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Final Report

**Legal Aspects of Global and Regional
International Security –
The Institutional Background**

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Table of Contents

Acknowledgments	4
Selected Abbreviations	5
Part One – Introductory. The Relevance of the Legal Framework	6
I. Relevance of Legal Analysis. Scope of the Present Research	6
II. National Interest and National Power	6
III. Constraints upon National Power and National Interest	8
A. Domestic Constraints	8
1. Constitutional Democracy and Separation of Powers	8
2. Adherence to Human Rights and Fundamental Freedoms	9
3. Availability of Resources	10
B. International Constraints	11
1. The Balance of Powers	11
2. International Morality and Ethics	11
3. International Law	11
IV. The Notion of Collective Interests and Collective Safeguards	12
A. Before Adoption of the United Nations Charter	12
B. After Adoption of the United Nations Charter	13
C. United Nations and Collective Safeguards of Collective Interests	15
Part Two – The United Nations Security Council	16
I. The Primary Responsibility of the UN Security Council in Maintenance of the International Peace and Security – Nature and Scope	16
II. Types of Competences of the Security Council	18
III. Determination of a Threat to the Peace, Breach of the Peace and an Act of Aggression as a Prerequisite for Application of Enforcement Measures	19
1. Necessity for a Determination	20
2. Consequences of a Determination	20
3. Expanded Notion of a Threat to the Peace and Criteria for a Determination	20
4. Threats to the Peace <i>ratione personae</i>	24
5. Threats to the Peace – Link with an Occurrence of an International Military Conflict	24
6. Threats to the Peace – Internal Situations	25
7. Threats to the Peace – Violations of International Obligations	28
8. Threats to the Peace – A Degree-Oriented Perspective	29
9. Case Study: Resolution 748 (1992)	30
10. Threats to the Peace – Conclusions	32
IV. Recommendations of the Security Council under Article 39	32
V. Provisional Measures under Article 40	33
VI. Non-Military Enforcement Measures under Article 41	34
1. The Functional Designation of the Measures	34
2. Effectivity and Successfulness of the Measures	36
3. The Measures and Domestic Jurisdiction of States	36
4. The Measures Not Explicitly Provided for under Article 41: The International Criminal Tribunal for Former Yugoslavia	37
5. The Measures Not Explicitly Provided for under Article 41: The United Nations Compensation Commission	37
VII. Authorisation of Military Force under Article 42	39
1. Conceptual Background for Authorisations under Article 42	39
2. The Nature and Legal Consequences of Authorisations	40
3. Restrictions Governing Authorisations	41
Part Three – Regional Arrangements within the Legal Framework of Enforcement Measures under the UN Charter	43
A. Regional Arrangements in the Context of Chapter VIII of the UN Charter	43
B. Forcible and Non-Forcible Enforcement Measures	44

C. Necessity of Prior and Explicit Authorisation	44
Part Four – Unauthorised Actions by States: Action by United States and United Kingdom Against Iraq	46
Part Five - Unauthorised Actions by Regional Organisations:	
Action by NATO against the Federal Republic of Yugoslavia	49
A. Legal Regime Governing Enforcement Actions by States and by Organisations under the UN Charter. Circumstances Invoked in Support of Lawfulness of Action by NATO	49
B. The Notion of “Humanitarian Intervention” in General	50
C. References to “Humanitarian Intervention” in Case of Kosovo	52
1. Scope of Prohibition of the Use of Force under Article 2(4) of the UN Charter	52
2. Use of Force in Accordance with the United Nations Purposes and Principles?	53
3. Use of Force for Safeguarding jus cogens rules and erga omnes obligations	53
4. Use of Force and the State of Necessity	54
5. Use of Force as a Countermeasure	54
D. Kosovo and Legal Standards Governing the Use of Force Applicable in the Future	56
E. Non-Condemnation of NATO Action by the Security Council	57
F. NATO Action in Kosovo and International Humanitarian Law	59
G. Kosovo: Conclusion	59
Part Six – Peace-Keeping Forces – The Legal Basis for Establishment	61
I. Introduction	61
II. The Security Council	62
1. Powers under Chapter VI of the Charter	63
2. Powers under Chapter VII of the Charter	64
a) Article 39	64
b) Articles 41 and 42	64
c) Provisional Measures under Article 40	66
3. An Interim Conclusion	67
4. Case Study: ONUC	68
5. Case Study: UNPROFOR and KFOR	70
6. Institutional Prerequisites: Article 29 of the Charter	71
7. General Conclusions concerning the Legal Basis of Peace-Keeping Forces Established by the Security Council	71
III. The General Assembly	72
a) The Recommendatory Powers	72
b) Institutional Prerequisites: Article 22 of the Charter	73
IV. The Secretary-General	73
1. Establishment of Peace-Keeping Forces by the Secretary-General in the Context of the UN Charter	73
2. The Law of Treaties as a Basis of Secretary-General’s Powers to Establish Peace-Keeping Forces	75
3. Institutional Prerequisites: Article 7 of the Charter	76
V. Regional Organisations	77
1. Legal Principles and Policy Considerations	77
2. Case Study: CIS Forces in Abkhazia (Georgia)	78
VI. Consent by Affected Parties as an Element of the Legal Basis of UN Peace-keeping Operations	79
1. Consent <i>ratione personae</i>	80
2. Consent <i>ratione materiae</i>	82
3. Consent <i>ratione temporis</i>	82
VII. Concluding Remarks on Legal Basis of Peace-Keeping Operations	82
Some Conclusions	84

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Selected Abbreviations

AJIL – American Journal of International Law
AJPIIL – Austrian Journal of Public and International Law
ASIL Proceedings – Proceedings of the American Society of International Law
AVR – Archiv des Voelkerrechts
CIS – Commonwealth of Independent States
CJTL – Columbia Journal of Transnational Law
CWILJ – California West International Law Journal
EJIL – European Journal of International Law
HILJ – Harvard International Law Journal
ICJ Pleadings – International Court of Justice: Pleadings, Oral Arguments and Documents
ICJ Reports – Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ILA – International Law Association
ILC – United Nations International Law Commission
ILM – International Legal Materials
ICTY – International Criminal Tribunal for the Former Yugoslavia
NILR – Netherlands International Law Review
PCIJ Series – Reports of the Permanent Court of International Justice
UNCC – United Nations Compensation Commission
UNGA – United Nations General Assembly
UNSC – United Nations Security Council
VCLT – Vienna Convention on the Law of Treaties (of 1969 or of 1986)
YbILC – Yearbook of the International Law Commission
YBUN – Yearbook of the United Nations
ZaoRV – Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht (or Heidelberg Journal of International Law)

Part One – Introductory

The Relevance of the Legal Framework

I. Relevance of Legal Analysis. Scope of the Present Research

The phenomenon of international security lies at the crossroad of several academic disciplines. It has been the subject of thorough study and analysis by scholars from the fields of international relations, political sciences, peace research, international economics, history and international law. All those disciplines, through their respective methodologies, may play unique role in understanding various aspects and dimensions of this subject. The purpose of the present research is, however, to explore and analyse the legal aspects of international security primarily if not exclusively.

Hardly may it be disputed that international legal process is constantly accumulating threats to security (whether national or international), as they emanate from the behaviour of State and non-State actors, and is elaborating means and methods of response to such threats. It is also more than clear that means, methods and mechanisms of response to threats to security are developed through the techniques of establishment of international legal rules and principles. The obvious consequence of such a reasoning is that when the international community identifies threat to security in certain behaviour of State or non-State actors, it develops in response the relevant sets of rules, principles and procedures designed to respond to such threats. The principal fields of international law dealing with preservation of international security are the following:

- a) the law of the use of force, the right of States to self-defence;
- b) the law concerning disarmament, arms control, non-proliferation and confidence- and security-building measures;
- c) legal aspects of combating international terrorism, drug-trafficking and other criminal behaviour of transnational character;
- d) the humanitarian law applicable to inter-State and internal armed conflicts;
- e) the legal framework governing functions and activities of international institutions in the area of international security, as comprising legal institutes of collective self-defence and collective security, peace-keeping and peace-enforcement.

The present research shall focus upon institutional aspects of international security primarily if not exclusively. The role, powers and functions of international organisations in this respect are crucial issues here. Accordingly, the other legal aspects of international security shall be focused upon only if and insofar the considerations based on the primary subject of our research so require.

Consideration and analysis of the role of international organisations in the field of international security requires first to analyse the nature and character of the environment in which those organisations exist and develop. This environment is called the international society, in which the nation-states constitute the primary category of actors. The will and interests of nation-States are giving shape to international relations and exert their influence also on activities and behaviour of international organisations. Therefore, before turning to principal subject of our research, this introductory chapter shall analyse the peculiarities of an environment in which international organisations operate and exercise their functions in the field of international security.

II. National Interest and National Power

Since international society is composed primarily of States, the national interest of States is the principal determining factor of international relations. Every State is supposed to have determined its national interests and to be pursuing the goal of building-up its national power in order to safeguard those national interests. The way the States understand extent and nature of their national interests is, however, characterised by diversity and may be understood on a case-by-case

basis only. Objectively, the notion of national interest serves the purpose to maintain territorial integrity and secure borders of a country, to achieve economic prosperity, to satisfy ordinary demands of population and, to that end, to have unhindered interaction with other actors of international society.

The national interest is however understood in certain cases as warranting assertion of world or regional dominance, establishment and maintenance of spheres of influence and imposition of own will on other actors. „Elite States seek to maintain position, wealth and power in an uncertain world by acquiring, retaining and wielding power – resources that enable them to achieve multiple purposes“.² Huntington elaborates upon this general proposition is more precisely by demonstrating the propensity of strong and powerful States to establish and maintain the spheres of influence, to establish and maintain in other States the governments which would enforce their will, to assert extraterritorial application of their legislation etc.³

Assertion of national interests in a way of asserting world or regional dominance indispensably encroaches upon independence, prosperity and development of other nations. Establishment or maintenance of a sphere of influence by a nation in a given region undoubtedly operates in a way endangering political independence of (other) nations located in that region. Imposition of a regime of concessions or of other forms of preferential economic treatment on a nation undoubtedly hinders economic prosperity and development of that nation because it precludes such a nation to take due advantage of its natural resources and wealth. Military presence of a foreign State affects the core of national independence of a country and has implications extending far beyond the purely military dimension and entailing consequences of cultural and of economic nature.

Establishment and maintenance of spheres of influence in detriment of independence and prosperity of other States is an old method in international relations, but it is still applied as an instrument of foreign policy of strong States. The principal factor supporting such a state of things is the power, which is indispensable to influence the will of relatively weak States and compel them to renounce – in whole or in part – from pursuing their objective national interests in detriment to their own independence and prosperity.

The power of a strong State consists of its ability to exert military, political (diplomatic), economic and ideological influence on a relatively weak State with a view to compel it to adjust its own policies to the interests of a strong State. The military influence is the heaviest burden the relatively weak States may face in this regard. Forcible performance of national interests has been an attribute of foreign and security policy of strong States throughout the centuries. The diplomatic pressure is also an old method and hardly needs any further elaboration. Economic influence and coercion has asserted its role in the foreign policy of strong States with the growth of economic interdependence in the world during the last century. The same holds true for ideological pressure, which may be exercised through the systems of mass information and through non-governmental organisations. It should be borne in mind, however, that these four tools of world or regional dominance are not mutually exclusive, but are viewed by strong States as complementary to one another, retaining their unique functions.

The attempts of powerful States to impose their influence on relatively weak States are not limited to inter-State relations purely and simply. Since an important deal of international policy decisions are adopted within international institutions, such institutions may happen to be attempted by powerful States to be used as a tool of their self-interest. Even the United Nations may not be considered free of such an influence. Hans Morgenthau, in his work on *Political Limitations on the United Nations*, emphasised that the creation of the United Nations has led to institutionalisation of power politics rather than to its elimination, although having been designed to achieve the latter purpose. That conclusion reached by Morgenthau in early fifties, is equally applicable to current international system. Moreover, under certain circumstances, international organisations may

² Keohane, International Relations and International Law: Two Optics, 38 *Harvard International Law Journal* (1997), 487-488

³ Huntington, The Lonely Superpower, *Foreign Affairs* (1999)

happen to support an image of hero of powerful States, which „is able to shape or act in order to make his mark upon the world. International organisations and major powers are imagined as the bearers of human rights and democracy, while local peoples are presented as victims of abuses conducted by agents of local interests. The people of States in Africa, Asia, South America and Eastern Europe are portrayed as unable to govern themselves. Those States, or their leaders, are the source of instability, to be refashioned as an extension of the self of the hero“.⁴ An intervention, possibly forcible one, might be presented as an appropriate tool to respond to those processes.

It may be considered as a logical response to such aspirations that by adoption of resolutions 44/51(1989),⁵ 46/43(1991)⁶ and 49/31(1994),⁷ the United Nations General Assembly recognised small States as being particularly vulnerable to external threats and acts of interference in their internal affairs.⁸ In this regard, the General Assembly affirmed the crucial relevance of respect of territorial sovereignty of States, of non-use of force and of non-intervention in internal affairs particularly and especially for the security of small States. It focused upon the role of United Nations‘ organs and of regional organisations in this regard.

III. Constraints upon National Power and National Interest

The need to safeguard legitimate national interests of relatively small and weak States necessarily envisages the existence and operation of limitations on national power of strong and powerful States. Such limitations may be divided mainly into two groups: those of domestic character and those of international character.

A. Domestic Constraints

1. Constitutional Democracy and Separation of Powers – Among the domestic constraints one needs to mention first of all the constitutional mechanism of representative government and the principle of separation of powers. In modern democracies, the governments are viewed as representatives of their respective peoples and their powers are divided between three branches of government: legislative, executive and judiciary. Such a system of governance shall ensure operation of checks and balances between various branches of government and avoiding usurpation of governmental power by one or another branch. Under the system of separation of powers, the executive branch of government, which by virtue of possessing real capacity to shape and influence the foreign policy of a country, is controlled by representative legislative organs and eventually, by judiciary. This circumstance holds true for decision-making process in the field of foreign policy for several countries.

It is obvious that States having democratic systems of governance are, as a rule, unable to initiate surprising and unexpected armed attacks and interventions. The public opinion, which is generally opposing to high military expenditures, to risks of victimising own nationals and to public conscriptions, obviously operates as a factor limiting the governments‘ capability to use force.⁹ However, constitutional models of democratic States do not necessarily secure the self-restraint by powerful States.¹⁰

⁴ Orford, Muscular Humanitarianism: Reading the Narratives of the New Interventionism, 10 *EJIL* (1999), 696

⁵ *Resolutions and Decisions of the General Assembly, 44th Session*, volume 1, 115

⁶ *Resolutions and Decisions of the General Assembly, 46th Session*, volume 1, 89-90

⁷ 48 *YBUN* (1994), 123-124

⁸ For mechanisms of safeguarding rights and legitimate interests of small and weak States under general international law and within the United Nations system see A. Orakhelashvili, *Weak States and Reform of International Legal Order, 5 Yearbook of Georgian Diplomacy* (1997) (in Georgian)

⁹ Damrosch, *Use of Force and Constitutionalism*, 36 *Columbia Journal of Transnational Law* (1997), 463

¹⁰ It has been suggested in this regard that US constitutional model does not necessarily secure compliance with the international law on the use of force. In certain notorious episodes of recent years, US Presidents have embarked on military initiatives in questionable fidelity to either constitutional or international law. See Damrosch, *Use of Force and Alexander Orakhelashvili Legal Aspects of Global and Regional International Security*

In Germany, for instance, the sending German military units to be engaged in conflicts in foreign countries not directly affecting Germany has always been effected subject to approval by Parliament and by Federal Constitutional Court. Those mechanisms do not, however, create reliable guarantees in all cases. The government of the United States has in numerous cases deployed military force abroad in clear violation of US War Powers legislation which deals with distribution of war authority between various branches of government. The case of intervention in Grenada may provide an appropriate evidence.

As far as representative character of democratic government is concerned, it should be borne in mind that the principal issues for which the citizens of a country may hold the government accountable are mainly belonging to domestic policy. These are issues of economic and social policy, such as employment, education and health service, directly affecting the population of a country. The behaviour of a government in the issues of foreign and security policy never play an important role in electoral process. Therefore, the governments are hardly subject to any reliable control or pressure on the side of population as far as foreign policy and foreign security is concerned.

The role of the judiciary is also not free of influence of these circumstances. Judicial branch of a government is independent and unbound except by the law. But still, the role of judiciary is limited in the area of foreign policy. Historically, the conceptual underlying principle of judicial control of executive and administrative decisions has been the need to safeguard rights, freedoms and legitimate interests of individual human beings or of their groups within a given State. The purpose of constitutional mechanisms of separation of powers, as suggested by Montesquieu, is the need to ensure individual freedom of citizens. It is of course an inevitable element of Western democracies that executive and administrative branches of the government shall respect human rights and fundamental freedoms. Moreover, this condition is viewed as indispensable for maintaining a given form of government. The judiciary, which is bound only by the law, is an appropriate machinery to enforce respect by the Executive of those limitations and, as the historical evolution of Western political systems shows, the Executive, although being most powerful among the branches of the government, accepts to be controlled and limited by the judiciary. Yet, this circumstance is unable to provide satisfactory answer in the field of foreign policy. As a rule, the judiciary never decides to object to foreign policy decisions of the Executive, insofar such decisions do not involve violation of domestic law of a given State and do not result in neglect of rights and legitimate interests of its citizens. Foreign policy decisions are thus, as a rule, non-reviewable within the constitutional systems of Western democracies. Judicial organs may not, in vast majority of cases, have a good reason for exercising judicial activism in the field of foreign policy.¹¹ In cases they are asked to do so, they are supposed to refer to any procedural or preliminary obstacle preventing them from exercising control of government in the field of foreign and security policy.

It remains therefore to conclude that operation of system of checks and balances in the field of foreign policy depends on the willingness of the executive branch of the government to recognise the role and relevance of the legislative and of the judiciary in process of adopting foreign policy decisions. Therefore, the democratic character of government of a State is not a factor which as such may prevent or render unsuccessful the attempts by that State to impose its influence on other States in detriment of independence and prosperity of the latter.

2. Adherence to Human Rights and Fundamental Freedoms – Another important possible constraint of a domestic nature may be the recognition of human rights and fundamental freedoms within a State's political systems. The constitutions of vast majority of some two hundred States contain the detailed guarantees of observance of human rights and in Western democracies these

Constitutionalism, 36 *Columbia Journal of Transnational Law* (1997), 453. See also Nolte, Kosovo und Konstitutionalisierung: Zur Humanitären Intervention der NATO-Staaten, 60 *ZaoRV* (1999), 957

¹¹ US government asserted the right to enter other countries and seize persons subject to prosecution under US law. The US Supreme Court upheld such an attitude in case *US v. Alvarez-Machain*, Tom Farer, The Future of International Law Enforcement under Chapter VII: Is there Room for "New Scenarios"? in Delbrueck (ed.), *The Future of international Law Enforcement, New Scenarios, New Law*, 46

guarantees work effectively indeed. But this circumstance is as such unable to prevent employing double standards in questions of human rights for foreign policy goals. US intervention in Panama has caused several hundreds of deaths, which were argued to be justified by alleged expected threat to the life and security of US nationals present in Panama. This holds equally true for human rights violations during peace-keeping and peace-enforcement operations, for instance in Haiti and in Iraq-Kuwait conflict.

The judicial practice may also offer interesting examples supporting assumption of insufficiency of domestic recognition of individual human rights guarantees for their effective protection under all circumstances. In *La Grand* case Germany sued the United States before the International Court of Justice for the failure by the latter to accord due protection to a German citizen according to the Vienna Convention on Consular Relations of 1963. The failure by the United States resulted in execution of two German citizens in violation of the Vienna Convention. Suing the United States before the ICJ, Germany invoked „the paramount interest of Germany in the life and liberty of its nationals“. ¹² The Court indicated provisional measures ordering stay of execution. This order has been neglected by the United States and *La Grand* has nevertheless been executed. Such a behaviour caused an irreparable harm to vital interests of the applicant State. But the level of protection of human rights and fundamental freedoms in the United States has not proved sufficient for safeguarding vital interests of Germany. Both in cases of *La Grand* and *Breard*¹³ (the similar case brought before the Court by Paraguay), the federal government, including the Supreme Court of the United States refused to enjoin the governors of states of Virginia and Arizona from executing German and Paraguayan citizens, because it considered itself as not empowered thereto under domestic law, despite the ruling of the International Court of Justice. Such a phenomenon is far from being country-specific.

3. Availability of Resources – The next constraint on national power and on pursuing national interests is the constraint based on the availability of appropriate resources. Economic, financial and military resources of a country plays a crucial role in designing and achieving foreign policy goals. Brzhezinsky, for instance, states that the United States leadership is not unlimited and may be exercised insofar the availability of resources allow this.¹⁴ The similar statement has been made in respect of NATO by US Deputy Secretary of State Talbott.¹⁵ This is true also for other situations. Russia, for instance, has not responded to developments in and around Kosovo as its key foreign policy interests would envisage, because of its heavy dependence on credits from international financial institutions. Also in conflicts in the Southern Caucasus, the outcome has always been determined by the factor of resources. Establishment of Armenian control in Nagorno-Karabakh has taken place because Armenia has had significant financial and economic advantages in this regard. On the other hands, Georgia is unable to regain factual control over its territories in Abkhazia and in „South Ossetia“ because it cannot afford this economically, financially and thus militarily. Examples of such kind are many indeed and to refer to each of them would require enormously much space.

It is thus clear that constraint on freedom of action imposed by the lack of resources is important, but it is not absolute. The notion of „lack of resources“ is as such relative. To be able to invade a neighbour country does not necessarily require to be a superpower. The decisive factor in this regard is the availability of resources sufficient and appropriate for achievement of a concrete foreign policy goal in a given concrete case. The circumstance that one is unable to act similarly in other situations, is without prejudice to that given case.

Moreover, in certain cases no special resources are needed. In Rwanda, genocide has been accomplished with knives and the absence of advanced technologies and of special economic or financial resources has not prevented occurrence of that large-scale human tragedy.

¹² *ICJ Reports*, 1999, 9ff.

¹³ *ICJ Reports*, 1998, 248ff.

¹⁴ See in Roberts (ed.), *US Security in an Uncertain Era* (1994)

¹⁵ As cited in Simma, *NATO, UN and the Use of Force*, 10 *EJIL* (1999)

B. International Constraints

The analysis of domestic constraints on national power demonstrates that these constraints do not provide sufficient guarantees for establishment or maintenance of stable inter-State relations based on respect by States of one another's objective fundamental interests. The answer should be sought for in analysis of constraints on national power of international character. The main categories of constraints of international character are balance of powers, international morality and international law.

1. The Balance of Powers – In the late middle ages, establishment of system of balance of powers has relatively weakened, though obviously not eliminated, the importance of power and force in international relations. As Hegel remarked, in the era of balance of powers, the conquest of one small island has become more difficult than annexation of the whole country in earlier periods. The balance of powers thus imposes some inherent limitations on national power. Such limitations, however, are exclusively factual and not based on any system of values. Objectively, the balance of powers is in position to prevent wars, conflicts and other challenges to stable inter-State relations, but the highly factual nature of its background makes it value-neutral. Its existence depends on proportion of strength of actors and not on their will. Every strong nation tries to avoid violation of balance of powers in disadvantage of its own, but it would not oppose such a violation if it would be politically successful for it.

Such a strictly factual and value-neutral of balance of powers has been precondition of its insufficiency for maintaining stability in international relations. The system of balance of powers established after the Peace of Westfalia has been destroyed by the outbreak of World War I. As regards the 20th century, the references to the balance of powers have been tantamount to assertion of spheres of influence by strong States in detriment of independence and prosperity of relatively weak ones.

Therefore, two main drawbacks of balance of power in international relations are (1) its value-neutral character and (2) its lack of legitimacy. The conclusion therefore should be that the systems of international relations based on balance of powers are as such not in position to safeguard and to maintain stable inter-State relations.

2. International Morality and Ethics – International morality and ethics, embodying considerations of humanity and equity, may be considered as a factor limiting States in exercising their self-interest. The various categories of morality, ethics and humanity, through distinguished between by some authors, serve the same purpose for the present research. In the age where propaganda is in position to influence seriously foreign and security policy decisions – through mass media and non-governmental organisations – governments may be considered as bound somehow by international morality.

Nevertheless, international morality and ethics is unfortunately not in position to provide guidelines restraining States acting in their self-interest. As the world consists of cultures largely different from one another, references to international morality and ethics alone are hardly in position to effect changes in most of the governmental policies. The issue of cultural relativism in the field of human rights may be referred to in this regard. While respect for individual freedom and dignity is a cornerstone of political and social systems in the West, the social milieus in Asia and to a certain extent, in Eastern Europe, hardly allow to make analogous conclusions. In those societies, respect for human rights and individual freedoms is far from being a foundatory value upon which the society and its political and economic systems rest. Invokation of moral categories alone may not be a sufficient argument with regard to societies which may adhere to different values.

3. International Law – International law is the only normative system setting forth the rules of conduct of nations which have objective character. It is the system of rules recognised by, consented to and binding upon all actors within the international society. In the process of clash of interests opposed to and under circumstances irreconcilable to each others, international law only is able to provide for objective solution and objective standards adhered to by and obligatory for all actors engaged in the situation concerned. That circumstance is the source of legitimacy.

Legitimacy is the positive aspect of justice, humanity and equity. It is the source and basis of a possible trust in an existing system of international relations. In order to abide by the rules of game of international society, States shall feel themselves and their rights secured from unlawful encroachment.

The methodology of international law is the most suitable tool for better identification of an actual content of values and principles associated with the notion of international security. The hierarchy of rules in international law is in fact a reproduction of hierarchy of values of the international society. These values are primarily reflecting the fundamental interests and rights of States. On the other hand, humanitarian values reflecting the basic needs of non-State actors – first of all of individual human beings – also have asserted their affiliation with the notion of international security by transcending by their importance the limits imposed by national frontiers. The circumstance that the international society is in position to identify its own values, to determine their hierarchy and accordingly, the degree of legal protection accorded to them, and to define the legal consequences of encroachment upon them, transforms it into international community.

The values and basic interests which may be asserted as considered by the international community to be its own, relate to (a) avoidance of wars and forcible conflicts, (b) universal respect for basic rights of an individual human being, and (c) preservation of human environment. In contemporary international relations, it is hardly disputable that international law only accumulates those basic values and interests in a way making them binding on all actors and subjecting those actors also to uniform legal consequences following from encroachment upon those basic values and interests. International law, as distinguished from ethics, morality and other systems of values, may be considered as a principal set of rules, principles and categories governing the behaviour of States in general, and in providing safeguards for basic rights of small States in particular.

IV. the Notion of Collective Interests and Collective Safeguards

A. Before Adoption of the United Nations Charter

We shall now turn to the question how the international society has managed, throughout several stages of its development, to elaborate the constraints on national power and to create mechanisms for preservation of the order established thereby. Analysis of developments having taken place in various periods may demonstrate the trends of evolution of international society from a society based on unrestricted relevance of force into the society governed by uniform legal rules and based on sovereign equality of States.

Hardly can it be disputed that development of international relations until and through late middle ages may be characterised as the permanent state of war. In 17th century, the European States reached the creation of system of balance of powers, which was based on Treaty of Westphalia of 1648. The European order based on Westphalian system introduced into international law an objective understanding of independence and sovereign equality of States. International society has been legitimised as a society composed on nation-States, independent from and equal to one another.

