1999).
23. K. Nowrot & E. W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 Am. U. Int'l L. Rev. 373 (1998).
24. B. Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 2-4 (1999).
25. A. Randelzhofer, *Article 2(4), in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 122 (1994). *See also* H. McCoubrey, *Kosovo, NATO and International Law*, 14 International Relations, August 1999, at 34.
26. Simma, *supra* note 24, at 4.

Based on the above considerations concerning the UN Charter, the lack of uniform practice and *opinio juris* and due to the high potential for abuse of a right of unauthorized humanitarian intervention[27] it is submitted here that regional organizations do not and should not have the right to conduct humanitarian interventions without prior SC authorization.

In sum, the major ambiguities of international law with regard to enforcement action concern the relation of the term to measures undertaken following a recommendation by the regional organization, peacekeeping and humanitarian intervention. There appears to be a broad consensus to the effect to treat the use of force as enforcement action even if it is based on a recommendation. Differences of opinion are more visible with regard to peacekeeping operations, especially those conducted with the consent of the host state. In the opinion of the present author the consent of the parties and the impartiality of the mandate rather than the classification of the action should be the determinants of legality. Finally, whereas sound arguments have been voiced in favor of a right of humanitarian intervention, the arguments in favor of the thesis that even for such operations SC authorization is required are more in line with the Charter stipulations and with contemporary legal and political reality.

2.3. (When) Should Security Council authorization be obtained?

The drafters and the delegates at the San Francisco Conference did not give ample consideration to this question and failed to determine the nature of authorization required for regional enforcement action.[28] Article 53(1) does not provide any guidance in this respect. The formulation 'without the authorization of the Security Council' does not indicate whether prior or *ex post facto* authorization is required and whether it needs to be express or can also be tacit.

The only guidance from the *travaux préparatoires* on this issue is contained in the amendment proposals. The submissions of the delegations show that opinions diverged strongly on this point. Bolivia, for instance, advocated the necessity of express approval.[29] In contrast, France claimed the right for regional arrangements to undertake enforcement action without prior approval by the Security Council in cases requiring urgent action. Venezuela argued that as late SC authorization might cause delay, revision rather than authorization should be required.[30]

27. *See,* for instance, O. Schachter, International Law in Theory and Practice 126 (1991).
28. It can be argued that action undertaken in response to 'immediate danger' is covered by Article 51 on self-defense, or is an action against the renewal of aggressive policy against an enemy state dealt with in Article 53. These cases do not constitute enforcement action in the sense as defined here and do not require authorization by the Security Council. Consequently, these cases are not analyzed for the purposes of the present study.
29. UNCIO Vol. XII, at 767, 844.
30. *Id.*, at 777, 784, 837. A similar proposal was made also by Czechoslovakia, *see id.*, at 737, 837.

The first in-depth SC debate concerning the right of regional organizations to carry out enforcement action which also concerned the question of authorization took place in 1960, in response to the OAS sanctions not involving the use of armed force against the Dominican Republic. The Soviet Union called for this meeting after the imposition of the sanctions in order to create a precedent of the necessity of SC authorization. Due to the opposition of the USA to all other options, the Council passed a resolution in which it merely took note of the OAS action.[31] As a result, the case became a precedent often referred to by the OAS and the USA arguing, even in the context of armed interventions, that no *prior* SC authorization is required, not quite in line with the intentions of the majority.

This was the beginning rather than the end of this debate. Subsequently rather convincing arguments have been presented in favor of the requirement of prior authorization. Wolf, for instance, claimed in his submission in the *Encyclopedia of Public International Law* that the *ex post facto* authorization argument could not be reconciled with the Charter's aim to establish effective SC control over regional enforcement measures, with the possibility of preventing them.[32] It has further been suggested, with reference to the argument that under a strict SC control regional action becomes impossible due to the use of veto, that without the support of the permanent five such action might be undesirable anyway.[33] Also defending the prior authorization requirement Akehurst submitted that

> the Security Council's authorization is a decision taken to the detriment of the State against whom the enforcement action is directed, and it is a general principle of law that a legislative text (like the United Nations Charter) should, if possible, not be interpreted to permit retroactive decisions to be taken to the detriment of a party concerned.[34]

Moore in contrast, although admitting that any regional enforcement action is illegal without prior authorization, did not see any reason why *ex post facto* authorization by the Council providing retroactive legitimization would not be possible.[35] However, in this case if a third state had acted against a regional intervention (e.g. in collective self-defense) on the assumption that the intervention was illegal, accepting the retroactive legitimization argument the legality of such action could also change *ex post facto*. As this could introduce further legal uncertainty in the international system, the possibility of retroactive *ex post facto*

31. Eide, *supra* note 3, at 127-128 and Wolf, *supra* note 9, at 293.
32. *Id.*, at 293. *See also* Kourula, *supra* note 14, at 118; G. Ress, *Article 53, in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 734 (1994); and Frowein referred to in Nolte, *supra* note 17, at 618. The question concerning the nature of recognition (explicit or tacit) is discussed later in this section, *infra*.
33. Eide, *supra* note 3, at 131.
34. Akehurst, *supra* note 3, at 214.
35. Moore, *supra* note 3, at 159.

authorization should be rejected even though in some cases it could have the advantage of allowing for rapid reactions. The position accepted here is that an intervention is illegal unless prior SC authorization is obtained, and *ex post facto* authorization legitimizes only the subsequent phases of the intervention.

US Department of State lawyers' suggestion, based on the inaction of the SC in 1960 during the first Dominican crisis, that the lack of condemnation by the Council would amount to tacit approval is also rejected here. Contesting this argument Akehurst submitted referring to the *Second Admissions Case* that the ICJ judgment concerning Article 4(2) implies that the authorization referred to in Article 53 of the Charter should be 'express and positive'. He further submitted that in San Francisco states understood that such approval was required, this is why some intended to amend these provisions.[36] Even more convincingly Eide maintained that if this was correct a regional organization that had the support of a permanent member of the Security Council could do whatever it pleased. A corollary to this argument would be that the use of force is legal, a finding which would contradict Article 2(4).[37]

A further problem with the issue of tacit or implied authorization is that although it has been touched upon by several authors, none of them has tried to define on a theoretical basis the type of reaction or the use of certain phrases by the SC which would in their view imply acquiescence or tacit authorization. What has been argued instead is that a specific reaction implied SC authorization or approval. Besides US Department of State lawyers' contentions that the lack of condemnation would amount to authorization another example of this was the claim that commendation by the Security Council of an intervention implies its view that the action "did not require authorization".[38] Note also that the ambiguity of the language of SC resolutions is most often the result of the lack of consensus among the permanent members. Consequently, in the view of the present author, settling for tacit approval – especially if it can be given *ex post facto* – would unnecessarily open a door for abuse.

Consequently the parallel between the relaxation of the requirement of prior express authorization on the one hand and the tacit Charter amendment concerning the interpretation of abstention of a permanent member in the vote of the Security Council and the adoption of the 'Uniting for Peace' resolution[39] on the other, also proposed by a US Department of State lawyer, is also rejected here. This parallel was criticized by various authorities who argued that to apply the arguments used in connection with the 'Uniting for Peace' resolution to regional organizations would be a much more radical step than the one made by the Gen-

36. Akehurst, *supra* note 2, at 218.
37. Eide, *supra* note 3, at 139.
38. Nolte, *supra* note 17, at 633-634 and Levitt, *supra* note 22, at 347.
39. A. Chayes, *Law and Quarantine in Cuba*, 41 Foreign Affairs 556-557. *See also* Meeker, *supra* note 8, at 520.

eral Assembly[40] and that such an amendment would imply an "undesirable loosening of Security Council control over regional action"[41] and might lead to disrespect for the principles of the Charter.[42] Also, most authors have treated the issue in a hypothetical manner, suggesting that the amendment, even in a tacit form, has not yet taken place. Akehurst claimed that even US policy indicates the belief that prior express authorization is necessary.[43]

To sum up, opinions are clearly divided on the issue whether *ex post facto* authorization is sufficient. In the view of the present author the acceptance of *ex post facto* authorization with retroactive effect is undesirable. The issue of tacit authorization is even more controversial and seems untenable especially in the light of the lack of clarity concerning what could amount to such authorization. Similarly, it is difficult to accept the idea of tacit Charter amendment relaxing the requirement of express prior authorization.

