

PEACEKEEPING OPERATIONS AND NATO'S ROLE IN THE COLLECTIVE SECURITY SYSTEM

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1. Introduction

The North Atlantic Treaty Organization (NATO) was established first and foremost as a defensive military alliance. Art. 5, the key provision of the Washington Treaty ⁽¹⁾, was accordingly modelled after Art. 51 of the Charter. In the last decade, however, the Alliance has radically changed as it clearly emerges from a comparison between the Strategic doctrines adopted in 1991 and 1999. The first document reads in part: "The Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defence [...] The role of the Alliance's military forces is to assure the territorial integrity and political independence of its member states" ⁽²⁾. While confirming the predominant defensive purpose of the Alliance, the second document extended its range of activity to tackling international terrorism, sabotage, organised crime and disruption of the flow of vital resources ⁽³⁾. These tasks were combined with new responsibilities in maintaining peace and security on the regional plan ⁽⁴⁾ and in coping with humanitarian emergencies ⁽⁵⁾.

This paper discusses NATO's military activities on the basis of a four-fold distinction: peacekeeping operations, military coercive operations, peace-implementing operations, and operations directed at protecting the members' security (Part I). It then assesses the evolution of the Alliance from the internal perspective, namely the nature of the Organisation and of the strategic doctrines and the North Atlantic Council's (NAC) decisions (Part II). Finally, it considers the question of the qualification of NATO as a regional organisation for the purposes of Chapter VIII of the United Nations Charter and the legal framework in which these activities are carried out.

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¹ Concluded on 4 April 1949, 34 *UNTS* 243.

² *The Alliance's New Strategic Concept*, Agreed by the Heads of State and Government participating in the meeting of the NAC, Rome, 7-8 November 1991, para. 35.

³ *Alliance Strategic Concept*, Approved by the Heads of State and Government participating in the meeting of the NAC, Washington, 23-24 April 1999, para 24.

⁴ See, in particular, para. 6.

⁵ See the Speech delivered by NATO Secretary General on 20 May 1999 before the Assembly of the Senior Civil Emergency Planning Committee.

PART I - NATO MILITARY ACTIVITIES

2. Peacekeeping operations

i) Peace-keeping operations in former Yugoslavia

NATO forces participation in peacekeeping operations was first prospected in June 1992, when the Alliance declared itself prepared to support peacekeeping activities under the responsibility of the Conference for Security and Co-operation in Europe (CSCE, later Organisation for Security and Co-operation in Europe, OSCE) ⁽⁶⁾. Six months later, the Alliance confirmed its readiness, to support, *on a case-by-case basis and in accordance with its own procedures*, peacekeeping operations carried out under the authority of the UN Security Council ⁽⁷⁾.

Meanwhile, on 10 October, NAC decide to provide the United Nations with the technical means necessary to monitor the Bosnian airspace. The operation, was based upon the consent expressed by the belligerent parties at the UN-EC sponsored Conference ⁽⁸⁾ and the UN Security Council non- mandatory resolution 781 ⁽⁹⁾. It was at once the first engagement of the Alliance forces in “out-of-area” military activities and the only truly peacekeeping operation performed by NATO during the Yugoslav crisis ⁽¹⁰⁾.

ii) Peacekeeping operations in Albania and Macedonia

Two large and successful peacekeeping operations were conducted by NATO forces in Albania (1999) and Macedonia (2001-2003). In both countries, they contributed to resolve humanitarian crisis, defuse the risk of escalation of the military clashes, promote the democratisation process, and increase regional security. The first operation, denominated *Allied Harbour*, was authorised by the NAC on 12 April 1999, following a request from the Albanian government, and lasted until 26 August ⁽¹¹⁾. According to Operative Order 10414, the force was deployed to provide humanitarian assistance in support of, and in close co-ordination with, the UNHCR and Albania civilian and military authorities.

⁶ NAC Ministerial Meeting, *Final Communiqué*, Oslo, 4 June 1992, para 11.

⁷ NAC Ministerial Meeting, *Final Communiqué*, Brussels, 17 December 1992, para 4. At the NAC Ministerial Meeting, at Brussels on 11 January 1994, the Alliance reiterated its readiness to undertake peacekeeping and other operations under the authority of the UN Security Council or the responsibility of the CSCE, *Declaration of the Heads of State and Government*, Press Communiqué M-1(94)3.

See also Nuclear Planning Group, *Final Communiqué*, Gleneagles, 21 October 1992, para 2.

⁸ International Conference on former Yugoslavia, *Documents adopted at the London Conference*, 26-27 August 1992, 31 *ILM* (1992) 1527, p. 1539. Croatia and the FRY gave their consent to inspections at the airports of Belgrade, Spilt and Zagreb in a Joint Declaration made on 30 September 1992 (see UN Doc. S/24476, Annex).

⁹ Adopted on 9 October 1992 (14-0-1).

¹⁰ See R. HIGGINS, *The New UN and former Yugoslavia*, 69 *Int. Affairs* (1993) 465, p.469.

¹¹ *Press Release* M-NAC-1(99)51. A SOFA Agreement was concluded with Albania through an exchange of letters.

NATO presence in Macedonia was initially decided by NAC on 20 June 2001, on the basis of a request from the Macedonian government ⁽¹²⁾. Throughout its existence, the force was mandated to collect and destroy the weapons of insurgent ethnic Albanians (Operation *Essential Harvest*, 22 August - 23 September 2001), to protect international personnel involved in monitoring the implementation of the peace plan (Operation *Amber Fox*, 23 September 2001 - 15 December 2002), and to assist the government in taking ownership of security throughout the country (Operation *Allied Harmony*, 16 December 2002 - 31 March 2003) ⁽¹³⁾.

3. Coercive operations

i) Coercive measures aimed at containing the conflict in former Yugoslavia

The already mentioned decision taken NAC on 17 December 1992 marked a turning point in NATO history. The Alliance confirmed its readiness, *on a case-by-case basis and in accordance with its own procedures* ⁽¹⁴⁾, not only to support peacekeeping operations under the authority of the Security Council, but also to carry out coercive military activities in order to enforce Chapter VII mandatory resolutions ⁽¹⁵⁾. The availability of the Alliance was further reaffirmed in other documents alongside the assertion that “participation in any such operation or mission will remain subject to decisions of member States in accordance with national constitutions” ⁽¹⁶⁾.

NATO coercive measures were initially aimed at containing the conflict in former Yugoslavia. On 18 November 1992, the NAC, acting upon Security Council resolution 787 ⁽¹⁷⁾, authorised NATO forces to halt and inspect or divert to an approved port or anchorage

¹² *Press Release* (2001) 93, 20 June 2001.

¹³ At the end of March 2003, the operation was formally handed over to the European Union, see *Press Release* (2003)25, 17 March 2003.

¹⁴ NATO Secretary General W. CLAES, *NATO's Ambitious Agenda*, in *NATO on Track*, Conference Report, The Hague, October 24-29, 1994, p. 57, points out that NATO is not a sub-contractor to the UN but a sovereign organisation with a right to discuss the conditions for supporting the UN.

¹⁵ Ministerial Meeting of the NAC, *Final Communiqué*, Brussels, 17 December 1992, para 4. See also NACC, *Final Communiqué*, Brussels, 18 December 1992, which in par. 7 stressed that UN authority or CSCE responsibility ‘ensure international legitimacy for such operations’. Par. 4 of resolution 241, adopted in November 1992 by the North Atlantic Assembly (NAA), reads in part: “NATO must now act upon its commitment to crisis prevention and management and upon its recognition that security in Europe is indivisible. Such action must derive from the authority of the United Nations or the CSCE” (AJ 298, SA 92-16).

¹⁶ See, in particular, Ministerial Meeting of the NAC, *Declaration of the Head of State and Government*, Brussels, 11 January 1994, para 7. See also the 1999 *Alliance Strategic Concept*, supra note 3, para 31.

¹⁷ Adopted on 16 November 1992 (13-0-2), the resolution called upon States, nationally or through regional agencies or arrangements, to use such proportionate measures to halt all maritime shipping in order to ensure strict implementation of resolutions 713 and 757 (para 12).

all vessels in order to verify compliance with the relevant Security Council resolutions ⁽¹⁸⁾. Germany announced that its naval forces already engaged in the monitoring operation would not participate to any activities involving the use of force ⁽¹⁹⁾. Coercive activities were later extended, in accordance with Security Council resolution 820 ⁽²⁰⁾ to the territorial waters of the FRY ⁽²¹⁾. Greece declared that its forces would not take part in the new operations ⁽²²⁾. On 11 April 1994, due to growing concern over the legitimacy of the arms embargo with regard to Bosnia, the United States government withdrew its participation to the enforcement operations in respect to vessels carrying weapons heading for Bosnia ⁽²³⁾.

In April 1993 N_{AC}, on the basis of Security Council Res. 816 ⁽²⁴⁾, decided to enforce the ban on military flights and agreed with the UN Secretary General upon the rules of engagement the Security Council. These rules, described as particularly strict ⁽²⁵⁾, required N_{ATO} aircraft to issue a double warning before resorting to force. Due to their marginal military relevance, the enforcement operations were tolerated by the belligerent parties, and in particular by the Bosnian Serbs against which they were essentially directed ⁽²⁶⁾.

ii) Coercive measures in support of UNPROFOR

Far more problematic were N_{ATO} coercive measures undertaken in support of the United Nations peacekeeping operation (UNPROFOR). Following the adoption of Security Council 836 ⁽²⁷⁾, N_{AC} decided first to provide protective air power in case of attack against

¹⁸ On 8 June 1993, NATO and WEU approved a combined concept (Operation *Sharp Guard*) and formed the Combined Task Force 440.

¹⁹ See W. HEINTSCHEL VON HEINEGG, U.R. HALTERN, *The Decision of the German Federal Constitutional Court of 12 July 1994 in Re Deployment of the German Armed Forces Out of Areas*, 41 *NILR* (1994) 285, p. 288.

²⁰ Adopted on 17 April 1993 (13-0-2).

²¹ Atlantic News, No. 2521, 30 April 1993.

²² See H. VOS, *Co-operation in Peacekeeping and Peace Enforcement*, NAA/DSC, 1993 Reports, AK 230, DSC/DC (93), p. 14.

²³ NATO Secretary General declared that the United States decision would not prevent NATO and WEU from continuing the enforcement activities, see Atlantic News, No. 2670, 16 November 1994.

²⁴ Adopted on 31 March 1993 (14-0-1), the resolution authorised member States to take, nationally or through regional organisations, all necessary proportionate measures, including the use of force, to ensure compliance with the ban to fly over Bosnian airspace (para. 4).

²⁵ See T. VAN VLIJMEN, *The Bosnian Tragedy*, NAA/DSC, 1993 Reports, AK 228, NAA/DSC (93)9.

²⁶ The only combat action took place on 28 February 1994, when four Galeb violating the no-fly zone were shot down near Banja Luka, see 88 *AJIL* (1994) 524; 65 *BYIL* (1994) 694.

²⁷ Adopted on 4 June 1993, the resolution authorised member States to use, nationally or through regional organisations or arrangements, air power to support UNPROFOR in the performance of its mandate, para. 10. For some critical comment on the resolution, see D. OWEN, *Balkan Odyssey*, London, 1997, p. 355; Y. AKASHI, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Area Mandate*, 19 *Fordham Int. Law Jour.* (1995) 312, p. 315; M. WELLER, *Peace-Keeping and Peace-Enforcement in the Republic of Bosnia and Herzegovina*, 56 *ZaöRV* (1996) 70, p. 111

UNPROFOR⁽²⁸⁾, then to take, under the authority of the Security Council, the necessary measures, including air strikes, to put an end to the strangulation of Sarajevo and other areas⁽²⁹⁾.

Up to summer 1995, NATO forces conducted only the air strikes - none of them of great military significance - expressly requested or authorised by the UN Secretary General or his delegates⁽³⁰⁾. Unlike previous coercive measures, which were conducted under exclusive NATO chain of command, the command and control arrangements for air strike established the so-called "dual key procedure". The first use of air power was to be authorised by the UN Secretary General, while the political authority was to be exercised by the NAC in co-ordination with the UN⁽³¹⁾. The enforcement of the protection of the safe areas was a complete failure to the point that and on 28 June 1995, the NAC provisionally approved a plan for UNPROFOR withdrawal under NATO exclusive command and control⁽³²⁾.

iii) Operation Deliberate Force

In summer 1995, the international community eventually expressed its resolve to stop the Bosnia Serbs offensive, if necessary a substantial and decisive military response⁽³³⁾. A few days later the NAC decided to launch extensive air strikes under the authority of existing Security Council resolutions, in the event of a Bosnian Serb attack against Goradze⁽³⁴⁾. On 10 August CINCOSOUTH and UNPROFOR commanders concluded a memorandum of understanding on the execution of air strikes by NATO forces. The memorandum became operative on 30 August 1995, when the second Sarajevo market massacre triggered massive NATO air operations. The decision to initiate the *Operation Deliberate Force* was jointly taken by NATO and UNPROFOR commanders. It was apparently agreed that the operation would have continued until *both* commanders had determined that they had

²⁸ NAC, *Final Communiqué*, Athens 10 June 1993.