After Napoleonic wars, the Congress of Vienna of 1815 has been the next crucial point in the evolution of international society. the Congress of Vienna may be considered as the first step undertaken by international society to identify its own interests – in other words, the common interests of States – and to attempt to elaborate responses to encroachments on them. In this regard, the Congress of Vienna has signified that expansion of national frontiers and of spheres of influence by forcible means constitutes a threat to all actors in international society regardless of their direct affection by such a threat. The common response was warranted in such circumstances.

But along with elaboration of safeguards of rights and interests of States, the Congress of Vienna has been in fact the first occasion of considering to elaborate safeguards for rights and interests of non-State actors, in particular, of individual human beings. The Congress of Vienna has shown determination of States to outlaw slavery and slave trade and to combat them. This

circumstance also supports our assumption that the Congress of Vienna was the first common acknowledgment by the nation-states of possibility of existence of their common interests.

World War I has been followed by collapse of empires. The fate of peoples which earlier constituted parts of former empires has been the main point on agenda of Versailles Conference in 1919. The response of the Conference has been recognition of right of peoples to self-determination. This has been undoubtedly an instance of expansion in scope of the notion of common interests of international society.

International order established at Versailles has mainly been unique in sense of acknowledgment of existence of common interest and of new understanding of safeguarding them. Westphalia and Vienna systems were based only on action by individual States, including their collective actions. The Conference of Versailles, on the other hand, created an organised mechanism to safeguard common interests – the League of Nations. The fact of creation of a permanent mechanism has been acknowledgment of the circumstance that consideration of common interests of international society were consisted not of individual exceptional instances, but should have become the regular business.

B. After Adoption of the United Nations Charter

Adoption of the United Nations Charter and establishment of that Organisation has been the last step the international society made in identifying its own interests, in elaborating and institutionalising safeguards for those interests. The principles of the United Nations, as enshrined in article 2 of the Charter, have indeed transformed international order by creating new dimensions and new levels of common interests. Unconditional affirmation of sovereign equality of States, absolute prohibition of the use of force in international relations and ban on intervention into domestic affairs may be asserted to have reshaped international legal order. The United Nations system in action is indeed characterised by irreversible trends to develop international legal order in a direction mirrored in the UN Charter.

The role of the United Nations in the maintenance of international peace and security can be evaluated in two ways. Firstly, the very existence of the United Nations as a world forum for international security has played decisive role in determining the scope and material aspects of international security. Secondly, the United Nations constitutes the mechanism of collective security capable of responding the threats to the security by particular actions.

The concept of international security, as shown above, is not limited to the absence of inter-state wars or other military dangers to security. The factor of existence of United Nations has contributed widely to the process of identifying by the States of values the preservation of which is a prerequisite of maintenance of international peace and security. This process has occurred and is occurring through the principal organs of the United Nations – mainly through General Assembly, Security Council, Economic and Social Council and International Court of Justice.

The activities of these organs have contributed to the development of the law as to international security – legal norms and institutions that have impact on international security, by defining its content and by establishing its safeguards. The interpretation and the progressive development of the United Nations Charter is of primary importance in this context. Adoption by the UN General Assembly of the Declaration on Friendly Relations (General Assembly Resolution 2625), Definition of Aggression (General Assembly Resolution 3314) and other declarations has helped to identify what actions amount to the violation of the prohibition of use of force under the Charter of the United Nations. These documents, although recommendatory in character, have received the wide support of the international community and form currently the part of customary international law, regulating thereby the key aspects of international security.

The identification of values pertinent to international security has also been advanced by the UN. From the beginning of the work of the organisation, the adoption of international bill on human rights has been put onto agenda. In 1948, the General Assembly adopted the Universal Declaration of Human Rights that has also crossed the threshold which separates the recommendatory acts from

the legally binding rules. The declaration has been incorporated into domestic legal orders of practically almost all States and therefore become the binding international law. The declaration has been followed by Convention on the Prevention and Punishment of the Crime of Genocide (1948), two International Covenants on Civil and Political Rights and Economic and Social Rights (1966), Convention against Torture (1984) and other foundatory acts. These normative documents have become the universal standards governing the behaviour of states towards individual human beings. The work of treaty and non-treaty human rights bodies of the UN, such as the Human Rights Commission and several subcommissions and special rapporteurs has been crucial in elaborating evidenced and verifiable international practice which is in position to guide the behaviour of States in questions of treatment of their own nationals. Existence of universally binding standards of human rights would hardly be imaginable without the work of the United Nations in this field.

The work of the United Nations has contributed also to defining the economic aspects of international security. The standards set in this area are enshrined in the Declaration of Permanent Sovereignty over National Resources, Declaration on New International Economic Order, Charter on Economic Rights and Duties of States. These documents contain the standards for impermissibility of interference with internal affairs of a State, responsibility for some internationally wrongful acts and at least in these relations they constitute the part of modern customary international law, although this is doubted by some authorities in theory¹⁶ as well as in judicial practice.

Environmental standards applicable in international relations, which also safeguard values common to all actors within the international community and are inevitable part of any workable notion of international security, owe their existence also to the work of the United Nations. Stockholm and Rio Declarations concerning the key aspects of preservation of human environment shall be mentioned in this regard.

The adoption of these universal standards may be considered to be fully caused by the nature of the United Nations as a forum representing all States and groups of States in the world. This factor has conferred the unique legitimacy on the activities of that organisation. Achievement of such progress in identifying the scope and material aspects of international security would be unrealistic within any other international forum. The standards of behaviour, which are considered as of fundamental importance in international relations, invoked currently against some States within or outside the United Nations, in accordance with or contrary to the UN Charter, owe their origin to the United Nations.

The development of progressive values and ideas in international relations would not happen unless the appropriate legitimacy had not been provided. The United Nations has performed this task being backed by the scope of its membership and relative democracy in decision-making process. This process has caused, in particular, that the universalization of above-mentioned values became possible. Acting in this way, the United Nations has led to significant (though not absolute) transformation of international relations.

Adoption of the UN Charter has been in fact the last step the international society has undertaken on the way of identification and safeguarding its own interests, in reshaping international relations. Several political scientists or even lawyers may nevertheless argue that transformation processes in 90s, characterising by disappearance of East-West confrontation and by collapse of Soviet bloc, resulted in transformation of international relations and order. But in fact, to understand these processes in that way is to misunderstand them. Developments in 90s obviously involved great changes in sense of democratisation and of re-allocation of power bases in international relations. These changes did not, however, result in shaping international order in a way different from international order as understood in the United Nations Charter. In other words, there occurred important changes in strength of several participants of the system, as well as new participants have emerged, but there has been no change of the international system as such.

¹⁶ Higgins, *Problems & Process: International Law and How We Use It* (1997)

C. United Nations and Collective Safeguards of Collective Interests

As it has been emphasised above, with the establishment of the League of Nations and its replacement by the United Nations, the international society undertook a step towards the major change throughout its history. This change consists in accumulating powers and competences necessary for response to threats to basic values in hands of an institution separate from individual States but mandated by the consent of all States. Such a decision by the international society leads to an international system based on collective security.

By becoming participants in collective security system, States are considered to abandon to a certain extent their freedom of action in order to promote preservation of values common to all participants. States retain their sovereignty and are still empowered to protect their interests and rights through use of peaceful reprisals and in case of an armed attack, of inherent right to self-defence. However, by becoming parts of a collective security system, States recognise that decision concerning preservation of common values shall be adopted within that collective security system. Collective security is therefore of an institutionalised character. It possesses the organs to identify threats to the security and to respond to them.

Although the primary goal of collective security is the preservation of values the members of the system adhere to, these values are not necessarily identical with self-interest of participants of the system. The collective security is designed to preserve the common values as such and not in dependency on interests of participants. This feature of collective security leads it to be constitutionalised. The legal framework created in such a way protects the interests separate from those of individual States. Therefore, the decision-making takes place within a constitutionalised mechanism. Constitutionalism at the present stage of international relations can be viewed as being *in statu nascendi*. At the same time, it is still possible to identify the basic essentials of it and these are:

- a) attempt to allocate the decision-making and forcible response to threats to impartial and effective body;
- b) maximum possible participation and representation of all participants of the system at all levels of the decision-making;
- c) introducing the system of checks and balances between various bodies of collective security mechanism and thus preventing the usurpation or abuse of power by some participants and organs.

These requirements are inevitable preconditions for effectiveness of collective security mechanism. Without meeting them there is practically no possibility to provide the trust of participants in the system.

Part Two

The United Nations Security Council

I. The Primary Responsibility of the UN Security Council in Maintenance of the International Peace and Security – Nature and Scope

The analysis of several provisions of the UN Charter in their context is in position to demonstrate that dangers and threats to international security may be of various degree and kind, requiring equally responses of various degree and kind. The Charter, having taken this assumption as a starting-point, provides for distribution of respective powers and competences among its principal organs. The principal point in this regard is that United Nations Security Council is vested with the primary responsibility for the maintenance of international peace and security. Article 24 of the Charter, containing this rule, clearly emphasises that the reason and basis of such an allocation of responsibilities is the need “to ensure prompt and effective action by the United Nations”. The relevance of such a reasoning is more than obvious; prompt and effective action may not be guaranteed when deliberations are lengthy because of the large number of States involved. The limited membership of the Security Council, however, makes this body the most suitable one for fulfilling this task.

Along with allocating responsibilities, article 24 of the Charter emphasises that the Security Council shall act on behalf of member-States of the United Nations. The normative content of such a provision may provoke controversial conclusions. Kelsen, for instance, regards the provision on acting “on behalf” as superfluous, because the Security Council, as an organ of the United Nations, shall act on behalf of the latter and not of member-States.¹⁷ This controversy seems nevertheless to be formalistic than substantial. The Security Council, along with being one of the principal organs of the United Nations, is entrusted with functions and powers of unique nature. Its powers differ both in range and in kind from powers of other principal organs and include possibility of application of coercive measures against States. Therefore, the provision of the Charter in question serves the purpose to reaffirm the legitimacy of powers of the Council in this area.

The notion of “primary” responsibility for maintenance of international peace and security requires also some analysis. The Charter does focus upon notion or frontiers of primary responsibility. The only authoritative guidance in this regard is provided in advisory opinion of the International Court of Justice on *Certain Expenses of the United Nations*.¹⁸ The Court emphasised that the primary responsibility of the Council in maintenance of peace and security is not exclusive one. Other organs of the UN may also assume certain powers in this field, as illustrated in a given case by establishment of peace-keeping forces by the General Assembly. But again, the Court’s observations were strictly limited to the given case and hardly may provide any general guidance as to what the nature and frontiers of primary responsibility of the Security Council are.

Several criteria may be employed for clarifying content and frontiers of primary responsibility of the Council. One of them obviously might be criterion based on action or inaction of the Security Council in a given situation. Such a criterion has been referred to many times in the literature as well as in practice. The essence of such an approach is that in case of inaction by the Security Council, other organs may use their secondary or residual responsibility and take actions for maintenance or restoration of international peace and security.

¹⁷ Kelsen, *The Law of the United Nations*, 1950; this provision in the Charter serves the purpose to render superfluous the doubts as to the legitimacy of the Security Council action due to its limited membership which is not considered as a true representation of the international community, see Franck, *Fairness in International Law and Institutions* (1995), 218, also White & Ulgen, *The Security Council and the Decentralised Military Option: Constitutionality and Function*, 44 *NILR* (1997), 382ff.

¹⁸ *ICJ Reports*, 1962, 163-164

Another approach may also be suggested. The notions of primary or secondary responsibility of principal UN organs may be indicative of basis and reasons of allocation and distribution of powers and competences among them. The Security Council, having primary responsibility for international peace and security, is endowed with wide range of powers which vary from recommendatory to enforcement ones. Other organs, possessing also certain responsibilities in this regard – secondary, not primary – are also given certain powers to act in situations involving dangers to peace and security. But the powers of the Council, as of organ endowed with primary responsibility, are more wide both in kind and in extent than powers of other principal organs. While the powers of other principal organs, for instance the General Assembly, are merely recommendatory, the Security Council may bind States and take enforcement measures against them. In case of Security Council's inaction, other principal organs are not in position to substitute the exercise of those powers to bind and to enforce, because they themselves lack such powers. The goals which would be attained through the Security Council's action are thus hardly fully attainable by other principal organs. Therefore, it may be submitted that the notion of primary responsibility of the Security Council is a reflection of distribution of powers and competences among principal organs of the United Nations. Other principal organs also have certain responsibilities in this area, but subject to allocation of respective powers and competences on the basis of the Charter.

United Nations General Assembly is often considered to be in position to undertake the secondary or residual responsibility for maintenance of international peace and security. While this is true, the Charter is clear in drawing frontiers of competence of the General Assembly. Its powers are mainly recommendatory,¹⁹ although it is also not prevented from adoption of operative decisions.²⁰ Nevertheless, the General Assembly does not possess the power to undertake enforcement actions against States. However, in early years of work of the United Nations, the General Assembly has made an attempt to use its recommendatory powers for initiating enforcement actions. This attempt is known as a resolution "Uniting for Peace" (UfP) adopted in 1950. Due to paralysing of the Security Council, the Assembly decided to act instead of it and it recommended the use of force against North Korean forces having invaded Southern part of Korea.

The principal argument in motivation in favour of UfP resolution is that absence of unanimity of permanent members shall not prevent the Organisation from pursuing its aims and purposes and therefore General Assembly may substitute the Security Council in certain cases. However, it would seem generally agreed that UfP resolution cannot create a valid legal title for enforcement action, otherwise in violation of public international law.²¹

UfP resolution is based on recommendation by the General Assembly to member States of the United Nations to adopt certain coercive measures against a given State. The lack of enforcement powers of the General Assembly is a circumstance preventing the measures recommended by the General Assembly to become universally applicable. Therefore, along with the legal deficiencies in powers of the General Assembly, the considerations of effectivity also dictate that this organ is not suitable to assume the power of initiating enforcement measures. The mere fact that the General Assembly cannot order universally applicable coercive measures binding on all States, inherently implies that there will be some States or groups of States unwilling to support the measures of the General Assembly and moreover, willing to support the target State. Such a circumstance contributes not to the effectivity of enforcement measures, but to aggravation of conflicts and confrontations between various States and groups of States. Involvement of the General Assembly in certain cases may therefore be a factor which supports escalation of a given conflict both in time and in space and to involvement of new actors in it.

¹⁹ UN Charter, articles 10, 11, 13, 14. More extensive analysis of recommendatory powers of General Assembly and their scope is given below, in context of UN peace-keeping operations.

²⁰ *Namibia*, Advisory Opinion, *ICJ Reports*, 1971

²¹ Frowein, *International Law Enforcement in Case of Security Council Inaction*, Delbrueck (ed.), *The Future of international Law Enforcement, New Scenarios, New Law*, 119

The case of Korean war is a clear illustration of this principle. Recommendation by the General Assembly of forcible measures to the member States contributed in fact to enlargement of the conflict in sense of space and actors involved. An inter-Korean armed activities have been transformed by General Assembly involvement into large-scale war involving United States and China. Therefore, in addressing international or intra-State conflicts as situations endangering peace and security, the principal organs of the United Nations ought to bear in mind not only on scale and gravity of measures to be applied and their possible impact on a target State, but also on possible impact of such measures on the outcome of a given conflict. In this sense, the legal effect of measures adopted on a target States and most importantly, on third States should be the prevailing consideration.

The lack of relevance of UfP resolution in context of an enforcement action has been confirmed by the subsequent practice of the General Assembly. In case of Yugoslavia, the General Assembly adopted a resolution 47/121 condemning armed action by Serbia-Montenegro against Bosnia. It urged the Security Council to use all necessary means to repel Serbian attacks and also to repeal arms embargo against Bosnia, as well as to establish an international criminal tribunal. The Assembly, however, did not recommend to States to apply those enforcement measures against Serbia-Montenegro, although it regarded those measures indispensable and under the UfP resolution it could have been considered to be competent to do so. The Assembly should therefore be viewed as exercising high degree of restraint as far as the competence of the Security Council to initiate enforcement measures against States are concerned.

II. Types of Competences of the Security Council

The primary responsibility of the Security Council for maintenance of peace and security obviously has an impact on essence and limits of its competence. The competence of the Council on the basis of the Charter shall be examined in this regard in material and in formal sense. The material competence of the Security Council is of functional nature. The Council may under the Charter deal with disputes and situations; not with each and every one, but exclusively with those threatening international peace and security. Chapter VI of the UN Charter empowers the Council to deal with disputes and situations which are likely to endanger international peace. Chapter VII empowers the Council to deal with actual threats to the peace. The competences set out in both Charters make in their unity clear that the Council's role in international legal system is strictly functional. On the other hand, in cases where the Council is seised of the matter, there should be a presumption that the dispute or situation in question is threatening international peace.

The formal competence of the Security Council relates to the nature of acts it is empowered to adopt. The Council has mainly recommendatory and enforcement powers. Recommendations by the Council may be adopted in context of preventing a given situation from endangering international peace and security – articles 36, 37 and 38 of the Charter – or in context of restoration of international peace – article 39 of the Charter. Under Chapter VII the Council may adopt military and non-military enforcement measures in accordance with articles 41 and 42.

Apart from those two principal groups of powers of the Council, there is also third one. That is the group of powers “to call upon”. As far as article 25 of the UN Charter makes acts of the Council binding on States unless the acts themselves are designed as recommendations, States shall be considered bound by what the Council has called upon them. The Charter envisages two kinds of such powers. Under article 33, the Council may call upon States to settle dispute through pacific means. Under article 40, the Council may order States to comply with provisional measures in order to prevent aggravation of a situation.

These various groups of powers are, as evidenced above, designed to enable the Council to identify threats to international security of various kind and degree and respond to them with means and methods warranted by concrete circumstances. The principal focus of our analysis shall be the legal basis of the power of the Security Council to take an enforcement action.

III. Determination of a Threat to the Peace, Breach of the Peace and an Act of Aggression as a Prerequisite for Application of Enforcement Measures

1. Necessity for a Determination

The Charter-based precondition of application of its enforcement powers by the Security Council is the prior finding under article 39 of the Charter of “threat to the peace, breach of the peace or act of aggression”. While the concept of aggression is more or less clear,²² the Charter does not suggest any definition of threat to or breach of the peace, nor does it define any of their components. This circumstance becomes more significant due to the fact that the Council in its Chapter VII practice has never resorted to the more or less clear concept of aggression, but has characterised the situations it was addressing exclusively as threats to or breaches of peace. This holds true also for situations involving clear cases of aggression, such as invasion of Kuwait by Iraq or invasion of Falkland islands by Argentina.²³ Generally, the Council is willing to characterise situations under article 39 as threats to the peace rather than breaches of the peace or acts of aggression.

Obviously, the Council shall make it clear whether it considers a situation it focuses upon as a threat to the peace. Some authors suggest that the implied determination under article 39 is possible without an explicit reference to existence of a threat to the peace.²⁴ This argument undoubtedly fails against the test of legal certainty. Without an explicit determination of a threat to the peace, it would be unclear in each concrete case which facts, events or circumstances are warranting application of Chapter VII measures, including enforcement ones. From the practice of the Council it is clear that by concrete references to the threats to the peace, the Council is willing to demonstrate which facts, events and circumstances it is addressing by applying such measures. A target of Chapter VII measures may be under concrete circumstances an action by a State or a non-State actor, or a general situation without blaming a concrete actor. But in any case, this should be made clear by the Council.

Even the reference to certain resolutions initiating Chapter VII measures without explicit reference to article 39 is not sufficient to consider that such a reference is not necessary to be made explicitly. All resolutions of such kind explicitly mention either article 39 or prior resolutions by the Council already having determined a given situation as a threat to the peace.²⁵ Implicit determination seems only to be conceivable and acceptable in cases where the Council explicitly mentions that it acts under Chapter VII and does not specifically refer to circumstances referred to in article 39. This option seems to be the only living space for such implicit determinations. But again, there is no relevant practice confirming viability of such an option. Moreover, the test of legal certainty would be relevant also in that case. A resolution shall make clear enough which facts, events or circumstances are warranting adoption of enforcement measures.

While making use of its Chapter VII powers, the Security Council has to make sure that existence of threat to the peace has been duly determined. The practice of the Council knows the findings of “danger to peace and security”, “situations endangering peace”, “situations seriously disturbing international peace and security”, or “situations likely to threaten or endanger

²² Definition of Aggression, UNGA res. 3314(1974). The International Court of Justice has confirmed in *Nicaragua* case that resolution of the General Assembly 3314(1974) is part of customary international law

²³ UNSC res. 660(1990)

²⁴ Freudenschuss, Article 39 of the UN Charter Revisited: Threat to Peace and the Recent Practice of the UN Security Council, 46 *Austrian Journal of Public and International Law* (1993), 31; Lapidoth, Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council, 30 *AVR* (1992), 115

²⁵ See, for instance, UNSC res. 819(1993), 820(1993), 824(1993), also UNSC res. 1171(1998), referring to UNSC res. 1132(1997)

international peace and security". The determinations of such a kind is not suitable to be the basis of action under Chapter VII. Determination shall make clear that an actual threat to the peace exists, consisting of objective facts, events or circumstances which, in view of the Council may warrant application of Chapter VII preventive or enforcement measures. To prevent abuses of power, it should be made clear in each and every case that an objective fact, event or situation already constitutes a threat to the peace both in degree and in kind.

Some resolutions refer not to threats to peace as such but to threat to peace and security in the region, or emphasise that the consequences of a given situation threatens the peace. It seems that such determinations fall within the purview of article 39. This article requires simply finding of threat to the peace (which, according to the Charter-based context, is nothing but international peace). Determination of threat to peace and security in the region is in fact a permissible determination under article 39, because peace in a given region is part of international peace. As regard to consequences of a given situation as threats to the peace,²⁶ such a determination would be permissible under article 39 only if such consequences referred to in the resolution by the Council do actually exist and not merely are expected to occur.

2. Consequences of a Determination

The Security Council uses wide discretionary powers in finding threats to or breaches of peace and this discretion is in accordance with the Charter. The content of threat to or breach of peace depends therefore in each concrete case upon a discretionary finding by the Council, which is hardly subject to any specific limitation by the Charter. Nevertheless, the finding by the Security Council of threat to or breach of peace necessarily entails certain legal consequences both within the realm of the Charter as well as of general international law. The principal consequences are as follows:

(a) Upon finding threat to or breach of peace, the Security Council is empowered, by virtue of articles 41 and 42 of the Charter, to initiate coercive non-military or military measures against a State or a non-State actor. These measures may consist of severance of communications, trade, economic and/or diplomatic relations. In case they are or would be ineffective, the Security Council may decide on the use of armed force.

(b) By virtue of operation of articles 2(5), 25, 48 and 103 of the Charter, all member-States of the United Nations are obliged to support the coercive measures initiated by the Security Council and carry them out.

(c) The Security Council, acting in its enforcement powers under Chapter VII, may disregard the area of domestic jurisdiction of States which the United Nations is otherwise obliged to respect (article 2(7) of the Charter).

It is thus clear they by determining threat to or breach of peace under article 39, the Council is in fact empowered to bring about wide and serious legal consequences which may be important both for a target State and for third States in sense of their rights, interests and obligations. The enforcement function as well as the appropriate discretion of the Council is thus very wide indeed. "It is apparent that the Council has broad discretion, but that is to be exercised *bona fides* and *intra vires*, in accordance with these specific procedural and substantive standards spelled out in the Charter."²⁷ Therefore, the need for appraising essence and frontiers of this discretionary function arises. The central point within this task is the clarification of concepts „peace“ and „threat to the peace“ as the prerequisites of application of enforcement powers.

3. Expanded Notion of a Threat to the Peace and Criteria for Determination

The concept of peace, as a word of chief importance in article 39 is not positively defined either under UN Charter or under any other international instrument. In its usual meaning peace

²⁶ See, for instance, UNSC res. 688(1991)

²⁷ Franck, *Fairness in International Law and Institutions* (1995), 220

denotes the absence of war, also as understood under classical international law, which has been treated as consisting of two principal parts – law of peace and law of war. But the peace as understood by the Security Council is much more wide than the classical meaning of the peace. The notion of peace in sense of the Charter includes not only the absence of inter-State wars, but also another factors pertaining to economic, ecological and humanitarian dimensions of international relations.²⁸ Therefore, the Council has directed its determination under article 39 and consequently applied its Chapter VII powers both to cases of inter-State armed conflicts and to situations not involving inter-State wars. In case of Southern Rhodesia, the establishment of minority rule and implementation of racist policies has been appreciated by the Council as a threat to peace and enforcement measures resulting in arms and oil embargo have been applied. The resolution 688(1991) declared the mass flow of refugees from Iraq as a threat to the peace. In resolution 940(1994), the removal of legitimate government of Haiti has also been assessed as a threat to the peace notwithstanding the purely domestic character of the situation. In resolution 794(1993), the Council addressed the failure of statehood and „magnitude of human tragedy“ in Somalia as a threat to the peace. The very fact of non-extradition by Lybia of two suspects allegedly having organised the crash of US plane over the territory of the UK has also been addressed as a threat to the peace under resolutions 748(1992) and 843(1993). In all mentioned cases the Council has applied extensive enforcement measures including, in some cases, the authorisation of member States to the use of armed force.

The practice of Security Council shows therefore that the Council finds appropriate to use enforcement powers for maintenance of international peace and security not only in case of inter-State armed conflicts, but also in other fields pertaining to purposes and principles of the United Nations and thus forming an inevitable part of international security. At the same time, the collection of these determinations does not help to clarify the positive content of peace, threat to or breach of it. An analysis based simply on determinations under article 39 made in the past would be strictly retrospective and descriptive. The necessity to find some objective or objectivised criteria for defining the scope of peace and threat to peace becomes thus obvious.

Most frequently, it is suggested that the determinations under article 39 are conclusive and within the absolute discretion of the Security Council.²⁹ For clarification of the content of peace and threat to the peace various criteria are suggested and advanced. The formal definitions of threat to peace are being used frequently. In this way the threat to peace is defined as „a situation which the organ, competent to impose sanctions, declares to be an actual threat to the peace“.³⁰ This definition places the decisive point upon discretionary powers of the Security Council and not upon the content of peace and nature of threat to or breach of it. It is being advanced that from the original point of view, the Council was designed to be the body adopting the solely political decisions in sense of both the decision-making process and the substance of decision. The determination of a threat to peace has also been viewed from this angle.³¹ This attitude is to an important extent also upheld in the current theory. According to Reisman, the UN collective security mechanism has been intended to be a mechanism working according to free will and discretion of permanent members of the Security Council.³² The threat to peace under UN Charter is therefore supposed to be equivalent

²⁸ Statement of Heads of States and Governments of members of the Security Council, 31 January 1992: “The absence of wars and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters”. UN doc. S/PV.3046

²⁹ Lapidoth, *Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council*, 30 AVR (1992), 115

³⁰ Definition by Combacau, quoted in Kooijmans, *The Enlargement of the Concept „Threat to the Peace“*, in Dupuy (ed.), *The Development of the Role of the Security Council* (1993), 111

³¹ Kooijmans, *The ICJ: Where Does It Stand?* in Muller, Raic & Thuranzsky (ed.), *The International Court of Justice. Its Future Role after Fifty Years* (1997), 416; For overview of such an approach see Schilling, *Neue Weltordnung und Souveränität*, 33 AVR (1993) at 79

³² Reisman, *The Constitutional Crisis of the United Nations*, 88 AJIL (1993) 83ff.

to what the Council determines it to be. Nevertheless, the analysis of the relevant Charter provisions, as well as imperative considerations of legal certainty lead us not to agree with the view that the power of the Council under article 39 is exclusively based on political discretion and is thus free of all visible limitations.