2.4. How to interpret the terms "appropriate for regional action" and "local disputes"?

Another relevant area not dealt with in the Charter relates to the scope of issues of legitimate concern to regional organizations and the methods available to them. An issue of concern here is the validity of consent. Wippman has limited the arguments concerning the legitimizing effect of consent in the following way:

> consent may validate an otherwise wrongful military intervention into the territory of the consenting state [...]. When a government is both *widely recognized and in effective control of most of the state*, this principle affords a clear alternative to Security Council authorization as a basis for justifying external intervention [...].[44]

He submitted that although this is a widely accepted thesis, under the special circumstances of collapsed state authority the argument is not applicable. Citing Moore's claim that many scholars support the view that regional peacekeeping in a collapsed state is not illegal under the UN Charter he expressed his fear that this would give too broad powers to regional agencies.[45] The present author shares the view that due to their complexity regional intervention in situations characterized by collapsed state authority should await SC authorization.

40. Halderman, *supra* note 3, at 108-111.
41. Eide, *supra* note 3, at 139, Moore, *supra* note 3, at 159-160.
42. Schreuer, *supra* note 3, at 492; J. Lobel & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AJIL 127 (1999).
43. Akehurst, *supra* note 3, at 219.
44. D. Wippman, *Military Enforcement, Regional Organizations, and Host-state Consent*, 7 Duke J Comp. & Int'l. L 209 (1996). Emphasis added.
45. *Id.*, at 231-233. *See also* Nolte, *supra* note 17, at 621.

A further ambiguity concerning what is "appropriate for regional action" concerns the internal-international dimension of a conflict. In this respect the Charter contains no clear limitation of the freedom on action specific to regional organizations,[46] and the issue has not been discussed with reference to organizations existing in 1945. As according to their belief the Security Council was to control enforcement actions, it appeared to the drafters that the question was without substance.[47]

Since then it has been argued that a comparison of Articles 52(4), 34 and 35 – due to the use in Article 52 of the word "situation" which is commonly understood to refer in the latter provisions to internal conflicts which constitute threat to the peace – implies that regional organizations may take the initiative to resolve such internal conflicts.[48] Regional intervention might be preferable to "unrestrained civil violence".[49] However, the intervention should not support the transformation of pre-existing structures, for instance it should not support secessionists.[50] This and the prior determination by the SC of the existence of threat to the peace should be prerequisites of any regional intervention in order to prevent abuse.

Another controversial question is whether the disputes and conflicts outside the region can legitimately be dealt with by a regional organization. Akehurst claimed that as the Charter allows regional enforcement against non-members only in cases of self-defense and action against enemy states or in case a non-member threatens the peace of the region, regional action of other kinds can be taken solely against members.[51] Rather than seeing it as an exclusive list, Kelsen regarded these as precedents proving the right of action in regard to third states.[52] He argued that the terminology of Article 53(1) does not prevent the Council from using the regional organization for enforcement action outside of the region.[53] Recent NATO activities also support this view.[54]

A corollary to these arguments is that if the SC can authorize them to do so, regional organizations may be entitled to carry out enforcement measures against third states on their own initiative with SC authorization.[55] However,

46. Article 2(7), which codifies the principle of non-intervention deals with that norm only in the relationship between states and the UN. The inter-state aspect is not covered. On this issue *see also* F. Ermacora, *Article 2(7), in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 147 (1994).
47. Akehurst, *supra* note 3, at 220.
48. Wolf, *supra* note 9, at 291.
49. Kourula, *supra* note 14, at 112 and 119.
50. *See* Guicherd citing Combacau and Sur (*International Law and the War in Kosovo*, 41 Survival Summer 1999, at 24) and J. Duursma, *Justifying NATO's Use of Force in Kosovo?*, 12 LJIL 292, at n. 37 (1999).
51. Akehurst, *supra* note 3, at 220-221.
52. Kelsen, NATO, *supra* note 4, at 165.
53. Kelsen, Law, *supra* note 4, at 327 and Ress, *supra* note 32, at 734–735.
54. Schreuer, *supra* note 3, at 491.
55. For a summary of arguments *see* Wolf, *supra* note 9, at 294.

Wolf argued that as the purposes of the relevant provisions (Sentences 1 and 2 of Article 53(1)) are different, this parallel is not valid. He also suggested that conflicts outside the organization are not "appropriate for regional action" therefore the argument that even if a regional agency undertakes an enforcement action as an organ of the SC the action is legal only if the matter is "appropriate for regional action" implies the illegality of out of area missions.[56] This is also supported by the fact that, although not codified in the Charter, the discussions in San Francisco dealt with the role of these organizations in the pacific settlement of local or regional disputes only, with the sole exception of the use of force against the special category of enemy states.[57] In contrast, it has been contended that a regional organization could get involved in the resolution of a dispute not confined to the region (i. e. to the membership of the organization) if that concerned a normally local dispute with a third party having interests in it and in its local resolution.[58]

It is not difficult to accept that a regional organization may act in a conflict outside the region with prior express SC authorization. Recent practice of the United Nations supports this possibility and contemporary doctrine does not reject this possibility. However, as demonstrated above the legality of such actions without prior authorization is a much more controversial issue. The present author shares the view of those who claim that conflicts outside the region are not legitimate targets for armed intervention by a regional organization unless it is authorized by the UN to get involved. There is nothing in the UN Charter that would suggest such a distinction between the rights of individual states and those of regional organizations.

In sum, although the consensus is not full, there appears ample reason to consider that consent may legitimize a regional intervention only if it comes from a government which is in effective control of the country. Furthermore, there is ample support for considering internal conflicts which constitute a threat to international peace, possibly with the limitation that intervention should not aim at promoting secession, as situations appropriate for regional action. While Kelsen's notion that regional organizations can be authorized to intervene, even with armed force, in conflicts outside the region has received general support, it is far from obvious that they can undertake enforcement measures outside the region on their own initiative, without authorization, as well.

56. *Id.*
57. UNCIO Vol. XII, at *e.g.,* 40, 42, 208, 686, 687, 769, 772, 773, 775, 776, 836.
58. Hummer & Schweitzer, *supra* note 4, at 696.

3. REGIONAL PRACTICE AND INTERNATIONAL REACTIONS

3.1. The Dominican Republic 1965

3.1.1. The conflict[59]

After a turbulent period of successive military coups, Donald Reid's government collapsed on 24-25 April 1965 as a result of coups conducted simultaneously by right-wing military leaders and by the supporters of the former left-wing President Juan Bosch. These two factions also started fighting against each other, and a violent civil war erupted. On April 28 US President Johnson announced that he was going to send troops to the country to rescue US citizens. Later it was admitted that the purpose of the operation was to prevent a communist take-over. The next day the OAS, of which the Dominican Republic was a member, called for a cease-fire. On April 30 the Organization passed a resolution drafted by the US calling for cease-fire and calling upon all parties to allow the establishment of an international neutral refuge zone. The parties reached a cease-fire. Yet, US troops intervened openly the next day on the side of the right-wing forces and established the international refuge zone by force in the capital, Santo Domingo.

On May 1 an OAS Committee was set up to investigate the situation in the country and to provide its good offices to secure a cease-fire. The next day the OAS Committee of Five started to mediate between the parties. These efforts concluded with the Act of Santo Domingo in which the parties reaffirmed the cease-fire. They accepted the establishment of the safety zone, promised to respect it and to respect the means chosen by the OAS to protect it. In the meantime the US pressed for the transformation of its forces into an OAS force. This became possible after May 6 when the OAS Meeting of Consultation resolved with the minimal amount of votes required, including that of the Dominican representative, to set up an Inter-American Force to be sent to the Dominican Republic.[60]

3.1.2. The Inter-American Force

The Inter-American Force created without prior SC authorization following the OAS resolution of 6 May was to

> have as its sole purpose, in a spirit of democratic impartiality, that of co-operating in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establish-

59. This section is based on Akehurst, *supra* note 3; Eide, *supra* note 3; and W. V. O'Brien, *The Prospects for International Peacekeeping, in* J. E. Dougherty & J. F. Lehman Jr. (Eds.), Arms Control for the Late Sixties (1966).
60. *Id.*, at 230, n. 44.