²⁹ *Press Statement by the Secretary General following the Special Meeting of the NAC*, Brussels, 2 August 1993.

³⁰ NATO ultimata issued in February and April 1994, respectively with regard to Sarajevo (*Decisions taken at the meeting of the NAC in Permanent Session*, Brussels, 9 February 1994) and Goradze (*Decisions taken at the Meeting of the NAC in Permanent Session*, Brussels, 22 April 1994), however, provoked the protest of the Russian Federation (see, in particular, the statement dated 10 February, UN Doc. S/1994/152, Annex) and some tension between and within NATO and the United Nations. On both occasions, Greece dissociated her position, but did not oppose the adoption of the NAC decisions.

³¹ *Decisions taken at the Meeting of the NAC on 9 August 1993*, in *NATO Review*, August 1993, p. 26 ff. See also *Declaration of the Heads of State and Government*, Brussels, 11 January 1994.

³² See *Atlantic News*, No. 2731, 30 June 1995.

³³ *Déclaration finale de la Conférence* (Londres, 21 Juillet 1995), in *Documents d'actualité internationale*, 1995, No. 249, p.585.

³⁴ NATO Secretary General, *Press Statement on Goradze following the NAC meeting*, 25 July 1995, in *NATO Review*, September 1995, p. 7. The warning was later extended to the remaining safe areas, see NATO Secretary General, *Press Statement on other Safe Areas following the NAC meeting*, 1 August 1995, *ibidem*.

achieved their aims⁽³⁵⁾, which essentially included: (a) cessation of attacks against Sarajevo and the other safe areas; (b) withdrawal of heavy weapons from the total exclusion zone around Sarajevo; (c) complete freedom of movement for UN troops and unrestricted use of Sarajevo airport⁽³⁶⁾.

Russian Federation⁽³⁷⁾, supported China⁽³⁸⁾ and the FRY⁽³⁹⁾ contested the lawfulness of the operation on several grounds, including its punitive and disproportionate nature, its incompatibility with existing Security Council resolutions, and the violation of the “dual key procedure”. The overwhelming majority of States, however, rejected these objections and admitted, though in a rather summary fashion⁽⁴⁰⁾, the conformity of the operation with the Security Council resolutions in force, and in particular with resolution 836. The operation, in any case, paved the way to the conclusion of the Peace accords concluded in Dayton and signed in Paris⁽⁴¹⁾.

iv) Intervention in Kosovo

The Security Council reacted to the dramatic situation existing in Kosovo by imposing an arms embargo⁽⁴²⁾, ordering the Belgrade government to withdraw the security forces used for the civilian repression, and establishing an international monitoring mission⁽⁴³⁾. The United States announced that NATO was planning military operations to guarantee, if necessary, compliance with the resolution⁽⁴⁴⁾. On 13 October, the NAC issued an activation order for limited air strikes and a phased air campaign in the FRY⁽⁴⁵⁾.

The military threat compelled the FRY to sign two agreements. The first agreement, concluded with OSCE, established the Kosovo Verification Mission (KVM) which was

³⁵ See the letter by the U.S. President to the Congress, dated 1 September 1995, in *Public Papers of the Presidents of the United States*, Washington, 1995, vol. II, p. 1279-1280.

³⁶ *NATO Press Release* (95) 79, 5 September 1995.

³⁷ UN Doc. S/PV. 3575, 8 September 1995, p. 2-4. See also the letter dated 7 September 1995, UN Doc. S/1995/776.

³⁸ UN Doc. S/PV. 3575, 8 September 1995, p. 8.

³⁹ *Ibid.* p. 12-13. See also the Statements dated 30 August, 7 and 8 September 1995, respectively UN Doc. S/1995/759, UN Doc. S/1995/777, UN Doc. S/1995/778.

⁴⁰ See M. WELLER, *supra* note 27, p. 161.

⁴¹ UN Doc. S/1995/999. See M. SOREL, *L'accord de paix sur la Bosnie-Herzegovine du 14 Septembre 1995: un traité sous bénéfice d'inventaire*, 41 *AFDI* (1995) 65; P. SZASZ, *The Dayton Accord: The Balkan Peace Agreement*, 30 *CILJ* (1997) 759.

⁴² Resolution 1160, 31 March 1998 (14-0-1), par. 8.

⁴³ Resolution 1199 adopted on 23 September 1998 (14-0-1), par. 9.

⁴⁴ UN Doc. S/PV.3930, 23 September 1998, p. 5. The Russian Federation, on the contrary, excluded that the Security Council contemplated the use of force, *ivi*, p. 3.

⁴⁵ *Statement by the Secretary General Following Decision on the ACTORD*, Brussels, 13 October 1998. Earlier, NATO Secretary General had declared that the Alliance could legitimately resort to force to put an end to the humanitarian catastrophe and ensure compliance with the relevant Security Council resolutions, See the letter dated 9 October 1998, partly quoted in B. SIMMA, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *EJIL* (1999) 1, text note 13.

charged with monitoring compliance with Security Council resolution 1199 ⁽⁴⁶⁾. On the basis of Art. 7, which obliged the FRY to permit and co-operate in the evacuation of KVM members caught in emergency situation, NATO deployed a rescue force in Macedonia (Operation *Determined Guarantor*). The second agreement, concluded with NATO, created a NATO air surveillance mission over Kosovo and defined the main technical aspects of Operation *Eagle Eye*. It also included a rather obscure article on “Force Protection” according to which violations of the agreement would have been “immediately arbitrated through bilateral channels to determine liability and appropriate action to be taken” ⁽⁴⁷⁾.

The facts that the operations were based on the two agreements and consisted in a verification mission and the rescue of international personnel - which is the most acceptable form of self-defence - could induce to qualify them as peacekeeping operations. The consensual character of these operations, however, is only apparent since the agreement was deliberately obtained through military threats ⁽⁴⁸⁾ and coercion expressly remained available in case of non-compliance.

The Security Council rapidly endorsed both agreements and confirmed that action may be needed to ensure the safety of the OSCE personnel involved in the monitoring mission ⁽⁴⁹⁾. Concern over NATO military threat was expressed by the Russian Federation, which urged NATO to abstain from taking unilateral action and to withdraw the activation order ⁽⁵⁰⁾ and China, which qualified NATO initiative as contrary to the Charter and general international law ⁽⁵¹⁾. The United Kingdom and the United States, on the contrary, underlined the need to take action to ensure the effective compliance of Security Council resolutions, and ultimately to prevent a humanitarian catastrophe ⁽⁵²⁾. Adopting a more prudent approach, France affirmed the centrality of the Security Council in the field of use of force and considered resolution 1203 as necessary to legitimate the accords signed by the FRY ⁽⁵³⁾.

On 23 March, after several weeks of unsuccessful diplomatic initiatives, the NATO Secretary General directed the SACEUR to initiate a broad range of air operations, against

⁴⁶ *Agreement on the OSCE Kosovo Verification Mission*, Belgrade, 16 October 1998, in UN Doc. S/1998/978. See also *OSCE Permanent Council Decision No. 263*, 15 October 1998, in UN Doc. S/1998/994 Annex; *OSCE Oslo Ministerial Draft Statement on Kosovo*, in UN Doc. S/1998/1221, Annex II, par. 10.

⁴⁷ *KVM Agreement between NATO and the FRY*, Belgrade 15 October 1999, in UN Doc. S/1998/991 Annex.

⁴⁸ The United States admitted that the credible threat of force was essential to conclude the two agreements, UN Doc. S/PV.3937, 24 October 1998, p. 15.

⁴⁹ Resolution 1203 adopted on 24 October 1998 (13-0-2), par. 9.

⁵⁰ UN Doc. S/PV.3937, 24 October 1998, p. 12.

⁵¹ *Ivi*, p. 14. See also the criticism expressed by Costa Rica, *ivi*, p. 6; and Brasil, *ivi*, p. 10.

⁵² *Ivi*, respectively p. 13 and 15.

⁵³ *Ivi*, p. 15-16. Successively France declared that NATO actions not based on Art. 5 of the 1949 Treaty “doivent être placés sous l’autorité du Conseil de sécurité”, *Discours du Ministre des Affaires étrangères*, Bruxelles, 8 décembre 1998, in *Doc. Actualité Int.*, 15 janvier 1999, p. 60.

the FRY. A draft resolution submitted before the Security Council and calling for an immediate cessation of the air operations gathered only the votes of the Russian Federation, China and Namibia ⁽⁵⁴⁾.

The intervention provoked a sharp division. On the one side, it was justified as necessary to prevent a humanitarian catastrophe ⁽⁵⁵⁾, to guarantee the respect by Belgrade government of its international obligations ⁽⁵⁶⁾ to protect the international personnel, to contain the flow of refugees pressing on neighbouring countries, and to prevent a further deterioration of peace and stability in the region ⁽⁵⁷⁾. Other States ⁽⁵⁸⁾ indicated the legal basis of the intervention in previous Security Council resolutions.

On the other side, NATO action was criticised by a significant number of States as contrary to Articles 2 (4) and 53 of the Charter as well as to the customary norm prohibiting the use of force in international relations. These State made abundantly clear that no coercive action could be undertaken by States or regional organisations without a Security Council authorisation ⁽⁵⁹⁾.

4. Peace implementing operations

(i) Bosnia Herzegovina

The conflict in Bosnia Herzegovina eventually ended with the peace agreement concluded at Dayton ⁽⁶⁰⁾ and then signed in Paris ⁽⁶¹⁾. In Annex 1A, concerning the military aspects of the Peace settlement, the Republic of Bosnia-Herzegovina and its constituent entities agreed that NATO could establish a force operating “under the authority and subject to the direction and political control of the NAC through the NATO chain of command” and invited the UN Security Council to adopt a resolution authorizing the deployment of such a force (Art. 1) ⁽⁶²⁾. The NAC authorised the deployment of a NATO led force (IFOR, successively

⁵⁴ UN Doc. S/1999/328.

⁵⁵ The United Kingdom, in particular, described the intervention as an exceptional measure on grounds of overwhelming humanitarian necessity, UN Doc. S/PV.3988, 23 March 1999, p. 12. See also: *Chairman’s summary of the Deliberations on Kosovo of the Informal Meeting of EU Heads of States*, 14 April 1999, UN Doc. S/1999/429, Annex.

⁵⁶ *Ivi*, p. 9.

⁵⁷ See in particular the position of the United States, UN Doc. S/PV.3989, 26 March 1999, p. 4-5.

⁵⁸ See the *Declaration of the French Foreign Ministry*, 25 March 1999, and the position taken by Belgium on 10 May 1999 in the proceeding before the ICJ, *infra* note 143, CR 99/15.

⁵⁹ See, in particular, the intervention of the Russian Federation, China, RFY, India, Cuba, UN Doc. UN Doc. S/PV.3988 and UN Doc. S/PV.3989, respectively 24 and 26 March 1999. See also: *Communiqué of the Rio Group of Latin American States*, 25 March 1999, UN Doc. S/1999/347, Annex; *Statement of the Movement of Non-Aligned Countries*, 9 April 1999, UN Doc. S/1999/451, Annex.

⁶⁰ Concluded on 21 November 1995, UN Doc. S/1995/1021, Annex; also in 35 *ILM* (1996) 170.

⁶¹ Concluded on 14 December 1995, UN Doc. S/1995/999, Annex; also in 35 *ILM* (1996) 75.

⁶² The agreement was endorsed by the FRY and Croatia, and supplemented, *inter alia*, by a SOFA concluded between Bosnia-Herzegovina and NATO. On 15 December, the Security Council authorised the establishment of the operation in Res. 1031 (unanimously).

SFOR), charged with ensuring compliance with the military aspects of the peace accord, if necessary by resorting to force ⁽⁶³⁾.

(ii) Kosovo

On 9 June 1999 the FRY and NATO concluded a Military Technical Agreement establishing an international military force to be deployed in Kosovo, following the adoption of a UN Security Council resolution ⁽⁶⁴⁾. Again, the force operated with unified NATO chain of command and under the political control of the NAC, in consultation with non- NATO force contributors.

The force was charged with taking any measure, including the use of force, necessary to maintain a secure environment in the province and facilitate the return of displaced peoples and refugees. The Security Council immediately endorsed the agreement and authorised member States and the relevant organisations to create a multinational force whose responsibilities included deterring the renewal of the hostilities, maintaining and, where necessary, enforcing a cease-fire, ensuring the withdrawal of the Federal and Republic military, demilitarising the KLA ⁽⁶⁵⁾.