The limitations on the power of the Security Council to make determinations under article 39 may be both of factual and of legal nature. Factual limitations on discretion of the Security Council relate to its power to find a threat to the peace, i.e. to identify certain facts, events or circumstances amounting as such to a threat to the peace. The legal limitations relate, on the other hand, to a decision-making powers of the Council under Chapter VII in its complexity. From the legal point of view, it may be determined under certain circumstances whether a concrete fact, event or circumstance may be considered as a threat to the peace. Equally, it may be assessed from a legal point of view whether the concrete measures adopted by the Council in response to threat to the peace as identified by it are adequate and justified as such a response. The judgment upon such an adequacy and justifiability may be passed on the basis of the UN Charter, as well as of general international law.

As far as possibility of existence of factual limitations are concerned, it must be examined whether the competence of the Security Council to identify the threats to the peace has only formal content or also material one. According to Schilling,

“Umstritten ist hingegen, ob sich die Feststellung der Friedensbedrohung auf einen bestimmten Sachverhalt stützen muss, ob sie also die – in das Ermessen des Sicherheitsrates gestellten – Rechtsfolge eines Tatbestandes ist, oder ob eine Bedrohung des Friedens immer dann vorliegt, wenn der Sicherheitsrat dies feststellt, ob also die dann nur sogenannte – Feststellung konstitutiv ist. Umstritten ist damit, ob die Feststellung eine rechtlich an die Erfuellung eines bestimmten Tatbestands gebundene oder eine rein politische Entscheidung ist.”³³

If the determination of threats to the peace is a purely political task,

“so bestehende an der Spitze der Vereinten Nationen kraft völkerrechtlichen Vertrags, nämlich der VN-Charta, die Möglichkeit zu rein politisch bestimmten, rechtlich ungebundenen, für die Mitglieder aber verbindlichen Entscheidungen.”³⁴

Therefore,

“Eine Durchbrechung der Souveränität der Mitglieder der Vereinten Nationen aufgrund der Vorrechte des Sicherheitsrats ist nur zulässig, soweit tatsächlich eine Bedrohung des Friedens in einem noch zu erörterndem Sinne gegeben ist. ... Eine rein politische Feststellung einer Bedrohung des Friedens, die ihre Grundlage nur in den formellen Befugnissen des Sicherheitsrates hätte, ohne dass ihr materiell eine Friedensbedrohung zugrunde liege, wäre keine ausreichende Rechtfertigung für eine Durchbrechung der staatlichen Souveränität; sie wäre zur Friedenswahrung nicht erforderlich. Sie wäre zudem mit dem Text des Art. 39 VNC, unter dessen Tatbestand sich Lebenssachverhalte subsumieren lassen, letztlich nicht vereinbar.”³⁵

“Die Feststellung einer Friedensbedrohung durch den Sicherheitsrat ist nur zulässig, wenn ihr Tatbestand erfüllt ist.”³⁶

The interpretation of article 39 of the Charter suggests that the discretion of the Council is not of absolute character and must be understood in the light of purposes and principles of the United Nations. The text and context of article 39 make clear enough that the enforcement powers of the Security Council are in functional dependence on purposes and principles of the UN.

³³ Schilling, Die “Neue Weltordnung” und die Souveränität der Mitglieder der Vereinten Nationen, 33 AVR (1995), 78-79

³⁴ id., 79-80

³⁵ id., 84-86

³⁶ id., 88

Although the discretion of the Council is very wide indeed and empowers it to adopt wide range of coercive and non-coercive measures, the Charter makes it clear that the Security Council shall maintain clear and inviolable link between its activities and purposes and principles of the Organisation. According to the Charter and relevant jurisprudence, the Council is bound by purposes and principles of the Charter.³⁷ This limitation on the powers of the Council extends to all possible areas of the Council's activities, insofar the text of the Charter does not provide that in making determinations under article 39 the Council is free to disregard the Organisation's purposes and principles. In making the determination under article 39 and in applying subsequent measures, the Council is equally bound to maintain the link between the steps it takes and purposes and principles of the Organisation. This circumstance dictates to assume that the Council's powers under Chapter VII are not free of all limitations. It is submitted thereby that the discretion of the Council is nevertheless based on subjective judgment of the Council (or of its members); however, the need to maintain link with Organisation's purposes and principles lets us conclude that that subjective discretion is subject to observable limitations of objective nature.

The limitations, it is submitted, may relate either (1) to the subject-matter of the determination itself, or (2) to the measures adopted in pursuance to determination.

It is conceded that it is impossible to realise fully what facts, events and circumstances may fall within the notion of the threat to the peace in sense of article 39. The practice of the Security Council may offer wide range of illustrations in this regard. On such empirical and illustrative basis, it is nevertheless hardly possible to identify the whole spectrum of situations which may threaten the peace. Due to its subjective discretion, the Council may perceive new needs for maintenance of international peace and security in pursuance to Organisation's purposes and principles and identify new situations as threats to the peace warranting application of enforcement measures. And the only thing a lawyer can do is to observe the Council's activities in retrospective sense, without prejudicing its subjective discretion in sense of its subject-matter. However, it is completely within the methods and approaches of the legal science to identify the objective limitations on the Council's discretion for the sake of judging whether the link between the Council's activities and Organisation's purposes and principles is being kept alive in concrete cases.

The purposes and principles of the Organisation shall be therefore be viewed not merely as political or moral aspirations, but as legally valid rules and principles capable as such and in themselves of providing the legal basis of action by the Organisation as well as of limitations to which such an action shall be subject. Subjective discretion of the Security Council is not a power of unlimited autointerpretation, but is connected with assessment of facts and circumstances in the light of United Nations purposes and principles and with clarification of relationship between those facts and operation of the UN Charter.

Insofar there is no objective uniform definition and understanding of the threat to the peace and its content becomes clear on a case-by-case basis after determination by the Security Council, States may not be considered as having obligation not to cause the threats to the peace. The threat to peace as such is not provided with legally binding prohibition.³⁸ The reason for such thinking is that no general concept of the threat to peace can be deduced. Its existence should be determined by the Council in each concrete case. Therefore, the consequences of a determination are in principle supposed to be consistent with ordinary legal expectations of States.

While it is clear that the threat to the peace is not provided with requisite legal prohibition and its content cannot be *a priori* clarified,³⁹ the Council, not being empowered to invent new legal

³⁷ UN Charter, articles 24 and 25; *Namibia case*, Advisory Opinion, *ICJ Reports*, 1971, 16ff.

³⁸ Contrary to assumption by Schilling, *Die "Neue Weltordnung" und die Souveränität der Mitglieder der Vereinten Nationen*, 33 *AVR* (1995), 89, arguing that insofar threats to the peace may involve measures under articles 41 and 42, this circumstance is sufficient to consider the threats to the peace as prohibited by the law.

³⁹ Here again, Schilling's line of reasoning seems inconsistent. If the threat to the peace is as such prohibited by the law, then the Security Council does not need to justify its determinations under article 39 by reference to concrete objective facts, events or situations which threaten the peace. The Council would not be bound by *any* criteria to characterise certain situations as threats to the peace. This outcome is opposed by Schilling himself, by suggesting that the Council shall refer to certain facts or situations in making determinations under article 39.

prohibitions, shall demonstrate in each concrete case which facts, events, situations or circumstances are threatening the peace and eventually warrant application of enforcement measures. The Council shall further demonstrate that those concrete facts, events, situations or circumstances are suitable to be addressed by enforcement powers which, on their side, are suitable to effectively eliminate or reduce those facts, events, situations or circumstances or their consequences.

Schilling has suggested that although a threat to the peace is very open and flexible notion, it may nevertheless be subject to interpretation.⁴⁰ While this is correct, one should look also for concrete criteria of clarifying the content of notion of threat to the peace in concrete cases. Those criteria may relate to analysis of the concept of threat to the peace as a kind-oriented notion on the one hand, and degree-oriented notion on the other.

The kind-oriented analysis of the notion of threat to the peace relates to the nature of facts, events or situations the Security Council has labeled or is going to label as a threat to the peace. The central point of an analysis in this regard is the question whether a given fact, event or circumstance is as such capable of representing a threat to the peace.

The degree-oriented analysis of the notion of threat to the peace relates to analysis of its development and evolution, to identification of various stages of its cristalisation. It might be suggested, for instance, that (1) the determining factor for existence of a threat to the peace may be the reach of a given situation to or beyond national frontiers, to or beyond a given region or (2) the aggravation of a given situation constitutes a threat in sense of article 39.

4. Threats to the Peace *Ratione Personae*

A threat to the peace may be indentified in a behaviour/conduct by certain actors and/or in a process/situation. The source of threat to peace has been identified in practice of the Council in various ways. It is being interpreted as consisting in conduct of a State or of a government or in a government or regime itself or in some process or situation (humanitarian emergency, terrorism etc.). The conduct of State or government has been identified as a threat to peace on several occasions. Resolution 660 (1990), for example, states that the invasion of Kuwait by Iraq's armed forces – a conduct by a State – constitutes the breach of peace. The process or situation as a threat to peace and security is invoked in resolution 794(1993) in which the Council characterized the „magnitude of human suffering“ – which was not based on conduct of a State – as a threat to peace. The expulsion of Kurdish population from northern Iraq and the possible destabilisation of situation in neighbouring countries in consequence of this expulsion has also been assessed as a threat to peace under resolution 688(1991). That resolution combines in a finding of a threat to the peace a conduct by a government and a wider process/situation extending beyond the frontiers of a country. These two facts are however linked with each other, the fromer being the source of the latter.

5. Threats to the Peace – Link with an Occurrence of International Military Conflict

Although the Security Council has explicitly rejected the idea that the notion of threats to the peace is limited to inter-State wars and armed conflicts, the relationship between those concepts should nevertheless be examined. This relationship is significant for making both methodological and substantive conclusions on what may constitute a threat to the peace and which criteria may serve for finding its existence in concrete cases.

Schilling has suggested that a threat to the peace may always be found in situations where the possibility of occurrence of an international armed conflict increases and the Council is bound in its determinations by necessity of existence of that circumstance.⁴¹ Instances where the Security Council has characterised as threats to the peace situations not involving possibility of occurrence

⁴⁰ Schilling, Die "Neue Weltordnung" und die Souverenitaet der Mitglieder der Vereinten Nationen, 33 AVR (1995), 87

⁴¹ Schilling, 90, 92

of an international armed conflict, constitute a practice is incompatible with the principle of sovereignty.⁴²

This suggestion that a threat to international peace is always constituted to by a situation that involves or can possibly lead to transboundary military actions has inherent value while providing the starting-point to clarify the objective criteria for determination of threats to the peace. At the same time, it must be conceded that the possibility of occurrence of international military conflicts cannot be the sole situation governed by the UN Charter, in particular, by its provisions on collective security. Under international peace and security the situations may be subsumed which do not constitute an armed conflict or even are not expected to lead to it. This approach is envisaged by Chapter VII which foresees the measures of response of very different kinds. The Council may apply military as well as non-military enforcement measures and these measures can be directed against armed conflict or against situations not involving the application of organised force. Moreover, the powers of the Council under Chapter VII can be applied in situations not transcending national borders of one State or not forming application of systematic and organised force or even able to lead to it. The Charter does not limit the subject-matter competence of the Security Council under Chapter VII to inter-State wars.

For successful and effective exercise of this function the Council possesses the power to make choice among various enforcement measures under Chapter VII. This margin of appreciation could be very useful tool on this way, allowing the Council to identify a threat and a suitable response to it. It can legitimately resort to non-forcible compulsory sanctions in a situation not amounting to an armed conflict. Therefore, the suggestion that threat to peace is inextricably linked with military conflicts cannot be tolerated. Situations amounting to threat to peace can be broader than those resulting in armed attack on a territory of a State and thus necessarily requiring response by the use of armed force.

6. Threats to the Peace – Internal Situations

Next issue to be examined is whether the notion of a threat to the peace in sense of article 39 is necessarily limited to inter-State conflicts and controversies, or it is also encompassing internal situations, such as civil wars and rebellions.

The obvious tendency in Council's activities may indicate to trends of internationalisation of domestic conflicts before the Security Council.⁴³ Situations occurring within the borders of a single country are in certain cases characterised by the Council as dangers or threats to international peace and security. This approach is supported by explicit provision of article 2(7) of the Charter allowing the Security Council to disregard domestic jurisdiction of States by applying enforcement measures under Chapter VII. This begs the question whether any criteria is capable to govern the permissibility of intervention by the Council into domestic jurisdiction of States. Such a criteria have been indeed suggested by several authors by reference to the necessity of Council's response to systematic and massive human rights violations. The starting-point of those suggestions is the justifiability of unilateral action by States or groups of States in response to humanitarian emergency and are substantially based on a doubtful doctrine of humanitarian intervention.⁴⁴ Leaving aside the fact that humanitarian intervention may hardly be considered as an established right under international law, the circumstance whether an unilateral action by States is justifiable in a given concrete case should not prevent the Security Council from passing its own judgment on permissibility of enforcement measures. It seems that the conceptual background of allowing "Chapter VII exception" to domestic jurisdiction clause is the need to eliminate threats to the peace as such, regardless of whether their source lies in domestic or in international sphere. The Council

⁴² *id.*, 91

⁴³ Frowein, On Article 39, in Simma (ed.), *The Charter of the United Nations, A Commentary*, 1994, 609

⁴⁴ Lillich, Humanitarian Intervention through the United Nations, 53 *ZaoRV* (1993), 562-563; McDougal & Reisman, Rhodesia: The Lawfulness of International Concern, 62 *AJIL* (1968), 1ff.

may therefore under certain circumstances be entitled to intervene into domestic affairs of States regardless of whether individual States would be entitled to a similar intervention.

Nevertheless, the principle that domestic situations are generally not subject of international concern still stands. According to O'Connell, reference in the Charter to "international peace" is intended to restrict authority of the Security Council to intervene in domestic situations, such as a civil war despite such wars being breaches of the peace. Article 39 refers to international peace. The internal wars and changes of governments are therefore situations the outcomes of which may not be dictated by the Security Council.⁴⁵ This assumption is no doubt correct. Certain domestic situations, however, may well have international implications. An obvious example of such an implication may be situations where domestic conflicts produce consequences transcending national frontiers, such as refugee flow, environmental pollution etc.

Does it mean that the Security Council is prevented from addressing under Chapter VII a situation not having transboundary implications? Obviously this is not the case. The guidance for characterising internal situations as dangers or threats to international peace shall therefore be the compatibility of a given internal situation with purposes and principles of the United Nations as enshrined in articles 1 and 2 of the Charter and with international obligations of State(s) concerned.

In practice it may be observed that even in cases where domestic situations, due to their incompatibility with United Nations' purposes and principles or with international obligations of State(s) concerned, may be considered as subject of international concern, the Council tries to tie up its response to a circumstance extending the nature or consequences of a given situation beyond national frontiers, wherever such a circumstance is present.

Certain authors consider that imposition by the Council of arms embargo on South Africa by resolution 418(1977) was an example of intervention by the Council in a purely domestic situation. As Franck has expressed, this resolution contributed "to create a threshold of conduct by a government towards its own people which, when crossed, may be deemed a threat to the peace".⁴⁶ However, if the resolution 418 shall be understood an unity in clarifying its real reach and content, Franck's assumptions may be considered as not properly reflecting that reach and content.

In resolution 418(1977), the Council characterised the military build-up by South Africa and its persistent acts of aggression against the neighbouring States as seriously disturbing security of those States. The Council referred also to the circumstance that South Africa was "at the threshold of producing nuclear weapons". In pursuance to those assumptions, in operative paragraph 1, the Council determined "that the acquisition by South Africa of arms and related *materiel* constitutes a threat to maintenance of international peace and security". Acting under Chapter VII, the Council imposed arms embargo on South Africa.

In the light of these considerations, the assumption that resolution 418(1977) was the case of application of Chapter VII enforcement measures to intra-State situations, seems to be not in accordance with the Council's intention as clarified in the text of the resolution. The Council referred, of course, to policy of apartheid of South Africa. However, the finding of a threat to the peace and response to it by enforcement Chapter VII measures, understood as a coherent process, demonstrates that the *action* by the Council, as distinguished from mere expression of concerns and condemnations, in case of resolution 418(1977) has been directed against a situation having transboundary character and involving the use of force. The Council expressed concern with military build-up, characterised the acquisition by South Africa of arms as a threat to the peace and then responded with concrete measures directed against that threat to the peace as identified in operative paragraph 1 of the resolution.

Last argument which may be advanced in this regard is why exactly arms embargo has been imposed by the Council through resolution 418 and not the measures of economic character which might be more suitable to address the human rights situation in a country. Arms embargo seems to be the more suitable to threats to the peace of military character. It hardly could be considered as an

⁴⁵ O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 *Columbia Journal of Transnational Law* (1997), 481

⁴⁶ Franck, *Fairness in International Law and Institutions* (1995), 230; White, *Keeping the Peace* (1997), 35

adequate response to human rights violations, due to its insufficiency to induce the governments to change their domestic policies. One may argue, of course, that it was political considerations which prevented the consensus in the Council for adopting more extensive enforcement measures. It must be borne in mind, however, that it is political considerations which lead the Council to adoption of each and every its Chapter VII decision. And it was clearly the lack of political will which might have precluded the Council from addressing purely domestic situation as a threat to the peace and object of enforcement measures in that given case. Accordingly, resolution 418 is limited to enforcement measures which are directed exclusively against the threats to the peace with transboundary implications.

Resolution 688(1991) refers to large-scale flow of refugees as a factor threatening international peace and security. Indeed, although the Council condemned the large-scale repressions in Iraq against the Kurdish population, in operative paragraph 1 it declared that the consequences of those repressions (and not the repressions as such) were threatening international peace and security. Also in the preamble, the Council emphasised that repressions as leading “to a massive flow of refugees towards and across international frontiers” were threatening international peace and security. This case also clearly illustrates that the Council has found threat to the peace not in repressions of Kurdish population as such, but in elements and consequences thereof having transborder and international effects.

Nevertheless, the Council has not been hesitating to qualify situations not crossing international borders as threats to the peace. One of the purposes of UN intervention in purely domestic conflicts may be, as White suggests, to prevent expansion of threats to the peace beyond the frontiers of a country which is the target of intervention.⁴⁷ The case of racist regime in the Southern Rhodesia may be invoked as an example. In that case, by resolution 217(1965), the Council imposed non-military sanctions on Rhodesia demanding the end of the racist regime and its substitution by a government constituted on the basis of the right of peoples to self-determination in accordance with Declaration of UN General Assembly on Granting Independence to Colonial Peoples – Resolution 1514(1960).

In case of Somalia, the Security Council in its resolution 794(1993) has found a threat to the peace in “the magnitude of human tragedy, further exacerbated by the obstacles being created to the distribution of humanitarian assistance”, requiring “an immediate and exceptional response” by quick delivering of humanitarian assistance. The resolution does not mention at all any transboundary impact or consequence which would internationalise the situation in Somalia. Moreover, paragraphs 7 and 10 authorise establishment of operational force for establishing the secure environment for humanitarian relief operations. Therefore, resolution 794(1993) leaves no doubt that the Security Council has addressed a purely internal situation as a threat to the peace. It has been correctly suggested, however, that in Somalia the action by the Council has been caused by absence of a government. It may therefore not be considered as an action against oppression by a government of its own population,⁴⁸ and respectively, that action hardly may be considered as an action carried out in disregard of reserved domain of domestic jurisdiction of a State in sense of article 2(7) of the Charter.

The *coup d'état* in Haiti was also a situation taking place within the frontiers of one State. By resolution 940(1994), the Council, having stated that “the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President” to the country, determined existence of threat to international peace and security in the region. The Council was addressing in this case the purely domestic situation having no transboundary impact capable of in itself constituting threat to the peace. In one of the preambular paragraphs the Council referred to deterioration of humanitarian situation and systematic violations of civil liberties causing “the desperate plight of Haitian refugees”. This circumstance does not permit, however, to conclude that this flow of refugees has as such been decisive factor having led

⁴⁷ White, *Keeping the Peace* (1997)

⁴⁸ Baehr, *The Security Council and Human Rights*, in Lawson & De Blois (ed.), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers* (1994), 25

the Council to make determination under article 39. Firstly, the resolution 940(1994) does not offer any evidence to consider the flow of refugees as a central issue addressed under that resolution. The Council directly refers to the goal of the international community to restore democracy in Haiti. Secondly, the final preambular paragraph of resolution 940(1994) refers to “situation in Haiti” and not its consequences as a source of a threat to the peace. These criteria lead us to the conclusion that in question of Haiti the Security Council has addressed the purely domestic situation as such under Chapter VII and applied enforcement measures to it.

All these examples show that the Security Council does not consider its function as limited to inter-State armed conflicts only. However, in order to answer the question whether or not in a given case the Council applies its Chapter VII powers to an internal situation as such, the decisions of the Council should be analysed by using the contextual approach. The mere presence of concern with or condemnation by the Council of certain domestic situations does not permit to conclude that Chapter VII powers are applied against an internal situation as such. The context of decision of the Council consisting of motivation, of identification of target and of type of concrete measures selected should be examined before one arrives at such a conclusion.

7. Threats to the Peace – Violations of International Obligations

There is a diversity of opinions as to whether the situation amounting to threat to peace in sense of article 39 should be necessarily tantamount to a violation of international legal obligations by a State against which the measures under Chapter VII are directed. It may be argued that threat to the peace can exist without involving the fact of commission of internationally wrongful act. The practical aspect of the question is whether the enforcement measures under Chapter VII can be taken without prior internationally wrongful act. The draft articles of the UN International Law Commission on State responsibility require existence of prior commission of an internationally wrongful act as a precondition of applying countermeasures against a State.⁴⁹

In almost all cases of application of Chapter VII enforcement measures, the threats to the peace found by the Council have been connected with breaches of international law by States or non-State actors. The case of aggression or other instances of the unlawful use of force (such as invasion of Kuwait and invasion of Falkland islands) does not need any further comment in this regard. In other cases, the Council was referring to massive violations of human rights and humanitarian law as immediate threats to the peace. In case of Rhodesia, the minority regime was systematically violating internationally recognised rules and standards of human rights. In case of Haiti, human rights violations have been equally involved. In case of Iraq massive repressions of minorities has taken place in direct violation of Iraq’s international obligations. In case of Former Yugoslavia, the violations of international humanitarian law have achieved such a large extent that the Council considered these violations to constitute in themselves a threat to international peace and security. Moreover, the Council has determined that the implementation of legal consequences of violation of humanitarian law – individual responsibility of perpetrators – has been an inevitable condition of restoration of international peace and security.⁵⁰ The Council in that case has in fact intertwined violations of law and threats to the peace with each other.

Even in cases where the Council fails to demonstrate the degree of wrongfulness in the conduct of a target State adequate for application of enforcement measures, it nevertheless appeals to certain rules of international law as justifications of general character for its action. For instance, in case of imposition of sanctions against Lybia under the resolution 748(1992), the Council referred to the provision of Friendly Relations Declaration of 1970 prohibiting States to engage in the use of force against another States by using methods and means of terrorism. These circumstances may provide an evidence that in deciding upon determination under article 39 and

⁴⁹ Draft article 41(1); Third Report on State Responsibility By Gaetano-Arangio Ruiz, YbILC (1991), vol. 2, Part One, 14ff.

⁵⁰ UNSC res. 771(1993), 817(1993)

upon adoption of subsequent Chapter VII enforcement measures, the Council finds it necessary to make reference to some degree of wrongfulness, which is involved in a given situation.

For countering the threats to the peace, the Council has at its disposal the wide variety of measures under Chapter VII. The measures under articles 41 and 42 of the Charter constitute only part of the Council's powers under chapter VII. The functions mentioned in articles 41 and 42 amount as such to coercive measures, or sanctions that necessarily presuppose the commission of internationally wrongful act. If the Council finds the threat to peace in situation not involving violation of international law, it is not empowered to impose sanctions on member States in sense of articles 41 and 42. In such situations the Council is limited to making recommendations under article 39 or ordering provisional measures under article 40 of the Charter.

However, the fact that coercive measures under articles 41 and 42 may be applied against a State only in response to its prior commission of internationally wrongful act, does not render enforcement powers of the Council moot and inapplicable in cases where no wrongfulness in conduct of a State is involved. The facts, events or situations which the Council may address include of course, but are not limited to cases where a State violates its international obligations. the Council may determine, for instance, that certain environmental situations, or activities of non-State actors, such as terrorists or rebels threaten international peace, for instance because of their transnational effect. In such cases the Council may resort to powers under articles 41 and 42 in order to coordinate activities by States in maintaining and restoring international peace and security, but not to direct enforcement measures against States, whose conduct has not resulted in international wrongfulness.

From the methodological point of view, it might be asked whether the involvement of wrongfulness shall be a basis a basis for determining existence of a threat to the peace by the Council or just an accompanying determinative criteria in making findings under article 39. Whichever interpretation shall be adopted, the Council should be considered to be bound by the duty of proportionality, which implies that an encroachment of rights of a State by using Chapter VII powers shall be commensurate to the degree of wrongfulness involved in the conduct of that State.

8. Threats to the Peace – A Degree-Oriented Perspective

The fact that determinations under article 39 relate to objectively observable and identifiable situations may be confirmed by the practice of the Security Council itself. In Spanish case, for instance, the Council established the Sub-Committee charged with the task to determine whether the situation in Spain during Franco regime did amount to threat to international peace and security.⁵¹ According to the Sub-Committee, the situation in Spain had not yet resulted in threat to the peace in sense of article 39, but was a situation likely to endanger international peace and security to be dealt with under Chapter VI of the Charter. The Sub-Committee emphasises in particular that “no threat of the peace has been established” and Chapter VII enforcement measures are not applicable.⁵²

It seems that the communication by Poland concerning the situation in Spain was concerned merely with the fact of existence of Franco regime and also with its connections with former Nazi regimes in Germany and Italy. However, the communication of Poland did not refer to any transboundary implications of situation in Spain. Moreover, no reference to an actual circumstances, consisting in actions by Franco's regime, which might have constitute a threat to the peace, has been made. And the Polish representative characterised the situation as falling not under article 39 but under article 34.

⁵¹ “The Security Council thereby resolves: to make studies in order to determine whether such a situation exists; to this end, the Security Council appoints a sub-committee of five its members ...”, *Yearbook of the United Nations* (1946-1947), 346

⁵² *Yearbook of the United Nations* (1946-1947), 347-348

Initiation of investigations by the Security Council in order to ascertain existence of threat to the peace in sense of article 39 has taken place also in series of other cases.⁵³ Such a practice of the Council is indicative of the fact that in case of relative unclarity of whether a threat to the peace is actual and not merely expected, investigation of objective facts, events and circumstances surrounding a given case should be performed in order to decide upon the applicability of the Chapter VII of the Charter in that case. Therefore, the presumption is that in cases where the Security Council does not initiate an investigation procedure, it holds for granted and undisputed that an actual threat to the peace exists and no additional inquiries are necessary to examine an obvious.

Under certain circumstances the matter may be not so simple, however. It may happen that the Council makes a determination under article 39 while some members of it hold that the threat to the peace is not actual or it has not properly been identified.

9. Case Study: Resolution 748 (1992)

By adoption of the resolution 748(1992), the Security Council asserted to have determined existence of threat to international peace and security and ordered on the basis of such a determination the wide-scale non-military coercive measures against the Lybian Arab Jamahyria. The cause of adopting that resolution has been the crash of an US civilian aircraft over the territory of UK, which has been considered by those countries and consequently, by the Security Council as organised by two Lybian nationals. Before the seising by the Council of the matter, US and UK have demanded from Lybia extradition of those suspected to them. Lybia refused by reference to the rule *aut dedere aut judicare* enshrined in article 7 of the 1971 Montreal Convention on Suppression of Illegal Acts against Civil Aviation. According to that provision, Lybia maintained that it had a freedom of choice between trying suspects in its own courts and extraditing them, and that it consequently favoured the former option, thus conducting fully in accordance with its international obligations.