> ment of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.[61]

According to the preamble of the OAS resolution, the creation of the force meant the transformation of national forces into an OAS force. The document emphasized the competence of OAS to assist its members in the maintenance of peace and security and the restoration of democracy through the means it deems necessary.

The emphasis on assistance and cooperation suggests that, although the Force was to be withdrawn only following a new OAS decision, the basis of its establishment was the consent of the warring factions of the Dominican Republic expressed in the Act of Santo Domingo. Participation in the operation was also on a voluntary basis.[62] Consequently, the composition of the Force was rather unbalanced. In July 1965, 1,115 Brazilian soldiers, marines and officers, 20 Costa Rican policemen, 3 officers from El Salvador, 250 Honduran, 164 Nicaraguan and 10,900 US army troops took part in the operations. At its peak the US contingent amounted to 22,000 troops.[63] This fact and the use of force by OAS troops in covert support of the right-wing faction, an example of which was the attempt by the Force to expand the neutral refuge zone to strategically important areas held by the communists, triggered international criticism. Probably to support an image of impartiality against mounting critique Brazil was requested to appoint a force commander on May 22, the day before the force was set up.[64]

3.1.3. International reactions

Following the US intervention but before the OAS decision to establish the Inter-American Force for the Dominican Republic, the Soviet Union requested an urgent meeting of the Security Council on 1 May 1965. However, at the series of meetings dealing with the situation in the Dominican Republic starting on May 3 the OAS rather than US intervention soon became a central subject. On 14 May these discussions resulted in a unanimously passed resolution which called for a cease-fire and called on the Secretary-General to send a representative to the country to inform the Security Council on the situation.[65] The OAS action was neither welcomed nor condemned.[66] On May 22 a new SC resolution called for a permanent cease-fire instead of the prevailing temporary suspension of hostilities. The relevance of this resolution for the present analysis lies in the fact it

61. UN Doc. S/PV.1202 of 6 May 1965, para. 36.
62. Akehurst, *supra* note 3, at 208.
63. O'Brien, *supra* note 59, at 230, n. 44.
64. Akehurst, *supra* note 3, at 209 and at 212-213, respectively.
65. *Id.*, at 209.
66. UN Doc. SCOR, 20th year, Supplement for April, May and June 1965, at 160.

was adopted with 10 affirmative votes, with the US abstaining because the final text of the resolution failed to acknowledge the efforts of the OAS.[67]

The debate on the issue continued in the Security Council until July 1965. The discussion was influenced by the conviction of many that the USA controlled the OAS force. Consequently, the legitimacy of the Inter-American Force was attacked on the point of impartiality. The impartial nature of the Force was also drawn into question because of its actions.[68]

Another major issue of contention concerning the legality of the establishment by the OAS of the Force without (prior) authorization was that, as France and Uruguay pointed out, the consent of the legitimate government had not been acquired by OAS. They submitted that the consent of the warring factions – in the absence of a legitimate government in control of the country – was not sufficient even when that meant that both sides to the conflict consented.[69] Moreover, the Soviet representative claimed that the establishment of the force violated not only Article 53 but also Article 39 of the UN Charter, entrusting the SC alone with the determination whether a situation constitutes threat to the peace and the decision on appropriate measures. He further maintained that as the internal organization of a state is a matter of domestic jurisdiction the OAS action constituted an unlawful intervention. The USSR even submitted a draft resolution condemning the intervention and calling for the withdrawal of US troops. The draft was, however, never put to vote. In response to the Soviet criticism, the US representative submitted that that the mandate of the force was the maintenance of peace and security, hence the operation could not be regarded as an enforcement measure requiring authorization. He also tried to justify the intervention referring to the suffering in the country and to the state of necessity.[70]

Finally the Soviet Union, supported by Cuba and Jordan, condemned the Inter-American Force arguing that irrespective of its purpose the intervention constituted an enforcement measure, and that the use of force in this case took place in contravention of Article 2(4) of the UN Charter.[71] In contrast the US delegation claimed, relying on the ICJ judgment in the *Certain Expenses Case*, that the mandate of the Force was to restore peace, security and respect for human rights and it enjoyed the consent of various factions, hence the action was not an enforcement measure and was not in conflict with the Charter. In turn, the representative of the USSR contended that peacekeeping and enforcement action were inseparable. The debate was inconclusive due to the lack of participation of other states.[72]

67. Akehurst, *supra* note 3, at 209-210.
68. *Id.*, at 212.
69. *Id.*
70. UN Doc. S/PV.1220 (1965), paras. 8, 13 and 16 and 19, respectively.
71. *Id.*, at 7-8. On the views of Cuba and Jordan *see* Akehurst, *supra* note 3, at 211, referring to UN Doc. S/PV.1221, (1965), para. 22.
72. *Id.*, at 211-213.

3.2. Liberia 1990

3.2.1. The conflict[73]

Despite his initial popularity following the *coup d'etât* which put him into power, Master Sergeant Samuel Kanyon Doe gradually lost the support of the Liberian population. Those opposed to his regime became organized under Charles Taylor in an armed group, the National Patriotic Front of Liberia (NPFL). In December 1989, Taylor's troops launched an offensive against Liberia from their training bases in Ivory Coast. A violent civil war erupted.[74] By May 1990 Taylor controlled a major part of the country except the capital, which remained on Doe's hands. In July Taylor waged an attack on the city. Around this time, the NPFL forces suffered a "minor setback"[75] due to the split off of a dissident faction, the Independent National Patriotic Front of Liberia (INPFL), which turned against the NPFL as well as against Doe's army.[76] As a result of the increasingly brutal civil war safety and health conditions in Liberia had deteriorated significantly by July 1990.[77]

ECOWAS and OAU had attempted without success to mediate a peaceful resolution to the civil war since around May 1990. However, Doe – who failed to get the requested support from the people of Liberia and the US government – turned to ECOWAS for help on 14 July, after the fall of his government and after he has lost control over most of the country, inviting a peacekeeping force to Liberia to help contain hostilities. In response, the 7 August 1990 meeting of the ECOWAS Standing Mediation Committee called on the parties to cease hostilities, and resolved to set up an ECOWAS Cease-fire Monitoring Group (ECOMOG) for Liberia.[78]

3.2.2. The ECOWAS Cease-fire Monitoring Group (ECOMOG) for Liberia

According to the ECOWAS decision of 7 August 1990, ECOMOG was given the task of "assisting the ECOWAS Standing Mediation Committee in supervising the implementation and in ensuring the strict compliance by the parties with the provisions of the cease-fire throughout the territory of Liberia."[79] The

73. *See* H. Howe, *Lessons of Liberia: ECOMOG and Regional Peacekeeping*, 21:3 International Security 147-148 (1997).
74. M. Weller (Ed.), Regional Peace-keeping and International Enforcement: The Liberian Crisis (1994).
75. Levitt, *supra* note 22, at 342-343.
76. Nolte, *supra* note 17, at 605-606.
77. Howe, *supra* note 73, at 150-151.
78. Levitt, *supra* note 22, at 343.
79. ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90 on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of Gambia, 7 August 1990, *reprinted in* Weller, *supra* note 74, at 67.

commander of the troops was given the power to "conduct military operations for the purpose of monitoring the cease-fire, restoring the law and order to create the necessary conditions for free and fair elections to be held in Liberia."[80]

ECOWAS justified the establishment of ECOMOG referring to the members' fear that for various reasons violence might spread across the borders and the conflict could endanger the stability of the subregion. This possibility meant that the war was no longer a solely domestic problem. It was also argued that the brutal and inhuman civil war constituted a humanitarian catastrophe justifying intervention. Moreover, as the NPFL and the INPFL took nationals of ECOWAS member states hostage, the organization also claimed the right to rescue these citizens.[81]

On 27 August 1990, having informed the UN Secretary-General and through him the Security Council but without approval expressed by any UN organ and without the consent of all Liberian parties except Doe, ECOMOG troops landed in Liberia. Immediately upon arrival they had to use force in self-defense, in response to the NPLF's attacks. ECOMOG was ordered to resort to force in self-defense and enforcement on several subsequent occasions, among others in September 1990, following Doe's assassination by INPLF at ECOWAS' headquarters. Another example of full-scale fighting by ECOMOG occurred in response to 'Operation Octopus' launched by Taylor's forces on 5 October 1992 against the ECOWAS-held capital, Monrovia.