⁶³ See Ministerial Meeting of the NAC, *Final Communiqué*, Brussels, 5 December 1995.

⁶⁴ *Military Technical Agreement between the KFOR and the Governments of the RFY and the Republic of Serbia*, Belgrade, 9 June 1999, in 38 *ILM* (1999) 1217.

⁶⁵ Resolution 1244 adopted on 10 June 1999 (14-0-1), par. 9.

5. Defensive operations

i) Defensive operation on the Mediterranean Sea

On 12 September 2001, the NAC declared that the terrorist attack perpetrated the day before were to be considered as armed attack from abroad against the United States and on that basis for the first time it invoked the application of Art. 5 of the Washington Treaty⁽⁶⁶⁾. At the request of the United States, member States successively decided to take, individually and collectively, eight measures to co-ordinate and enhance the Allied response to international terrorism⁽⁶⁷⁾. These measures included the deployment of a naval force on the Eastern Mediterranean charged not only with surveillance and monitoring tasks, but also with enforcing responsibilities in case of vessels suspected to be engaged in international terrorism, no matter the flag they fly. The first boarding operation took place on 29 April 2003 and regarded a merchant vessel flagged by Comoros. Since 10 March, NATO force also escort allied ships through the Straits of Gibraltar as a preventive measures against possible terrorist attacks.

ii) Defensive measures to assist Turkey

On the basis of Art. 4, during the recent Iraqi crisis, Turkey requested consultation among the Allied on the threat to its security. On 19 February 2003, the Defence Planning Committee (DPC) authorised certain defensive measures against threat posed by Iraq and namely the deployment of AWACS (under SACEUR Command), theatre missile defences, and chemical and biological equipment⁽⁶⁸⁾. As a matter of speculation, one could assume that the decision was taken within the DPC - without the participation of France - due to the disagreement existing within the NAC, where the consultation had been initially conducted at the request of the United States⁽⁶⁹⁾. Operation *Display Deterrence* ended on 16 April when the NAC assessed that Iraq did not represent any longer a military threat to the political independence and territorial integrity of Turkey⁽⁷⁰⁾.

⁶⁶ *Statement by the NAC*, Press Release (2001) 124.

⁶⁷ *Statement to the Press by NATO Secretary General*, 4 October 2001.

⁶⁸ See *Decision Sheet of the DPC*, 16 February 2003; *Statement from the Spokesman*, 19 February 2003, Press Release (2003) 13; *Conclusion of Operation Display Deterrence and Art. 4 Consultations*, 16 April 2003, Press Release (2003) 40.

⁶⁹ According to the Secretary General, the disagreement did not concern the necessity to take defensive measures but rather on their timing, see *Statement to the Press*, 10 February 2003.

⁷⁰ Press Release (2003) 40, 16 April 2003.

PART II - THE EVOLUTION OF THE ALLIANCE

6. Nature of the Organisation

The Washington Treaty is silent on the international legal status of the Alliance. ⁽⁷¹⁾ A specific norm in the constituent treaty, however, is neither sufficient nor necessary to establish the international personality of the organization. What needs to be demonstrated is the exercise, based on an autonomous decision-making process, of powers not limited to the national systems of one or more member States ⁽⁷²⁾.

The main arguments advanced in favour of considering NATO as a subject distinct from its member States include the following. The Alliance has treaty-making power as expressly foreseen, in particular, in Art. 25 of the Ottawa Convention. As a result, the Alliance enters into relations with other members of the international community, including its own member States, and assumes international obligations and rights ⁽⁷³⁾. NATO's international personality may be deduced from the privileges and immunities its forces enjoy in the legal systems of member States ⁽⁷⁴⁾.

Neither argument is conclusive. In concluding international agreements, the Alliance's organs could act either as common organs of member States or as organs of the Alliance as a distinct international subject ⁽⁷⁵⁾. It has indeed been argued that the treaty-making power only apparently belongs to the Organization as its exercise is based on an agreement among member States rather than on the expression of will of an independent subject ⁽⁷⁶⁾. The concession of privileges and immunities to an international organisation, in turn, does not presuppose its international legal personality. Quite the contrary, the intergovernmental character of the Organisation and the nature of the activities carried out by its common organs could be sufficient to enjoy immunity from jurisdiction before national courts.

The international legal personality of international organisations has been described as *primary* since it is not the legal effect of its constituent instrument. Similarly to the personality of other subjects of international law, the international personality of international organisations derives from the emergence of "an entity materially able – in certain matters – to act and to manifest a will in such condition of independence as to distinguish itself from any other international person" ⁽⁷⁷⁾.

⁷¹ Art. 4 is irrelevant since it deals with the Alliance's legal status within the national legal systems of member States.

⁷² See I. BROWNIE, *Principles of International Law*, Oxford University Press, 1998, p. 678-680.

⁷³ See, in particular, G. CASSONI, *L'Organizzazione del Trattato dell'Atlantico del Nord*, Milano, Giuffrè, 1967, p. 31 *et seq.*

⁷⁴ G. CASSONI, *supra* note 73, p. 29 *et seq.*

⁷⁵ See, for instance, the agreements concluded on 13 October 1998 and on 9 June 1999 with the FRY.

⁷⁶ R. QUADRI, *Diritto internazionale pubblico*, 5th ed., Napoli, Liguori, 1968, p. 385.

⁷⁷ G. ARANGIO-RUIZ, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law*, Sijhoff, Alphen aan den Rijn, 1979, p. 246 *et seq.* See also the works by the same author quoted in the corresponding footnotes and, more recently, *The "Federal Analogy"*

The most reliable test to verify whether a given international organization possesses legal personality distinct from these of member States remains its attitude with regard to the acceptance of international responsibility for acts committed by its organs or by the forces employed under its effective control, and, conversely, the bringing of international claims for allegedly unlawful acts committed by other subjects in violations of its rights⁽⁷⁸⁾.

In this regard, the events related to the accidental bombing of the Chinese embassy in Belgrade occurred on 7 May 1999 strongly militates against the attribution of international personality to NATO⁽⁷⁹⁾. Although NATO immediately expressed its regrets and opened an investigation on the matter⁽⁸⁰⁾, it was the United States (the State to whom belonged the aircraft involved) that in the following months entered into bilateral negotiations with China. The offer of immediate *ex-gratia* payments to the victims made by the United States⁽⁸¹⁾ was finalised on 16 December 1999 when the two governments signed an agreement providing for a \$ 28 million compensation damages in favour of China⁽⁸²⁾.

In the very same direction point the arrangements related to the international responsibility for unlawful acts committed by IFOR/SFOR in Bosnia Herzegovina⁽⁸³⁾ and KFOR in Kosovo⁽⁸⁴⁾ outside their official duties: member States and not the Alliance may be called to respond for these acts.

and UN Charter Interpretation: A crucial Issue, 8 *EJIL* (1997) 1. See also R. AGO, 15 *YBILC* (1963), vol. I, p. 302; F. SEYERSTED, *Objective International Personality of Intergovernmental Organizations*, 34 *Nordisk Tidsskrift for International Ret* (1964) 5, p. 100; K. ZEMANEK, *The UN Conference on the Law of Treaties Between States and International Organizations: The Unrecorded History of its "General Agreement"*, in K.H. BÖCKSTIEGEL *et al.* (eds), *Law of Nations, Law of International Organizations, World Economic Law*, Köln, Heymanns, p. 665 *et seq.*, p. 670-671.

⁷⁸ As pointed out by R. QUADRI, *supra* note 76, pp. 534-5, international personality is to be desumed from international responsibility, not the other way around. See also A. GIARDINA, *Comunità europee e Stati terzi*, Napoli, Jovene, 1964, p. 177.

⁷⁹ The episode refutes the conclusion reached by E. STEIN, D. CARREAU, *Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty*, 62 *AJIL* (1968) 577, p. 602, according to whom 'NATO has evolved into an international organization endowed with its own international personality and legal order, possessing an extensive, complex institutional machinery, and engaged in activities of common interests that can no longer be imputed to individual members singly and severally' (footnote omitted).

⁸⁰ See the intervention by the United States, France and the United Kingdom, *ibid.*, respectively p. 3, p. 4, and p. 7.

⁸¹ U.S. State Department, *Report on Accidental Bombing of Chinese Embassy*, July 6, 1999, available at <http://usinfo.state.gov/regional/ea/uschina/bombrpt.htm> (visited on 7 June 2000).

⁸² *Press Statement* of 16 December 1999 of the U.S. State Department, available at www.state.gov.

⁸³ See M. GUILLAUME, *La reparation des dommages causes par les contingents français en ex-Yougoslavie et en Albanie*, 43 *AFDI* (1997) 151.

⁸⁴ T. STEIN, *Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?*, in C. TOMUSCHAT (ed.), *Kosovo and the International Community*, Kluwer, The Hague, 2002, p. 181 *et seq.*; M. GUILLAUME, *Le cadre juridique de l'action de la KFOR au Kosovo*, *ibid.*, p. 243 *et seq.*

In spite of the recent impressive evolution, therefore, NATO should still be considered as a highly developed institutional union of States and consequently its organs are common organs of member States⁽⁸⁵⁾. The legal effects of its organs' acts, therefore, are identical to those that would have been produced by the same act performed individually by all States members of the union.

7. Nature of the acts of the Organisations

Although expressly foreseen only with regard to accession of new members to the North Atlantic Treaty⁽⁸⁶⁾, the unanimity rule has been consistently applied by NATO's organs, in the first place by the NAC. This voting procedure guarantees that member States could assume obligations stemming from decisions of the Alliance's organs only if they have concurred to, or at least not opposed, their adoption⁽⁸⁷⁾. With regard to military coercive measures, in particular, the Alliance' organs can never adopt mandatory decisions upon member States. It has been observed that "[n]ot even in time of war or declared emergency would the integrated command assume the authority over a member's armed forces without its concurrence: SACEUR would acquire operational control over the forces *assigned* to him only after the member States concerned have turned over their units to him, and each State again makes its own determination to this effect"⁽⁸⁸⁾.

Nothing in fact excludes that certain decisions taken by NATO's organs, and in particular those of the NAC decisions, may constitute international agreements concluded in simplified form, provided that the States' representatives have clearly manifested the will of the respective governments to assume legal obligations⁽⁸⁹⁾. In this regard, it may be useful to distinguish *ad hoc* decisions from those having general character.

The first group of decisions includes the NAC decisions authorising the Alliance forces to take part to single military operations⁽⁹⁰⁾. NATO forces undertook no military activity without a formal decision by the NAC. The attitude of the UN Secretary General during the

⁸⁵ On the notion of common organ, see T. PERASSI, *Lezioni di diritto internazionale*, Padova, Cedam, 1954, Part I, p. 145 *et seq.*, who observes that a common organ is simultaneously the organ of all member States.

⁸⁶ Art. 10.

⁸⁷ The United States Deputy Secretary of State recently declared: "NATO is a consensus organization, and it defines its common interests accordingly – by consensus of its members. We would not go anywhere as an Alliance unless all our members want to go there", quoted in B. SIMMA, *supra* note **Error! Bookmark not defined.**, p. 15.

⁸⁸ E. STEIN, D. CARREAU, *supra* note 79, p. 593-4.

⁸⁹ E. STEIN, D. CARREAU, *supra* note 79, p. 613; E. CANNIZZARO, *N.A.T.O., Digesto Discipline Pubblicistiche*, IV ed., vol. X, Torino, Utet, 1995, 52, *et seq.*, p. 65; A. CARLEVARIS, *Accordi in forma semplificata e impegni derivanti dal Trattato NATO*, in N. RONZITTI (ed.), *NATO, conflitto in Kosovo e Costituzione italiana*, Milano, Giuffrè, 2000, p. 67 *et seq.*, p. 87.

⁹⁰ See, in particular, NAC decisions adopted on 18 November 1992, *supra* para 3 (i); 8 April 1993, *supra* para 3 (ii); 10 June 1993, 2 August 1993, 9 August 1993, 9 February 1994, 22 April 1994, *supra* para 3 (iii); 30 January 1999, 23 March 1999, *supra* para 3 (iv).

Bosnian conflict confirms that a N_{AC} decision was considered as indispensable before resorting to force within the Alliance framework. In January 1994, in particular, he introduced a distinction between the use of force to defend UNPROFOR (close air support) and that having pre-emptive or punitive character (air strikes). Referring to a letter from the N_{ATO} Secretary General, he declared himself unable to request air strikes until N_{AC} had expressly authorised N_{ATO} forces to launch this kind of operations ⁽⁹¹⁾.