Despite those arguments, US and UK have seised the Security Council with the matter and managed to re-write their demands towards Lybia into the resolution 731(1992), adopted outside the framework of Chapter VII. Lybia turned thereafter to the International Court of Justice and sued US and UK stating that it was fully in compliance with its international obligations under international treaty and customary law. Lybia referred also to threats of force against it by US and UK and requested the Court to enjoin them from realising that threat.

After hearings at the Court have been finished but before an order of the Court has been delivered, the Security Council adopted resolution 748(1992) under Chapter VII, which reiterated demands of resolution 731(1992) supporting them by large-scale non-military sanctions against Lybia. The circumstances leading to adoption of resolution 748(1992), as well as its content is crucial for determining limits of powers of the Council to make determinations under article 39 and to adopt subsequent measures under Chapter VII.

The Council has determined that State sponsored terrorism, as banned under the Friendly Relations Declaration, constitutes a serious threat to international peace and security. The Council seems thus to be referring to a general phenomenon of terrorism. After that the Council went on to one of the options under article 39, in particular, it asserted to have determined “what measures shall be taken for maintenance or restoration of international peace and security under articles 41 and 42”. As far as the Council determined State supported terrorism as such as a threat to the peace, it was supposed to adopt measures wor eliminating it or essentially reducing its impact in international relations. However, the Council simply linked its coercive measures with extradition of two suspects to US and UK.

It is thus clear that while labeling a general phenomenon as a threat to the peace, the Council directed its enforcement measures not against that threat but to a concrete fact of terrorism. It is

⁵³ Overview of such cases see in Conforti, *The Law and Practice of the United Nations* (1996), 158-159

more than obvious that non-extradition of two suspects to a particular country as such may in no circumstances be viewed as a threat to the peace however wide the discretion of the Council in making determinations in this regard may be. Undoubtedly, this is the reason that a threat has been found in general phenomenon of terrorism and not in particular instance the Council was seized of. The measures by the Council were therefore – apart from their doubtful adequacy in general for that purpose – not directed at elimination of a threat to the peace as determined in the resolution.

Required extradition of two Libyan suspects could hardly ensure removal of a threat to the peace as identified by the Council. As is known, the Council made suspension of its sanctions conditional upon extradition of two Libyan suspects. The fact of that extradition to US and UK as such could in no case have been a circumstance leading to elimination of State supported terrorism. Extradition and punishment of two suspected terrorists is not equal to elimination of general threats to international peace, such as State sponsored terrorism. The resolution 748(1992) is therefore undoubtedly serving the purposes other than maintenance and restoration of international peace and security as such.

For the elimination of a State supported terrorism – the goal asserted by the Council – the enforcement of provisions of multilateral conventions concerning these issues should have been the best possibility. Even in wider conceptual sense, the goal to suppress and punish terrorism is to bring suspects before justice and not to try them in any particular country. Whether or not a terrorist will be tried in a country in which he/she committed a crime is not essential either for elimination of terrorism in general or for enforcement of legal consequences thereof. If the US and UK, and consequently the Security Council have considered that the punishment of suspects was necessary for maintenance of peace, they (1) did not provide evidence why the trial in any particular country would have been a best option and (2) failed not to aggravate a situation. Instead of demanding extradition, which would foreseeably aggravate the situation, the Security Council could have demanded from Libya to accept international observation and supervision in order to ensure that a trial in Libya was not a tool to shield suspects from true prosecution. Moreover, the Council, by adoption of resolutions 731(1992) and 748(1992) supported in fact threats of force against Libya which were unlawful under international law, its conduct being contrary to article 2(4) of the UN Charter, and thus breached article 24(1) of the Charter according to which it was obliged to act in accordance with purposes and principles of the United Nations.

The action by the Security Council in question of Libya is signified by inadequacy also from the perspective of law-enforcement. The Council referred to State supported terrorism and thus it touched the field of State responsibility. Libya, by implementing its duty under 1971 Montreal Convention to try or extradite the suspects, should have been considered as implementing the duty to make appropriate satisfaction as required under draft article 45 of the ILC's draft articles on State responsibility. The demand to extradite suspects to US and UK has correctly been considered as a demand to implement satisfaction impairing upon a dignity of a State. It goes without saying that the preservation of peace and stability in international relations is only possible by mutual respect by States of each other's dignity. This may be considered by some as a theoretical abstract assumption, but hardly can be any concrete case be invoked from the practice where impairment of dignity of a State has contributed towards maintenance of peace, security and stability in general or in a given particular case.

It has therefore to be concluded that determination of a threat to the peace in resolution 748(1992) has been inadequate and unjustified under article 39 of the Charter from a kind-oriented perspective. Now the adequacy and justifiability of that resolution from a degree-oriented perspective shall be examined.

As shown above, the degree-oriented analysis of the notion of a threat to the peace involves analysis of development and evolution of situations which has been in concrete cases declared by the Council to be a threat to the peace. The factual circumstances leading to adoption of resolution 748(1992) demonstrate that a situation addressed by that resolution has not developed to an extent warranting application of coercive measures. There has been no peace-threatening development in action by Libya between adoption of resolution 731(1992) and adoption of resolution 748(1992),

which determined existence of a threat to international peace and security. Even if the Council referred to State sponsored terrorism generally as a threat to the peace, it could not be believed seriously that such a terrorism acquired the nature of a threat to the peace in time between adoption of those two resolutions. Moreover, it is highly doubtful that State supported terrorism may acquire peace-threatening nature in consequence of two suspects to a particular country. The Council has consequently failed to demonstrate by virtue of which facts, events or circumstances did either State sponsored terrorism or a concrete fact of non-extradition acquired the nature of a threat to the peace. Its judgment on a threat to the peace was therefore unjustified also under a degree-oriented perspective.

The Council and sponsoring members were undoubtedly aware that Lybia's conduct was fully in compliance with international law. Presumably, that is the reason of their attempt to balance this factor by indicating in the resolution 748(1992) to the Friendly Relations Declaration banning State supported terrorism and thus assuming the role of enforcers of important international law rules. They failed, however, to demonstrate the coherent link between the general prohibition of State sponsored terrorism, the relevance of that general prohibition in that particular case in context of conduct by Lybia and the measures adopted to enforce that prohibition.

In view of the all the aforesaid, it should be concluded that resolution 748(1992) and coercive measures adopted by the Council could not be considered as measures to maintain international peace and security required by article 39. As it has been adopted in excess of powers of the Council under article 24, it must be considered *ultra vires*. The legal consequence thereof is a substantive invalidity of resolution 748(1992) and it shall be considered as having no legal force whatsoever since the moment of its adoption. In practice, this assumption has been confirmed by the Organisation of African Unity, which decided in 1998 that it was not bound to observe air embargo ordered by resolution 748(1992).⁵⁴

10. Threats to the Peace – Conclusions

Determination of threats to peace and response to them is a process with some inevitable elements. Even without doubting the wide discretion of the Council in finding the threats to peace, some logical conclusions suggest themselves. Firstly, the Council, in addressing the situation, should clearly identify the threat to the peace and indicate to it, as to an objective fact, in a resolution. Secondly, the Council, in deciding upon the measures to be applied in response to the identified threat, should direct the measures to eliminate this threat in an objective sense. In other words, the measures applied by the Council should be directed to effectively eliminate or reduce the threat including the further aggravation of the situation and avoidance of casualties. Therefore, even if the determination of threat to peace may depend on subjective discretion of the Council, after this determination is made, the response shall be directed against the threat to peace in an objective sense as determined by the Council. This implies that what the Council determines to be a threat to the peace must in fact constitute the threat to the peace objectively. Otherwise, the enforcement measures of the Council would be moot, unjustified and probably ineffective. It can therefore be suggested that the discretion of the Council in identifying the threats to peace is often assessed in a very exaggerated way. However wide the margin of appreciation of the Council in characterising situations as threats to the peace, its enforcement measures should nevertheless have objective content and target. This makes clear the responsibility the Charter places on the Council. This organ is responsible for correct identification of threat to peace and for correct invention of measures to be applied against this threat and this is exactly what the discretionary powers of this organ serve. The Council, in case it decides to act under Chapter VII, shall ensure that its action is a coherent process of response to threat to peace in an objective sense as identified by the Council. In other words, the direct link between the identified threat to the peace and measures applied to it must be maintained at all stages of the Council's action.

⁵⁴ The OAU decided that it would not observe the air embargo imposed on Lybia by the Security Council after 1 September 1998. The Security Council expressed its concern in this regard. *Sueddeutsche Zeitung*, 21.09.98, S. 8

IV. Recommendations of the Security Council under Article 39

After having made determination under article 39, the Council may resort to the option of making recommendations with a view to restore or maintain peace and security. Unlike certain provisions of the Chapter VI of the Charter dealing with recommendatory powers of the Council, article 39 does not impose any subject-matter limitation on the Council's recommendatory powers under Chapter VII. It is thus clear that under articles 33, 36 and 37, the Council's recommendations should have certain functional limitations and shall consist of recommending means of settlement of disputes by peaceful means, procedures of adjustment situations or of terms of settlements, respectively. Moreover, there is certain sequence in making recommendations, by which the Council is bound under Chapter VI. For instance, recommendations under article 37 may be made only after option under article 33 has been unsuccessfully used. Recommendations under article 39, however, are free of all limitations concerning means of adjustment or terms of settlement possibly covered by them. The fact that under article 39 the Council is dealing with actual threats to the peace, makes it clear that it should be free to make any recommendation it considers necessary for maintenance or restoration of peace and security without being subject to any sequence-based scurples.

The fact that the Security Council may exercise its recommendatory powers both under Chapter VI and Chapter VII may give rise to certain confusions on the way of understanding legal basis of concrete recommendations made by the Council. Several criteria have been suggested by Conforti in this regard:

“In Order to establish whether a resolution which recommends procedures or terms of settlement comes under article 39 rather than Chapter VI, the following criteria must be evaluated. First, pursuant to the principle that acts of the Council must be identified mainly on the basis of their operative part, article 39 comprises those resolutions which, in indicating procedures or terms of settlement, simultaneously adopt one of other measures contemplated by Chapter VII (provisional measures under article 40, measures involving or not involving the use of force under articles 41 and 42). If the operative part does not allow an unambiguous identification, one must look at the reasoning and refer to article 39 those decisions which expressly declare that they concern threat to the peace, a breach of the peace or an act or aggression. Lastly, one can look at the objective situation and consider article 39 as applicable if the resolution refers to a crisis provoked by the use of military force (it does not matter whether it is in a situation of international war or of civil war) and thus objectively qualifying as a breach of the peace.”⁵⁵

Approach by Conforti does not seem to reflect a proper essence of the issue. By arguing that resolutions under Chapter VII shall necessarily contain either provisional measures under article 40 or enforcement ones under articles 41 and 42, one neglects the content of article 39 which confers upon the Council the power to choice whether to make recommendations, or take enforcement measures, or combine both. The power to give recommendations under article 39 is a power independent from powers under articles 40, 41 and 41. The Council may therefore use recommendatory power under article 39 either independently or in conjunction with other Chapter VII measures. The Charter does not oblige the Council to make recommendations only in conjunction with other Chapter VII powers. Agreement with the reasoning by Conforti would mean to deprive the Council of its prerogative to make choice in which legal context its recommendations and other measures will be adopted.

The last submission by Conforti seems also to be missing the point. The fact whether the Council is making recommendation under article 39 or under Chapter VII depends not on objective nature of a situation and its involvement with the use of force (as Conforti suggests), but solely on the intention of the Security Council which is decisive for using or not using concrete powers conferred upon it under the Charter.

⁵⁵ Conforti, *The Law and Practice of the United Nations* (1996), 180-181, references omitted

V. Provisional Measures under Article 40

According to article 40 of the Charter, the Security Council, while dealing with a situation under Chapter VII, may indicate provisional measures in order to avoid aggravation of a situation. Article 40 requires that such provisional measures should be without prejudice to the rights, claims and positions of parties concerned. No further limitations or qualifications of the Council's power may be inferred from the text of the Charter. The Council may therefore decide to indicate provisional in sense of demanding from parties to follow a certain course of action or it may itself take an action as a provisional measure.

The classical and most frequently used option of provisional measures is an order demanding cease-fire. This option has been indicated in many cases, such as Middle East and Cyprus. The case of Middle East is the classical example in this regard. By resolution 50(1948) the Council demanded a cease-fire in war between Israel and Arab countries. The Council clearly indicated that non-compliance with its demand to cease hostilities might lead to application of respective coercive measures. This indication was in accordance with a provision of article 40 of the Charter stating that the Council shall duly take into account any failure by the parties to comply with the provisional measures.

Establishment of safe areas in Bosnia by resolution 836(1993) may be invoked as another example of provisional measures indicated by the Council. The Council, establishing safe areas, clearly noted that they "are temporary measures and that the primary objective remains to reverse the consequences of the use of force and to allow all persons displaced from their homes in the Republic of Bosnia and Herzegovina to return to their homes in peace". This wording makes it clear that the Council by establishing the safe areas, did not purport to prejudice rights, claims or positions of parties. In particular, the safe areas have not been considered as a measure as such reversing consequences of the use of force and therefore, prejudice rights, claims and interests of parties.

Provisional measures may consist in indication of certain lines of conduct to States or non-State actors or in action by the Council itself or in measures combining actions both by parties and by the Council.

VI. Non-Military Enforcement Measures under Article 41

1. The Functional Designation of Measures

Some conceptual observations shall be made about the power of the Security Council to adopt non-military coercive measures for maintenance and restoration of peace and security under Chapter VII. Article 41 UN Charter empowers the UN Security Council to "decide what measures not involving armed force are to be employed to give effect to its decisions ... These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication and severance of diplomatic relations". The measures of that category are obviously intended to exercise political and economic pressure on a State or a non-State actor⁵⁶ with a view to compel it to comply with demands of the Security Council which it deems necessary for maintenance of international peace and security. On the occasions, the Council has decided that States shall implement an arms embargo, as in cases of Liberia, South Africa and Yugoslavia, or reduce their diplomatic personnel in a target State, such as in case of Lybia.

Economic pressure, in particular, is considered as a most effective tool in this regard. Economic sanctions may have severe impact on economy of a country, on life of a underlying the

⁵⁶ See UNSC res. 1171(1998), which imposed mandatory sanctions on non-governmental forces in Sierra-Leone by demanding from States that they shall prevent sale of arms and related *materiel* to forces in Sierra-Leone other than the government of the country (para.2).

non-military measures of the Council seems to be similar to that of countermeasures in context of the law of State responsibility. The measures by the Council differ, however, from unilateral countermeasures in that they are not designed as means of enforcement of international law, but as methods of maintenance and restoration of international peace and security. Nevertheless, it has been demonstrated above that the Security Council, in making determinations under article 39 and adopting subsequent measures under Chapter VII, tries to demonstrate at least *prima facie*, an involvement of international wrongfulness in a situation it addresses.

The non-military measures adopted by the Security Council differ also from unilateral countermeasures in that they after ordered by the Council, shall be implemented by all States, by virtue of articles 2(6), 25 and 103 of the Charter. Those measures assume therefore universal character and are able to lead to immense pressure on and complete isolation of a State or a non-State actor against which they are directed. A target of those measures has therefore to make a crucial choice – either to comply with Security Council’s demands or to subject economic situation in the country to very serious dangers.

As far as there is a consensus both in literature and in practice to the effect that maintenance of international peace and security inherently involves promotion of economic development,⁵⁷ it might be highly questionable whether the measures ordered by the Security Council designed to weaken or destroy the economy of a target State as such may be considered as compatible with purposes and principles of the United Nations. Yet, the purposes of the United Nations may dictate that the needs of economic development may be subordinated to the needs prevention or end of military conflicts or of massive human rights violations. The Charter allows to make such a balance of values. However, the sanctions interrupting normal economic life of a nation shall be both sufficient and effective in achieving their goals. Otherwise, they may not carry a justification of heavy losses they cause to economic development.

Economic sanctions, being supposed to affect economic situation in a country to an extent which is in position to cause the compliance by the government with Security Council’s demands and conditions, are equally supposed to severely affect life conditions of population and under some circumstances result in violation of certain human rights of that population. For avoiding unjustified burden on rights and conditions of population, the Security Council is using so-called humanitarian exceptions to the sanctions imposed. Such humanitarian exceptions were present in sanctions programmes against Rhodesia, Iraq and Yugoslavia.⁵⁸ The sanctions imposed under article 41 nevertheless result very often in deprivation to populations of their vital needs. The philosophy of imposition of economic sanctions on a State necessarily implies affection of life conditions of population in order to direct that population against its own government and thus ensure that government’s compliance. Even if assumed that such a goal may justify imposition of hardships on a population, the permissibility, adequacy and reasonability of such sanctions shall be judged upon in this functional perspective.

This functional perspective includes two dimensions. For sanctions to be reasonable and justifiable (1) they should be adequate to ensure compliance by a government with demands directed to it, and (2) they should not impose hardships not being justifiable by aims and purposes the sanctions serve. These both requirements dictate that economic sanctions imposed by the Security Council on a State shall necessarily be as short-term as possible. In other words, those sanctions should be able to achieve their destination within a relatively short period of time. Otherwise, the losses and damages have double detrimental effect both for a situation in a country and for the purposes of the United Nations. If the sanctions under article 41 last over a unreasonably long period of time they endanger economic prosperity of a country and at the same time they fail to effect the end of military conflict and/or human rights violations. Peace and security may be irreparably endangered in such instances because such cases involve jointly economic deterioration, violence and aggravation. The time factor is therefore a crucial point in determining permissibility and adequacy of economic sanctions in any concrete case. It may even operate as a factor depriving

⁵⁷ See Boutros-Ghali, *Agenda for Development* (1995), 17ff.

⁵⁸ UNSC res. 820(1993), 757(1992), 253(1968), 666(1990), 670(1990)

legitimacy to sanctions which were reasonable and justifiable at the time of imposition, at later stages.

It may be taken for granted that the Security Council shall ensure avoidance of double standards in its actions for maintenance of peace and security. Although there is no duty on the Security Council to exercise completely identical measures in similar situations, it is nevertheless bound not to permit application of double standards in one and same situation it is addressing. In particular, the Council shall not differentiate between various State and non-State actors while deciding whether and to that extent to apply coercive measures against them in context of suppression of a threat to the peace which might be attributed to several actors and not to only one of them. In addressing threats to the peace in context of the war in Bosnia under resolution 757(1992), the Security Council ascertained that armed activities it condemned had been carried out both by Serbia and Croatia. However, the Council distinguished between these two States in evaluating their conduct and directed enforcement measures only against the Serbia-Montenegro, by imposing arms embargo on it.

2. Effectivity and Successfulness of the Measures

According to White, the only efficient non-military measure which the Council may adopt under article 41 of the Charter is the comprehensive embargo and not limited one. The limited embargoes may be effective only against very weak States.⁵⁹

Sanctions against the FRY and Bosnian Serbs have for the reasons of insufficiency and weakness failed to achieve their goals, in particular, withdrawal of Serb forces from territories conquered and cleansed by them. Bosnian Serbs refused to accept also the plan of political settlement in Bosnia (so-called Vance-Owen plan), despite the effect of sanctions imposed. Likewise, results of sanctions imposed against Lybia were also not tangible.⁶⁰

Economic sanctions against Iraq in sense of causing sufferings to civilian population have reached their exhaustion point. Perpetuation of those sanctions is causing severe hardship to Iraqi population, including the Kurdish minority, without any effective influence on Iraqi elite which took decisions to invade Kuwait.⁶¹ Sanctions against FRY have also not avoided placing heavy burden upon the civilian population.⁶² It can also hardly be disputed that sanctions against Haiti, FRY and Iraq contributed to increasing infant mortality and impairing access to food and medicines⁶³

Damrosch concludes that “presumably, the theory of applying comprehensive economic sanctions to a State (or para-State) is that infliction of hardship on the people living there will induce changes in the practices that the senders of sanctions deem unacceptable. The causal mechanism by which economic pressure on a population could produce behavioural change in the leadership is far from evident”.⁶⁴

3. The Measures and Domestic Jurisdiction of States

The Security Council may disregard the area of domestic jurisdiction of States when it uses Chapter VII enforcement powers. However, not all enforcement powers involve such a disregard. Hardly may it be assumed that the Security Council, by imposing, for instance, arms embargo, economic boycott or freezing assets on a State, is in fact impairing the domain of domestic jurisdiction of that State. Such measures cannot, as such, constitute infringement on domestic

⁵⁹ White, *The Law of International Organisations* (1996), 189-190

⁶⁰ Damrosch, *Enforcing International Law through Non-Forcible Measures*, 269 *Recueil des Cours* (1997), 127-130,139

⁶¹ White, *The Law of International Organisations* (1996), 188; Damrosch, *Enforcing International Law through Non-Forcible Measures*, 269 *Recueil des Cours* (1997), 117, 121

⁶² *id.*, 127

⁶³ Damrosch, *Enforcing International Law through Non-Forcible Measures*, 269 *Recueil des Cours* (1997), 139,147-148

⁶⁴ Damrosch, *Enforcing International Law through Non-Forcible Measures*, 269 *Recueil des Cours* (1997), 129

jurisdiction of a target State. However, these measures may acquire such a feature if the demands or conditions of the Council with which those measures are linked, are related to the sphere of domestic jurisdiction.

On the other hand, measures of such kind may as such result in infringement of domestic jurisdiction of third States, which by virtue of article 25 of the Charter are obliged to accept and carry out measures imposed by the Council on a target State. Such an obligation may restrict third States in making decisions otherwise belonging to the area of their independent political decision-making. Moreover, such an obligation may result in a duty of third States to breach their other obligations which are in conflict with the decision of the Council.

4. The Measures Not Explicitly Provided for under Article 41: The International Criminal Tribunal for Former Yugoslavia

The measures that might be taken by the Security Council under article 41 of the Charter are not exhaustively listed in the text of that article. That list is illustrative rather than exhaustive. It is generally accepted and confirmed in judicial practice that the Security Council may adopt any measure under article 41 which does not violate purposes and principles of the United Nations. So in *Namibia* case the ICJ clearly noted that the powers of the Council are not limited to those explicitly mentioned in the Charter but may include all those necessary for discharging by the Council of its primary responsibility for maintenance of international peace and security. This line in reasoning is in accordance with previous finding by the Court in *Certain Expenses* case that the Organisation may take all measures warranted by the need to achieve purposes of the United Nations. The Council has understood the extent of its powers exactly in the same way. Thus, establishment of International Criminal Tribunal for the Former Yugoslavia is not covered by any explicit provision of the Charter. The Council, however, established the ICTY under article 41 as a non-military enforcement measure.⁶⁵ Such a decision was based on the Council's determination that large-scale violations of humanitarian law may cause threats to international peace and security and the only means to maintain or restore it is to bring those responsible for atrocities to the trial. This concrete case demonstrates clearly the link between action by the Council and purposes of the Organisation.

5. The Measures Not Explicitly Provided for under Article 41: The United Nations Compensation Commission

By resolutions 687(1991) and 692(1991) the Security Council decided to create an organised machinery for implementation of compensation by Iraq for damages and losses caused by its aggression against Kuwait. Compensation fund has been created which is being administered by the Compensation Commission. The fund shall be financed from the income produced by Iraqi oil exports. Commission is empowered to determine the share of oil export which shall be expended for compensation, within the maximum limits established by the Security Council. At the proposal of UN Secretary-general, by resolution 705(1991) the Council unanimously determined this maximum as 30 per cent.⁶⁶ According to resolution 778 (paragraphs 1 and 2), the funds of Government of Iraq and petroleum products owned by the Government of Iraq shall be made available by member-States to be used for satisfying the claims. The Governing Council of the Commission has met in July 1991 and determined six categories of claims to be satisfied: category A – claims of individuals connected with departure from Iraq and Kuwait; category B – claims of individuals concerning death or serious personal injury; category C – claims of individuals up to US\$ 100 000; category D – claims of individuals more than US\$ 100 000; category E – claims of corporations; category F – claims by governments and international organisations.⁶⁷

⁶⁵ UNSC res. 827(1993)

⁶⁶ Murphy, Force and Arms, in Schachter & Joyner, *United Nations Legal Order*, vol. 1 (1995), 291

⁶⁷ R. Betauer, UN Compensation Commission, 82 *AJIL* (1995), 417 et seq.; see also *Criteria for Additional Categories of Claims*, S/AC.26/1991/7/Rev.1, paras. 1 ff., 16 ff., 30 ff.

Claims may be submitted by States and international organisations. Claim can be submitted also on behalf of natural or juridical person. Juridical person shall apply to the State for submission of a claim on behalf of this juridical person. If the claim will not be submitted within a period established by the Governing Council, juridical person may itself make a claim to the Commission.⁶⁸ Commission will not consider claims by Iraqi nationals unless they have *bona fide* nationality of other State.⁶⁹ This circumstance precludes consideration by the Council of claims connected with the need to compensate Iraqi nationals which were victims of massive and gross human rights violations by the Iraqi government.⁷⁰

In decision 15 the Governing Council determined two criteria for granting compensation for losses suffered: a) loss shall be the result of Iraq's unlawful invasion and occupation of Kuwait; b) causal link must be direct.⁷¹ Commission has established that Iraq shall not compensate those losses and damages which arose as a consequence of trade embargo. Compensation should only be paid to the extent the losses are caused by invasion and occupation and would be caused irrespective of introduction of trade embargo. At the same time, responsibility of Iraq is not excluded if the loss or damage is caused simultaneously by invasion by Iraq and trade embargo.⁷²

For considering claims of each category the special commissions are created. Consideration of claims under categories A, B and C have been concluded by the Commission. Under these categories, payment of compensation in the amount of approximately US\$ 21 billion has been approved. Claims under categories D, E and F are still being processed, the amount of compensation requested being approximately US\$ 210 billion.⁷³

UN Compensation Commission has been considered in practice as a "new structure to enforce state responsibility",⁷⁴ as a "concrete manifestation of international community's commitment to the principles of state responsibility",⁷⁵ and even as a "powerful precedent for the effective enforcement of any compensation claim as a result of a committed crime of aggression".⁷⁶ On the other hand, there has been expressed enough criticism concerning creation and work of UN Compensation Commission. Central point of critical approach is the lack of competence of the Security Council to award compensation in concrete cases and to create subsidiary organs empowered with such functions. Graefrath, referring to authoritative expressions made by UN acknowledging consent of Iraq on creation of Compensation Commission. He therefore considers consent by Iraq as *sine qua non* for establishing Compensation Commission.⁷⁷ Graefrath holds that methods of compensation like UN Compensation Commission do not serve the idea of maintenance of lasting peace. Inability of Iraq to provide reparation to the full extent⁷⁸ and exclusion of Iraq from participation in procedure⁷⁹ of the Commission are invoked as factors undermining effectiveness and prestige of this organ.