Initially, ECOMOG consisted of 3,000 troops but gradually grew to 10,000-12,000. The force included personnel contributed on a voluntary basis by five ECOWAS members, namely Gambia, Ghana, Guinea, Nigeria and Sierra Leone. Mali and Senegal joined later.[82] Because the force heavily drew on Nigeria's contribution and because Nigeria was seen as pursuing its interest in its own regional hegemony rather than in the attainment of peace in Liberia the operation has attracted some initial criticism.[83]

ECOMOG has also been accused of being partial since the beginning of the conflict. Its aim being to expel Taylor from power and reinstall Doe whom ECOWAS saw as the legitimate president, it fought the NPFL as well as using and supporting other Liberian factions against it.[84] In contrast, it has been argued that ECOMOG did not intend to support Doe's regime against Taylor. The forces had ample opportunity to kill Taylor still they did not do so. Moreover, if

80. *Id.*, at 68.
81. J. O. C. Jonah, *ECOMOG: A Successful Example of Peacemaking and Peace-keeping by a Regional Organization in the Third World, in* W. Kühne (Ed.) Blauhelme in einer turbulenten Welt 305 (1993). *See also* ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90, *supra* note 79.
82. Weller, *supra* note 74, at 7.
83. Africa Watch, Human Rights Watch, Liberia: Waging War to Keep the Peace: ECOMOG Intervention and Human Rights 3 (1993).
84. Howe, *supra* note 73, at 156-157.

their goal was to support Doe the intervention should have started at a point when Doe's regime could still have been rescued.[85]

3.2.3. International reactions

On 10 August 1990 the Chairman of ECOWAS informed the UN Secretary-General of the decision of Banjul summit establishing ECOMOG, and on 13 August 1990 the Secretary-General reported to the SC the step to be taken by ECOWAS. He further notified the Council that according to ECOWAS, ECOMOG's functions would not conflict with the provisions of the UN Charter. Despite this report and the fact that ECOMOG did not wait for SC approval to start the intervention, the SC did not respond until 22 January 1991, when it finally discussed the situation in Liberia.[86] After that meeting, the Council commended ECOWAS for its efforts to restore peace in a presidential note.[87] The reason for this delay appears to have been the opposition of the three African SC members (Ethiopia, Zaire and Ivory Coast) to any action. However, after the Bamako meeting and peace accords in November 1990 these states themselves brought the issue to the Council.[88]

The SC commended ECOWAS for its efforts to end the Liberian conflict on a number of subsequent occasions.[89] An early instance of this was a note by the President of the Security Council on 7 May 1992.[90] On 19 November 1992 the Council unanimously adopted Resolution 788 which, besides commending ECOWAS for its role in the "*peaceful* resolution of the Liberian conflict [emphasis added]",[91] called upon the member states to implement the agreements sponsored by ECOWAS. It further imposed an arms embargo upon Liberia under Chapter VII. From this ECOWAS was an exception. Nevertheless, the resolution fell short of authorizing ECOMOG to carry out any kind of enforcement action.

The statements made – mostly by ECOWAS members, but also by others – at the meeting where this resolution was adopted displayed a general support for previous ECOWAS actions including peacekeeping.[92] Although the representative of Burkina Faso voiced disapproval concerning any military solution, the legality of ECOMOG's establishment has not been raised at this or any other

85. Levitt, *supra* note 22, at 354, also referring to Wippman.
86. Jonah, *supra* note 81, at 320.
87. UN Doc. S/22133 (1991).
88. *See* Jonah, *supra* note 81, at 319-320 referring to Pérez de Cuéllar; and Levitt, *supra* note 22, at 346 citing Wippman.
89. In the following, where the Security Council expressly referred in the resolution cited to the role of the organization in the *peaceful* resolution of the conflict this fact will be pointed out.
90. UN Doc. S/23886.
91. UN Doc. S/RES/788 (1992).
92. UN Doc. S/PV.3138 in Weller, *supra* note 74, at 248-272.

meeting.[93] Many states, including France and China, focused on the attempts by ECOWAS to reach a solution by peaceful means. In contrast, the US representative and others expressed support also for ECOMOG's peacekeeping activities.[94]

On 22 September 1993 the Council passed another crucial unanimous resolution[95] commending again the efforts of ECOWAS in Liberia, this time not expressly limited to its peaceful actions. It also established a UN Observer Mission in Liberia (UNOMIL) which was to cooperate and coordinate its activities with ECOMOG. This was the first peacekeeping operation carried out by the UN in cooperation with peacekeepers mandated by a regional organization.[96]

The UN documents cited above have been interpreted by ECOWAS and others as an implied, *ex post facto* authorization to ECOMOG. Arguments in support of this thesis emphasized the lack of condemnation, and the commendations expressed by the SC.[97] In contrast, others have interpreted the phrases used by the Council more restrictively and argued that those did not indicate any sign of the Council's willingness to authorize intervention.[98]

3.3. Sierra Leone 1997

3.3.1. The conflict

The devastating civil war of Sierra Leone started in 1991 when the Revolutionary United Front (RUF), a group of Sierra Leonean dissidents organized in Liberia assisted by Charles Taylor, launched its campaign against the country and its government.[99] Since early 1990 Nigerian troops under ECOWAS command[100] had been stationed in the territory of Sierra Leone, for instance to defend Freetown.[101] Talks sponsored by the UN, the OAU and the Commonwealth led to a peace accord in 1997. However, as the UN failed to send peacekeepers to enforce the accords despite express request by President Kabah, RUF failed to demobilize and seized power in a *coup d'etât* in May 1997, putting Major Koromah into power.[102] President Kabah called for military intervention by Nigeria and ECOWAS. It is however unclear whether his requests were issued before or

93. *See* UN Docs. S/PV.2974 (1991), S/PV.3071 (1991), S/PV.3138 (1992), S/PV.3187 (1993), S/PV.3233 (1993), S/PV.3263 (1993), S/PV.3281 (1993).
94. UN Doc. S/PV.3138, *supra* note 93, at 255-256, 265, 266.
95. UN Doc. S/RES/866 (1993).
96. Levitt, *supra* note 22, at 247.
97. *See, e.g.,* Nolte, *supra* note 17, at 631-634.
98. *See, e.g.,* Kufour, *supra* note 22, at 539-540.
99. S. P. Riley, Liberia and Sierra Leone: Anarchy or Peace in West Africa 7 (1996).
100. Nowrot & Schabacker, *supra* note 23, at 327.
101. Keesing's Record of World Events 38278 (1991).
102. Nowrot & Schabacker, *supra* note 23, at 326-327. Keesing's Record of World Events 41625 (1997).

after he fled to Guinea.[103] The international community, including the UN,[104] the OAU and ECOWAS, condemned the coup. The May 28-30 OAU meeting appealed to ECOWAS to help reestablish the constitutional order in the country. UNSC welcomed this decision.[105]

Due to the fighting, corruption and the restrictive policies of the Koromah junta the humanitarian situation became critical. The international community provided humanitarian assistance and a UNSC Presidential Statement issued on 6 August 1997 expressed the Council's concern over the worsening humanitarian situation in the country.[106] ECOWAS, in turn, has tried to bring about a negotiated solution. After the failure of these attempts, more than three months after President Kabah's invitation, the ECOWAS Summit of 30 August 1997 finally decided to set up an ECOWAS Cease-fire Monitoring Group also for Sierra Leone.[107]