Following the N_{AC} decision, member States remain free to participate to ⁽⁹²⁾, and eventually to withdraw at any time from these operations ⁽⁹³⁾. In order to have the decision implemented, therefore, a further expression of will must be manifested at least by some of the member States. The forces voluntarily provided for by member States are put under the command of the civilian and military authorities of the Alliance, acting as common organs of these States.

Although deprived of any mandatory effect with regard to member States, N_{AC} decisions may have certain legal consequences and in particular that of allowing member States that intend to participate to the military coercive activities to use the Alliance structure, chain of command, facilities and equipment ⁽⁹⁴⁾. To this extent, the N_{AC} decisions can be considered as international agreements concluded in simplified form ⁽⁹⁵⁾. Besides, the decision may create an estoppel preventing member States that did not participate to the military enforcement measures from challenging the lawfulness of the resort to force by other members.

Moving to the second group of decisions, the most important N_{AC} decisions having general nature are a string of decisions adopted during the Yugoslav crisis ⁽⁹⁶⁾ and the 1999 Strategic concept ⁽⁹⁷⁾. It is difficult to discern from the content of these documents any new rights for or obligations upon member States, nor even limited to compulsory consultation

⁹¹ Report dated 28 January 1994 (UN Doc. S/1994/94).

⁹² This obviously implies the right of participating States to put limitations on the use of their forces. With regard to Kosovo crisis, for instance, the Italian government excluded the use of its aircraft above the 44° parallel or in so-called “non-defensive operations”. On this point, see A. CARLEVARIS, *supra* note 89, p. 87.

⁹³ See *supra* notes 19, 22 and 23.

⁹⁴ It must be further noted that aircraft belonging to the Alliance took part to the operations carried out by NATO forces, including *Operation Deliberate Force* and the air campaign against the FRY.

⁹⁵ In the decision delivered on 12 July 1994, 90 BVerfGE (1994) 286; English translation in 106 *ILR* (1997) 319, the German Constitutional Court concluded that N_{AC} decisions related to the naval operation in the Adriatic Sea and to the enforcement of the no-fly zone over Bosnian airspace did not constitute “new treaty regulations affecting future cases” (p. 371) and did not amend the Washington Treaty (p. 372). Rather unconvincingly is the position of the dissenting judges according to whom the decisions are to be considered as soft-law. For a critique of the concept of soft law, see J. KLABBERS, *The Concept of Treaty in International Law*, The Hague, Kluwer, 1996, p. 157 *et seq.* As observed by P. WEIL, *Towards Normative Relativism*, 77 *AJIL* (1983) 413, p. 417, “however much writers denies the difference between norms and non norms, States continue clearly to perceive this difference”.

⁹⁶ See, in particular, the documents referred to *supra* notes 6, 15 and 16.

⁹⁷ See *supra* note 2.

among member States had the Security Council authorised the use of force or generally in case of threat to international peace not triggering the functioning of Art. 5 of the Washington Treaty ⁽⁹⁸⁾.

These decisions were intentionally drafted in extremely vague terms in order to avoid any suggestions of legal engagement. The relevance of these decisions seems to be exclusively political: they merely assert that the member States will consider, on a case by case basis and provided there is an unanimous agreement within the N_{AC}, taking part to enforcement measures. As member States remain free to determine within the N_{AC} the very existence of any obligations or their extent, all these decisions lack “an essential condition of validity of legal instruments” ⁽⁹⁹⁾ and are better described as political commitments ⁽¹⁰⁰⁾. What is needed therefore is another N_{AC} *ad hoc* decision, whose implementation will depend on the concrete availability of member States to provide the necessary armed forces.

Even more than the vague character of their texts ⁽¹⁰¹⁾, the decisive element that permits to exclude that these documents impose legal commitment is the clear unwillingness on behalf of the contracting parties to legally engage themselves ⁽¹⁰²⁾. Suffice it to note that the United States President issued a declaration that reads in part: “I feel compelled to make clear that the document is a political, not a legal document. As such, the Strategic concept does not create any new commitment or obligation” ⁽¹⁰³⁾.

An identical conclusion has been reached by the German Constitutional Court in two judgements. In the first, delivered in 1994, the Court was unable to evince “an intention to enter into new legal treaty obligations” ⁽¹⁰⁴⁾. In the second, it maintained that the text of the Strategic Concept “mostly consists of descriptions and analysis of the present political

⁹⁸ An obligation to consultation in “any situation which constitutes a threat to or a breach of the peace” appeared in Art. 4 (b) of the 1948 Draft text of the North Atlantic Treaty, but was eventually deleted.

⁹⁹ See, in general, Judge *ad hoc* H. LAUTERPACHT, diss. op., in the *Case of Certain Norwegian Loans*, *ICJ Reports 1957*, p. 9, at p. 48.

¹⁰⁰ In this sense, see P. PICONE, *La “guerra in Kosovo” e il diritto internazionale generale*, 83 *RDI* (2000) 309, p. 318 *et seq.*

¹⁰¹ The discretion left to contracting parties, even when particularly wide, does not necessarily precludes the legal nature of the document, see, in particular, M. VIRALLY, *La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique*, 60 *AIDI* (1983), p. 334 *et seq.*

¹⁰² See M. VIRALLY, *supra* note 101 p. 341 *et seq.*; and the comments by P. WEIL, *ibid.*, p. 369 *et seq.*

¹⁰³ Quoted in E. CANNIZZARO, *La nuova dottrina strategica della NATO e l'evoluzione della disciplina internazionale sull'uso della forza*, in N. RONZITTI (ed.), *supra* note 89, p. 43 *et seq.*, p. 46, footnote 26. See also, for Canada, *Seventh Report on the Standing Senate Committee on Foreign Affairs*, April 2000, in E. SCISO (ed.), *L'intervento in Kosovo. Aspetti internazionalistici e interni*, Giuffrè, Milano, 2001, p. 216 *et seq.*

¹⁰⁴ See *supra* note 95, p. 371.

situation and expresses declarations of intent that are too general to create obligation that would arise from a treaty”⁽¹⁰⁵⁾.

The foregoing considerations militate against the view that following NATO undertaking of non-defensive military activities the 1949 Treaty has been tacitly revised⁽¹⁰⁶⁾ or needs to be formally revised⁽¹⁰⁷⁾. Nonetheless, nothing prevents NATO member States from performing, through the common organs of the Alliance, activities entirely outside those included in the constituent treaty, but not prohibited thereby, provided that the relevant NAC decisions were taken unanimously or at least without opposition⁽¹⁰⁸⁾.

The legal basis for NATO non-defensive military operations is to be sought not in its constituent instrument but rather in the relevant *ad hoc* NAC decisions insofar as they constitute international agreements⁽¹⁰⁹⁾. Through these decisions, in fact, member States agree, on a case-by-case basis, upon the use of the Alliance's structure, chain of command, facilities and equipment, still reserving their individual position as to whether, how and how long participate to the military operations. It has been rightly pointed out that “the fact that NATO might conduct operations outside the scope of its founding treaty means not that such operations are illegal but that a member State has no legal obligation to participate in them”⁽¹¹⁰⁾.

Accordingly, there is no need to resort to dynamic interpretations of the 1949 Treaty⁽¹¹¹⁾ and in particular of its Art. 4⁽¹¹²⁾, or to the doctrine of implied powers⁽¹¹³⁾. The textual

¹⁰⁵ 22 November 2001, 2 BvE 6/99, 22 November 2001, available with extracts translated into English at www.bverfg.de. See M. RAU, *NATO's New Strategic Concept and the German Federal Government's Authority in the Sphere of Foreign Affairs: The Decision of the German Federal Constitutional Court of 22 November 2001*, 44 *GYIL* (2001) 544.

¹⁰⁶ In this sense, see E. CANNIZZARO, *supra* note 89, p. 58.

¹⁰⁷ See I.F. DEKKER, E.P.J. MYJER, *Air Strikes on Bosnian Positions: Is NATO also Legally the Proper Instrument of the UN?*, 9 *LJIL* (1996) 411.

¹⁰⁸ The position of the Greek government not to concur to certain NAC decisions, but not oppose them either, could be considered as an example of abstention (see *supra* note 30). For want of any provisions in the 1949 Treaty, the admissibility of decisions taken without the participation of all members has emerged in the Alliance practice alongside the general application of the unanimity rule, see E. CANNIZZARO, *supra* note 89, p. 61-62.

¹⁰⁹ In the judgement delivered in 1994, *supra* note 94, p. 369, the German Constitutional Court observed that “the WEU Member States apparently work under the legal assumption that enforcement of UN resolution requires no basis in the Brussel Treaty”. The consideration can be extended to NATO.

¹¹⁰ See the Canadian report *supra* note 103, p. 219. This position is reminiscent of the considerations made by G. FITZMAURICE, diss. op. in *Certain Expenses of the United Nations*, *ICJ Reports 1962*, p. 151, at p. 205, with regard to contribution to merely permissive operations of the United Nations.

¹¹¹ This view was apparently held by the German government in the decision referred to *supra* note 95, p. 372.

¹¹² See, for instance, the resolution adopted on 6 March 1998 by the U.S. Senate Committee of Foreign Relations, in 92 *AJIL* (1998) 497, p. 499.

¹¹³ G. NOLTE, *Die “Neuen Aufgaben” von NATO und WEU: Völker- und verfassungsrechtliche Fragen*, 54 *ZaöRV* (1994) 94, p. 108 *et seq.*

clearness of the 1949 Treaty does not leave much room for interpretation ⁽¹¹⁴⁾. Contracting parties intended to establish a purely defensive alliance and the obligations they assumed were strictly limited to mutual defence. Being non-Art. 5 operations completely unrelated to the 1949 Treaty, subsequent practice of member States can hardly be considered as *in application* of the treaty and has no relevance for interpretative purposes ⁽¹¹⁵⁾. Art. 4, in turn, does not present any connection with non-defensive military operations. It regards threats to the territorial integrity, political independence or security of the allied and it obliges them to consult each other before making a final decision on unilaterally taken measures that could have an adverse effect upon the Alliance's collective defensive system ⁽¹¹⁶⁾. Moving to the (controversial) implied powers doctrine, it must in the first place be noted that NATO was established and still remains a military defensive alliance based on the cooperation between member States. As such, it can perfectly function without any attribution of implied powers, which has been defined as those powers not expressly provided for in the constituent treaty but nonetheless conferred upon the Organization "by necessary implication as being essential to the performance of its duties" ⁽¹¹⁷⁾.

8. NATO as a regional organisation

At the S. Francisco Conference, the notion of regional organization had been deliberately left vague ⁽¹¹⁸⁾. Due to the difficulties, if not the impossibility, to define a region from both geographical and legal perspectives, the Charter contains no indication as to the membership of regional organisations or the geographical proximity or political affinities of its members ⁽¹¹⁹⁾.

The Charter is equally silent on the degree of institutionalisation regional organisations should developed in order to act under Chapter VIII. States can "certainly create a full-fledged organization, meaning an intergovernmental organization with a separate legal personality, operating through organs of its own; but nothing prevents them from setting up a less developed 'institutional union', operating through common organs of the Member

¹¹⁴ In *Competence of Assembly regarding Admission to the United Nations*, Advisory Opinion, *ICJ Reports 1950*, p. 4, at p. 8, the Court states that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter".

¹¹⁵ Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties.

¹¹⁶ Criticism on the pertinence of Art. 4 has been expressed by E. CANNIZZARO, *supra* note 103, p. 46, footnote 5.

¹¹⁷ *Reparation for Injury Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Report 1949*, p. 174, at p. 182.

¹¹⁸ A restrictive definition proposed by the Egyptian delegation was rejected, see 12 *UNCIO*, p. 850.

¹¹⁹ See for instance G. SCHWARZENBERGER, *Power Politics. A Study of International Society*, London, Stevens, 1951, p. 521; O. YAREMTCHOUK, *Le régionalisme et l'ONU*, 59 *RGDIP* (1955) 406, p. 409.

States, or even a ‘simple union’, operating through the (mere) cooperation of its Members”⁽¹²⁰⁾. This view is supported by the *travaux préparatoires* of the Charter since the Act of Chapultepec of 3 March 1945⁽¹²¹⁾ was expressly considered as a regional arrangement under the terms of Article 52⁽¹²²⁾.

Accordingly, even a simple union of States, functioning as the co-ordination centre for national activities carried out through common organs, may qualify as a regional organisation, provided it has “as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security”⁽¹²³⁾. The occasional grouping of States, such as Groups of Contact, on the contrary, not being even an institutional or simple union of States, cannot be considered a regional organisation for the purpose of Chapter VIII⁽¹²⁴⁾.