It is hardly conceivable that by not fixing initially the amount to be paid by Iraq the Security Council and the Compensation Commission have breached international law or exceeded their

⁶⁸ Decision 10 Taken by the Governing Council of the United Nations Compensation Commission: Provisional Rules for Claims Procedure, 26 June, 1992, Article 5, in: *The United Nations and Iraq-Kuwait Conflict* (1996), 460

⁶⁹ Decision 7 Taken by the Governing Council of the United Nations Compensation Commission: Criteria for Additional Categories of Claims, 17 March, 1992, paragraph 11, in: *The United Nations and Iraq-Kuwait Conflict* (1996), 426

⁷⁰ Damrosch, *Enforcing International Law through Non-Forcible Measures*, 269 *Recueil des Cours* (1997), 119

⁷¹ Decision 15 Taken by the Governing Council of the United Nations Compensation Commission, 18 December, 1992, paragraph 3, in: *The United Nations and Iraq-Kuwait Conflict* (1996), p. 510

⁷² *id.*, 511 ff.

⁷³ In quoting these data we rely on information provided for on the website of the United Nations Compensation Commission, www.uncc.ch

⁷⁴ Crook, *United Nations Compensation Commission – A New Structure to Enforce State Responsibility*, 87 *AJIL* (1993), 144ff.

⁷⁵ *id.*, 157

⁷⁶ Hoogh, *Obligations Erga Omnes and International Crimes* (1996), 160

⁷⁷ Graefrath, *Iraqi Reparations and the Security Council*, 55 *ZaoRV* (1995), 28 ff.

⁷⁸ *id.*, 45

⁷⁹ *id.*, 51 ff.

powers. Nevertheless, it must be conceded that the Commission did not take into account the principles governing attribution of internationally wrongful acts to States. Under the Compensation Commission scheme, Iraq has to pay for loss which resulted from coalition's military operations.⁸⁰ Notwithstanding the fact of commission of aggression, Iraq should not be held liable for actions it has not committed and for damages it has not caused.

VII. Authorisation of Military Force under Article 42

1. Conceptual Background for Authorisations under Article 42

Article 42 of the UN Charter empowers the Security Council in case the non-military measures are inadequate or would be inadequate, to take military actions for maintenance or restoration of international peace and security. According to original Charter scheme, the Security Council should have been provided with military units for taking military enforcement actions on the basis of agreements concluded on the basis of article 43 of the Charter. Such agreements have never been concluded. The Charter, however, does not require troops to have been placed to the disposal of the Security Council according to article 43.⁸¹ In *Certain Expenses* case, the International Court of Justice clearly indicated that absence of conclusion of article 43 agreements shall not render the Security Council impotent when it is facing urgent needs to discharge its responsibilities in the area of peace and security.⁸²

The alternative to article 43 agreements in the field of enforcement measures is the authorisation by the Council of members of the United Nations. The Security Council may therefore authorise member States or their groups, in case of finding the threat to or breach of peace under article 39, to undertake military action with a view to maintaining or restoring peace and security in a given situation. Military operations based on such an authorisation are performed under command not of the UN, but of implementing States. Nevertheless, as far as the use of force is authorised by the Security Council, it is the collective use of force on behalf of the United Nations.⁸³ All instances of use of force under Chapter VII have been so far based on such an authorisation. The examples are military actions in Iraq-Kuwait conflict, Haiti, Somalia and Bosnia. Unlike the non-military coercive measures under article 41, under article 42 the Council authorises and not obliges member-States to use the armed force. The legal consequence thereof is that unlike the measures under article 41, States are not bound to join military measures authorised by the Council, but they are merely bound not to obstruct them.

The question may arise what the legal background may be for authorisation of member States to carry out an UN-mandated operation. Frequent references are made in this regard to article 51 of the Charter dealing with the right of States to self-defence in cases of an armed attack. It has been suggested that "a delegation by the Council of its Chapter VII powers to UN Member States to undertake military enforcement action represents a combination of characteristics from the two categories of collective self-defence and collective security".⁸⁴ But in fact, the question of relevance of collective self-defence in authorisation by the UN of its member-States to use force shall be examined in the light of circumstances of each concrete case. The Security Council may authorise the use of force also in cases not involving armed attack and thus act completely outside the ambit of collective self-defence.

⁸⁰ *Criteria for Expedited Processing of Urgent Claims*, S/AC.26/1991/1 para.18; S/AC.26/1991/7/Rev.1, paras 6, 21, 34; Crook, United Nations Compensation Commission – A New Structure to Enforce State Responsibility, 87 *AJIL* (1993), 147 ff.

⁸¹ Frowein, International Law Enforcement in Case of Security Council Inaction, Delbrueck (ed.), *The Future of International Law Enforcement, New Scenarios, New Law*, 112

⁸² *ICJ Reports*, 1962

⁸³ White, *The Law of International Organisations* (1996), 192-193

⁸⁴ Sarooshi, *The United Nations and Development of Collective security* (1999), 145

Some instances, like that of authorisation of US-led coalition to use force against Iraq by resolution 678(1990), confirm indeed that authorisation may take place when the use of the right to self-defence is relevant. However, authorisation under article 42 may serve wide variety of purposes other than countering armed attack on States.

The Council may consider that some forcible actions may be necessary for keeping effective the non-military measures it ordered or orders under article 41. The very first authorisation of force was in fact serving enforcement of non-military coercive measures against the racist regime in Southern Rhodesia. By resolution 221(1966), the Council authorised the United Kingdom to arrest vessels supplying oil to racist regime in Southern Rhodesia. In particular, the arrest of a tanker registered in Greece – “Joanna V” – has been authorised. By resolution 665(1990), the Council authorised States to use the force in order to prevent violation of the naval blockade against Iraq. Likewise, by resolution 787(1992) the Security Council authorised member States, acting through NATO and WEU, to secure observance of blockade against Serbs by patrolling in Mediterranean Sea, including the use of force in this connection.

Authorisation may serve also the purpose to end a humanitarian catastrophe which does not transcend beyond the frontiers of one State. By resolution 794(1993) the Council authorised the use of force to counter the “magnitude of human suffering” in Somalia and to secure an environment suitable for delivering humanitarian assistance.

By resolution 836(1993) the Council authorised the use of force for protection of no-fly zones established by itself in Bosnia-Herzegovina.

The action by the Council in support of democracy has also been supported by forcible action. By resolution 940(1994) the Council authorised creation of multinational force in order to reestablish legitimate government and replace by it the military junta which had seized the power.

All this practice confirms that the relevance of authorisations by the Council of the use of force under article 42 shall not be limited to cases of armed attack, but should be conceived within the broader contexts of international peace and security. The threats to the peace is, as illustrated and evidenced above, a category substantially broader than that of armed attack.

This circumstance no doubt influences the relevance of authorisation *ratione personae*. Authorisation of the use of force under Chapter VII may be directed not only against the target State, but also against other States and non-State actors insofar they are or might be considered as hindering the Security Council to achieve the purposes it pursues by its Chapter VII action. The resolutions 221(1966) and 787(1992) may provide evidence in this regard.

2. The Nature and Legal Consequences of Authorisations

“The current system as developed by the Council involves authorisation by that body, but lacks true collectivity in the command, control and composition of the force. Although it is a recognition that the current system falls short of the Charter ideal, it does not make it unconstitutional. ... Simply to dismiss a viable alternative system because it does not match the text of the Charter is too formalistic.”⁸⁵

Although the decentralised use of article 42 powers is the only option so far available, it has its inherent weaknesses which potentially may render them ineffective. Authorising the States to use of force does not become illegitimate by the fact that the force is used by authorised States and not by the United Nations itself. However, this “dry” legitimacy is not sufficient to perform a given operation effectively. While moved by political considerations, the contributing States may at any time withdraw from participating.

The permanent members of the Security Council are unwilling to submit to UN command when they deliver armed contingents and pay for the operations.⁸⁶ The Council is therefore deciding,

⁸⁵ White & Ulgen, *The Security Council and the Decentralised Military Option: Constitutionality and Function*, 44 *NILR* (1997), 381, 386

⁸⁶ Gaja, *Use of Force Made or Authorised by the United Nations*, Tomuschat (ed.), *The United Nations at Age Fifty* (1995), 43

as a rule, that the forces established by the member States for performance of the Security Council's mandate shall operate under unified command, which means in practice that the forces are controlled by permanent members. This option has been practiced, for instance, in cases of Somalia and Haiti.⁸⁷ "An intervention which is only recommended or authorised by the Security Council inevitably gives one or more member States freedom in deciding whether to make use of the recommendation and whether to terminate their military operations even before the Security Council so decides".⁸⁸

The resolutions authorising the use of military force against Iraq after its invasion of Kuwait are ambiguous as to the final goal of those operations. It was unclear whether the tendencies going beyond liberation of Kuwait, such as capture of Baghdad would fit into the terms of the authorising resolution 678(1990). In particular, "restoration of peace and security in the area" as the goal of action against Iraq did not allow to identify its frontiers.⁸⁹

It is clear that a justification to use armed force under the UN Charter exist only as long as States applying force keep within the limits of the authorising resolution. "Delegation of powers continues to exist until such time as the objective which the Council has specified in the resolution which delegates powers has been fulfilled. Upon the fulfilment of this objective the delegation of powers will automatically cease."⁹⁰ The wording of certain resolutions are however not unambiguous enough to allow easy identification of a purpose of delegated powers.

Since a new resolution terminating the use of force may be vetoed, considerable dangers exist with regard to open-ended resolutions. A permanent member may veto any resolution of the Council which is intended to impose some restriction on its unlimited use of force against a State whether or not fully justified under earlier resolutions of the Council.⁹¹

3. Restrictions Governing Authorisations

The Security Council, while delegating its powers to member States, shall ensure that those delegated powers are exercised in full compliance with purposes and principles of the United Nations as specified in articles 1 and 2 of the Charter. Since the power delegated under Chapter VII to member-State(s) is nevertheless a power of the United Nations, its exercise shall not result in neglectation of those purposes and principles. This circumstance leads to consideration of UN control over operations exercised on the basis of delegated powers.

Sarooshi correctly notes that the competence of the Security Council, having delegated its military enforcement powers shall ensure that enforcement action is exercised under its overall authority and control. Otherwise, the delegation is *ultra vires*.⁹² The concrete method of retaining such an overall command and authority seems to be the duty imposed on respective member-States to report to the Council regularly on the progress of an operation. Such a reports, submitted to the Security Council, shall necessarily focus upon development of a given military operation in the light of the purposes and principles of the United Nations. By resolution 678(1990), paragraph 4, the Council requested "the States concerned to keep the Security Council informed on the progress of actions" concerning Iraqi invasion of Kuwait. Also the request has been made by the Council in resolution 794(1993), paragraph 13, to member States "to establish appropriate mechanisms for coordination between the United Nations and their forces" in Somalia. Paragraph 13 of resolution 940(1994) contains similar request concerning authorisation of force in Haiti. Resolution 1244(1999) does mention that leadership of international security presence in Kosovo shall report regularly to the Security Council through the Secretary-General of the UN.

⁸⁷ UNSC res. 794(1993), para. 13; 940(1994), para 4; 1244(1999), Annex 2, para. 4

⁸⁸ Gaja, Use of Force Made or Authorised by the United Nations, Tomuschat (ed.), *The United Nations at Age Fifty* (1995), 42

⁸⁹ Frowein, Unilateral Interpretation of Security Council Resolutions: A Threat to Collective Security? Goetz, Selmer & Wolfrum (ed.), *Liber Amicorum Gunther Jaenicke – Zum 85. Geburtstag* (1999), 101

⁹⁰ Sarooshi, *The United Nations and Development of Collective Security* (1999), 157

⁹¹ Frowein, International Law Enforcement in Case of Security Council Inaction, Delbrueck (ed.), 114

⁹² Sarooshi, *The United Nations and Development of Collective security* (1999), 155

In view of failure of States and of the UN to conclude article 43 agreements and of the fact that notwithstanding proposals of the UN Secretary-General no establishment of a United Nations permanent stand-by force has taken place, the option of regular reporting by forces authorised under article 42 is an important and crucial option for ensuring a clear and tangible link between the UN Security Council and operations it authorises.

Another method of controlling by the Security Council of forces it authorised is to set the time-limit of their operation. The Council has been very reluctant in this regard so far. For instance, resolution 1244(1999), paragraph 19, states that international security presence in Kosovo is “established for an initial period of 12 months, to continue thereafter unless the Security Council so decides”. Therefore, the Council in fact assumed no duty to review the issue of presence of KFOR in Kosovo regularly. The initiatives in this regard may be blocked by a negative vote of any permanent member. The operation KFOR in Kosovo is therefore in fact outside the control of the United Nations, although it has been authorised by it. Unacceptability of such a solution has nothing to do with justifiability of deployment of KFOR in Kosovo as such and in general. What is submitted thereby is that in cases where the United Nations Security Council, acting on behalf of the whole membership of the United Nations according to article 24 of the Charter, authorises the presence of international enforcement force in any part of the globe, it shall retain the control of the whole UN membership on action of such a force, including duration of its mandate. If the international security presence in Kosovo is authorised by the UN, the Security Council should not have abdicated its responsibility to decide on further progress of such an operation.

Part Three

Regional Arrangements within the Legal Framework of Enforcement Measures under the UN Charter

A. Regional Arrangements in the Context of Chapter VIII of the UN Charter

There is no uniform or generally accepted criteria for definition of regional arrangements or agencies to which Chapter VIII of the UN Charter refers. It is nevertheless clear that the notion of “arrangements or agencies” is indeed relatively wide and may cover any association of States irrespective of their international legal background. The notion of arrangement may not, in our view, be identical with the notion of international organisation in classical sense, but may include also other associations. The qualification of an association of States as a regional arrangement in sense of Chapter VIII of the UN Charter – whether by the United Nations or by an association itself – is therefore without prejudice to general legal status of that association, in particular, to existence of its legal personality and other rights and privileges under international law.

As far as the constitutional background of regional arrangements have no relevance for their qualification as arrangements under Chapter VIII, they may be utilised by the Security Council for the purposes of maintenance of international peace and security regardless of whether their founding instruments explicitly foresee such a possibility.⁹³ It is the will of the Security Council which is decisive in utilising regional arrangements for the purposes of Chapter VIII and which, due to the operation of article 103 of the Charter, may cure alleged deficiencies in constituent instruments of regional arrangements in sense of their suitability for being utilised under Chapter VIII. The practical purposes of such an approach are twofold: (1) the regional arrangements may be utilised beyond the area of their membership; and (2) the regional arrangements may be utilised beyond their functional scope of activities as defined in their constituent instruments.

Regional organisations are certainly considered under the UN Charter as necessary components in maintenance of international peace and security. They may assume certain functions in this regard before or parallelly to the UN action or in case of UN’s inaction. Chapter VIII of the UN Charter explicitly grants the regional organisations such powers. Article 52 of the Charter recognises the primary role of regional organisations in settlement of disputes or adjustment of situations likely to endanger maintenance of international peace and security. The role of the United Nations is subsidiary in this regard. However, as far as action against the threat to the peace, breach of the peace or act of aggression is concerned, the United Nations assume the primary role. First of all, the determination of existence of threats to the peace lies completely in the UN Security Council’s hands, according to article 39 of the Charter. On the basis of such a prerogative, the Security Council may, pursuant to article 53 of the Charter, utilise regional arrangements for the purpose of maintenance of international peace and security. Walter correctly observes that in cases of authorisation of regional organisations to take enforcement actions

“handelt es sich ...nicht um eine Ausweitung der Zuständigkeiten von Regionalorganisationen gegen den Wortlaut der Satzung der Vereinten Nationen, sondern lediglich um eine zusätzliche

⁹³ Contrary to assertion by Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 288

Form, in der der Sicherheitsrat von seinem ihm unzweifelhaft zustehenden Ermächtigungsrecht Gebrauch machen kann".⁹⁴

Therefore, the determination of situations when regional organisations may act against actual threats to the peace lies within the hands of the Security Council. Moreover, the Security Council has also the prerogative to decide which coercive measures may the regional organisations apply. According to article 53, regional organisations may not apply enforcement measures without the authorisation by the Security Council. This circumstance must be regarded as a manifestation of constitutional superiority of the United Nations towards regional arrangements in the field of maintenance of international peace and security.

B. Authorisation of Regional Organisations to Undertake Forcible and Non-Forcible Enforcement Measures

The analysis of those relevant provisions of the UN Charter may raise the question what may be a legal basis for enforcement actions under general international law. In this context, permissibility of forcible and non-forcible enforcement actions must be analysed separately.

As far as forcible actions are concerned, it is more than established that the use of force in international relations is banned by absolute prohibition not only under the UN Charter but also under general (customary) international law.⁹⁵ Nor contains the general international law any particular authorisation for regional organisations of the use of force prohibited for States. Therefore, the state of the law under general international law is wholly identical to that under article 53 of the Charter.

The case of non-forcible enforcement actions may however demonstrate certain differences between Charter regime and general international law. General law of State responsibility recognises the right of States to take non-forcible countermeasures against a State violating its international obligations.⁹⁶ This right is subject to certain limitations and qualifications.

Therefore, if the conduct of a target State involves violation of its international obligations, either member-States of regional organisations acting in concert, or competent bodies of those organisations may decide on imposition of non-forcible sanctions upon the wrongdoer State. No doubt, these sanctions may be identical with non-forcible measures which the Security Council may apply under article 41 of the Charter. Insofar the Charter contains only prohibition of forcible actions and not of law-enforcement measures in general, regional organisations may, in case of determination by the Security Council of a threat to the peace or in case of its inaction, resort to non-forcible enforcement measures against a target State, proportional to the degree of wrongfulness involved in a given situation. The Charter does not operate as precluding operation of the law of State responsibility in this regard.

Non-military enforcement measures by regional organisations have nevertheless to be distinguished from those by the Security Council on certain points. Measures by regional organisations may involve only member States of those organisations and also other States in case of their consent thereto. Moreover, the regional organisations do not possess the power to bind their member-States comparable to the power of the Security Council under article 25 of the Charter. In regional organisations decision on enforcement measures are adopted, as a rule, by unanimity or consensus. The Security Council may however bind its member States without their will.

In addition, the measures by regional organisations are not as such capable of involving non-members of such organisations. Regional organisations also lack the power comparable to power of the United Nations under article 2(6) of the Charter to ensure that the conduct of non-members shall be in accordance with decisions of the Organisation. The lack of this power became evident during the Kosovo crisis, where the initiation by NATO countries of a sea blockade aimed at prevention of

⁹⁴ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 304-305

⁹⁵ *Nicaragua case*, Merits, *ICJ Reports* 1986, 14ff.

⁹⁶ ILC draft on State responsibility, article 47

oil supply to Federal Republic of Yugoslavia did not find wide support outside NATO and the FRY was receiving oil during the NATO action against it.⁹⁷

C. Necessity of Prior and Explicit Authorisation

The authorisation of regional organisations to apply enforcement measures should be the prior authorisation. Otherwise, the Security Council is not in position to control action undertaken by a regional organisation. The text of the Charter is clear to that point. Article 53(1) makes it clear that enforcement action by regional organisations is perceivable only in context of utilisation of such regional organisations by the Security Council. If enforcement action is commenced without authorisation by the Council, then the regional organisation may in no way be considered to be utilised by the Council. The legal state of affairs created by the fact of unauthorised enforcement action by the Council is therefore clearly illegal under the Charter and may not be cured by subsequent approval and authorisation by the Council, because such a decision by the Council would violate the the provision of the Charter according to which the regional organisations may take enforcement measures only if utilised by the Security Council. This is dictated by both the spirit of the Charter and its concrete provisions.

It has been also suggested that the authorisation by the Security Council of enforcement action by a regional organisation could be concludent/implicit, because article 53(1) does not mention any specific form in which authorisation should be granted – implicitly or explicitly. However, the evidence of such an implicit/concludent authorisation is highly difficult to find. Walter, for instance, suggests that the attitudes expressed by the members of the Security Council could provide evidence for existence of concludent/implicit authorisation. But in order to be considered as an implicit/concludent authorisation, the attitudes of members shall concur in a way necessary for adoption of non-procedural decisions of the Security Council, i.e. the evidence of consent of nine members including five permanent members should be existent. Insofar there is no evidence of consent by appropriate majority or even one permanent member does not agree, the implicit/concludent authorisation is not conceivable.⁹⁸ Merely inaction by the Security Council is not an evidence of implicit/concludent authorisation.⁹⁹

Walter's criteria are no doubt correct. Nevertheless, as far as the consequences of such an approach are concerned, it might be doubted whether any circumstance may prevent nine members of the Council including five permanent members, to adopt an explicit resolution authorising a given action by a regional organisation. If appropriate majority agrees on authorisation, they may do that explicitly and thus avoid any controversies and juridical misunderstandings. And they are supposed to do so also from the practical point of view. Therefore, the concludent authorisation hardly may have any relevance here.

Apart from a dogmatic point of view, there is only the case of action by Economic Community of West African States (ECOWAS) in Liberia, which is considered as an example of subsequent and implicit authorisation of enforcement measures. However, this example is not in position to provide the proper evidence of a power of regional organisations to commence enforcement actions without the prior authorisation by the Security Council. ECOWAS has acted upon invitation by the government of Liberia and the consent of that State has been confirmed also at subsequent stages of that operation. The Security Council, while joining to a certain extent to efforts commenced by the ECOWAS, was obviously guided by the circumstance that ECOWAS was acting on the basis of government invitation. An attitude of the Council, as evidenced for instance by resolution 866(1993), does not permit to assume that the Council would approve an enforcement action by a regional organisation which has been commenced without the consent and against the will of government of a given State.

⁹⁷ Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *AJIL* (1999) 633

⁹⁸ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 304

⁹⁹ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 308

Part Four

Unauthorised Actions by States: Action by United States and United Kingdom Against Iraq

International law is based on principle of fulfilment of international obligations in good faith – otherwise called principle *pacta sunt servanda*.¹⁰⁰ As international organisations are created on the basis of a treaty, which determine their powers, those treaties shall be necessarily considered as limiting the freedom of unilateral action by States in questions which have been designated as subject-matter of competence of organs of a given international organisation. If States may nevertheless act unilaterally, the object and purpose of a given treaty would be frustrated. In *Exchange of Greko-Turkish Populations* case, the Permanent Court of International Justice focused on impermissibility to supersede the powers of an international body by unilateral actions of member-States. Where such a superseding is permissible, relevant instruments usually make necessary stipulations in this regard. Article 4 of the Cyprus guarantee treaty, concluded between Cyprus, Greece, Turkey and United Kingdom, explicitly referred to the right of each guaranteeing power, in case of breach of treaty, to take an action with a view of reestablishing the state of affairs created by the treaty.

As we see, the applicability and fundamental importance of principle *pacta sunt servanda* to treaties establishing international institutions has been recognised under international law far before creation of the United Nations. The issue in question is crucial for recognition of binding force of international law, which has been disputed by so-called realist school of thought asserting the right of unlimited autointerpretation of States of rules governing their behaviour in international relations. In contemporary international legal system, the sovereignty is not more absolute and does not imply the power of autointerpretation; it is limited by and conditional upon fulfilment of international obligations in good faith. This is called the coexistence of sovereignties, which consist of mutual respect by States of one another's rights and duties. This principle is unlikely to be disputed by any international lawyer whether positivist, naturalist, realist or policy-oriented. The practice may show, however, that contemporary international system still suffers from assertion by certain States to interpret unilaterally their rights and duties. Moreover, States assert their right to autointerpretation not merely in issues of strictly bilateral character, but also concerning the operation of UN collective security system which is the basis of international legal order. The tendency is far from becoming lawful and hardly is expected to do that, but it may prevent the UN collective security system to become more effective and stable.

After liberation of Kuwait by the coalition force authorised by the Security Council under the resolution 678(1990) to use all necessary means for restoration of peace and security in the Gulf region, the Council decided to adopt a package of measures designed to eliminate consequences of Iraqi aggression against Kuwait and produce guarantees of non-repetition of such a behaviour in the future. The measures adopted to that end have been subsumed under resolution 687(1991). In particular the Council, acting under Chapter VII, intended to impose the duty on Iraq that it “shall unconditionally accept the destruction, removal or rendering harmless its chemical and biological

¹⁰⁰ UN Charter, article 2(2); Vienna Convention on the Law of Treaties of 1969, article 26

weapons” and agree to these ends to be subjected to supervision by the United Nations Special Commission (UNSCOM).

In the period thereafter, reluctance of Iraq to cooperate with UN in matters of arms control and disarmament on the basis of resolution 687(1991) has led to serious confrontations between Irak, on the one hand, and US and UK, on the other. demanding renewal of cooperation of Iraq with UNSCOM, US and UK did not rule any kind of action to compel Iraq to comply with the said resolution. In February 1998, the Memorandum of Understanding between UN and Iraq has been signed, whereby Iraq accepted the cooperation with UNSCOM.

Contingencies reappeared in November 1998, which eventually led to United States and United Kingdom using force against Iraq to ensure its compliance with its obligations under Security Council resolutions. Military action against Iraq has not been authorised by any of the Security Council decisions and it was thus use of force contrary to the UN Charter and international law. However, US and UK regarded their action as not unlawful, invoking certain justifications thereof.

As one of justifications of the use of force without the Security Council authorisation has been invoked the authorisation to use force against Iraq contained in previous resolutions of the Council. Reference has been made to resolution 678(1990), which authorised the use of force by member-States to ensure Iraq’s compliance with resolution 660(1990), which demanded Iraq’s withdrawal from occupied Kuwait, and with all subsequent resolutions. Resolution 678(1990) has therefore in fact been interpreted by United States and United Kingdom as a general and multiple authorisation of the use of force against Iraq. The correctness of such an approach should be tested against the conceptual background of authorisations of the use of force as enshrined in the UN Charter as well as against the peculiarities of that concrete case of forcible action against Iraq.

Firstly, it is highly doubtful whether the Security Council is empowered to grant general and multiple authorisations to member-States to use military force. Such an assumption would be contrary to the Charter. The use of force is outlawed under article 2(4) and the exceptions the Charter knows are self-defence under article 51 and authorisations of force by the Security Council under article 42. When the Council makes use of its powers under article 42, the Charter makes it necessary that the Council – and not any other actor – shall determine existence of a threat to the peace in order to make the use of force permissible. To grant member-States a multiple and general authorisations under article 42, the Council would have abdicated its responsibility under article 39 to determine existence of a threat to the peace. If member-States “authorised” by the Council may decide when and in which circumstances to use force, they should be considered also empowered to determine existence of a threat to the peace, which is obviously not the case. The Council may authorise member-States to use force on a concrete occasion, but it is not entitled to empower them to make decisions on which occasions the armed force shall be used.

Secondly, it is equally doubtful whether the Council, in an empirical sense, could be considered as having authorised US and UK to use force against Iraq. References in this regard has been made to resolution 678(1990). It is true that resolution 678(1990) authorised UN member-States to take forcible action (“use all necessary means”) against Iraq in order to ensure implementation of resolution 660(1990) and of all subsequent resolutions and thus ensure restoration of international peace and security in the area (para. 2). This circumstance begs the question whether such an authorisation granted in November 1990 might have been invoked as a title to use the force for enforcement of resolution 687(1991) which have been adopted in April 1991, several months later than authorising resolution 678(1990). To give affirmative answer to this question would result in affirming that the Security Council authorised States to enforce forcibly the resolutions adopted after that authorisation. This would in fact mean the abdication by the Council of its Chapter VII powers to member-States. Apart from the fact that the Council hardly can be considered to be empowered to do that, the intention to abdicate its enforcement powers to member-States may not be presumed unless supported by clear and convincing evidence, which was lacking in case of Iraq.

Thirdly, the Council in the light of its decisions, hardly may be considered as having abdicated its responsibility in the area of peace and security to member-States. In all resolutions dealing with obligations of Iraq in the field of human rights and disarmament, such as 678(1990), 687(1991), 688(1991), 1154(1998), the Security Council decided to follow up on Iraq's compliance with its demands and take necessary action in case of need. According to all those resolution, it is thus the Council and not member-States which shall ensure implementation of the resolutions. The Council and not member-States shall decide what measures, if any, shall be taken in order to ensure implementation of compliance by Iraq.