3.3.2. The ECOWAS Cease-fire Monitoring Group (ECOMOG) for Sierra Leone

The August 30 decision guided by the fear that the conflict in Sierra Leone, which in the view of the members constituted threat to international peace, would destabilize the entire region and by humanitarian concerns[108] gave ECOMOG the mandate to enforce economic sanctions against Koromah and his government with the aim to ensure the return of the legitimate government and to restore order in Sierra Leone.[109] The composition of the ECOMOG troops in Sierra Leone, contributed on a voluntary basis, was unbalanced. Although no complete data were presented in the reviewed sources, it appears that Nigerian troops constituted the overwhelming majority of the force. Keesing's reported the arrival of 4,600 Nigerian soldiers and 1,500 Guineans to Sierra Leone, mentioning also the participation of Ghana in 1998.[110]

Nigerian troops under ECOMOG control engaged in full-scale fights against RUF forces soon after the coup.[111] Despite cease-fire agreements between ECOMOG and RUF, they continued to fight each other during a major part of the conflict, mutually accusing each other of being the first to break the cease-

103. *See* Levitt, *supra* note 22, at 365 and Nowrot & Schabacker, *supra* note 23, at 327.
104. UN Doc. S/PRST/29 (1997).
105. UN Doc. S/PRST/36 (1997).
106. UN Doc. S/PRST/42 (1997).
107. Levitt, *supra* note 22, at 343.
108. For the arguments of the representative of Nigeria at the 3822nd SC meeting *see* UN Doc. S/PV.3822 (1997).
109. UN Doc. S/1997/695, Ann. I and II, at 12-13 and 20-21.
110. *See* Nowrot & Schabacker, *supra* note 23, at 334, and Keesing's Record of World Events 41625-41626, 41673, 42048 (1998).
111. Nowrot & Schabacker, *supra* note 23, at 327 and Keesing's Record of World Events 41672, 41803 (1997).

fire.[112] An outstanding example of the use of force by ECOMOG was when, in response to a claimed attack by the junta on ECOMOG forces, it carried out a major offensive against RUF in February 1998, removing Koromah from power and capturing Freetown and other major cities. The offensive brought about the reinstallation of the Kabah government.[113] The action, which made ECOMOG appear as a highly partial actor in the eyes of the world, gained wide-spread support among Sierra Leone's population.[114]

3.3.3. International reactions

On 8 October 1997 the Security Council finally passed its first resolution, Resolution 1132 on Sierra Leone. In this decision the Council

> express[ed] its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourag[ed] it to continue to work for the *peaceful* restoration of the constitutional order, including through the resumption of negotiations [...] [emphasis added].[115]

However, it did not comment on the enforcement actions including full-scale fighting conducted by ECOMOG troops. While determining that the situation constituted a threat to international peace, the resolution stopped short of authorizing the use of force. Instead it stated the following:

> [a]cting also under Chapter VIII of the Charter of the United Nations, [the Security Council] authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related materiel of all types, including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations, and calls upon all States to cooperate with ECOWAS in this regard.[116]

The significance of this paragraph lies in its ambiguity concerning the means available to ECOMOG to ensure the implementation of the embargo. Due to its lack of clarity, the provision has been interpreted by some as to "sanction ECOWAS to enforce its terms",[117] whereas others thought it "stopped short of authorizing the use of force by ECOWAS in implementing the provisions of the Resolution".[118] In line with the first view, at the SC meeting where the resolution

112. *Id.*, at 41672, 41849 (1997), 41992, 42048 (1998).
113. *Id.*, at 42048 (1998).
114. Nowrot & Schabacker, *supra* note 23, at 329-330, 334.
115. UN Doc. S/RES/1132 (1997).
116. *Id.*
117. Levitt, *supra* note 22, at 366.
118. Nowrot & Schabacker, *supra* note 23, at 328.

was adopted the representative of Nigeria claimed that the provision constituted an "enabling authorization of the Council to ECOMOG to carry out its tasks as mandated by the ECOWAS summit".[119] At the same time he admitted that Nigeria wished for the authorization of stronger measures. These remarks did not trigger protest or clarification by other SC members.

As it has been pointed out above, ECOMOG resorted to the use of force not only to enforce the sanctions but also to oust the junta. OAU's reactions to this action were not less positive than to the original ECOMOG mandate.[120] In contrast, the SC was more careful welcoming only the fact that Koromah's government had been removed from power and commending ECOMOG for its role "towards the *peaceful* resolution of the crisis." It further encouraged the force "to proceed in its efforts [...] *in accordance with relevant provisions of the Charter of the United Nations.*"[121] However, as before, it did not mention the use of force by ECOMOG. In March the SC passed Resolution 1156[122] on Sierra Leone which did not even mention the role played by ECOWAS in the restoration of order. Consequently it has been suggested that these documents support the view that the Council never intended to provide an *ex post facto* authorization to ECOWAS.[123] This view seems to gain support in that the fact that, although in April a UNSC resolution "commend[ed] [ECOWAS and ECOMOG for Sierra Leone], on the important role they [were] playing in support of the objectives related to the restoration of peace and security [...]"[124] and similar statements were made in Resolution 1181,[125] a subsequent SC resolution expressed support again for the efforts of ECOWAS towards the *peaceful* restoration of order in Sierra Leone.[126] In contrast, it has been argued that the actions of the Council in connection with the ECOMOG intervention amounted to tacit retroactive authorization.[127]

The SC meeting records and other UN documents do not present any discussion of the legality of the measures undertaken by ECOMOG. Issues such as the consent of the government and other parties, or the legitimacy of the action in general have not been touched upon in any of the reviewed meeting records.[128]

119. Records of the 3822nd SC meeting, *supra* note 109.
120. Nowrot & Schabacker, *supra* note 23, at 330.
121. UN Doc. S/PRST/5 (1998). Emphasis added.
122. UN Doc. S/RES/1156 (1998).
123. Nowrot & Schabacker, *supra* note 23, at 365.
124. UN Doc. S/RES/1162 (1998).
125. UN Doc. S/RES/1181 (1998).
126. UN Doc. S/RES/1231 (1998).
127. Levitt, *supra* note 22, at 369, 372-373.
128. *See, e.g.*, UN Docs. S/PV.3822 (1997), S/PV.3857 (1997), S/PV.3867 (1997), S/PV.3872 (1998), S/PV.3902 (1998).

3.4. Yugoslavia – Kosovo 1999

3.4.1. The conflict[129]

After a long drawn-out but non-violent conflict over authority between the Federal Government of Yugoslavia and the local population of Kosovo organized in the Democratic League of Kosovo (LDK) led by Ibrahim Rugova, the LDK – with the knowledge of the Federal Government – formed its own 'shadow government', which exercised certain autonomy. Political developments and the inability of the LDK to reach its goals with peaceful means led to an escalation of tension and radicalization, resulting in the establishment of the Kosovo Liberation Army (UCK) in 1998. The latter set independence rather than autonomy as its main goal. As a response to the UCK's excessive insurgent activity against Serbians and Serbian installations, the Yugoslav Ministry of Interior ordered security operations by heavily armed police and by Serb Security Forces starting in February and in May 1998, respectively, and launched an offensive in September, regaining control over areas held by the UCK.

In the meantime the Security Council imposed arms embargo on the former Yugoslavia due to these policies. In a subsequent resolution passed in September the Council called upon the parties to cease hostilities and enter into negotiations, among other things. It further demanded that the Federal Republic of Yugoslavia (FRY) withdraw its special security forces from Kosovo and accept international monitoring missions on its territory.[130] Following non-compliance by the FRY, NATO threatened to launch air strikes against Serbia to enforce this resolution in October 1998. Consequently, President Milošević agreed to comply with UN demands.[131] After a short period of compliance and decrease in the level of hostilities there was an upsurge of violence again starting in late December 1998. The events culminated in the massacre of forty-five Kosovars in Racak by Serbian forces. NATO's reaction to these developments was to give Yugoslavia an ultimatum to reach a settlement on Kosovo. As the FRY, after initial talks resulting in a partial agreement with the Kosovars, moved new troops to the border of Kosovo and failed to sign the negotiated settlement on 18 March 1999, NATO responded by launching Operation Allied Force on 24 March 1999.