During the negotiations that led to the conclusion of the Washington Treaty, opposing views were put forward as to the possibility that the Alliance could also operate as a regional organisation⁽¹²⁵⁾. Eventually, the position held by United Kingdom⁽¹²⁶⁾ and the United States⁽¹²⁷⁾ that NATO was exclusively a defensive alliance prevailed over the French proposal to qualify NATO in the preamble of the Treaty also as a regional organisation⁽¹²⁸⁾.

¹²⁰ A. GOIA, *The United Nations and Regional Organizations in the Maintenance of Peace and Security*, in M. BOTHE, N. RONZITTI, A. ROSAS (eds.), *The OSCE in the Maintenance of Peace and Security* The Hague, Kluwer, 1997, p. 191 *et seq.*, p. 198 (footnotes omitted).

¹²¹ In 39 *AJIL* (1945) Suppl. 108.

¹²² See, in particular, the discussion within the Advisory Committee of Jurists, 17 *UNCIO*, p. 396.

¹²³ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, *I.C.J. Rep.* 1998, p. 275, at p. 307. The UN Secretary General included among others “regional organizations for the 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”, UN Doc. S/24111, 17 June 1992.

¹²⁴ J.M. YEPES, *Les accords régionaux et le droit international*, 71 *RdC* (1947-II) 235, p. 250. In *Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction and Admissibility, Judgment, *ICJ Reports* 1984, p. 392, at p. 440, the ICJ excluded that the Cantadora process could be considered as a regional organisation for the purpose of Chapter VIII.

¹²⁵ See N. HENDERSON, *The Birth of NATO*, London, Weidenfeld & Nicolson, 1982, p. 101 *et seq.*

¹²⁶ The British government declared before the House of Commons: “The Treaty is not a regional arrangement under Chapter VIII of the Charter. The action envisaged is not enforcement action in the sense of Article 53 at all”, see *Hansard*, Session 1948/1949, vol. 464, col. 2018-2019.

¹²⁷ The United States Secretary of State excluded that the Alliance could take “enforcement action, aggressive action, preliminary action, any sort of action at all, except defensive action, after an attack has occurred”, *Hearings before the Committee on Foreign Relations*, U.S. Senate Reports, No. 48, 81st Congress, 1st Session (1949) p. 31. According to the Committee on Foreign Affairs, however, NATO could “be utilized as a regional arrangement under Chapter VIII of the Charter or in any other way”, *ibid.* p. 22. Ambassador Austin, in turn, maintained that “activities under both Article 51 and Chapter VIII are comprehended in the Treaty [...] In certain of its aspects the treaty is also a regional arrangement”, *ibid.* p. 94.

¹²⁸ See the report of the Foreign Affairs Commission, in *Assemblée Nationale, Documents Parlementaires*, Annex 7849, p. 1343 *et seq.* On 14 April 1949, France declared before the UN General

It was eventually agreed that, in their public statements, the member States would have stressed the primary defensive purpose of the Alliance “recognized and preserved by Article 51, rather than any specific connection with Chapter VIII or other Articles of the United Nations Charter”⁽¹²⁹⁾.

During the Cold War, when the Security Council was virtually paralysed by the veto, the question whether NATO could function as a regional organisation was essentially limited to the academic debate⁽¹³⁰⁾. Following recent developments, the question has acquired a significant practical relevance⁽¹³¹⁾.

Contrary to the position of the United Secretary of State in 1949⁽¹³²⁾, the concepts of collective self-defence and enforcement action are by no means mutually exclusive⁽¹³³⁾. Hence, an organization can function as a military defensive alliance based on Art. 51 of the Charter and also as a regional organization for the purposes of Chapter VIII. This is conclusively demonstrated by the Organization of American States and in particular by Art. 5 of the Rio Treaty⁽¹³⁴⁾ and Chapter 5 of the Charter of the Organization⁽¹³⁵⁾.

Assembly that the Treaty “represented an incontestably correct application of Articles 51 to 53” of the UN Charter, UN Doc. A/PV.194, p. 98.

¹²⁹ *Minutes of the Ambassadors’ Committee*, 15 March 1949, in *Foreign Relations of the United States*, 1949, vol. IV, p. 222.

¹³⁰ The qualification of NATO as a regional organisation was generally ruled out, see E. W. BECKETT, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations*, London, Stevens, 1950; GOODHART, *The North Atlantic Treaty of 1949*, 79 *RdC* (1951-II) 183; A. MIELE, *N.A.T.O., Novissimo Digesto*, vol. XI (1965) 21; F. DURANTE, *Organizzazione del trattato dell’Atlantico del Nord*, *Enciclopedia giuridica*, vol. XXXI (1981) 211. See, however, H. KELSEN, *Is the North Atlantic Treaty a Regional Arrangement?*, 45 *AJIL* (1951) 162; D. BOWETT, *Self-Defence in International Law*, London, 1958, p. 222; M. AKEHURST, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 *BYIL* (1967) 175, p. 184.

¹³¹ Among the authors prepared to treat NATO as a regional organization, see U. VILLANI, *Les rapports entre l’ONU et les Organisations Régionales dans le domaine du maintien de la paix*, 290 *RdC* (2001) 225, p. 286 *et seq.*; N. BLOKKER, S. MULLER, *NATO as the UN Security Council’s Instrument: Question Marks from the Perspective of International Law*, 9 *LJIL* (1996) 417; C. GRAY, *Regional Arrangements and the United Nations Collective Security System*, in H. FOX (ed.), *The Changing Constitution of the United Nations*, London, BIICL, 1997, p. 92. *Contra* P. PICONE, *Interventi delle Nazioni Unite e obblighi erga omnes*, Padova, Cedam, 1996, p. 517 *et seq.*, p. 570; M. IOVANE, *La NATO, le organizzazioni regionali e le competenze del Consiglio di sicurezza delle Nazioni Unite in tema di mantenimento della pace*, 53 *CI* (1998) 43, p. 50; B. SIMMA, *supra* note **Error! Bookmark not defined.**, p. 10.

¹³² See *Foreign Relations of the United States*, 1949, vol. IV, p. 170 *et seq.* The weakness of this view is revealed by the admission that “it would be difficult to draw the line” between collective self-defence and enforcement action.

¹³³ C. SCHREUR, *Regionalism v. Universalism*, 6 *EJIL* (1995) 477, p. 490, considers that the distinction between regional organization and collective self-defence alliance as obsolete. See also Y. DINSTEIN, *War, Aggression and Self-Defence*, 3rd ed., Cambridge University Press, 2001, p. 270.

¹³⁴ 21 *UNTS* 78.

¹³⁵ 119 *UNTS* 3.

NATO itself declared on several occasions, including the 1999 Strategic concept, that it openly aspires not only to ensure the defence of its members but also to contribute to promoting and maintaining peace and stability in the region. Although deprived of legal character, the document proves the member States determination to carry out, within the Alliance framework and on a voluntary case-by-case basis, enforcement actions typically included in Chapter VIII of the Charter.

As to the practice of the Alliance on the ground, the military coercive and consensual activities conducted in the Yugoslav conflicts offer some *indicia* of the effective capability of the Alliance to function as a regional organisation. The forces involved were fully integrated in the Alliance military structure, and operated under NATO rules of engagement and NATO chain of command. The NAC exercised political control and strategic direction over the operations, while the troops were under exclusive NATO command and control.

The UN Security Council resolutions provide little guidance⁽¹³⁶⁾. Initially, the resolutions were adopted under Chapter VII of the Charter and addressed to member States, “acting nationally or through regional agencies or arrangements”⁽¹³⁷⁾. Occasionally, the authorization to resort to enforcement action was granted to “member States acting through or in cooperation” with NATO⁽¹³⁸⁾ or to Member States and the relevant international organizations⁽¹³⁹⁾. The attitude of the Secretary General is perhaps more significant. He apparently regarded NATO as a regional organisation⁽¹⁴⁰⁾ and considered the resort to force by NATO forces permissible within the limits set not only by the Security Council resolutions, but also by the NAC decisions⁽¹⁴¹⁾. Also third States⁽¹⁴²⁾, and in particular the

¹³⁶ According to G. RESS, *Article 53*, in B. SIMMA (ed.), *The Charter of the United Nations*, 2nd ed., Oxford Univ. Press, 2002, p. 854 *et seq.*, p. 862, however, the resolutions adopted during the Yugoslav crisis demonstrate that the Security Council considered NATO as a regional organizations that might be entrusted with specific enforcement actions.

¹³⁷ See, in particular, Res. 787, para. 12; 816, para. 4; and 836, para. 10. Occasionally, however, reference was made also to Chapter VIII of the Charter, as in Res. 787.

¹³⁸ Res. 1031, para. 12.

¹³⁹ Res. 1244, para. 7.

¹⁴⁰ See, for instance, the exchange of letters dated 20 August 1993 between the UN Secretary General and the Security Council; and the UN Secretary General letter dated 18 April 1994 (UN Doc. S/1994/466, par. 2) and report dated 19 May 1994 (UN Doc. S/1994/600, par. 3).

¹⁴¹ See *supra* note 91. On 6 February 1994, he urged the NAC “to authorize the Commander-in-Chief of NATO’s Southern Command to launch air strike, at the request of the United Nations, against artillery or mortar positions in or around Sarajevo which are determined by Unprofor to be responsible for attacks against civilians targets in that city”, UN Doc. S/1994/131, p. 2.

¹⁴² See, for instance, with regard to the Bosnian conflict, the Russian Federation statement dated 10 February 1994 (UN Doc. S/1994/152, Annex). NATO action in Kosovo was criticised by a significant number of other States as contrary not only to Art. 2 (4) but also to Art. 53 (1), see, in particular, the intervention of the Russian Federation, China, India, Cuba, UN Doc. S/PV.3988 and UN Doc. S/PV.3989, respectively 24 and 26 March 1999.

FRY⁽¹⁴³⁾ perceived the involvement of NATO forces as falling within the reach of Chapter VIII of the Charter.

The only real obstacle to qualify NATO as a regional organisation is the fact that so far the Alliance has accurately avoided to define itself as such, presumably in order not to assume the obligations related to the Security Council control on its military activities, including the submission of periodical reports as required under Art. 54 of the Charter.

Under the circumstances, it seems appropriate to adopt a pragmatic approach and to focus on whether NATO may effectively function as a regional organisation rather than whether it qualifies itself as such⁽¹⁴⁴⁾. The Alliance has reached quite an advanced level of institutionalisation and integration and with any probability satisfies the requirements established by the Chapter VIII of the Charter. This permits its utilisation by the Security Council or its autonomous performance of enforcement activities upon a Security Council authorisation⁽¹⁴⁵⁾.

PART III - THE LEGAL FRAMEWORK OF NATO MILITARY ACTIVITIES

9. Peace-keeping operations

For the purpose of this paper, the expression peacekeeping operations is intended as including any operation carried out by military forces abroad, with the consent of the territorial State, and aimed at preventing the outbreak or resumption of hostilities or, more generally, at managing humanitarian crises, supporting electoral processes or monitoring compliance with human rights.

Classifying peacekeeping operations according to their objectives would scarcely contribute to better define the legal framework within which these operations are conducted⁽¹⁴⁶⁾. Quite the contrary, such an exercise could be counterproductive insofar as it could blur the

¹⁴³ On 18 February 1994, in particular, it filed an application before the ICJ complaining *inter alia* about alleged violations by NATO members of Art. 53 (1) of the Charter (*ICJ Communiqué* 94/11). The application was not entered in the General List as none of NATO member States accepted the Court's jurisdiction. Claims regarding alleged violations of Art. 53 (1) of the Charter were also included in the separate proceedings against ten NATO member States instituted on 29 April 1999 by the FRY before the ICJ, see the applications the requests for provisional measures submitted by the FRY, available at: www.icj-cij.org.

¹⁴⁴ See D.W. BOWETT, *supra* note 130, p. 222; M. AKEHURST, *supra* note 130, p. 180. According to the second author, "the question is not whether an organization is a regional agency, but whether it is functioning as one in a given situation" (emphasis original).

¹⁴⁵ M. PERRIN DE BRICHAMBAUT, *Les Nations Unies et les systèmes régionaux*, in Société Française pour le droit international, *Le Chapitre VII de la Charte des Nations Unies*, Paris, 1995, 97 *et seq.*, p. 103 points out that "l'OTAN n'est pas une organisation régionale reconnue et pourtant [...] elle en exerce concrètement tous les attributs tels qu'ils sont prévus par l'article 53 de la Charte".

¹⁴⁶ In this sense, see P. PICONE, *Il peace-keeping nel mondo attuale: tra militarizzazione e amministrazione fiduciaria*, 79 *RDI* (1996) 5, p. 8 *et seq.*

fundamental distinction between them and coercive measures ⁽¹⁴⁷⁾. The importance of rigorously distinguish peacekeeping operations from coercive operations (or peace enforcement) is clearly perceived by States. Relevant international documents and national legislation emphasise the consensual nature of the former ⁽¹⁴⁸⁾.