Fourthly, the possibility of general and multiple authorisations of the use of force, while placing a discretion to find threats to the peace in hands of member-States, opens a door for different and possibly mutually exclusive interpretations by member-States in assessing relevant circumstances. Interpretations by member-States may differ from one another in assessment whether a given situation – which is considered by some member-States as warranting the use of force – is in fact so grave and serious as to justify that step.

Fifthly, forcible enforcement of Security Council resolutions without an authorisation by the Council itself is deprived of all legal safeguards the Council-authorized use of force would enjoy under the Charter. Non-authorized use of force is not protected by operation of article 25 of the Charter. States not participating in non-authorized enforcement and those opposing it are legally entitled to oppose and confront such an action. Non-authorized use of force is not safeguarded also by operation of article 103 of the Charter and may thus not override operation of the right of self-defence and of collective defence pacts. The allies of a target State are empowered to give military assistance to it. This circumstance is likely to transform a confrontation between States into a confrontation between groups of States, which is obviously contrary to principles underlying UN collective security system and may thus not be considered as support of UN Security Council action and, moreover, enforcement of its decisions.

It is thus clear that forcible action against Iraq may not be considered as lawful and moreover, as enforcement of Security Council decisions. It is more likely to frustrate rather than support UN action in the field of disarmament. The contemporary system of international law imperatively demands avoidance of any unilateral interpretation of issues which pertain to the area of collective decision-making. Frowein remarked, an UN resolution authorising force against a State “is the legal basis for the most severe encroachment upon the sovereignty of a member of the United Nations. It is submitted, therefore, that from the interpretation of such a resolution the old rule according to which limitations on sovereignty may not be lightly assumed is fully justified. Only where the use of force against a sovereign State is clearly authorised by a resolution this is in fact lawful under United Nations law”.¹⁰¹

All those circumstances are thus unanimous in requiring from us to consider that “there is no entitlement in hands of individual members of the United Nations to enforce prior Security Council resolutions by the use of force”.¹⁰²

¹⁰¹ Frowein, *Unilateral Interpretation of Security Council Resolutions: A Threat to Collective Security?* Goetz, Selmer & Wolfrum (ed.), *Liber Amicorum Gunther Jaenicke – Zum 85. Geburtstag* (1999), 112

¹⁰² Higgins, *Problems and Process. International Law and How We Use It* (1997), 259

Part Five

Unauthorised Actions by Regional Organisations: Action by NATO against the Federal Republic of Yugoslavia

A. Legal Regime Governing Enforcement Actions by States and by Organisations under the UN Charter. Circumstances Invoked in Support of Lawfulness of Action by NATO

After having clarified that individual States or groups of States may not use force without the authorisation by the Security Council, the question may arise whether the regional institutions may do so. In the above analysis, it has been shown that regional organisations shall not take any forcible action without authorisation by the Security Council and that the authorisations by the Security Council should be prior and express.

It should be necessarily submitted in this regard that the regime governing the use of force by individual States under the UN Charter necessarily applies to regional arrangements. Apart from the prohibition laid down in article 53 of the Charter, the use of force by a regional arrangement against a State shall be in accordance with the ban of the use of force according to article 2(4), with the requirement of an armed attack according to article 51 and with the notion of the exclusive responsibility of the Security Council to authorise use of force in cases other than those of an armed attack. The fact that a regional organisation acts forcibly and not a State is not in position to change anything in this legal situation. Regional arrangements are subject not only to general prohibition of force under the Charter, but also to specific one under article 53, applying especially to them.

As far as article 53 of the Charter prohibits forcible actions without Security Council authorisations, it shall have clear legal consequences. The circle of addressees of article 53 prohibition is not different from circle of addressees of other Charter provisions. The addressees of article 53 prohibition thus are:

(a) individual States, which have signed the Charter of the United Nations and on which article 53 is therefore imposing binding obligations. Individual States are therefore bound by that prohibition wherever they intend to participate at or to support otherwise military actions taken outside the framework of article 53.

(b) organs of the United Nations – both principal and subsidiary ones – which are established by or on the basis of the UN Charter and whose powers shall thus be interpreted and applied in accordance with the provisions of the Charter. The principal organs of the United Nations – Security Council, General Assembly and International Court of Justice – shall in particular be unconditionally abide by the provisions of the UN Charter. Otherwise, their decisions must be considered as being *ultra vires* and therefore invalid.

(c) regional arrangements whose existence is legitimised under Chapter VIII of the UN Charter. Article 52 of the Charter requires that the regional arrangements shall be established and act in accordance with purposes and principles of the United Nations. This circumstance, supplemented by regional arrangements' possible being international legal persons obliged to obey international law, leads to imposition of duty on regional organisations to refrain from any forcible action without an authorisation by the Security Council.

It is thus completely irrelevant whether an unauthorised action is described as an action by a State or by a regional organisation, or whether the United Nations have taken any consequential

steps in this regard. The Charter of the United Nations, being the treaty of a supreme legal force, is in itself in position to provide criteria for judgment of legality of any enforcement action regardless of performed by States or by regional arrangements.

These criteria are undoubtedly governing the legality of military action by North Atlantic Treaty Organisation (NATO) against the Federal Republic of Yugoslavia (FRY) concerning the humanitarian crisis in Kosovo. On 24 March 1999, NATO launched an air campaign against the FRY, which lasted over more than ten weeks, in order to respond to large-scale human rights violations by the FRY against ethnic Albanian minority in Kosovo. Air strikes have been conducted without the authorisation by the Security Council and were therefore unlawful under the Charter and general international law. Several justifications have, however, been invoked by NATO member States, as well as by some scholars for supporting the legality of air strikes against the FRY. Those alleged justifications may be listed as follows:

(a) The FRY was not complying with and systematically breaching UN Security Council resolutions 1160(1998), 1198(1998), 1203(1998) demanding from it immediate end of atrocities, acceptance of international peace observation and substantial autonomy for province of Kosovo. This contention will not be dealt with here, because its acceptability has been discussed above at the example of Iraq and the conclusions reached there fully apply to action against FRY.

(b) Humanitarian catastrophe in Kosovo made necessary immediate armed response, because diplomacy failed and atrocities were continued. This is in fact an argument based on alleged right of humanitarian intervention. The legal framework has sometimes been described by reference to

- (1) applicability of the prohibition of the use of force in context of the principles and purposes of the United Nations;
- (2) textual scope of prohibition of force under article 2(4);
- (3) rules of international law violated by FRY being *jus cogens* and having *erga omnes* effect;
- (4) the state of necessity in context of the law of State responsibility;
- (5) countermeasures against an internationally wrongful act.

(c) The United Nations Security Council did not condemn NATO or its members for an unauthorised use of force and it thus legitimised their action.

In the analysis below, all these contentions shall be considered in turn, in order to clarify whether they are in position to provide legal justification for the use of force against a State not justified either as a right to self-defence or as authorised by the United Nations Security Council.

B. The Notion of “Humanitarian Intervention” in General

Before doing justice with the notion and permissibility under international law of humanitarian intervention, one remark of methodological character should be made, without prejudice to the issue of the legality of humanitarian intervention as such.

The concept of “humanitarian intervention” involves some inherent controversies. By denoting it as an “intervention”, one does not properly reflect its essence. Intervention generally means interference with domestic affairs of a State without its will and independent of whether it occurs by using forcible or non-forcible means. When one speaks about humanitarian “intervention” of an instance constituting an exception from the prohibition of the use of force in sense of article 2(4) of the UN Charter, one chooses misleading line of reasoning. Article 2(4) covers only prohibition of forcible acts and it is without prejudice to prohibition of intervention in domestic affairs of a State in general. Therefore, if one wishes to refer to circumstances warranting use of force either on the basis of interpretation of article 2(4)¹⁰³ or by qualifying it as an exception from a prohibition under article 2(4)¹⁰⁴ the term “humanitarian intervention” is not the proper description of such a behaviour. More correct way would be to qualify such instances of the use of

¹⁰³ For instance, by reference to words “contrary to territorial integrity or political independence or in any other way inconsistent with the purposes of the United Nations”

¹⁰⁴ For instance, by reference to (new or old but still surviving) customary law

force as “humanitarian invasion” or “humanitarian aggression”. The latter terms reflect more properly that one tries to justify the use of force either on the basis of or by way of formulating exceptions to the provisions of the UN Charter governing the use of force.

Even to more neutral term – “humanitarian armed attack” – there is never made a reference. This term would be more neutral and less protest-provoking than aggression or invasion. But it would also remind that a target State may resort to its inherent right to self-defence under article 51 of the UN Charter.

The use of term “intervention” is obviously designed in such cases to neutralise impressions created on the basis of unlawfulness of an armed attack on a territory of a State. It may, of course, help manipulate public opinion in cases of the use of force unjustified under international law (we do not invade, we do not commit an act of aggression, we do not attack, but we just intervene, for humanitarian purposes, of course), but it is of little assistance if one decides to clarify its legal content. Here expression “humanitarian intervention” will nevertheless be used, not because this author is in agreement with correctness of such a composition of words, but simply because it is the mostly disseminated expression and helps thus in avoiding confusions.

There is no definition of humanitarian intervention,¹⁰⁵ nor is there an uniform notion of it. As far as the legal source is concerned, the views among the supporters differ in referring to need of interpretation of UN Charter in a certain way, to extra-Charter customary law, to the need of finding balance between conflicting values and to moral considerations as distinguished from legal ones.

The scholars supporting the concept of humanitarian intervention try usually to elaborate upon the criteria for its applicability and justification. 12 criteria for justification of humanitarian intervention in International Law Association’s Third Interim Report have been suggested.¹⁰⁶ Professor Cassese in his recent publication suggests six criteria for justifying unilateral use of force for humanitarian purposes.¹⁰⁷

According to Schilling, the forcible humanitarian intervention is permissible either in case of support of successful attempt of secession or in case where a State, on the basis of a treaty, permits international legal control on its territory concerning serious human rights violations committed by it and later closes that control unilaterally in breach of a treaty in question.¹⁰⁸ Schilling’s criteria seem to be wholly factual (in first case) or wholly procedure-oriented (in second case) and not value-oriented. While other authors try to refer to the gravity of human rights violations, for Schilling the permissibility of unilateral humanitarian intervention is determined not by degree of humanitarian emergency, but by the fact that a target State has not complied with a particular treaty regime.

¹⁰⁵ Kimminich, *Der Mythos der Humanitären Intervention*, 33 *AVR* (1995), 431

¹⁰⁶ International Protection of Human Rights by General International Law, *Report of the ILA’s Fifty-Sixth Conference* (1976), 219ff.

¹⁰⁷ Cassese, *Ex Injuria Jus Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 *EJIL* (1999), 23ff.

¹⁰⁸ Schilling, *Zur Rechtfertigung einer Gewaltamen Humanitären Intervention als Nothilfe oder Repressalie*, 35 *AVR* (1997), 458: “Eine einseitige gewaltsame humanitäre Intervention ist völkerrechtlich nur gerechtfertigt, wenn sie entweder zur Unterstützung eines letztlich erfolgreichen Sezessionsversuchs unternommen wird oder wenn der Interventions addressat gegen von ihm begangene Menschenrechtsverletzungen vertraglich eine völkerrechtliche Kontrolle eröffnet hat und diese vertragswidrig wieder beschränkt. Ihre völkerrechtliche Rechtfertigung setzt damit im zweiten Fall voraus, dass sich der Interventionsaddressat selbst der Kontrolle der Völkerrechtsgemeinschaft unterstellt hat. Erst damit verschafft er ihm die Möglichkeit, sein Verhalten trotz des Grundsatzes der souveränen Gleichheit aller Staaten zu wuerdigen. Fehlt es an dieser Voraussetzung, kann eine humanitäre Intervention im Falle schwerster Menschenrechtsverletzungen moralisch gerechtfertigt sein. Auf dieser Ebene kann sich ein Staat zum Hueter der Rechte aller Menschen machen. Rein rechtlich gesehen aber kommt ihm eine solche Position durch den Interventionsadressaten nicht zu.” See also id. 456: “Eine gleichwohl erfolgende, dem Weltgewissen und nicht oder doch nicht in erster Linie dem Eigennutz gehorchende gewaltsame einseitige Intervention, die aus moralischer Sicht zu begrüssen ist, bleibt rechtswidrig.”

In considering permissibility of intervention supporting successful secessions, Schilling does not specify what role is played in determining legality of such an intervention by the factor of permissibility of a secession in a given concrete case in the light of applicable international law, as embodied in Friendly Relations Declaration.

According to another suggestion, unilateral humanitarian intervention may be lawful if (1) free elections are held in a country, (2) the government so elected is barred from taking office or deposed by use of force, (3) another State or States intervene, restore the legitimate government and (4) withdraw.¹⁰⁹ Here an emphasis is made on duty to withdraw after accomplishing humanitarian intervention tasks. Professor Reisman argues, on the contrary, that subsequent withdrawal is not an indispensable condition. Intervening forces may stay in a target State for unlimited time.¹¹⁰

It must be concluded that theoretical approaches justifying humanitarian interventions are confusing rather than offering any reliable guidance. Approaches differ on scope and on criteria of permissibility of humanitarian intervention. Criteria suggested by several authors are controversial and often mutually exclusive. Such a state of things in a theory is the clearest indication to the circumstance that theoretical attempts to find legal basis for the use of force for humanitarian purposes constitute an attempt to make imaginations about the non-existent rather than observations about the existent.

The relevance attached to a so-called “right” to humanitarian intervention by those invoking it extends far beyond the realm of international law. The primary purpose of invoking humanitarian justifications of the use of force is to manipulate domestic and international public opinion by way of persuading them on acceptability of the use of force which otherwise would not be justified.

C. References to “Humanitarian Intervention” in Case of Kosovo

It is clearly established that by attempting to find humanitarian justifications for the use of force, one tries to escape operation of rules of international law. But as far as it is clearly understood that each and every use of force in international relations has its clear legal consequences, an attempt is made to present humanitarian intervention as a legally permissible action, as a legal exception to the prohibition of the use of force either under the UN Charter or under general international law.

1. Scope of Prohibition of the Use of Force under Article 2(4) of the UN Charter – Some commentators, mainly those supporting existence of several non-Charter exceptions to the use of force, refer to the circumstance that the article 2(4) prohibits the use of force against the territorial integrity or political independence of States. Therefore, the suggestion is made that any use of force which is not intended to impair territorial integrity or political independence of a State, but serves merely a limited purpose, such as, for instance response to humanitarian emergency or protection of own nationals, is legal under the Charter.¹¹¹

Correctness of such an interpretation of article 2(4) of the Charter is highly doubtful.¹¹² It has been correctly indicated also that a humanitarian intervention not affecting territorial sovereignty of a target State may not take place except on the high seas.¹¹³

However, even if the Charter-based prohibition of the use of force may be understood as being subject to those functional limitations as referred to above, the use of force in and around Kosovo may nevertheless not be considered as lawful. To clarify whether the force has been used against territorial integrity or political independence of a State, due regard shall be given to intention of States using force as evidenced by their actions as well as to factual circumstances surrounding the use of force in a given case. It is the fact of common knowledge that the bombing of FRY has been commenced because FRY refused to accept Rambouillet draft of peace accords on political settlement concerning Kosovo. Rambouillet draft contained several conditions which were affecting the core of political independence and territorial integrity of FRY. In sense of territorial integrity, Rambouillet draft considered the gradual elimination of FRY’s authority over Kosovo.

¹⁰⁹ Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 *HJIL* (1993), 175

¹¹⁰ Reisman, *Hollow Victory: Humanitarian Intervention and Protection of Minorities*, *ASIL Proceedings* (1997), 431

¹¹¹ Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, *AJIL* (1984), 642ff.; Higgins, *Problems & Process: International Law and How We Use It* (1997), 245ff.

¹¹² See, for instance, Dinstein, *War, Aggression and Self-Defence* (1994), 83ff.

¹¹³ Kimminich, *Der Mythos der Humanitaeren Intervention*, 33 *AVR* (1995), 440-441

Leaving aside the fact that the level of autonomy and international supervision required were highly incompatible with the notion of territorial sovereignty, the Rambouillet draft was foreseeing possibility of secession of Kosovo from FRY by way of referendum. In sense of political independence, Rambouillet accords demanded from FRY the consent to stationing several thousands of NATO troops, equipped with military technique, which were demanded to have free access to FRY's military bases and enjoy rights of free movement throughout its territory. Hardly may one imagine the political independence of a country unaffected in case of imposition of such a regime. Use of force, which has been commenced after failure by FRY to sign Rambouillet draft, was obviously directed to bring about the fulfilment of the demands contained in the draft by force. Therefore, even if the proponents of limited interpretation of article 2(4) of the UN Charter are right, this interpretation is not in position to provide legal justification of use of force against FRY.

2. Use of Force in Accordance with the United Nations Purposes and Principles? – Some authors, like Henkin, have suggested that NATO's action was not unlawful under the UN Charter, because it was not inconsistent with the purposes of the United Nations, as required by article 2(4) of the Charter. In such a case, the NATO, article 1 of constituent treaty of which is tantamount to subordination of NATO to purposes and principles of the UN, cannot be considered as violating the law of the Charter, because the preamble of the UN Charter aims at outlawing of use of armed force save in the common interest.¹¹⁴ Henkin's analysis, however, fails to reflect the relevant context of the Charter. The provision of the preamble to which Henkin refers, reads in its unity as follows: "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest". Henkin, as well several other authors referring to that preambular paragraph, usually disregard that the use of force in common interests shall occur through acceptance of principles and institution of methods.¹¹⁵ Therefore, that preambular paragraph may in no way be invoked as justification of the use of force not authorised by the United Nations. It explicitly mentions that the aim of peoples of the United Nations is to institute methods for the use of force in the common interest, which results in powers of the Security Council under the Chapter VII. The words "institution of methods" make it clear that the decision on the need of the use of force shall be made by using methods instituted under the Charter and not by unilateral autointerpretation by some member States or groups of States.

It is thus clear that it is impossible to find justifications for use of force without Security Council authorisation by way of construing exceptions to the prohibition of force on the basis of interpretation of the UN Charter. Treaty law provides therefore no justification for forcible action against FRY. The issue should therefore be examined in context of legal rules and principles of general international law.

3. Use of Force for Safeguarding jus cogens rules and erga omnes obligations – The contention has been made, both in theory and in practice, that the use of force by NATO against FRY concerning Kosovo might be justified by necessity to ensure compliance by FRY with its obligations in the field of human rights – obligations which have *erga omnes* nature and are protected by rules of *jus cogens* character. *Jus cogens* and *erga omnes* status of human rights norms under international law is obviously beyond doubt. Such a status of these rules withdraws human rights from domestic jurisdiction of States and human rights become an object of interest of the international community as a whole. As the International Court of Justice emphasised in this regard in *Barcelona Traction* case, "every State has an interest in their protection". This consequence of human rights' being part of *jus cogens*, is however different from the issue whether the violation of peremptory rules of international law may as such warrant the use of force against a wrongdoer. There is in fact no evidence either in treaty law or in customary law that such an assumption is justified. Also at the level of concepts and values, such an assumption hardly might seem tolerable. Assume the force is used against a State in response to violation of human rights – *jus cogens* rules. Such a use of force is a direct violation of other legal prohibition, which equally possesses status of

¹¹⁴ Henkin, Kosovo and the Law of "Humanitarian Intervention", 93 *AJIL* (1999), 826

¹¹⁵ Similarly, article 1 of the Charter speaks about "collective measures for the prevention and removal of the threats to the peace, and for suppression of acts of aggression and of other breaches of peace".

jus cogens and *erga omnes* – the prohibition of the use of force. Vindication of one rule of fundamental character is attempted by way of violation of other rule of the same nature. Leaving aside that there is no evidence in of permissibility of such kinds of enforcement of law, the factual circumstances make such an enforcement necessarily moot. Use of force against a State in response to human rights violations by the latter necessarily involves causing serious human suffering to that State's population (regardless of ethnic origin) resulting eventually in deaths and destructions. That was exactly what happened in FRY. After air strikes by NATO have been initiated, the number of Albanian refugees increased several times and NATO air strikes did not result in stopping this process. Moreover, large-scale human suffering on the whole territory of FRY has been caused, in this case by the NATO forces directly. The case of Kosovo sets therefore a clear example and lesson by demonstrating that one rule of fundamental importance may not be violated for the sake of enforcement of other rules of the same character. The inevitable result will be – as it was in FRY – the violation of one rule and the failure in enforcing the other.

4. Use of Force and the State of Necessity – A suggestion can be met that humanitarian intervention may be justified by the state of necessity. Article 33 of the ILC's draft articles on state responsibility confirms that the state of necessity may be invoked as a ground for precluding the wrongfulness of an act of the State not in conformity with an international obligation if

- (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

Necessity of urgent and effective response to humanitarian catastrophe might therefore asserted as justifying the violation of prohibition of the use of force. Such an approach is intolerable all under the content of the rule on the state of necessity, under exceptions to it and in the light of way and manner the NATO military action was performed.

Military action by NATO can obviously be regarded as seriously impairing an essential interest of the FRY. It is hardly imagineable that FRY could have had an interest more important and essential than non-use of force against itself.

It should also be borne in mind that the prohibition of the use of force is peremptory rule under international law, which possesses the highest legal force within the hierarchy of international legal rules. Paragraph 2(a) of draft article 33 clearly emphasises that the state of necessity does not preclude wrongfulness of an act of the State if it offends against peremptory norm. That's what NATO's military action did, so the state of necessity is here of little relevance.

5. Use of Force as a Countermeasure – The contention has been made that action by NATO in Kosovo may be justified as countermeasures in response to internationally wrongful acts. This view, advanced mainly by Cassese, consists of two main components: (1) massive violations of human rights may give rise to response by international community and (2) the precedent of Kosovo may play important role in modification of international law to the effect of allowing states to take forcible countermeasures against large-scale violations of human rights.¹¹⁶

According to customary international law as embodied in ILC's draft articles on State responsibility, it is permissible not to fulfil one or more international obligations towards a wrongdoer State as a response to internationally wrongful act committed by that State.¹¹⁷ In that sense, situation in Kosovo could have warranted application of countermeasures and the question is begged if NATO's action can be considered as such.

It is obviously beyond doubt, as confirmed in the above analysis, that obligations of States to observe human rights are of *erga omnes* nature and may be invoked against the wrongdoer by any State or group of States regardless of having suffered any individual damage. Yet it is still

¹¹⁶ Cassese, *Ex Injuria Ius Oritur*: Are We Moving towards Legitimation of Forcible Humanitarian Countermeasures in the World Community? 10 *EJIL* (1999), 23ff.

¹¹⁷ See also ILC's draft article 47 on State responsibility

doubtful whether relevant rules of international law allow for taking forcible countermeasures in response to such breaches. Evidences to that effect hardly could be found. Leaving aside the absolute character of prohibition of force under article 2(4) of the UN Charter, the customary international law has developed in clear contradiction with assertion of permissibility of forcible countermeasures. According to Friendly Relations Declaration (UNGA res. 2625), “States have the duty to refrain from acts of reprisal involving armed force”. The resolution of the Institute of International Law, specifically devoted to the role of countermeasures in case of massive and systematic human rights violations, expressly confirms that in such cases no recourse to armed force is permissible.¹¹⁸

International law lays down a set of limitations which a conduct of a state shall satisfy in order to be considered as a legitimate countermeasure. –exhaustion dispute settlement, third parties - These limitations are embodied in draft article 50, which prohibits performance by way of countermeasures of:

- a) the threat or use of force as prohibited by Charter of the United Nations;
- b) extreme economic and political coercion designed to endanger territorial integrity or political independence of the State which has committed internationally wrongful act;
- c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;
- d) any conduct which derogates from basic human rights;
- e) any other conduct in contravention of peremptory norm of international law.

Now it remains to consider how NATO’s action has complied with these requirements:

- (a) NATO’s action not being justifiable under article 51 of the UN Charter, nor being authorised by Security Council, was the use of force prohibited by the Charter of the United Nations;
- (b) During the negotiations which preceded the use of force, FRY has been subjected to extreme political coercion, which was in fact designed to endanger territorial integrity and political independence of that country. Danger to territorial integrity was embodied in Kosovo status settlement projects which were tried to be imposed on FRY. Rambouillet proposals were comprising provisions which were supposed to result in lost of FRY’s legal authority on territory of Kosovo. Highest degree of provincial self-government provided with similarly highest degree of international control were likely to undermine territorial integrity of FRY. As regards dangers political independence, demands to allow stationing and free movement of many thousands of foreign troops throughout FRY’s territory can provide appropriate evidence.
- (c) During military action inviolability of diplomatic agents and premises has been neglected. Bombardment of Chinese embassy, including causing injury to diplomats may be referred to in this regard. Missions of other States have also been damaged or injured.
- (d) NATO’s military action has affected lives, health and living conditions of large number of human beings in FRY – both ethnic Serbs and ethnic Albanians. Many people have been killed, wounded and remained without shelter.
- (e) Leaving aside peremptory character of non-use of force and human rights, evidence of violation of peremptory rules can be provided by facts of violation of international humanitarian law by destroying civilian buildings, bridges, means of communication and religious and cultural monuments. It is also noteworthy to emphasise that along with prohibitions under international law generally, there exist prohibitions applicable in particular context of humanitarian law: reprisals against civilian population or protected objects are unlawful. NATO’s action had to be consistent also with these standards.

Therefore, it becomes clear that there is little evidence for assuming that NATO’s action may be justified as countermeasures against large-scale atrocities committed by FRY. This action failed to meet the most important requirements applicable to countermeasures. However, the argument

¹¹⁸ Resolution of the ILI on “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States”, adopted at the session of Santiago de Compostela in 1989, article 2, 63 *Yearbook ILI* (Part II), 343

advanced by Cassese nevertheless contends that Kosovo might lead to modifying international law by legitimising forcible countermeasures in response to large-scale atrocities.¹¹⁹

D. Kosovo and Legal Standards Governing the Use of Force Applicable in the Future

In order to analyse this issue, one should bear in mind the means and techniques available for modification of international law. One general truth, which would not be disputed by any international lawyer is that changes in law may not be simply assumed; they shall be evidenced. This comprises occurrence of changes in law in general and occurrence of changes in context of peremptory rules of international law. Changes in law through treaty amendment are hardly necessary, as far as it has not occurred and is hardly likely to take place. As regards changes in customary law, no adequate consensus among States has been crystallised. NATO action has met protests on part of substantial number of States and this circumstance as such is sufficient to have prevented any changes in customary international law. Moreover, as far as prohibition of force is a peremptory norm, changes in its scope or content may not occur unless they are accepted by the international community as a whole, as unambiguously confirmed by article 53 of the Vienna Convention on the Law of Treaties. Particular context of Kosovo situation, involving negotiations, consultations, political confrontations and compromises, makes clear that no change in *jus cogens* could have taken place. Requirement of acceptance of changes by “international community as a whole” makes necessary not only the consent of all States, but also consent by all main groupings of States should be present.¹²⁰ What the case of Kosovo involved, was first of all the confrontation between attitudes of various groupings of states: NATO and several its partner States, such as Slovenia, on the one hand, and FRY, Russia, Ukraine, Belarus, Namibia, China, India and several Latin American States, on the other. Therefore, the possibility of changes in any rule of international law has proved unrealistic.