129. The following account of the conflict is based on J. Perlez, *Ethnic Conflict in Kosovo Has Centuries-Old Roots*, New York Times, 5 May 1999, at http://www.nytimes.com/library/world/europe/050499kosovo-history.html and on an article on Kosovo on the homepage of the Canadian Ministry of National Defense at http://www.dnd.ca/eng/archive/apr99/Kosovo1_b_e.htm. *See also* McCoubrey, *supra* note 25, at 29-31.
130. UN Docs. S/RES/1160 (1998) and S/RES/1199 (1998).
131. *See* Holbrooke-Milošević Agreement (UN Doc. S/1998/953).

3.4.2. Operation Allied Force

Members of the Alliance could not agree on the legal basis of the intervention. Some argued that it could be justified as a humanitarian intervention or self-defense, while others claimed that SC Resolutions 1160 and 1199 authorized the action.[132] NATO Secretary-General Solana referred to humanitarian concerns[133] in his 23 March press statement. While announcing the authorization of air strikes, Solana stated that "NATO [was] not waging war against Yugoslavia".[134] Instead, the goals of the organization in launching the air-campaign were the following: ending the Serb offensive in Kosovo, withdrawal of Serb troops from the province, agreement on international military presence in Kosovo, unconditional return of refugees and internally displaced persons and access to them by humanitarian organizations and finding a political solution for the Kosovo crisis.[135] NATO required full compliance with all conditions before halting the operation. Therefore, subsequent cease-fire proposals by Milošević and his announcement that he would end the offensive against Kosovo or that he would allow unarmed international presence in Kosovo did not satisfy NATO.[136]

The NATO operation started with the bombardment of air defense and other military installations across Yugoslavia.[137] In the second phase NATO conducted low-altitude attacks on heavy weapons in Kosovo. Attacks on military establishments in Belgrade and other towns continued with increased intensity. While NATO frequently emphasized its intentions to avoid collateral damage including civilian casualties, the attacks hit civilian homes, public transportation vehicles, a Serbian state run TV station, the Chinese embassy, etc. Following a warning NATO hit even human shields around strategically important establishments.[138]

132. *See* Guicherd, *supra* note 50, at 26-28.
133. According to UNHCR's estimates cited in the 17 March report of the UN Secretary-General there were 211,000 internally displaced persons in Kosovo and 25,000 Kosovars were displaced to Montenegro. *See* Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, UN Doc. S/1999/293 (1998).
134. *See* http://www.nato.int/docu/pr/1999/p99-040e.htm.
135. Federation of American Scientists' (FAS) homepage, http://www.fas.org/man/dod-101/ops/allied_force.html.
136. Such proposals were rejected by NATO on 30 March, 6 April, 8 April, 22 April, *etc. See* CNN's special pages on the Kosovo crisis at http://www.cnn.com/SPECIALS/1988/10/Kosovo/stories/ archive/index.html.
137. Keesing's Record of World Events 42847 (1999).
138. *See* articles on CNN's homepage, *supra* note 136. On collateral damage *see* FAS page, *supra* note 135, and, for instance, Yugoslavia's Request for the Indication of Provisional Measure concerning the Application of the Federal Republic of Yugoslavia against the Republic of France for Violation of the Obligations not to Use Force, at http://www.icj-cij.org/icjwww/idocket/iyfr/iyfrframe.htm.

In the beginning of the operation NATO troops, submitted with the consensus of the contributors,[139] consisted of "seven vessels capable of launching Tomahawk missiles, [...] between 350 and 400 aircraft [...] [and] some 13,000 troops stationed in Macedonia."[140] Although eight NATO members (Canada, France, Germany, Italy, the Netherlands, Spain, the UK and the USA) participated and a further five contributed troops, the composition of the force was heavily unbalanced towards US personnel and equipment.[141] Still it was its mandate commonly perceived as biased towards the Kosovars rather than the overwhelming US presence in the NATO operation that attracted most criticism.

3.4.3. International reactions

Shortly after the first threats by NATO to launch air strikes against Serbia, should the latter fail to comply with the demands of the international community, in the Security Council on 24 October 1998 China, Russia and other SC members expressed opposition to such threats and to the adoption of the Activation Order by NATO. The main reasons for this were that the air strikes would constitute intervention in the internal affairs of a sovereign state, as well as the fact that the "decision was made unilaterally, without consulting the Security Council or seeking its authorization".[142] They clearly expressed their objection to authorizing NATO action.[143]

The day the Operation commenced, the representatives of China, Russia and a few other states[144] expressed even stronger criticism in the Council and called for the immediate cessation of the attacks. The Chinese delegate called the acts "brutal and unprovoked aggression against [...] a sovereign and independent state". The representative of the Russian Federation expressed "categorical rejection"[145] and added that the operation which has been "carried out in violation of the Charter of the United Nations and without the authorization of the Security Council" would have "harmful consequences [...] for the stability of the entire modern multi-polar system of international relations".[146] He claimed that the operations justified by NATO as humanitarian intervention were "not only [...] in no way based on the Charter or other generally recognized rules of interna-

139. As NATO's decision-making is based on consensus, without the consent of all members to the operation and to troop contribution Operation Allied Force could not have been launched. *See also* NATO Handbook, NATO Office of Information and Press (1995).
140. Keesing's Report of World Events 42847 (1999).
141. *See* FAS homepage, *supra* note 135, at http://www.fas.org/man/dod-101/ops/kosovo_orbat.html
142. *See* Guicherd, *supra* note 50, at 29 and the records of the 3937th meeting of the Security Council, UN Doc. S/PV.3937 (1998).
143. *Id.*
144. Namibia, India, Ukraine, Belarus. *See* especially the records of the 3989th meeting of the Security Council, UN Doc. S/PV.3989 (1999).
145. Records of the 3988th meeting of the Security Council, UN Doc. S/PV.3988 (1999).
146. *Id.*

tional law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences."[147]

In contrast, representatives of NATO member states, supported by a few other nations, referred to the fact that the SC had, in subsequent resolutions, established that the situation in Kosovo constituted a threat to peace and security in the Balkans.[148] They argued that in those resolutions the international community had indicated its willingness to use force, and this is what NATO acted upon.[149] More importantly, speaking on behalf of the Presidency of the EU the German representative added that the countries of the EU considered it their moral obligation to prevent indiscriminate violence and events similar to the massacre at Racak.[150] Supported by the UK and Dutch representatives he sought to justify the intervention also in the following way:

> as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.[151]

The Dutch representative suggested the existence of a customary right to humanitarian intervention, reminding the other members that "the UN Charter is not the only source of international law".[152] He also proposed a discussion at a later date in the SC over the relationship between sovereignty and human rights arguing that it is a "generally accepted rule of law that no sovereign state has the right to terrorize its own citizens".[153] Canada, France, Slovenia, and the majority of non-European representatives expressed similar views during these meetings.

In response to such claims the representative of Russia rejected "the assertion that the traditional basis for the use of force lies beyond the confines of the United Nations Charter".[154] He also referred to the prohibition in Article 53 of the Charter of enforcement measures by regional organizations without SC authorization. China, in turn, emphasized that the maintenance of international peace and security is the primary responsibility of the SC, and that the determination of whether a situation constitutes threat to the peace and to act upon it are within the exclusive authority of the Council. Similar views were expressed by representatives of Namibia, India, Belarus, Ukraine and on later occasions by Costa Rica.[155] The representative of India reminded the Council that for

147. *Id.*
148. *See*, for instance, the speech made by the American representative, *id.*
149. *See*, for instance, the speech made by the representative of the Netherlands at the 3989th meeting, *supra* note 144 and Slovenia's contribution at the 3988th meeting. *See supra* note 145.
150. *Id.* For the submission of the UK representative *see* the records of the 3989th meeting, *supra* note 144.
151. *Id.*
152. Records of the 4011th meeting of the Security Council, UN Doc. S/PV.4011 (1999).
153. *Id.*
154. Records of the 3988th meeting of the Security Council, *supra* note 145.
155. *See id.*, the records of the 3989th meeting of the Security Council, *supra* note 144 and of the 4011th meeting, *supra* note 152.

peacekeeping operations the consent of the host government had to be secured. Cuba went so far as to call the NATO operation a "genocide".[156]

Russia even submitted a draft resolution condemning the NATO air strikes and calling for their immediate cessation.[157] During the discussion of this draft, which was rejected by all members of the Council except China, Russia and Namibia,[158] the illegality of the establishment of the force under international law and the manner in which it was conducted, namely the extensive, indiscriminate and disproportionate use of force by NATO attracted much criticism.[159] A further sign of opposition by, for instance, Russia was the suggestion to include into the text of Resolution 1239[160] the words "there must be an immediate cessation of all military activities".[161]

Unlike in the examples relating to ECOWAS activities in West Africa the Security Council, having passed a number of resolutions on Kosovo, never commended or even referred to NATO's efforts for the resolution of the Kosovo crisis. Furthermore, even Resolution 1244[162] authorizing peacekeeping by member states individually or through international organizations failed to mention NATO.