There is no need either to insist on the other requirements traditionally associated with peacekeeping operations, namely the limitation of the use of force to self-defence and impartiality ⁽¹⁴⁹⁾. Force may be used beyond self-defence without necessarily affecting the nature of the operation provided that this occurs in order to neutralising unorganised groups ⁽¹⁵⁰⁾ or is tolerated by the concerned parties, which do not withdraw their consent ⁽¹⁵¹⁾.

The requirement of impartiality, in turn, is to a large extent absorbed in that of consent. Violating the canon of impartiality may certainly undermine the operation or even cause its failure ⁽¹⁵²⁾. The crucial element, however, is the attitude of the party that perceives the operation as discriminatory. Should it not tolerate the alleged partiality of the operation and consequently terminate its cooperation or even assume an hostile stance, then the operation ceases to be a peacekeeping one precisely because it is not based any more on the consent of all parties concerned. The impartiality character of peacekeeping operation, nonetheless, serves to distinguish these operations from those having a defensive purpose in the sense of Art. 51 of the UN Charter, where the force deliberately takes side in the confrontation or conflict.

What really matters is the consensual character of the operations ⁽¹⁵³⁾. When the force imposes its will upon one or more of the concerned parties by military means or influence the outcome of the conflict, then the operation assumes a coercive character.

¹⁴⁷ On this distinction is based the International Court of Justice advisory opinion on *Certain Expenses*, *supra* note 110.

¹⁴⁸ The *Russian Chinese Joint Declaration on a Multipolar World and the Establishment of a New International Order*, Moscow, 23 April 1997, 36 *ILM* (1997) 986, reads in part: "Peacekeeping operations can be conducted only on the basis of the [...] countries concerned, in strict compliance with the mandate issued by the Security Council and under the Council's supervision". For the United States, see *Administration Policy on Reforming Multilateral Peace Operations*, 33 *ILM* (1994) 795. See also the legislation of Japan, unofficial translation in 32 *ILM* (1993) 215.

¹⁴⁹ See the definition contained in United Nations Publications, *The Blue Helmets: A Review of United Nations Peacekeeping*, 3^d ed., New York, 1996, p. 4. See also N.D. WHITE, *Commentary on the Report of the Panel on United Nations Peace Operations (The Brahimi Report)*, 1 *JCSL* (2991) 127.

¹⁵⁰ UNPROFOR mandate was interpreted as limited to "to dissuade random or unorganised attacks" at the exclusion of overpowering obstructionist or hostile activities by belligerent parties.

¹⁵¹ When not expressly provided for, the right to withdrawal is to be presumed, see H. MCCOUBREY, N.D. WHITE, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth, Aldershot, 1996, p. 73.

¹⁵² On the case of Somalia, see P.F. DIEHL, *International Peacekeeping*, John Hopkins University Press, Baltimore, 1993, p. 188.

¹⁵³ In 1967, UNEF I was terminated following the withdrawal of Egypt's consent, UN Doc. A/6370. More recently, see also the attitude of Croatia concerning the presence of UNPROFOR in March 1995, UN Doc. S/1995/206. See also A. DI BLASE, *The Role of the Host State's Consent with Regard to Non-*

Similarly to the case of intervention by States upon a request from a government ⁽¹⁵⁴⁾, consent to peacekeeping operations may be difficult to establish from both the effectiveness and the authenticity standpoints. In a context of civil war, in particular, insurrectional groups or movements may become subjects of international law ⁽¹⁵⁵⁾ and thus their consent is no longer a matter of practical necessity but a legal requirement for the deployment of the force. When no effective governmental authority exists, as in Somalia in 1992, consent can be obtained not from central authorities but from the parties involved in the fighting, whose international legal status is unclear. Equally problematic is ascertaining the genuineness of the consent that has been obtained through military threats.

The peacekeeping operations undertaken by NATO in former Yugoslavia, Albania and Macedonia satisfy by any standard the consent requirement. In the case of former Yugoslavia, in particular, all the belligerent parties - whose international legal status was at the time controversial - validly expressed their consent at the London Conference ⁽¹⁵⁶⁾. In the case of Albania and Macedonia, the operations were not only requested by and carried out in co-operation with the respective governments; they were also directed at involving non-governmental groups or entities in the peace building and democratisation process.

The consent of all concerned parties provides an adequate legal basis for peacekeeping operations carried out by regional organisation ⁽¹⁵⁷⁾. Accordingly, if NATO is considered as a regional organisation, there is no need for the Security authorisation. In this perspective, the reference often made in NATO official documents to the authority of the UN or the responsibility of the CSCE ⁽¹⁵⁸⁾ indicates a political opportunity rather than legal necessity ⁽¹⁵⁹⁾.

If, on the contrary, NATO is not qualified as a regional organisation, the lawfulness of its peacekeeping operations carried out without the UN Security Council authorisation is not

Coercive Actions by the United Nations, in A. CASSESE (ed.), *United Nations Peacekeeping. Legal Essays*, Alphen aan den Rijn, 1980, p. 55; C. DOBBIE, *A Concept for Post-Cold War Peacekeeping*, 36 *Survival* (1994) 121, p. 145.

¹⁵⁴ See L. DOSWALD-BECK, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 *BYIL* (1985) 189.

¹⁵⁵ On the international status of insurgents, see G. ARANGIO-RUIZ, *L'Etat dans le sens du droit des gens et la notion de droit international*, Bologna, Coop. Lib., 1975, esp. p. 282 *et seq.*

¹⁵⁶ UN Security Council resolution 781 provided an additional legal basis.

¹⁵⁷ See: M. AKEHURST, *supra* note 130, p. 210 *et seq.*; A. GIOIA, *supra* note 120, p. 232; C. WALTER, *Security Council Control over Regional Action*, 1 *MPYUNL* (1997) 129, p. 173 *et seq.*; U. VILLANI, *supra* note 131, p. 395.

¹⁵⁸ See for instance *supra* note 6 and 7.

¹⁵⁹ In this sense, see UNITED NATIONS LESSONS LEARNED UNIT, *Co-operation between the UN and Regional Organizations/Arrangements in a Peace-keeping Environment. Suggested Principles and Mechanism*, March 1999, available at www.un.org/Depts/ddkp/lessons/PBPUOnline.htm.

unquestionable⁽¹⁶⁰⁾. Given the general support, or in any case the complete lack of protest by the members of the international community, it may be argued that NATO peace keeping operations have confirmed the existence, or at least contributed to the emergence of a norm of general international law allowing group of States to undertake this kind of operation⁽¹⁶¹⁾.

10. Coercive operations

The main lesson learnt from the United Nations recent practice is that peacekeeping and coercive measures are mutually exclusive options. In this regard, the Secretary General has rightly pointed out that “peace-keeping and the use of force (other than self-defence) should be seen as alternative techniques and not as adjacent points on a *continuum* permitting easy transition from one to the other”⁽¹⁶²⁾.

Attempts have been made to upgrade peacekeeping operations by interpreting Chapter VI of the Charter as allowing the use of limited and impartial military coercive measures⁽¹⁶³⁾, or by introducing in their mandates enforcement functions typically falling under Chapter VII⁽¹⁶⁴⁾. Neither view is entirely convincing⁽¹⁶⁵⁾. When military coercive measures are directed against one or more of the concerned parties, the operation assumes a hostile nature. This would imply – as maintained by the Secretary General with regard to the involvement of UNPROFOR in the Bosnian conflict – “a fundamental shift from the logic of peacekeeping to the logic of war”⁽¹⁶⁶⁾. Whether such a shift occurs must be ascertained from a factual standpoint⁽¹⁶⁷⁾, in the same way as the determination of a state of war between States⁽¹⁶⁸⁾.

¹⁶⁰ Compare M.L. PICCHIO FORLATI, *Introduzione*, in M.L. PICCHIO FORLATI (ed.), *Le Nazioni Unite*, Torino, Giappichelli, 1998, p. 7 *et seq.*, p. 27-8 and B.L. ZIMBLER, *Peace Keeping without the United Nations: The Multinational Force in Lebanon and International Law*, 10 *YJIL* (1984) 222, p. 226.

¹⁶¹ On the precedents, whose lawfulness was apparently never contested, see M. BOTHE, *Peacekeeping*, in B. SIMMA (ed.), *supra* note 136, p. 648 *et seq.*, p. 698-9.

¹⁶² UN Doc. S/1995/1, 3 January 1995 (*Supplement to an Agenda for Peace*).

¹⁶³ See, in particular, K. ANNAN, *UN Peacekeeping Operations and Cooperation with NATO*, *NATO Review*, October 1993, p. 3; E. CLEMONS, *No Peace to Keep: Six and Three Quarters Peacekeepers*, 26 *NYUJLP* (1993) 107; D. OWEN, *The Limits of Enforcement*, 42 *NILR* (1995) 249.

¹⁶⁴ See, in particular, J.J. PAUST, *Peace-making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 *SIULJ* (1994) 131; D. BROWN, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 27 *RBDI* (1994) 557; P. SZASZ, *Peacekeeping in Operation: A Conflict Study in Bosnia*, 28 *CILJ* (1995) 685.

¹⁶⁵ See the critical remarks by M. BOTHE, *Peace-keeping and the Use of Force. Back to the Charter or Political Accident*, 1 *IP* (1994) 2; G. ABI-SAAB, *United Nations Peacekeeping Old and New: An Overview of the Issues*, in D. WARNER (ed.), *New Dimensions of Peacekeeping*, Dordrecht, Nijhoff, 1995, p. 9

¹⁶⁶ UN Doc. S/1994/1067, 17 November 1994, p. 13. With regard to the possible use of air force to neutralise the Bosnian Serbs air control system, he further pointed out that “such a pre-emptive action ... is inevitably considered by the Bosnian Serbs as an hostile act and therefore take UNPROFOR beyond the limits of a peace-keeping operation and quickly make it a party to the conflict”. In a document issued on 8 June 1995, the International Committee of the Red Cross stated that UNPROFOR

In order to assess the lawfulness of NATO coercive military measures, the authorisation given by the Security Council is of fundamental importance. Depending on the qualification of NATO as regional organisation, the legal basis of the measures is Art. 53 of the UN Charter - which expressly permits regional organisations to undertake enforcement measures upon a Security Council authorisation - or a customary norm that has emerged in the 90s allowing the Security Council to authorise member States to resort to force. The so-called authorisation practice represents a remarkable downgrading of the collective security system foreseen in the Charter. The control exercised by the Security Council over the operations is in fact limited to the initial approbation of the use of force, expressed through the authorisation which is substantially a procedural guarantee.

In both cases, the resolution deprives the concerned member States of the legal protection against the threat or use of force ensured by Art. 2 (4) of the Charter. Aimed at protecting an interest common to all member States (¹⁶⁹), the obligations stemming from Art. 2 (4) are legally indivisible. Legal indivisibility is the essence of *erga omnes* obligations (¹⁷⁰). The legal relationships deriving therefrom cannot be decomposed, as it is normally possible with multilateral treaties, in a bunch of bilateral relationships, which permits each State to comply with the obligations imposed by the treaty in relation to some contracting Parties and disregard them in relation to others. In the case of *erga omnes* obligations, conversely, it exists for each member State a “unique legal situation” (¹⁷¹) *vis-à-vis* all other addressees of the norm. This makes selective compliance impossible. Suspending the functioning of Art. 2 (4), therefore, requires the consent of all the subjects bound by this norm.

Both Art. 53 of the Charter and as the so-called authorisation practice are founded on the will of member States to entrust the Security Council with the power to deprive a State of the legal protection it enjoys under Art. 2 (4). The Security Council's decision expresses the consent of the whole membership to temporarily exclude the concerned State from such a legal protection and to activate the collective security mechanism (¹⁷²). As a result, the

personnel held hostage of the Bosnian Serbs were entitled to the status of prisoners of war under the 1949 Geneva Conventions, document on file with the author.

¹⁶⁷ See the considerations on the coercive and hostile nature of UNOC made by judge L.M. MORENO QUINTANA, diss. op., *Certain Expenses* case, *supra* 147, p. 246.

¹⁶⁸ See common Art. 2 of the Geneva Conventions, 75 *UNTS* 31, 85, 135 and 287. In literature, see Y. DINSTEIN, *supra* note 133, p. 29 *et seq.*

¹⁶⁹ During the S. Francisco conference it had been emphasised that “[t]he use of force is left possible only in the common interest. As long as we have an Organization, the Organization only is competent to see the common interest and to use force in supporting it”, Doc. 994, 13 June 1945, *UNCIO* vol. VI, p. 446, at p. 451. For the definition of common interest, see G. MORELLI, sep. op., *South West Africa Cases*, Second Phase, *ICJ Reports 1966*, p. 64-65.