The legal significance of attitudes of certain States supporting the action by NATO against FRY is also far from being doubtless. NATO members and certain other States have considered the action against FRY as justifiable in law. Leaving aside the problem that several NATO members have referred to legal justifications different from one another, it should seem highly problematic and unfounded to hold that a justification by a State of a group of States of their own action may give rise to changes in the law in force. As regards supportive attitudes of States not participating in air strikes against the FRY, their value in law is equally highly disputable. As the International Court of Justice emphasised in *Asylum* case, the *opinio juris* in customary law shall be based on statements embodying the sense of legal duty or necessity and not merely sense of political expediency.¹²¹ Earlier, in *Lotus* case, the Permanent Court of International Justice made it clear that an abstention from acting, in order to possess relevance in custom-formation process, shall be accompanied by the verifiable sense of legal duty.¹²² This is helpful also in explaining the legal

¹¹⁹ See also the contention by Henkin to the effect that “the NATO action in Kosovo, and the proceedings in the Security Council, may reflect a step towards a change in the law, part of the quest for developing ‘a form of collective intervention’ beyond a veto-bound Security Council”, Henkin, Kosovo and the Law of “Humanitarian Intervention”, 93 *AJIL* (1999), 828

¹²⁰ Compare with Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 *AJIL* (1999), 837. Among the contributors to the editorial comments in that volume of the *American Journal*, Professor Charney has been regrettably the only contributor who has mentioned the relevance of *jus cogens* character of the prohibition of force in context of Kosovo.

¹²¹ *Asylum* case, *ICJ Reports*, 1950, 276-277; Cassese remarked that NATO’s air strikes have been condemned by limited number of States, A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*, 10 *EJIL* (1999), 792, 798. However, bearing in mind the requirements for effecting changes in the customary international law, as reflected in particular by the ICJ’s pronouncements, it would be more correct to suggest that NATO’s action has been supported and justified by the limited number of States. Equally, Nolte has correctly considered that reaction of third States was far from being prevalingly or even uniformly supportive of NATO’s action. See Nolte, Kosovo und Konstitutionalisierung: Zur Humanitaeren Intervention der NATO-Staaten, 60 *ZaoRV* (1999), 946-947

¹²² *Lotus*, PCIJ Series A, No. 10, 28

value of attitude of States which have not supported NATO's action, nor have explicitly condemned it.

Apart from difficulties connected with establishment of a rule allowing in exceptional situations a humanitarian intervention or humanitarian forcible countermeasures, based on peculiarities of international law-making, the emergence of such a rule is also very unlikely to survive the substantial test. Or, more precisely, the rule allowing humanitarian intervention or humanitarian forcible countermeasures is, due to its nature and substance, uncrystallisable, being incompatible to the nature of international legal order. The governments may never be supposed to accord due *opinio juris* to such a rule, because before doing that, they shall reflect whether they themselves are willing to be subjected to the use of force in case they commit large-scale human rights violations. For they are highly unexpected to give affirmative answer to that. Moreover, affirmation by State of a right under international law to humanitarian intervention would be tantamount to renunciation, to a certain extent and under certain conditions, of the inherent right to self-defence. No State may be reasonably expected to do that. Such an outcome seems hardly imaginable even in case of employing the strictest positivist approaches to the issue in question.

E. Non-Condemnation of NATO Action by the Security Council

Contention has been advanced that the use of force by NATO has not been condemned – thus has been approved – by the UN Security Council and the draft resolution to that effect proposed by Russia, China, India and Belarus has been defeated by 12 votes to 3. It has also been suggested that by adopting resolution 1244(1999) on Kosovo settlement, the Council has finally legitimised use of force by NATO (although no provision of this resolution may be interpreted to that effect).¹²³ This issue involves the problem of expression of will by member-states of the Council, on the one hand, and by the Council as a body, on the other.

Conceptually, assumption that unlawful use of force might be legitimised by virtue of non-condemnation by the Security Council is tantamount to an assumption that the prohibition of the use of force, as a rule and principle of the law, is not capable to produce legal consequences in case of its violation independently and without explicit statement by the Security Council condemning such a violation. But in fact, the prohibition of the use of force, as each and every rule under both treaty and customary international law, produces in case of its violation the appropriate legal consequences simply by virtue of its being the legal rule. To make the legal consequences of violation of a rule dependent upon subsequent determination or condemnation by any international organ means to deprive the rule of its legal character.

Henkin suggested that NATO's action could have been monitored by Security Council and ordered to be terminated, so it was under control of the UN. But the Council did not take such a decision.¹²⁴ As a matter of law, if such a proposition will be suggested as justification of military action, it contains in itself the great controversy. The fact whether or not an action can be monitored by the Security Council does not affect the legality of action itself. NATO's action was in clear breach of articles 2(4) and 53 of the UN Charter as well as of customary rules prohibiting the use of force. Article 53 of the UN Charter is more than clear in stating that no enforcement action shall be performed without authorisation by the Security Council. If the opinion of framers of the UN Charter were similar to that of Henkin, article 53 would have been framed in different way, namely, as allowing regional organisations to take enforcement measures without authorisation but with subsequent monitoring by the Council, as for instance, article 51 of the Charter does with regard to the right of self-defence. As we see, this is not the case. Also as a matter of fact, Henkin's proposition is unjustified. Three of five permanent members of Security Council, which were supporting NATO's action, were not supposed to allow the Security Council to monitor NATO's activities or, moreover, to order cessation of military campaign.

¹²³ Henkin, Kosovo and the Law of "Humanitarian Intervention", 93 *AJIL* (1999), 826; Wedgwood, NATO's Campaign in Yugoslavia, id., 830-831

¹²⁴ Henkin, Kosovo and the Law of "Humanitarian Intervention", 93 *AJIL* (1999), 826

Stance of member-States of the Security Council which opposed resolution condemning NATO military action shall not necessarily be interpreted as justifying this action. It is well-established that not every stance of States may amount to their attitudes with significance in law. States express sometimes attitudes for political expediency, as explained above. But even if it may be admitted that opposition by members to adoption of resolution condemning NATO action can be interpreted as justification of this action by members, such an attitude of 13 states is of little relevance both under general international law and from perspective of expression of its own will by the UN. This begs the question of how the will of the Security Council as a body should be interpreted. Can the Council as such be deemed as having acquiesced to NATO's action?

It goes without saying that one is not allowed to do by way of acquiescing what is not within one's powers to do explicitly. The Security Council, as a body of the United Nations, owes its existence and powers to the UN Charter, the constitution of limited powers, to which it is subordinated. The Council as a political body, as International Court of Justice affirmed in *Admissions* case, cannot be released from its duty to observe provisions of constituent treaty by which it was established.¹²⁵ If the Charter requires that "no enforcement measures shall be taken without authorisation by the Security Council", this means that this provision shall be respected not only by member-states and regional organisations, but also by organs of the United Nations. If the Council by implicitly acquiescing into NATO's action confers legitimacy on it, this means that it legitimises violation of the Charter. This is clearly beyond the Security Council's powers.

Security Council cannot be deemed to have approved NATO's action also for more pragmatic reasons. The Council is not empowered to grant regional organisation the right to perform enforcement measures without authorisation by the Council. Nor is it supposed to be willing to do that. This would mean that every regional organisation could start armed coercive actions against a State without asking the Council for authorisation. If significant number of Council members or at least one permanent member are engaged in such a coercive action (what is very likely to be the case, because no one wishes to be deprived of legitimacy after having launched risky and costly enterprise), then the Council will always "acquiesce" into it. Then the question arises what is the function and utility of article 53 of the UN Charter at all. Therefore it is very unlikely that the Council would agree with such an interpretation of its powers.

Nor has been such an interpretation of Security Council's powers able to gain support of UN membership. All support, explicit or "implicit" may be argued to have been expressed by those 13 Security Council members and by member-states of NATO. This is far from being sufficient to amount to subsequent practice which might be relevant for interpretation of the UN Charter. Notwithstanding "acquiescence" or "approval" by the Council, the action by NATO has been treated as illegal by the certain number of States.

Consideration of the Security Council's failure to condemn NATO action has also another drawbacks. It is unclear to what extent the NATO action may be considered as legitimised in consequence of non-condemnation by the Security Council. Along with violation of *jus ad bellum*, the air strikes against the FRY involved considerable violations of *jus in bello*. Attempt to consider non-condemnation by the Security Council as implicit approval of NATO air strikes will necessarily raise the question whether the Security Council might be considered as tacitly legitimising, approving or acquiescing to violations of international humanitarian law connected with air strikes. The Security Council remained silent both concerning the use of force and concerning violations of humanitarian law. Yet, to interpret the Council's silence as acquiescence to those violations would not be a proper reflection of the state of things in question.

According to articles 1 and 55 of the UN Charter, the protection and promotion of human rights is one of the principal purposes of the United Nations and thus directly binding limitations upon the action by the Security Council.¹²⁶ Moreover, in acting for maintenance and restoration of

¹²⁵ *Admissions to the United Nations*, Advisory Opinion, *ICJ Reports*, 1947-48

¹²⁶ According to article 24 of the Charter, the Security Council shall act in accordance with purposes and principles of the United Nations. According to article 25, the decision by the Security Council shall be in accordance with the UN Charter in order to be binding upon member States.

international peace and security and in adopting enforcement measures in this context, the Security Council in each and every case considers itself bound by human rights standards. This is demonstrated by inclusion of so-called humanitarian exceptions in resolutions adopting Chapter VII enforcement measures. Moreover, the Security Council in its decisions on conflict in Former Yugoslavia considered that violations of international humanitarian law shall be as such considered as immediate and direct threats to international peace and security. End of such violations has been considered by the Council as a necessary prerequisite for restoration of international peace and security.

Therefore, the Security Council is bound by human rights standards both by operation of the Charter and by its own practice. It may thus in no way be considered as having approved or acquiesced a forcible action involving considerable non-compliance with international humanitarian law. Even if there were evidences supporting assumption of the Council's approval and acquiescence, such an action by the Council should be considered as invalid because its incompatibility with the UN Charter.

F. NATO Action in Kosovo and International Humanitarian Law

Military action against FRY involved large extent of casualties against civilian population both in and outside Kosovo and both against ethnic Serbs and Albanians. It entailed also destruction of living places, industrial entities and means of communication of a civilian nature throughout the FRY, as well as caused considerable damage to environment. Such an impact of NATO air strikes against the FRY has been confirmed also by the United Nations High Commissioner for Human Rights (UNHCHR).¹²⁷ These casualties are undoubtedly falling within operation of Geneva Conventions of 1949 and are punishable both under the Statute of International Criminal Tribunal for Former Yugoslavia and International Criminal Court (if the Statute of the latter would have entered into force at the time of bombing). It is also beyond doubt that the Statute of ICTY does not lay down any restriction *ratione personae* with regard of Tribunal's jurisdiction on crimes committed in territory of former Yugoslavia. So the Tribunal clearly possesses jurisdiction on acts performed during NATO operations which have entailed civilian casualties.

Conclusion that NATO's actions have violated international humanitarian law and entail individual criminal responsibility are yet only one side of coin. NATO's campaign in Kosovo shall put onto agenda the issue of necessary link between operation of *jus in bello* and *jus ad bellum*. Kosovo has shown that the frontier between these two areas are not so strict as earlier, when these concepts emerged in international law. In 18th or 19th, also in early 20th century, in case of armed attack on a State, there could perfectly separately be done a legal evaluation of aggressor's compliance with the rules governing the use of armed force, on the one hand, and with humanitarian law on the other. The enormous progress in development of military technologies shall raise issue of interdependence between *jus ad bellum* and *jus in bello*. It should be clear for every State that the violation of article 2(4) of the UN Charter and its counterparts under customary international law will very likely and perhaps inevitably involve violation of international humanitarian law protecting the civilian population having no real link with crimes the launchers of military intervention are going to prevent and respond. Compliance with *jus ad bellum* and humanitarian law do not any more involve separate judgments on each by intervening State(s), as they probably did under Westphalian system of international relations. It might be well imagined that a government, while deciding to use the force, does not intend to violate humanitarian law, for instance by using prohibited weapons with non-selective effect and attacking protected objects. However, a State using modern military weaponry must be deemed to have ascertained that such violations are hardly avoidable. Increase of risk of breaching *jus ad bellum* necessarily increases the risk of breaching *jus*

¹²⁷ Report by UNHCHR on the Situation of Human Rights in Kosovo, 31 May 1999, see on the internet site of the UNHCHR, <http://www.unhchr.ch/Hurricane/Hurricane.nsf/FramePage/Statements/OpenDocument>. Further reports by the UNHCHR criticising the NATO action are referred to in Cassese, A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*, 10 EJIL (1999), 796

in bello. The problem deserves careful analysis and evaluation both by legal advisers and politicians in process of preparation and performance of respective political decisions.

G. Kosovo: Conclusion

Good intentions alone do not necessarily guarantee good results. Kosovo has been no exception to that rule. US President Clinton has referred to lessons of Bosnia which was dictating to the Alliance to respond to humanitarian emergency in Kosovo:

“In Bosnia we had the UN in there first in a peace-keeping mission, and we tried for four years, you know, 50 different diplomatic solutions, all those different maps, all that different arguments, and at the end of it all, from 1991 to 1995, we still had Srebrenica. ... When it was all said and done, we had a quarter of a million people dead and two and a half million refugees. And I think what you have to understand is that we saw this through the lens of Bosnia. And we said we are not going to wait a day, not a day if we can stop it. ... Once we knew there was a military plan, they had all those soldiers deployed, they had all those tanks deployed, you know, we knew what was coming and we decided to move”.¹²⁸

And they moved. “When it was all said and done”, we had some 10 thousand people dead and some 800 thousand refugees.¹²⁹ Being far from arguing that the increase in number of refugees shall be attributed to NATO or to its member States, it should nevertheless be conceded that those numbers would not be so high in the absence of NATO air strikes. Inaction in certain cases may give rise to large-scale human suffering and atrocities, but the forcible interference is as such not adequate for preventing such atrocities and suffering.¹³⁰ This conclusion does not, of course, prejudice the criminality of atrocities committed in Kosovo against civilian population, nor does it prejudice the relevance of individual responsibility of perpetrators, including FRY’s political leaders. It is clear, however, that use of force against the FRY did not prevent them from committing those atrocities.

The case of Kosovo sets therefore not merely a precedent of unlawful use of force, not merely an act of power politics, not merely an instance where the role of the United Nations in maintenance of international peace and security has been highly endangered, but also it gives a clear indication that in all legal, political and sociological perspectives, the unilateral use of force in international relations is a highly unsuitable tool for adjustment of international differences. Not only does it violate the positive rules of international law, but it is also inherently designed to fail in achieving the humanitarian purposes it allegedly serves.

¹²⁸ Cited in Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *AJIL* (1999), 882-883

¹²⁹ Prior to the bombardments, the largest case of atrocities has been the massacre at Racak, involving 45 deaths, Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *AJIL* (1999), 628. See also O’Connell, *The UN, NATO and International Law after Kosovo*, 22 *Human Rights Quarterly* (2000), 80. For the view that air strikes did not have any definitive impact on decisions of perpetrators of atrocities, see Nolte, *Kosovo und Konstitutionalisierung: Zur Humanitären Intervention der NATO-Staaten*, 60 *ZaoRV* (1999), 955-956.

¹³⁰ Compare with Schreuer, *Is there a Legal Basis for the NATO Intervention in Kosovo?* 1 *International Law Forum* (1999), 153

Part Six

Peace-Keeping Forces – The Legal Basis for Establishment

I. Introduction

The principal factor in historical, political and legal background of UN peace-keeping operations has been the failure by the Organisation and its Member-States to conclude agreements under article 43 of the UN Charter providing the possibility to deliver military units for enforcement of the UN Security Council decisions. This circumstance deprived the UN the possibility to have active military impact on international conflicts and the only way to appear as an actor was limited to “narrow security role”. In general, the use of enforcement powers by the United Nations always has always been dependent on existence of high-degree consensus between various States and groups of States. Peace-keeping has been therefore considered as an alternative to collective security.¹³¹ This factor is crucial in determining the legal basis of those operations, because it clarifies some relevant consequences. In the absence of “article 43 agreements” the Organisation has to find the legal basis for every concrete PK operation in each concrete case. This task involves the questions of interpretation of UN Charter in order to make it clear which organs of the UN are competent to establish PK forces and by virtue of which powers may they do so.

Two principal issues in legal basis of United Nations Peace-keeping operations is the powers of relevant bodies of the UN and the consent by the affected parties.¹³² As far as PK operations are based on consent given by parties, it may seem not well understandable at a first sight what an importance of powers and functions of the UN principal organs may be: the parties to the conflict, in case they reach an agreement, may negotiate on a bilateral basis or under involvement of third States on establishment of peace-keeping forces for purposes of maintenance of peace in and prevention of aggravation of a given conflict. The role of organs of the United Nations may, in a formalistic sense, seem to be here superfluous.¹³³ On the other hand, the United Nations as well as several regional organisations have considered and are considering the establishment of PK forces as an integral element of their activities in the area of maintenance of international peace and security. PK operations though not inevitably and necessarily connected with action by an international organisation, constitute nevertheless an important instrumentality in their activities. Moreover, establishment of PK forces under the auspices of the UN may be considered to be endowed with increased degree of legitimacy, because the process of their establishment is characterised by relatively more transparency and more balance between conflicting political interests. This factor increases also the possibility of impartiality of PK forces thus established. Also in an institutional sense, PK forces established by the United Nations are subsidiary organs of this organisation based on article 7, article 22 and article 29 of the UN Charter.

¹³¹ McCoubrey & White, *Blue Helmets: The Legal Regulation of United Nations Military Operations* (1996), 2-3, 11-12; Murphy, Force and Arms, in Schachter & Joyner, *United Nations Legal Order*, vol. 1 (1995), 292

¹³² Bothe, Peace-Keeping, in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 587-588

¹³³ Establishment of *ad hoc* independent peace-keeping forces has been practiced without the mandate of international organisations, mainly in conflicts of Middle East and Indo-China. For an overview of such operations see Wiseman, UN Peace-Keeping Operations: A Comparative Analysis, in *The United Nations and the Maintenance of International Peace and Security* (UNITAR-edited) (1987), 315ff

There is a uniform practice that the PK forces are created by a resolution of an UN organ. It is currently held for conventional wisdom that the bodies relevant in peacekeeping context are the Security Council, the General Assembly and the Secretary-General. The doctrine is however not unanimous which power of which organ may serve as a basis of establishment of PK operations. The International Court of Justice, although having possibility to clarify this issue by way of *obiter dictum*, reluctantly refused to clarify which articles of the UN Charter were the basis of PK operations.¹³⁴

The Charter of the United Nations does not contain express authorisation for any organ of the UN to establish PK forces. Therefore, relevance of any UN body for establishing PK forces should be focused upon in the light of functions and powers entrusted to it under the Charter. As Seyersted stated, “even if it is determined that the Organisation as a whole has the inherent power to establish and operate military forces with the consent of Member States concerned, the organ making a decision to this effect can only do so within its field of competence as laid down in the Charter”.¹³⁵ All these circumstances make it necessary to examine the place of PK operations in context of powers and functions of principal organs of UN and, to a certain extent, of regional organisations.

It may be held for a conventional wisdom that implied or inherent powers of international organisations may provide basis for action not expressly warranted under their constituent instruments and may thus have some relevance also for peace-keeping operations. Such an approach has more than enough support in theory¹³⁶ as well as in jurisprudence of the International Court of Justice.¹³⁷ It is not the purpose of this paper to challenge the relevance of implied powers. It is nevertheless submitted that although frequent references to implied/inherent/general powers of the UN organs are made as to a basis for establishment of PK operations, the provisions of the UN Charter relating to maintenance of peace and security and to the powers of its organs in this regard may provide more clear guidance than inferred by some commentators.

As Eric Suy made it clear, the difference should be made between distribution of powers between UN bodies concerning the establishment of PK forces and distribution of powers concerning continuing authority over established operations.¹³⁸ The authority to establish PK forces, as the core issue in sense of legal basis of PK operations, will be mainly focused upon here.

II. The Security Council

As far as the Security Council is vested with primary responsibility for maintenance of international peace and security,¹³⁹ its role has to be analysed first. The natural difficulty in this regard is presented by the circumstance above referred to, that the Charter contains no explicit basis for PK operations in Chapters V, VI and VII, which govern respective powers of the Security Council. This circumstance has its impact on analysis of the role of the SC whose powers under the Charter vary in substance and legal force. Therefore, the nature of PK operations and their role in

¹³⁴ *ICJ Reports*, 1962, 177

¹³⁵ Seyersted, *United Nations Forces in the Law of Peace and War* (1966), 170

¹³⁶ Seyersted considers that limiting the powers of international organisations to those enumerated in their constitutive instruments may not be supported by practice of intergovernmental organisations, because they enact regulations, conclude treaties, exercise territorial jurisdiction, establish organs although the constitutive instruments do not specifically confer relevant powers on them, Seyersted, *United Nations Forces in the Law of Peace and War* (1966), 144-150; Seyersted holds that it is a principle of well-established customary international law that the powers of an organisation are not confined to those enumerated in the constitutive instrument, *id.*, 151

¹³⁷ *Reparations case*, *ICJ Reports*, 1949, 182, 184; *Effect of Awards*, *ICJ Reports*, 1954, 57; *Certain Expenses*, *ICJ Reports*, 1962, 167-168; *WHO*, *ICJ Reports*, 1996, para. 25; *Cumaraswamy*, General List No. 100, 1999, paras 40ff.; For a sceptical approach see Opinion by Judge Hackworth in *Reparations case*, stating that “powers not expressed cannot freely be implied”, due to the delegated nature of powers of the United Nations; *ICJ Reports*, 1949, 198

¹³⁸ Suy, *Peace-Keeping Operations*, in Dupuy (ed.), *A Handbook of International Organisations* (1988), 384

¹³⁹ UN Charter, article 24(1)

achievement of UN purposes shall be a necessary guidance for determining the suitability of particular powers of the Security Council for establishment of PK forces.

On the basis of such an assumption, it is now possible to focus upon the concrete powers of the Security Council in order to assess them in sense of their suitability for establishment of PK forces. The obvious difficulty in this regard is presented by the circumstance that in various cases the various articles from Chapter VI or Chapter VII of the Charter are invoked as a legal basis of a particular PK operation. This is helpful, but may under circumstances be also confusive. Therefore, the best suitable approach seems to be examination of those particular provisions of the Charter in the light of nature and function of PK operations. Such an approach may be of assistance in understanding if and to what extent those particular provisions may provide legal basis for PK operations.

In examining particular powers of the Security Council in sense of their suitability for establishment of PK forces, the discretionary nature of Security Council's powers should be necessarily borne in mind. Of course, the Council is limited by purposes and principles of the United Nations,¹⁴⁰ but within those limits this organ is empowered to act according to its discretion. The Council possesses wide discretion in assessing situations in which it is called upon to act. It may decide which measures shall be necessary and effective in a given context. This context necessarily consists not only of factual situations, but also of the nature of particular powers of the Council. Thus, the Council may decide which of its powers, as considered in conjunction with other powers and in the light of factual circumstances, might be useful and necessary for performance of its primary responsibility in the area of peace and security. This conclusion is, of course, of general nature, but it is necessary to understand properly the suitability of particular powers of the Security Council for establishment of PK forces.

1. Powers under Chapter VI of the Charter

Chapter VI of the UN Charter deals with procedures of pacific settlement of disputes. This circumstance has been considered by some authors as preventing establishment of PK forces under Chapter VI. Higgins feels generally uncomfortable with an approach that Chapter VI may provide basis for establishment of PK forces.¹⁴¹ According to Giobanu, it is impossible to find constitutional basis for PK operations in Chapter VI of the Charter, because these operations may, to a certain extent, be connected with the use of force, which is in no way an element of pacific settlement of disputes.¹⁴²

However, under Chapter VI the Council is empowered to deal not only with disputes in a strict sense, but also with situations which may, in case of their continuance, endanger international peace and security.¹⁴³ According to article 36(1) of the Charter, the Council may "recommend appropriate procedures or methods of adjustment" of a situation of such a nature.¹⁴⁴ In *Certain Expenses* case the Court clearly decried United Nations Emergency Force (UNEF) in Egypt as an operation *to promote and to maintain a peaceful settlement of the situation*.¹⁴⁵

¹⁴⁰ UN Charter, article 24; *Namibia* (Advisory Opinion), *ICJ Reports*, 1971, 52

¹⁴¹ Higgins, *United Nations Peace-Keeping*, vol. 4 (1981), 144

¹⁴² Giobanu, *The Power of the UN Security Council to Organise Peace-Keeping Operations*, in Cassese (ed.), *UN Peace-Keeping. Legal Essays* (1978), 17, 40; the official UN-edited handbook also states that PK operations "go beyond purely diplomatic means of those described in Chapter VI of the Charter" and makes emphasis on the notion of "Chapter six and a half", *The Blue Helmets*, 2nd ed. (1990), 5

¹⁴³ Kelsen, *The Law of the United Nations* (1950), 401

¹⁴⁴ References to this provision in context of PK operations see in Suy, in Dupuy, *A Handbook of International Organisations* (1988), 383; also Murphy, *Force and Arms*, Schachter & Joyner (ed.), *United Nations Legal Order*, vol. I (1995), 294

¹⁴⁵ *ICJ Reports*, 1962, 172; The fact that UNEF has been established by the General Assembly, is without prejudice to our conclusion. As an element of peaceful settlement, the PK forces may be established both by General Assembly and the Security Council, both organs possessing respective Charter-based competence in this regard.

It may be at a first sight, be not well understandable how a provision dealing with adjustment of situations, as understood narrowly within the dispute settlement perspective, may provide legal basis for UNPK operations, which really do not, as such, fall within the category of methods of dispute settlement. It should be borne in mind, however, that approach taken by the ICJ concerning the legal basis of PK operations does not permit to understand “appropriate procedures or methods of adjustment” in sense of article 36 so narrowly. The Court in case concerning *Certain Expenses* did affirm that article 11(2) and article 14 of the Charter providing for powers of General Assembly similar to those of the Council under article 36 may serve as a basis for establishment of PK operations. Therefore, there appears little doubt that the Security Council – an organ with primary responsibility for international peace and security – may exercise a power which may also be exercised by the General Assembly, whose responsibility in this area is secondary and residual.

Kelsen correctly observes that recommendations made by the Security Council on “procedures or methods of adjustments” in sense of article 36(1) do not relate to substantive settlement of a dispute or of a situation, but merely to procedural aspects thereof. At the example of *disputes*, he concludes that “procedures or methods” in sense of article 36(1) are the identical with means of settlement of disputes in sense of article 33(2).¹⁴⁶ But Kelsen does not clarify what the content of recommendations under article 36(1) could be, when they relate to *a situation* and not to a dispute. Obviously, the Council may recommend all methods of adjustment which it considers appropriate to prevent continuance of a situation which is likely to endanger the maintenance of international peace and security. Peace-keeping operations, which do not relate to substantive terms of settlement, but only to methods of adjustment, naturally fall within this category and may therefore be initiated on the basis of recommendations under article 36(1).¹⁴⁷ It remains therefore to conclude that Chapter VI of the UN Charter may provide legal basis for establishment of PK forces.

The last submission in context of Chapter VI shall be that PK operations established under that Chapter may be empowered to use the force.¹⁴⁸ As it follows from conclusions reached by the ICJ in *Certain Expenses* case, any PK force not involving use of force against a *State* may be established outside the context of Chapter VII.¹⁴⁹ The Charter, taken in isolation, may leave open the question which forcible actions may be performed exclusively under Chapter VII. But the Court has given its authoritative interpretation of relevant provisions of the Charter by stating that only actions involving enforcement against a *State* are exclusively governed by Chapter VII.¹⁵⁰ The non-State secessionist or separatist elements may therefore be subject to the use of force by the Security Council even outside the context of Chapter VII of the Charter.