4. DISCUSSION

4.1. Enforcement actions

The issues whether a specific measure constitutes enforcement action or whether it is covered by any exception to the requirement of authorization have been discussed at length at the SC meetings reviewed above. The only aspect mentioned in Section 2 that has not been raised in the SC was whether an action can be enforcement action even if it is based on a non-binding decision of a regional organization.[163] Although the consent of the troop contributors was in every case required for their participation in the operation as the decisions concerning the interventions were recommendatory, not even in the cases of the Dominican Republic or Kosovo, where the measure needed justification in the light of heavy

156. *Id.*
157. UN Doc. S/1999/328.
158. The other speakers opposed to NATO action at the meeting discussed above were not members of the Security Council. It should also be born in mind that five of the fifteen SC members are also members of NATO.
159. *See,* for instance, the speech of the Chinese representative made at the 4003rd SC meeting, UN Doc. S/PV. 4003 (1999).
160. UN Doc. S/RES/1239 (1999).
161. 4003rd meeting of the Security Council, *supra* note 159. *See also* the view expressed by the representative of Belarus at this meeting.
162. UN Doc. S/RES/1244 (1999).
163. *See* Meeker, *supra* note 9.

criticism, was the argument raised. Consequently, it appears that in line with the above conclusion the argument has lost support, if it ever had enjoyed any.

In contrast, the question of consent of the legitimate government and of other parties has attracted a considerable amount of attention during the debates in the case of the Dominican Republic and Kosovo, demonstrating the importance attributed to the issue. As it has been indicated in the discussion of international reactions, in the first case the lack of consent from the legitimate government was emphasized by France and Uruguay, in the latter mainly by China. On the other hand the question whether the consent of all parties needs to be attained has not been raised. Rather, France argued that the consent of all major parties is not sufficient unless those include the legitimate government. The arguments indicate that the consent of the internationally recognized government is necessary and sufficient (assuming that otherwise the lack of consent by Taylor in Liberia and by Koromah in Sierra Leone would have triggered criticism in the Council). Hence the findings confirm the above views on the legitimizing effect of consent except the requirement that the consent of all major parties should be attained. Therefore, it can be argued that there was, during the past decades, a shift towards the acceptance of the use of force if it is undertaken with the consent of the government. Alternatively, the criticism by some states to such actions may have reflected their interest to deny the rebels' right to prevent an intervention by not consenting to it.

The question of how long a government can be seen as legitimate after it has lost control over the country has not been raised in the Security Council. It seems the delegates assumed that even if a government is temporarily not in control of the territory and population, it remains legitimate. Otherwise the requests by Kabah of Sierra Leone and Doe of Liberia would not have been sufficient or, in the case of the Dominican Republic, the lack of the government's consent would not have been seen by, for instance, the French representative as an obstacle to intervention.

Another issue that deserves consideration is the relationship between peacekeeping and enforcement actions. The mandate of the first three intervening forces was defined to resemble UN peacekeeping operations (to maintain or restore peace) and the use of force was, at least theoretically, not directed against the states concerned. Nonetheless, in the case of the Dominican Republic this was not convincing enough, for example, for the Soviet representative who claimed that the operation was an act of aggression. A possible explanation is the lack of impartiality and the use of force by the OAS troops in the age of first generation peacekeeping when the non-use of force and impartiality were still generally accepted criteria. The lack of criticism on these points in the ECOWAS cases may, in turn, be due to the fact that these criteria were in practice relaxed in second generation peacekeeping starting 1989. This indicates that contemporary practice and *opinio juris* do not support the above stated requirement of impartial mandate.

The mandate of the NATO deviated from peacekeeping. Moreover, NATO has never claimed the operation to be peacekeeping. The intervention was heavily criticized in the SC on this point among others by the Chinese delegate who expressed the view that the operation constituted an act of aggression against a sovereign state. Considering the lack of criticism of the ECOWAS interventions which had a peacekeeping mandate as opposed to heavy criticism by Russia and China of the NATO action it is arguable that operations undertaken with the aim of maintaining or restoring peace in a state (with the consent of the legitimate government) do not constitute enforcement action or do not require authorization. This is in line with the expectations based on the theoretical submissions.

Let us now turn to the thesis concerning the existence or emergence of a right to prevent human suffering even at the price of military intervention. Such arguments are not supported in the above cases. Considering all conflicts or only pure cases of claimed humanitarian intervention, hence omitting the conflict in the Dominican Republic and Sierra Leone which can be categorized as pro-democratic interventions, it seems that at least two important international actors with interest in the issue (China and Russia) strongly object to such intervention, with the potential exception of cases where the consent of the government is obtained. Chinese and Russian statements, and views expressed by, for instance, India, Costa Rica and Cuba in relation to Operation Allied Force indicate that as yet there exists no such thing as a customary right of humanitarian intervention even reserved for extreme situations. This supports the conclusions reached following the above theoretical arguments.

Nevertheless, as it has been indicated by the *Kosovo* case, at least the majority of Euro-Atlantic states appear to advocate for a right.[164] Yet, even if it was true that there is a growing acceptance of a right of humanitarian intervention in the Euro-Atlantic region, the possibility of its emergence as a regional custom – which would clearly violate the universally recognized *jus cogens* norm concerning the prohibition of the use of force – is legally questionable or would, at least raise a multitude of complicated questions.[165]

Yet, humanitarian motives may be raised as an explanation for the fact that the ECOWAS interventions have not been criticized. Following the argument presented in Section 2.2 that human suffering on a massive scale may justify humanitarian intervention under certain additional circumstances[166] the difference in the level of violence appears to be a potential explanation. However, although no exact figures have been presented on this issue it is likely that the level of violence (or of violations of human rights) was not significantly lower in Kosovo and in the Dominican Republic than it was, for instance, in Sierra Le-

164. *See* the views of Germany, United Kingdom, the Netherlands, Canada and the USA cited above.
165 *See* Simma, *supra* note 24, at 3.
166. Cassese, *supra* note 22, at 27.

one. These facts disprove the argument that a high level of violence justifies intervention.

4.2. Security Council authorization

In none of the four cases has there been a prior SC authorization. Still, this requirement was referred to only in two of the cases, in connection with the Dominican Republic and Kosovo. Considering that besides the lack of consent there is nothing else in common between these two cases that is not shared also by the others than the fact that the USA was one of the main intervening actors in both cases it is arguable that rather than or besides legal explanations, some states were opposed to these interventions due to political motives.[167] It is possible, however, that the issue was raised in those cases for different reasons. It is likely, for instance, that in 1965 some members of the Council were not yet ready to allow a reinterpretation of the Charter provisions on the requirement of prior authorization even in the case of actions closely resembling peacekeeping. Note however that the question whether *ex post facto* authorization could have a retroactive effect has not been raised in the discussions.

In contrast, a possible explanation of Operation Allied Force might be that China, Russia and others in favor of prior authorization wanted to break the subsequent chain of precedents against the requirement established by the ECOWAS interventions where the lack of condemnation has been interpreted as tacit approval. However, although the Council did not condemn these operations, on many occasions in the case of Sierra Leone and although less often but at times even in the case of Liberia, it expressed support for the role of ECOMOG in the '*peaceful* resolution of the crisis'. This might indicate an intention to prevent being interpreted as providing *ex post facto* authorization. In contrast, the fact that the Council later entrusted ECOMOG with the supervision of UN sanctions acting under Chapter VIII indicates that the SC may indeed have intended to provide a tacit authorization – short of suggesting that the lack of condemnation amounts to approval. These inconsistencies of UN reactions may explain the fact that the scholarly community is divided over the effect of these resolutions, making it difficult to judge the theoretical submissions in light of practice. Consequently, the question of the validity of the tacit *ex post facto* approval argument and the definition of what might amount to such authorization require further research.