¹⁷⁰ See G. ARANGIO-RUIZ, 4th *Report on State responsibility*, 44 *YBILC* (1992), vol. II, part II, p. 33 *et seq.*

¹⁷¹ G. MORELLI, *A proposito di norme internazionali cogenti*, 51 *RDI* (1968) 108, p. 115.

¹⁷² In the *Report of Committee I to Commission I*, 6 *UNCIO* p. 459, “The use of force remains legitimate only to back up decisions of the Organization”. Alternatively, the consent of all States would be required.

resolution produces a permissive effect by making lawful a conduct otherwise prohibited by Art. 2 (4) of the Charter ⁽¹⁷³⁾.

With regard to NATO coercive operations, the normative phase ignited by the Security Council is then completed by a decision adopted by the NAC. The enforcement action effectively takes place only if, and to the extent to which NATO member States provide, on a case-by-case basis, the forces asked for.

The question whether a regional organisation is entitled to carry out enforcement action against a non-member State has become immaterial ⁽¹⁷⁴⁾. Once admitted that the Security Council is nowadays entitled to authorise member States to individually resort to armed force in respect to any other State (regardless to its geographical location or participation to any regional organisation) a positive answer is compulsory. It would indeed be illogical to preclude a group of States from carrying out within the framework of a regional organization, regardless to its degree of institutionalisation, activities that each of them could already lawfully carry out individually.

Little doubt that the coercive military measures carried out by NATO until August 1995 were duly authorised by the Security Council. NATO forces assumed the entire control of the operations and respectfully acted upon, and within the limits set by such an authorisation.

The coercive military measures taken in support of UNPROFOR, nonetheless, must be singled out due to the so-called dual-key procedure which allowed the United Nations to retain the political control and to exercise, through its Secretary General, an effective control over the operations. As a result, the operations could be considered, alternatively, as an instance of utilisation by the Security Council of a regional organisation under Art. 53, or as legally based on an extensive interpretation of art. 42 of the UN Charter ⁽¹⁷⁵⁾. Although quite interesting from a legal standpoint, the experiment was a complete failure due not to the alleged inadequacy of international law but rather to the lack of a coherent strategy and the contrasts that arose between the two organisation and their respective memberships.

Operation Deliberate Force marked a bold attempt by NATO to refuse any form of effective control by the United Nations and to act as an independent actor in the collective security system. Serious doubt can be cast on the conformity of the operation with existing Security Council and ultimately on its lawfulness. Its negative impact on the rules governing

¹⁷³ M. AKEHURST, *supra* note 130, p. 185 *et seq.*, has convincingly demonstrated that, for the purpose of Art. 53 (1), enforcement action is to be confined to measures involving military force. This conclusion is confirmed by the recent imposition of economic sanctions by ECOWAS and the OAS, without Security Council authorization, respectively against Liberia and Haiti, see C. GRAY, *International Law and the Use of Force*, Oxford Univ. Press., 2001, p. 221.

¹⁷⁴ See, in particular H. KELSEN, *The Law of the United Nations*, New York, Stevens, 1951, p. 327 and p. 923; P. VELLAS, *Le régionalisme international et l'Organisation des Nations Unies*, Paris, 1948, p. 206; G. GAJA, *Use of Force Made or Authorized by the United Nations*, in C. TOMUSCHAT (ed.), *The United Nations at Age Fifty*, The Hague, 1995, p. 39 *et seq.*, p. 41.

¹⁷⁵ For a full discussion, see T. GAZZINI, *NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)*, 12 *EJIL* (2001) 391, p. 425 *et seq.*

the use of force, however, was at least mitigated by the fact that NATO members legally based it - however unconvincingly - upon previous Security Council resolutions (¹⁷⁶).

The intervention in Kosovo was never authorised by the Security Council, nor even implicitly or subsequently due to the evident opposition, which lasted throughout the crisis, of some of its permanent members. The intervention represents a clear departure from the normative pattern followed so far, which was based on the authorisation by the Security Council as *conditio sine qua non* for the use of force apart from the exercise of the right of self-defence.

Although adopted during the military campaign, the 1999 Strategic Concept does not indicate any legal basis neither for Kosovo intervention nor for non-Art. 5 coercive operations the Alliance could carry out in future (¹⁷⁷). On several points, the document recalls, directly or through a reference to Art. 7 of the 1949 Treaty, the primacy of the obligations stemming from the UN Charter and the principal responsibility of the Security Council in the field of maintenance of international peace and security. In para. 31, in particular, it is confirmed that the Alliance could, on a case-by-case, undertake coercive operations under the authority of the Security Council. At the same time, however, it is affirmed that ‘NATO will seek, in cooperation with other organizations, to prevent conflict, or, should a crisis arise, to contribute to its effective management, consistent with international law, including through the possibility of conducting non-Article 5 crisis response operations’.

Deliberately drafted in ambiguous terms, para. 31 reflects the diverging view held by member States. For the United States, the strategic concept “states the obvious point that NATO’s crisis response activity must be consistent with international law, but significantly, does not suggest that NATO must have permission from the United Nations or any other outside body before it can act” (¹⁷⁸). This stands in sharp contrast with the position of certain European States, and in particular of France, which at the end of the Washington Summit declared that ‘l’Otan ne pourra et ne devra pas agir sans avoir l’assentiment de l’Organisation internationale’ (¹⁷⁹).

¹⁷⁶ On the consequences of an unfounded invocation of the exceptions foreseen by a norm, see the position of the ICJ in *Nicaragua case, supra* note 124, Merits, *ICJ Report 1986*, 14, at p. 98.

¹⁷⁷ The change of attitude is somehow anticipated by the North Atlantic Assembly that in November 1998 urged member States “to seek to ensure the wildest international legitimacy for non-Article 5 missions and also to stand ready to act should the UN Security Council be prevented from discharging its purpose of maintaining international peace and security”, AR 295 SA. Compare with *supra* note 15.

¹⁷⁸ See the declaration of the US Under Secretary of Defence dated 28 October 1999, quoted in E. CANNIZZARO, *supra* note 103, p. 64-65.

This view is shared by the British Minister of Defence, see the reply to the Third Special Report on the Future of NATO, 19 May 1999, available at www.parliament.the-stationery-office.co.uk.

¹⁷⁹ Available at www.elysee.fr.

Taken individually and assessed in the light of the international law existing at the time, the intervention in Kosovo cannot but be considered unlawful⁽¹⁸⁰⁾. However, this was not the only case in recent practice that the rule conditioning to the Security Council authorisation the lawfulness of any use of force not expressly provided for in the Charter has not been observed. This occurred, in particular, in the aftermath of the Gulf crisis⁽¹⁸¹⁾ and, more importantly, in the recent intervention in Afghanistan⁽¹⁸²⁾ and Iraq⁽¹⁸³⁾.

Bearing in mind that international law is “a dynamic, continually operating process of rejection or refinement of old rules; and the confirmation of new ones in supplement or replacement of the old”⁽¹⁸⁴⁾, these departures, globally assessed, could affect existing rules on the use of force in terms of desuetude or change. Depending on the attitude of the States putting forward new claims and the reaction of the other States, deviations from existing customary international law may “create occasions for emphatic confirmation of the custom and thus in the end contribute to its strengthening”⁽¹⁸⁵⁾, or lead to the desuetude or the modification of the custom⁽¹⁸⁶⁾.

At the beginning of the process of change or desuetude, the behaviour contrary to the existing norm unavoidably amounts to illegal acts⁽¹⁸⁷⁾. When such behaviour is gradually

¹⁸⁰ See, in particular, M. KOHEN, *L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international*, 32 *RBDI* (1999) 122; N.D. WHITE, *The Legality of Bombing in the Name of Humanity*, 5 *JCSL* (2000) 27.

¹⁸¹ On the air strikes carried out in December 1998, see, in particular, U. VILLANI, *La nuova crisi del Golfo e l'uso della forza contro l'Iraq*, 82 *RDI* (1999) 451; N.D. WHITE, R. GRYER, *Unilateral Enforcement of Resolution 678: A Threat too Far?*, 29 *Cal. Western Int. Law Jour.* (1999) 243.

¹⁸² The intervention in Afghanistan, however, must be singled out for two reasons. First, it is entirely implausible to maintain that it was legally based on the right to self-defence. Second, its striking feature is the deliberate bypassing of the Security Council, which on that occasion was not prevented from taking a decision on the use of force.

¹⁸³ See *United States National Security Strategy*, at www.whitehouse.gov. See also, T. FARER, *The Bush Doctrine and the UN Charter Frame*, *International Spectator* (2002) 91; W.B. SLOCOMBE, *Force, Pre-emption and Legitimacy*, 45 *Survival* (2003) 117; E. CANNIZZARO, *La dottrina della guerra preventiva e la disciplina internazionale sull'uso della forza*, 86 *RDI* (2003) 171; M. GLENNON, *Why the Security Council Failed*, 82 *FA* (2003) 16.

¹⁸⁴ E. MCWHINNEY, *The World Court and the Contemporary International Law-Making Process*, Alphen aan den Rijn, 1979, p. 1. At p. 3, he suggests to adopt a “legal realist approach” and to concentrate on the facts rather than on the *a priori* legal categories. See also M.S. MCDOUGAL, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 *AJIL* (1955) 353, p. 354.

¹⁸⁵ K. WOLFKE, *Custom in Present International Law*, 2nd ed., Dordrecht, Nijhoff, 1993, p. 65.

¹⁸⁶ According to A.A. D'AMATO, *The Concept of Custom in International Law*, Ithaca, Cornell Univ. Press, 1971, p. 97, departure from the existing customary law “contains the seeds of a new legality”.

¹⁸⁷ E. GRAUD, *Le droit positif, ses rapports avec la philosophie et la politique*, in *Hommage d'une génération de juristes au Président Basdevant*, Paris, Pédone, 1960, p. 210 *et seq.*, p. 233, observes that “le fait qu'une règle de droit a subi des violations graves et répétées ne suffit à l'abolir. Toutes règles de droit sont destinées à être violées. Mais tant que la règle de droit a conservé sa valeur, ces violations suscitent des réactions telles que mesures de répression à l'égard des violateurs, représailles, protestations qui attestent le caractère anormal et illicite de la violation. Au contraire quand

shared or tolerated by the generality of States and considered as compulsory under, or compatible with international law, it becomes the new rule. Being a matter of degree rather than kind, a period of legal uncertainty cannot be ruled out.

In order to ascertain whether a customary norm has been, or is about to be changed, what States actually do is certainly more important than what they declare. When breaching international law, indeed, States normally attempt to prove that their behaviour is entirely in line with existing international law⁽¹⁸⁸⁾. When no plausible and consistent legal rationale is provided by acting States, the material element has to be privileged and the *opinio juris* has to be looked for in their concrete acts rather than in their declarations⁽¹⁸⁹⁾. Besides, when the norm to be changed has a restrictive character, like the norm conditioning the use of force to the Security Council's authorisation, "an express claim that States are entitled to act in a particular way is not necessary: it can be inferred from the fact that they do act in that way"⁽¹⁹⁰⁾. The analysis has the focus primarily on the process of claims and counterclaims – to which considerations of power and even economic bargain are certainly not extraneous⁽¹⁹¹⁾.

The relevance of the cases of use of force without Security Council authorisation in terms of *opinio juris* is rather limited. No legal argument adequately coherent and uniform to challenge the existing norms has been elaborated. With regard to Kosovo, additionally, some of the States that took part to the operations insisted on the fact that the intervention did not set a precedent.

Besides, a constant feature of all these cases - with the exception of Afghanistan - was the firm protest of a remarkable number of States, sometimes including NATO members. The generality prerequisite required to create, terminate or change customary international law is then far from being satisfied. In all probability, this is enough to prevent a change of existing customary international law in the sense of rendering superfluous the Security Council authorisation⁽¹⁹²⁾.

Until the proposal for change gathers the consent or acquiescence of the generality of the members of the international community the norms in this area may suffer from a certain legal uncertainty. Deducing from such an uncertainty the non-existence of any rule

la règle paraît perdue de vue ou quand une pratique contraire à la règle se généralise, la règle en question a cessé de faire partie du droit positif”.

¹⁸⁸ J. BRIERLY, *The Law of Nations*, 6th ed., Oxford, Clarendon, 1963, p. 69-70.

¹⁸⁹ A. D'AMATO, *Reply to Letter of M. Akehurst*, 80 *AJIL* (1986) 148, p. 149, warns against focusing too much on *opinio juris* since States "may assert that even the most blatantly illegal acts are consistent with a rule of international law". See also A.M. WEISBURD, *Use of Force. The Practice of States Since World War II*, Pennsylvania State Univ. Press, 1999, p. 23.