4.3. Situations "appropriate for regional action" and "local disputes"

The cases display some interesting variation also concerning this final major group of ambiguities. As the issues of the use of force and consent have been

167. *Cf.* Sections 3.1.3 and 3.4.2, *supra*.

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discussed above in Section 4.1., they will not be treated here again. One aspect of the latter that has not been touched upon yet is the relationship between consent and the position of the state authority. Despite the importance attributed to actual control in theory, the legality of intervention in a collapsed state and the effect of consent from the legitimate government no longer in control have not even been raised in the SC discussions. Note however that, with the possible exception of Sierra Leone where the information given by different sources concerning the date of Kabah's request is controversial, in none of the cases has state authority totally collapsed before the intervention commenced. The case studies are, therefore, inconclusive on this issue.

In contrast, the cases do offer some guidance on the question of the suitability of internal conflicts for regional action. In the context of the Dominican and the Kosovo crises the Soviet Union (Russia) and China, among others, considered the intervention illegal partly because the action constituted an interference with the internal affairs of a state, whereas no such statement has been made in connection with the other conflicts. What could explain this difference? Another possible explanation may be that, whereas the first cases concerned power struggle, the original conflict in Kosovo was a secessionist conflict. Consequently, it is possible that, as suggested above, the international community has grown to accept intervention when it is aimed at the termination of an armed struggle between various political factions while some permanent SC members as well as other states still do not accept interference in wars of secession, especially not when it protects the interests of the secessionist movement.

It should be recalled here that based on theoretical contributions it was concluded in Section 2.4 that regional organizations could deal with internal conflicts only after a determination by the Security Council that the situation constituted a threat to the peace. Practice, however, showed a different picture. Such determination was made only in the case of Kosovo, and even then it apparently did not convince China and Russia of the legality of the intervention. Conversely, in the cases where there has not been any such prior determination by the SC, no Council members protested against the action. It was only in the context of the Dominican crisis that the Soviet representative referred to a breach of Article 39.

A final issue to be discussed here is whether regional organizations are entitled to deal with local disputes only, as suggested above, or can also legitimately intervene in conflicts outside the region (organization). Three of the four cases discussed in this article concerned local crises. In contrast, Operation Allied Force was clearly an out of area mission. Surprisingly enough concerning other strong objections by Russia and China, none of the members of the Security Council have raised this issue. This may suggest that Kelsen and others were

correct in claiming that regional organizations could also deal with conflicts outside their region, possibly even without prior authorization.[168]

5. SUMMARY AND CONCLUSIONS

Due to limitations of this study concerning the range of material used and to the limited number of cases the conclusions concerning potential new interpretations of the Charter are not more than tentative ones. Nevertheless, the lack of uniformity displayed by the cases in most respects and the apparent lack of uniformity of reactions to seemingly similar cases may enhance the validity of the findings which suggest that there has been a move towards a more liberal interpretation of the provisions of the UN Charter dealing with regional enforcement action.

One of the indicators of this change was the recognition that consent appears to be a prerequisite of intervention and if it comes from the internationally recognized government it may legitimize an unauthorized regional intervention, or help avoid condemnation. The consent of other parties does not appear to be required in practice. This finding is supported by all cases as it was only the OAS and NATO interventions, none of which enjoyed the consent of the recognized government, which attracted criticism. Moreover, as demonstrated by the cases, a temporary loss of control by the government over a major part of the country is negligible in this respect.

The issue of the relationship between peacekeeping and regional enforcement action also seems to have been determined in a relatively straightforward manner in theory and practice. As indicated above, the cases appear to support the thesis that peacekeeping operations undertaken with the consent of the parties concerned (or more importantly of the legitimate government) and/or with the sole aim of maintaining peace do not constitute enforcement actions requiring authorization. It might further be argued that with the suggested relaxation of the criteria of non-use of force and impartiality even those regional peacekeeping operations may be acceptable without prior authorization in which these criteria are not strictly followed (e.g. Liberia and Sierra Leone).

In contrast, it has been demonstrated by critiques in the *Kosovo* case that in line with the above theoretical submission the justification of an intervention as humanitarian intervention does not relax the obligation to seek explicit and/or prior SC authorization. The level of violence or of human rights violations does not seem to be able to account for the different responses. Due to the nature of the prohibition of the use of force as a universal *jus cogens* norm it furthermore seems unlikely that a regional customary right of humanitarian intervention could emerge in the Euro-Atlantic or any other region. Nonetheless, unauthor-

168. *Cf.* Section 2.4, *supra*.

ized humanitarian interventions may be acceptable if they enjoy the support of the recognized government and can in general also be justified as peacekeeping operations, as happened in the ECOMOG cases.

Another finding is that, despite the theoretical predictions, tacit *ex post facto* authorization may be sufficient in certain cases. The ECOMOG interventions might suggest this view. However, due to the lack of clarity concerning the delimitation of what constitutes a tacit enforcement it is not possible to draw any clear conclusions on the issue at this point. Moreover, it could be argued that China and Russia protested to the intervention in Kosovo in part with the aim to break the series of precedents against the requirement of prior explicit authorization.

It further appears that internal conflicts may be seen as situations 'appropriate for regional action', especially if they concern struggle for power rather than a secessionist conflict. A theoretically hardly justifiable variant of this explanation could be that an intervention – even in internal conflicts – does not require prior authorization if it takes place in a conflict characterized by struggle for power by various domestic factions. Both contentions are supported by all cases except the OAS intervention. However, as it has been argued, the difference in this case may originate from the fact that the consent of the recognized, but by the coup ousted, government has not been attained by OAS. Alternatively, it can be submitted that the criticism to this intervention was due to the strict criteria imposed on first generation peacekeeping.

Moreover, although suggested otherwise in theory, the determination by the Security Council that the situation constitutes a threat to the peace does not seem to be a precondition of the acceptance of unauthorized enforcement actions by regional organizations in internal conflicts. The only case where such determination has been made before the intervention is Kosovo. The neglect by the SC of the question of out of area missions in this case suggested furthermore that such missions might be acceptable or 'appropriate for regional action'.

In sum, it can be argued that the prevailing interpretation of the Charter is rather different in many respects today from what was envisaged by its drafters in San Francisco. Maybe out of practical necessity but it is clear that regional organizations enjoy a considerably larger degree of freedom even in the field of enforcement measures involving the use of armed force than they did during the early days of the UN. The cases indicate that the international community is going through a redistribution of authority between the UN and regional organizations but, as the number of preconditions presented above suggests, the scope of this redistribution is limited.

Nevertheless, even though the SC retains the primary responsibility for the maintenance of international peace and security, regional organizations are – expressly or tacitly – attributed an increasing range of rights and responsibilities even in the field of enforcement. Although these tentative conclusions are drawn from a limited range of operations (mainly peacekeeping), the facts that consent

and a mandate resembling peacekeeping appears to legitimize most operations undertaken without prior consent, even in internal conflicts, and the lack of criticism on the point of out of area missions in the *Kosovo* case, support the view that regional organizations have the possibility today to become increasingly involved in the maintenance of peace and security even by forcible means. The only incident that may imply different conclusions is the Kosovo crisis, in which the opposition of two of the permanent members and some other states may have been a result of their wish to stop this process of liberalization or to stop the USA. Alternatively, as indicated by the findings, the specific features of the Kosovo crisis – for instance its mandate not even resembling peacekeeping and the use of force undertaken in effect in support of a secessionist movement without the consent of the government – may explain the different attitude.

Before Kosovo the conclusions of a similar study could have been more consistent and more enthusiastic about the new possibilities opening up for regional organizations. One solution to the dilemmas reinforced by Operation Allied Force is to wait and see the reactions of the world to future regional interventions until a set of criteria is crystallized providing guidance for those who wish to intervene.