¹⁹⁰ M. AKEHURST, *Custom as a Source of International Law*, 47 *BYIL* (1975-6) 1, p. 38.

¹⁹¹ C. DE VISSCHER, *Theory and Reality of Public International Law*, 2nd ed, Princeton Univ. Press., 1968, p. 154, underlines that "every international custom is the work of power".

¹⁹² According to M.H. MANDELSON, *The Formation of Customary International Law*, 272 *RdC* (1998) 155, p. 293: "if a sufficient number of like-minded States object to a new practice, they can prevent its becoming general law".

prohibiting the use of force is not entirely convincing ⁽¹⁹³⁾. What needs to be demonstrated is precisely that the challenge to the existing norm has been successful and for the time being this is quite premature.

11. Peace implementing operations

The main features of NATO peace implementing operation in Bosnia-Herzegovina and Kosovo are: the prior conclusion of accords putting an end or suspending the conflicts; the almost simultaneous authorisation from the UN Security Council; the potential coercive nature that these operations could have assumed following non-compliance with the peace accords.

The first operation was based, in the first place, on the peace accords concluded between the Republic of Bosnia-Herzegovina and its constituent entities. Although at the time the international legal status of the parties was far from undisputed and despite the impact of *Operation Deliberate Force* on the final settlement of the conflict, there is sufficient ground to affirm that the accords were freely negotiated and entered upon.

The same cannot be said with regard to the second operation. Here, the military coercion exercised by NATO upon the FRY is rather evident and calls into play the paradoxical character of peace treaties ⁽¹⁹⁴⁾. They should be considered as void under the terms of Art. 52 of the Vienna Convention on the Law of Treaties ⁽¹⁹⁵⁾, although it would become useless to try and put any formal end to a state of war unless these instruments produce their effects ⁽¹⁹⁶⁾.

Distinguishing peace treaties imposed upon the aggressor (which would be valid) from those rewarding it (which would be void) ⁽¹⁹⁷⁾ is not of much help as long as the lawfulness of NATO action has not been established. In this regard it must be underlined that the Security

¹⁹³ M.J. GLENNON, *Limits of Law, Prerogatives of Power. Interventionism After Kosovo*, New York, Palgrave, 2001, p. 45 and 63.

¹⁹⁴ For the purpose of this paper, the agreement between NATO and the FRY is considered as a peace treaty although the classification under the rubric of armistice might be more accurate since operation were *suspended*, see NATO Secretary General letter dated 10 June 1999, UN Doc. S/1999/663, Annex. In general, see Y. DINSTEIN, *supra* note 133, p. 33 *et seq.*

¹⁹⁵ 1155 UNTS 331. In *Fisheries Jurisdiction Cases*, Jurisdiction, Judgment, *ICJ Reports 1973*, p. 3 at 14 and p. 49 at 59, the Court declared that Art. 52 codified existing general international law. See also the ILC Commentary (Art. 49), *YBILC*, 1966, vol. II, p. 246. As the ILC itself acknowledged, however, it may be argued that the same threat or compulsion that procured the conclusion of the treaty could also procure its execution.

¹⁹⁶ See the considerations made by G. FITZMAURICE, in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *ICJ Pleadings*, p. 329. See also A. MIELE, *La Comunità internazionale*, 3rd ed., Torino, Giappichelli, 2000, p. 10.

¹⁹⁷ See R. JENNINGS, A. WATTS, *Oppenheim's International Law*, 9th ed., London, Longman, 1992, p. 1292.

Council passed no judgement on such a lawfulness. Such a pronouncement might be delivered, in due time, by the ICJ ⁽¹⁹⁸⁾.

The controversial question whether the party that has been coerced to conclude a treaty might subsequently express its consent to be bound by such a treaty ⁽¹⁹⁹⁾, in turn, has been deprived of any practical relevance due to the supervening Security Council Res. 1244, which offered a solid legal basis to the operation.

As long as Art. 2 (4) is considered as still binding upon the Organisation's member, in any case, when the mandate of the force engaged in the peace-implementing operation includes coercive powers, a Security Council adopted under Chapter VII of the Charter is indispensable. Such a requirement derives from the *erga omnes* character of the obligations stemming from Art. 2 (4). The indivisible nature of these obligations, in fact, does not permit to suspend their compliance except in case of an agreement among all of the addressees of the underlying rule and not simply of the sending and receiving States ⁽²⁰⁰⁾. As a result, the lawfulness of the establishment of IFOR and KFOR rest on the relevant Security Council resolutions ⁽²⁰¹⁾ that, similarly to the coercive operations authorised by the Security Council, produced a permissive effect ⁽²⁰²⁾.

A similar path was followed in the aftermath of the military intervention in Afghanistan, although in this case these were no peace accords but rather an agreement between the parties involved in the re-establishment of a government accompanied by a request for the creation of an international force authorised by the Security Council ⁽²⁰³⁾. It is significant that the United Kingdom based its offer to lead such the International Security Assistance Force (ISAF) "on the willingness expressed to receive such a force and an authorising Security Council resolution" ⁽²⁰⁴⁾. This position was shared by the other NATO members as demonstrated by the fact that when the NAC announced that in August 2003 the Alliance will assume the strategic coordination, command and control of ISAF, it declared that ISAF will continue to operate under United Nations mandate ⁽²⁰⁵⁾.

¹⁹⁸ See *supra* note 143.

¹⁹⁹ Such a course of event was considered as admissible under Art. 14 (5) of the Draft articles proposed by G. FITZMAURICE, *3rd Report on the Law of the Treaties*, YBILC, 1958, vol. II, p. 26.

²⁰⁰ See *supra* text notes 169 *et seq.*

²⁰¹ In this sense, see U. VILLANI, *supra* note 131, p. 416. *Contra*, with regard to IFOR, M. WELLER, *supra* note 27, p. 165.

²⁰² According to H. MCCOUBREY, N.D. WHITE, *supra* note 151, p. 63, there is little difference with the potentially offensive military operations undertaken by member States in Rwanda, Haiti and Somalia.

²⁰³ See UN Doc. S/2001/1154, Annex I. The Security Council authorised the deployment of ISAF with Res. 1386, adopted unanimously on 20 December 2001.

²⁰⁴ UN Doc. S/2001/1217, Annex.

²⁰⁵ Ministerial Meeting of the NAC, *Final Communiqué*, Madrid, 3 June 2003, Press Release (2003)059.

12. Defensive operations

NATO forces are certainly allowed - individually, jointly or within the framework of a regional organisation - to undertake naval military operations aimed at protecting commercial vessels on the high sea and to react to any threat or hostile military activities against them. What they cannot do without a Security Council mandate is to forcefully intercept and board third States vessels suspected to be engaged in international terrorism, but not representing an immediate military threat to navigation. During the 1990-1 Gulf and the Yugoslav crises, a Security Council resolution adopted under Chapter VII of the Charter was perceived as indispensable to move from a monitoring operation to an interception one ⁽²⁰⁶⁾.

Nevertheless, it must be admitted that the already unclear borderline between a purely defensive military operation against a target posing an immediate threat and a pre-emptive one aimed at preventing such a threat from concretising has further been blurred by terrorist activities. The innovative aspect of NATO naval operations is the claim to systematically and unilaterally control and search, if necessary through coercion, any vessels regardless to the concrete and immediate risks they might represent to navigation. Given the general acquiescence and complete lack of protest NATO naval operations could pave the way to the relaxation of the rules governing boarding foreign vessels on high sea.

Moving to NATO operations directed at protecting Turkey from possible armed attacks from Iraq, these operations are, at least in principle, not only admissible under general international law and the United Nations Charter; they also represent the first instance of NATO functioning as a defensive military alliance, although in preventive terms.

Whether Art. 4 of the Washington Treaty imposes upon member States an obligation to hold consultation has been the object of controversy ⁽²⁰⁷⁾. Although the 1999 Strategic concept limited itself to describe the Alliance as “an essential transatlantic forum”, it may be argued that normative expectations have arisen in the Alliance that compulsory consultations are to be held when the political independence or territorial integrity of a member State is threatened ⁽²⁰⁸⁾. In this sense, not only Turkey ⁽²⁰⁹⁾, but all members would be at once be entitled to request and bound to take part to the consultations.

²⁰⁶ See *supra* text notes 17 et seq. See also A. MIELE, *La guerra Irachena*, Padova, Cedam, 1991, p. 28 et seq.; *Guidance Issued by SACEUR Concerning the Procedures for Passing Legitimate Cargo Through the U.N. Embargo of the Former Yugoslavia*, partially reproduced in L.E. FIELDING, *Maritime Interception and U.N. Sanctions* (1997) p. 256-259

²⁰⁷ On the meaning of Art. 4, see F.L. KIRGIS, *NATO Consultation as a Component of National Decisionmaking*, 73 *AJIL* (1979) 372.

²⁰⁸ See, in particular, *The Future Task of the Alliance* (Harmel Report), 14 December 1967, and the *Declaration on Atlantic Relations*, 26 June 1974, in 17 *DSB* (1974) 42.

²⁰⁹ As observed by R. BARATTA, *La protezione della Turchia in base all'art. 4 del Trattato NATO*, 86 *RDI* (2003) 174

Member States remained free as to supporting the decision within the NAC or the DPC⁽²¹⁰⁾ and to contribute to the defensive measures decided upon since only the occurrence of an armed attack would have triggered the obligation imposed by under Art. 5 to assist the attacked State with the measures - not necessarily having military character⁽²¹¹⁾ - considered as necessary not.

These considerations, however, must be qualified in the sense that they presuppose that Turkey could have been the victim of an attack by Iraq. In reality, this depend on the lawfulness of the United States led intervention in Iraq, with the support of Turkey, and by way of consequence of the possible Iraqi reaction. Dealing with this complex question lies beyond the purpose of this paper.

11. Conclusions

Although NATO was established as a defensive alliance, most of the military activities carried out by its forces were at once undertaken out of area⁽²¹²⁾ and extraneous to Art. 5 of the Washington Treaty. From an internal perspective, these developments did not involve any new obligation for member States nor amount to a tacit revision of the treaty. The Alliance involvement in the maintenance of international peace and security requires a decision shared by all its members or at least not opposed by any of them, whereas each of them remain free to participate to the operations agreed upon.

Depending on the qualification of NATO as a regional organization, the operations contemplating coercive measures were initially compatible with the existing legal framework, and in particular with Art. 53 of the United Nations Charter; or contributed to the consolidation of the so-called authorisation practice. In both cases, they were conducted under the authority - however limited at the initial approval - of the United Nations.

Such a respectful attitude was abandoned during the Kosovo crisis. In spite of the unity of the Alliance in the management of the crisis, no coherent and uniform legal rationale was elaborated. Equally important, the military intervention found the widespread and firm opposition of the majority of the States composing the international community. It is therefore premature to infer from this case - even if read together with other cases of use of force without Security Council authorisation - that Art. 2 (4) of the United Charter has become obsolete and member States could resort to military force individually, jointly or within the framework of regional organisations.

The debate that took place during the recent Iraqi crisis, on the contrary, demonstrates that even within NATO membership there is no general agreement on the downgrading of the

²¹⁰ In the field of defense, the DPC has the same authority of the NAC.

²¹¹ See R.H. HEINDEL, T.V. KALJARVI, F.O. WILCOX, *The North Atlantic Treaty in the United States Senate*, 43 *AJIL* (1949) 633, esp. the declaration of Senator Vandenberg (footnote 10) and the Watkins reservation (footnote 11). This position reflects perfectly that of all member States.

²¹² LORD ROBERTSON, *Transforming NATO, NATO Review*, Spring 2003. The Strategic doctrine adopted in 1999 expressly foresees that the Alliance forces could be employed beyond the Allies' territory, either for collective defence purposes or for crisis response operations (paras 52 and 53).

Security Council authorisation from legal requirement to a matter of political opportunity. The lack of consensus over such a crucial issue ⁽²¹³⁾ - which incidentally is largely reflected worldwide - may not only bring about a period of legal uncertainty, but also undermine the role that NATO aspires to play in the maintaining international peace.

These developments, however, do not prevent NATO from functioning as a military defensive alliance. Here the innovative element lies in the relaxed application of the right of the self-defence, which has been extended beyond the reaction to immediate and concrete military threats to the point to encompass coercive activities having preventive character. In this regard, the Alliance has shown greater cohesion and - significantly - its operations met no objections from third States.

²¹³ I. BROWNLIE, *The Use of Force by States in International Law*, Clarendon, Oxford, 1963, p. 273, observes: "The whole subject of the Charter was to render unilateral use of force, even in self-defence, subject to the control of the Organisation".