2. Powers under Chapter VII of the Charter

a) *Article 39* – According to article 39, the Security Council may either take coercive measures or make recommendations with a view of maintaining or restoring international peace and security. Such recommendations may undeniably serve as a basis of PK operations. There seems to be no controversy here.

¹⁴⁶ Kelsen, *The Law of the United Nations* (1950), 402, 415; Article 33 of the Charter obliges the States to settle their disputes by negotiation, conciliation, arbitration or judicial methods. According to article 33(2) the Council may “call upon the parties to settle the dispute by such means”.

¹⁴⁷ Recommendations concerning substantive settlement or adjustment of a dispute or of a situation is the subject-matter of article 37(2) of the Charter, see Kelsen, *The Law of the United Nations* (1950), 401. See also UNSC res. 186(1964) establishing United Nations Forces in Cyprus (UNFICYP) and clearly designating its recommendations as a basis of establishment of that force (para. 4).

¹⁴⁸ It should not be forgotten that Chapter VI of the Charter governs peaceful settlement of *disputes only*, but neither its title nor any provision of it may justify an assumption that settlement or adjustment of a *situation* under Chapter VI shall be necessarily peaceful.

¹⁴⁹ *ICJ Reports*, 1962, 177; See also Written Statement by the Government of Netherlands in *Certain Expenses* case, reaching analogical conclusions, *ICJ Pleadings*, 1962, 173

¹⁵⁰ Indeed, the ONUC has been authorised to use force without a reference to Chapter VII, UNSC res. 161(1961), para.1

b) *Articles 41 and 42* – The International Court of Justice clearly stated in *Certain Expenses* case that PK operations are not enforcement actions.¹⁵¹ It has been argued therefore by some writers that articles 41 and 42 of the Charter are not in position to provide legal basis for establishment of PK forces.¹⁵² It has been considered that insofar articles 41 and 42 deal with enforcement actions, “there would be a *contradictio in subjecto* to designate, as their [PK operations’] constitutional basis, a legal rule which precisely regulates that kind of actions [enforcement ones]. It is not certain that under that legal rule [article 39] the Security Council may take other measures than those provided in Article 41 and Article 42.”¹⁵³

The incorrectness of such an approach may be illustrated by text of article 39, which empowers the Council to take not only enforcement actions, but also to make recommendations. Moreover, the wording of articles 41 and 42, which contains merely illustrative and not exhaustive list of enforcement actions, does not *a priori* exclude establishment of PK operation as a part of action by the Security Council under Chapter VII. According to articles 41 and 42 the Council possesses wide discretion in choosing the measures it will apply.¹⁵⁴ There are no Charter-based limitations on the powers of the Council as to the nature of measures under Chapter VII and they may not be held as strictly limited to enforcement ones.¹⁵⁵ PK operations as such, by their very nature, may therefore constitute part of enforcement action taken by the Security Council.

It has been suggested that the Council, “acting under article 39, may not take other actions than the enforcement measures provided for in the two legal provisions that the said rule specifically mentions”.¹⁵⁶ It must however be observed that the limitations imposed by the Charter on the SC by virtue of operation of article 39 is of negative rather than of positive nature. It merely implies that the enforcement measures may not be taken unless determination under article 39 has been made. It does not mean, therefore, that the Council’s role after making determination under article 39 is limited solely to enforcement measures. The Council may adopt every measure it deems appropriate for restoration of international peace and security and not only enforcement one.

The conclusions reached by the International Court of Justice in *Certain Expenses* case do not, in fact, justify the assumption that Chapter VII may not provide legal basis for PK operations. The conclusions made by the Court have negative rather than positive importance for issues here under consideration. The assessment by the ICJ of UNEF and ONUC as non-enforcement actions was designed to demonstrate that establishment of those forces was not exclusively within the powers of the Security Council. The aim was to show that the General Assembly also might assume certain responsibility in the area of peace and security provided that only non-enforcement measures are involved. But the Opinion of the Court on *Certain Expenses* did not prejudice the powers of the Security Council to establish PK forces as part of an action under Chapter VII. This was simply not within the framework of request for advisory opinion in that case.

¹⁵¹ *ICJ Reports*, 1962, 166, 171

¹⁵² The official UN-edited handbook of UNPK operations emphasises that PK operations “fall short of the provisions of Chapter VII ... which deal with enforcement”, *The Blue Helmets*, 2nd ed. (1990), 5; “The international force in Korea was not a United Nations peace-keeping operation in the current sense of the term since the enforcement action was not carried out by the Organisation, was not based on the consent of the parties, and involved the use of force”, *id.*, 9; Reference to *Certain Expenses* case is made in this regard by Giobanu, *The Power of the UN Security Council to Organise Peace-Keeping Operations*, in Cassese (ed.), *UN Peace-Keeping. Legal Essays* (1978), 18

¹⁵³ Giobanu, *The Power of the UN Security Council to Organise Peace-Keeping Operations*, in Cassese (ed.), *UN Peace-Keeping* (1978), 18, for similar scepticism see *id.*, 35-36

¹⁵⁴ According to article 41 “The Security Council may decide what measures not involving the use of armed force *are necessary* to give effect to its decisions”. Under article 42 the SC “may take such action by air, sea or land forces *as may be necessary* for maintain or restore international peace and security” (emphasis added).

¹⁵⁵ Secretary-General Hammarskjöld was holding that article 41 of the Charter could serve as a basis of UN operation in Congo, although it involved no enforcement measures, in Simmonds, *Legal Problems Arising from United Nations Military Operations in Congo* (1968), 62. Moreover, ICTY has been established under article 41 of the Charter. Although the text of article 41 does not expressly provide for this possibility, the Tribunal held in *Tadic* case that this article may serve as a legal basis of its establishment, *Tadic*, Decision by Appellate Chamber, 2 October 1995, IT-94-1-AR72, paras 35-36

¹⁵⁶ Giobanu, *The Power of the UN Security Council to Organise Peace-Keeping Operations*, in Cassese (ed.), *UN Peace-Keeping* (1978), 22

Particular scepticism has been expressed as to suitability of article 41 of the Charter for establishment of PK forces, because they involve only non-military enforcement measures and PK operations are in fact military measures. It should be borne in mind, however, that the only kind of action excluded from the ambit of article 41 is *military enforcement measures*. PK operations cannot fall under that category. The fact that PK forces may use force in self-defence does not permit to consider them as enforcement measures directed against a State or a non-State entity.

The recent developments in the UN practice have put onto agenda the issue of necessity to have an extended notion of peace-keeping. In particular, the UNOSOM II and UNPROFOR in former Yugoslavia are referred to as instances of combination of peace-keeping and enforcement measures under Chapter VII, bearing in mind that some support for powers of those missions may be found in resolutions of the Security Council adopted under Chapter VII.¹⁵⁷

Nevertheless, there is still possible to make difference in sense of legal basis. The Council may create non-enforcement PK forces with the consent of parties to the conflict without resorting to its Chapter VII powers. But if the Council comes to the conclusion that a given situation constitutes threat to the peace in sense of article 39 of the Charter, it may add enforcement elements to powers of a PK force already established. Such a subsequent enlargement of powers of an existing PK force may be effected only by reference to Chapter VII, as it was evidenced in cases of UNPROFOR¹⁵⁸ and UNOSOM.¹⁵⁹ If element of enforcement (including possible enforcement against a State) is present, it is imperative that it must be based on Chapter VII decision. By adopting Chapter VII decisions, the Security Council may utilise the units and entities created by its earlier decisions (including non-Chapter VII ones) for the purposes of enforcement measures. This is in accordance with wide discretion the Security Council enjoys in deciding on measures to be taken for prevention or suppression of threats to the peace. But again, this discretion does not empower the Council to add enforcement powers to the mandate of a PK force without formally resorting to Chapter VII.

The difference both in legal basis and legal nature is here perfectly observable: the peace-keeping mission may be transformed into peace-enforcement one. Presence or absence of consent makes this clear. Transformation of peace-keeping into peace-enforcement takes place without requiring consent by parties. This difference is also crucial for determining allocation of powers between the UN and regional organisations. The latter are empowered to establish peace-keeping missions, but not to perform enforcement activities.¹⁶⁰

c) Provisional Measures under Article 40 – According to the prevailing opinion, the most proper legal basis for PK operations may be article 40 of the Charter.¹⁶¹ Article 40 of the Charter empowers the SC to “call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable”. It follows from the nature of PK operations, which have been described as follows: “The peace-keeping is not the same as peaceful settlement; it is simply a provisional measure aimed at stopping the fighting – it does not, at least in its basic form, sort out the underlying problem”.¹⁶²

While this is generally true, the scope of applicability of article 40 of the Charter is also of some relevance. Provisional measures under article 40 may be ordered: (a) after the determination of existence of a threat to the peace in sense of article 39 has been made by the Council; and (b)

¹⁵⁷ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 327-329

¹⁵⁸ UNSC Res. 836(1993), paras 4-5

¹⁵⁹ UNSC Res. 837(1993), para. 5

¹⁶⁰ UN Charter, article 53(1)

¹⁶¹ Higgins, *United Nations Peace-Keeping*, vol. IV (1981), 144; Giobanu, *The Power of the UN Security Council to Organise Peace-Keeping Operations*, in Cassese (ed.), *UN Peace-Keeping. Legal Essays* (1978), 19, putting emphasis on “strong resemblance between the operations here under consideration and provisional measures provided for in Article 40”. According to the official UN-edited handbook, “peace-keeping operations are intended to be provisional and thus temporary measures”, *The Blue Helmets*, 2nd ed. (1990), 8; See also Murphy, *Force and Arms*, in Schachter & Joyner, *United Nations Legal Order*, vol. I (1995), 294; Rudolph, *Peace-Keeping Forces*, in Wolfrum, *United Nations: Law, Policies and Practice*, vol. II (1995), 963

¹⁶² McCoubrey & White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996), 5

before the Council decided to make recommendations under article 39 or take enforcement actions under articles 41 and 42. Therefore, although generally article 40 is highly suitable for establishment of PK forces, in practice its applicability depends on fulfilment of these two conditions. This should necessarily be borne in mind while trying to invoke article 40 as a legal basis of a particular PK operation.

Within above-mentioned limits, there seems to be no Charter-based limitation on using article 40 as a basis for establishing PK forces. It has been asserted that the nature of provisional measures precludes establishment of PK operations as a provisional measure under article 40. It has been argued by way of analogy that as far as provisional measures indicated by international tribunals focus on action by States exclusively and not on actions by a tribunal itself, the Security Council may not order provisional measures which go beyond requiring action or omission by States only and exclusively. Provisional measures may not, therefore, consist of action by the Organisation itself.¹⁶³

It should be necessarily emphasised in this connection that nature and extent of limits of provisional measures depends not on essence of provisional measures (as reflected in the Charter or in the Statute of a relevant judicial institution), but on limits of competence of an organ ordering those measures. The powers of the Security Council are relatively wide in this regard, because it may not only deal with a dispute or a situation, but also take independent action for its resolution. Therefore, the provisional measures may include orders directed to parties to conflict requiring from them to act in a certain way or to abstain from certain action or may consist of orders to comply with the action taken by the Council itself, such as establishment of PK operation.¹⁶⁴ The international tribunals do not possess adequate powers for independent unilateral action for preventing aggravation of dispute, while the Security Council does, by virtue of operation of article 29 of the Charter enabling it to create subsidiary organs for fulfilment of its functions.

Frowein expresses somewhat sceptical view on article 40 of the Charter as the basis of PK operations, considering that establishment of a PK force under article 40 would go beyond the scope of article 40 and constitute in fact action under article 42.¹⁶⁵ As it has been concluded above at the example of article 41, it may be reiterated also here that PK operations do not constitute military enforcement measures and therefore do not belong exclusively to the ambit of article 42.

The question may arise in this regard whether the establishment of PK mission under article 40 requires determination by the Security Council according to article 39 of the Charter, which is the basis of operation of other Chapter VII decisions including indication of provisional measures under article 40; in other words, whether the Council may indicate provisional measures outside the context of Chapter VII. Frowein considers that systematic position of article 40 supports clearly the view that this provision assumes the fulfilment of the prerequisites for application of article 39. In certain cases the Security Council has made formal determination under article 39 in order to make possible application of article 40.¹⁶⁶

3. An Interim Conclusion

It has been thus established that both Chapter VI and Chapter VII of the UN Charter are in position to provide legal basis for UNPK operations. In this regard, the question may arise, which criteria may be used in order to clarify whether a given PK operation should be considered as based either on Chapter VI or on Chapter VII. The answer may be offered on the basis of analysis of the Charter itself, which contemplates action by the Security Council in different contexts. Chapter VI

¹⁶³ Written Statement by South Africa in *Certain Expenses* case, *ICJ Pleadings*, 1962, 261ff.; Giobanu, *The Power of the UN Security Council to Organise Peace-Keeping Operations*, in Cassese (ed.), *UN Peace-Keeping* (1978), 20-21

¹⁶⁴ It seems therefore that such a limited perspective on provisional measures by the Security Council is not justified in the light of article 40 of the Charter which, according to its natural and plain meaning may contemplate actions and omissions by States as well as compliance with actions taken by the Security Council.

¹⁶⁵ Frowein, *On Article 40*, in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 619

¹⁶⁶ Frowein, *On Article 40*, in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 618

deals with disputes or situations “the continuation of which is likely endanger the maintenance of international peace and security”.¹⁶⁷ Chapter VII, on the other hands, deals with “existence of any threat to the peace, breach of the peace or act or aggression”.¹⁶⁸ The Council may decide that establishment of a PK force is necessary to avoid continuance of a dispute or of a situation which is likely to endanger international peace and security. The Council may equally decide that an establishment of a PK force may be appropriate in response to threat to the peace which already exists. In first case the Council may act under Chapter VI, in second case – under Chapter VII. The power to make appropriate determinations is a part of Security Council’s discretionary powers in the area of international peace and security.

Likewise, the Security Council may face the circumstance that article 2(7) of the UN Charter prohibits the United Nations to interfere into matters essentially within domestic jurisdiction of States. Nevertheless, if the Council considers that the needs of maintenance of peace and security so require, it may adopt decision on establishment of a PK force under Chapter VII and thereby escape operation of article 2(7). This may happen if establishment of a PK force is decided in context of or in conjunction with enforcement measures; for instance, if the Council uses its enforcement powers in order to achieve stationing of a PK force on a given territory. Otherwise, the Council shall respect the domestic jurisdiction of States.

It has to be concluded, therefore, that the various types of powers of the Security Council, as based on relevant Charter provisions, may empower this organ to effectively discharge its primary responsibility in the area of peace and security by choosing relevant legal basis for establishment of a given operation and by adapting its actions to the nature and level of aggravation of a given conflict, as well as to the level of political consensus within the Security Council itself. Only such an approach is in position to enable the Council to exercise its “primary responsibility in the peace-keeping to the fullest extent possible”.¹⁶⁹

4. Case Study: ONUC

United Nations Operation in Congo (ONUC) may seem probably to be most controversial PK operation initiated by the United Nations and is therefore worth of being focused separately. Absence in UN resolutions of a reference to a concrete Charter provision as a legal basis of ONUC, as well as dynamic development of that operation leading to its evolution into a force empowered to use force and engage into hostilities, has given basis to radical divergence of opinions in a theory as to ONUC’s legal basis. Seyersted, for instance, argues that ONUC might be considered to be based on article 42 of the Charter.¹⁷⁰ Writers like Schachter,¹⁷¹ Higgins¹⁷² and Simmonds¹⁷³ argue, on the other hand, that ONUC has been established as a provisional measure under article 40 of the Charter.

The conclusion by Simmonds that articles 41 and 42 may not be considered as a legal basis of ONUC is obviously correct and in accordance with an approach expressed by the ICJ in *Certain Expenses* case that ONUC was not a preventive or enforcement measure under Chapter VII.¹⁷⁴ Nevertheless, the line of reasoning chosen by Simmonds to justify his conclusion can hardly be in

¹⁶⁷ UN Charter, article 33, paragraph 1

¹⁶⁸ UN Charter, article 39

¹⁶⁹ Suy, Peace-Keeping Operations, in Dupuy (ed), *A Handbook of International Organisations* (1988), 385

¹⁷⁰ Seyersted, United Nations Forces: Some Legal Problems, *The British Year Book of International Law* (1961), 446; The same view seems to be shared by Halderman, Legal Basis for United Nations Armed Forces, 56 *AJIL* (1962), 985-986, see also 990; On the other hand, Higgins correctly considers that article 2(7) of the UN Charter was applicable to the situation in Congo and therefore ONUC was not an enforcement measure in sense of Chapter VII, Higgins, *United Nations Peace-Keeping*, vol. III (1980), 56-57

¹⁷¹ Schachter, Legal Aspects of UN Action in Congo, 55 *AJIL* (1961), 1ff.

¹⁷² Higgins, *United Nations Peace-Keeping*, vol. III (1980), 55

¹⁷³ Simmonds, *Legal Problems Arising from the United Nations Military Operations in Congo* (1968), 63; Article 40 is designated as a basis of ONUC also in McCoubrey & White, *The Blue Helmets: Legal Regulation of the United Nations Military Operations* (1999), 53

¹⁷⁴ *ICJ Reports*, 1962, 177

position to explain the legal basis of ONUC. Schachter, Higgins and Simmonds find that ONUC was based on article 40 of the Charter with implicit determination by the Council under article 39¹⁷⁵ and Simmonds gets to this conclusion (a) by excluding operation of articles 41 and 42 and (b) by excluding relevance of recommendations under article 39.¹⁷⁶ Therefore, he concludes that ONUC could not have been established but as a provisional measure under article 40. It is submitted that Simmonds' approach has several shortcomings which deprive it of the position to explain ONUC's legal basis.

Simmonds gives sufficiently detailed reasoning why articles 41 and 42 may not be considered as ONUC's legal basis; but in case of exclusion of relevance of recommendations under article 39 he does not give any explanation of his view.¹⁷⁷ Such a hesitance seems understandable, because Simmonds finds that establishment of ONUC involved implicit determination of threat to the peace under article 39. But controversy in Simmond's reasoning still stands: if he finds that provisional measures under article 40 are possible to be based on implicit determination under article 39, it is unclear why recommendations under article 39 itself are not. To focus upon this issue would involve destruction of Simmonds' line of reasoning, because necessity of *explicit determination* by the Security Council under article 39 would become clear.

Express determination of a threat to the peace is in fact an inevitable condition for action under Chapter VII, as it follows from the text of article 39, according to which recommendations or coercive actions shall be made after determination of a threat to the peace has been made. The text is clear on this point. Equally, article 40 of the Charter stipulates that provisional measures should be ordered before the decision is taken on recommendations or coercive measures under article 39. This circumstance makes it impossible to order provisional measures before explicit determination under article 39 has been made. Even the title of Chapter VII makes it clear that article 40 is kind of an "action with respect to threats to the peace etc." which shall be determined under article 39. Therefore, ONUC could not have been based on article 40 without an explicit determination under article 39.

Along with dogmatic prerequisites as considered above, approach by Schachter, Higgins and Simmonds fails to take into account practical circumstances surrounding operation of ONUC as well as its nature. By declaring that ONUC was not a *preventive* or enforcement measure under Chapter VII, the International Court of Justice excluded this operation from the ambit of Chapter VII completely. Provisional measures under article 40 (like recommendations under article 39) are clearly preventive ones, as they shall be ordered "in order to *prevent an aggravation of the situation*". Hereby it is clarified why ONUC could not be based on recommendations under article 39, despite the suitability of this option, or on article 40 – ONUC was established completely outside of Chapter VII.

Also by its very nature, ONUC could not be considered as a provisional measure. Resolutions 143(1960), 161(1961) and other resolutions by the Security Council make it clear that the intention of the Council was to assist the government of Congo in fighting with secessionist Katanga. The nature of ONUC was therefore not in accordance with requirements of article 40 of the Charter in that it was not "without prejudice to the rights, claims or the position of the parties concerned". Development of ONUC resulting in its engagement into hostilities against military units of Katanga is a practical evidence in this regard. Moreover, by resolution 169(1961) the Council authorised the Secretary-General "to take vigorous action, including the use of requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations command" (para.4). All this evidence supports the view that the Council, from

¹⁷⁵ Schachter, *Legal Aspects of UN Action in Congo*, 55 *AJIL* (1961), 4, arguing that explicit determination under article 39 is not a prerequisite for all Chapter VII decisions; Higgins, *United Nations Peace-Keeping*, vol. III (1980), 56, and vol. IV (1981), 144; Simmonds, *Legal Problems Arising from the United Nations Military Operations in Congo* (1968), 59-61;

¹⁷⁶ Simmonds, *Legal Problems Arising from the United Nations Military Operations in Congo* (1968), 63

¹⁷⁷ *id.*, 62-63

the moment of commencing its action concerning Congo, (1) was not determined to take provisional action and (2) was clearly designating its measures as ones supporting government of Congo

Therefore, the views expressed by Schachter, Higgins and Simmonds on relevance of article 40 as the legal basis of ONUC fail to reflect the proper legal basis of this operation. This legal basis shall be sought for outside the Chapter VII and it is now submitted that this legal basis was article 36(1) of the Charter. The legal principles and circumstances may be invoked for supporting such an assumption. ONUC has been established, as the ICJ mentioned, with a view of maintaining international peace and security,¹⁷⁸ while addressing a situation which might endanger maintenance of international peace and security and thus falling within the scope of article 36(1). Establishment of ONUC was a *method of adjustment* of this situation again in sense of article 36(1). The fact that ONUC involved the use of force did not prejudice the fact that it was based on Chapter VI, under which only *disputes* shall be settled exclusively by peaceful means and this limitation does not extend to adjustment of *situations*. And lastly, by resolutions establishing and developing ONUC the Security Council did not intend to bind either Congo or other States including those delivering troops for this operation. Therefore, these resolutions were fully *recommendatory*, which makes it possible to consider them as based on article 36(1).

It has therefore to be concluded that a PK operation, in order to be considered as established under a given provision of the UN Charter, shall satisfy at least two conditions: (a) by its nature and character a PK operation must be suitable to be established under that provision; and (b) the formal criteria of applicability under the Charter of a provision which is claimed to be legal basis of a given PK operation shall be fully met.

5. Case Study: UNPROFOR and KFOR

United Nations Protection Force (UNPROFOR) has been established by the Security Council by resolution 743(1992). Establishment was based on determination of threat to the peace under article 39. Although no other provision of Chapter VII has been invoked by the Council,¹⁷⁹ establishment of UNPROFOR was nevertheless clearly an action with regard to the threat to the peace under Chapter VII. In its original state, UNPROFOR may be considered to have been established as a provisional measure under article 40. Resolution of the Security Council 740(1992) clearly emphasised that UN peace-keeping plan and its implementation was in no way intended to prejudice the terms of political settlement (para. 6). The same approach has been expressed by the Secretary-General in his report to the Council¹⁸⁰ and further reaffirmed by the Council itself in para. 10 of the resolution 743(1992).¹⁸¹ The functions of UNPROFOR were limited to good offices, observation and monitoring¹⁸² and were thus preventive rather than enforcement ones. UNPROFOR's precedent is of course without prejudice to the power of the Security Council to establish PK forces under articles 41 and 42, but in this concrete case UNPROFOR's original mandate falls within the scope of provisional measures under article 40.

Generally, after finding the threat to the peace under article 39, the Council may establish PK forces either as a provisional measure or under articles 41 and 42. This depends on the intention of the Council. If the Council intends to establish a PK force for protection of rights or positions of one of the parties, it may resort to articles 41 and 42. But if the Council wishes to act without prejudice to those rights, claims and positions, as well as to final settlement, as in case of establishment of UNPROFOR, article 40 may be invoked as a legal basis.

¹⁷⁸ *ICJ Reports*, 1962, 175

¹⁷⁹ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 328

¹⁸⁰ "It is to be emphasised that these arrangements will be of an interim nature, pending the negotiation of an overall settlement", *Further Report by the Secretary-General pursuant to Security Council Resolution 721 (1991)*, S/ 23592, 5

¹⁸¹ Therefore, the Council's intention was not to prejudice rights, claims or positions of parties concerned, as required by article 40 of the Charter.

¹⁸² 46 *Yearbook of the United Nations* (1992), 332

Resolution 836(1993) extended the mandate of UNPROFOR. In particular, paragraph 5 of this resolution authorised UNPROFOR “to deter attacks against the safe areas, to monitor cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground”. Paragraph 9 empowered UNPROFOR to use force in carrying out the mandate as defined in paragraph 5.

This case is a clear illustration of possibility to transform a force established as a PK one, into a peace-enforcement one. Paragraph 5 in conjunction with paragraph 9, empowers UNPROFOR to use force against military units of States other than Bosnia. Therefore, by resolution 836(1993) UNPROFOR has been transformed into peace-enforcement force, acting under article 42 of the Charter and empowered to take enforcement measures against *States*. Therefore, transformation of UNPROFOR made it possible to consider it as a Chapter VII enforcement measure, in accordance with the criteria developed by the ICJ in *Certain Expenses* case.

The basis of KFOR in Yugoslavia is resolution 1244(1999) which established international security presence in Kosovo(Yugoslavia). The resolution is adopted under Chapter VII and makes explicit determination under Chapter VII, following similar determination in resolution 1198(1998). Under paragraph 9 of resolution 1244(1999), the KFOR is authorised to take actions for “detering renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces”.

Therefore, although KFOR has many similarities with traditional PK forces (being based on consent by the FRY and empowered to maintain ceasefire), its initial mandate as enshrined in the resolution 1244(1999) supports an assumption that KFOR is a Chapter VII enforcement measure established under article 42. By being empowered to deter renewed hostilities and to prevent return into Kosovo of FRY’s military forces, KFOR is in fact authorised to use coercion against a *State*. Therefore, according to the ICJ’s criteria, KFOR is an enforcement force. It differs, however, from UNPROFOR in that the KFOR has been designated as an enforcement force from the moment of its establishment.

6. Institutional Prerequisites: Article 29 of the Charter

Article 29 of the Charter enables the Security Council “to establish such subsidiary organs as it deems necessary for the performance of its functions”. Equally, the Council as an organ enjoying *Kompetenzkompetenz*, may itself determine whether such a necessity exists.

Article 29 of the Charter may provide merely institutional or procedural background for establishment of PK operations. For it alone is insufficient to explain legal basis of PK operation as such as it follows from its nature.¹⁸³ The recourse should therefore necessarily be made to one of the powers of the Security Council analysed above.

7. General Conclusions concerning the Legal Basis of Peace-Keeping Forces Established by the Security Council

The legal basis of PK operations established by the SC are provided for in the UN Charter by virtue of operation of:

- Recommendatory power under article 36(1) in conjunction with article 29
- Recommendatory power under article 39 in conjunction with article 29
- Provisional measures under article 40 in conjunction with article 29
- Powers to take measures under articles 41 or 42 in conjunction with article 29

¹⁸³ Hilf, On Article 29 in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 485; Simmonds, *Legal Problems Arising from the United Nations Military Operations in Congo* (1968), 64

For the need of establishment of PK forces in particular situations, as well as for determining their functions and powers by taking into account the need of their effectiveness and successful performance, the various bases explicitly or implicitly provided for in the UN Charter should be considered as mutually supportive and not as mutually exclusive legal preconditions. As each operation is unique, both by circumstances of its establishment and by environment in which it operates and develops, the consideration of various elements of legal basis in a mutually complementary way is in position to contribute towards viability of each and every peace-keeping force.

III. The General Assembly

a) *The Recommendatory Powers* – As the International Court of Justice has confirmed, the primary responsibility of the Security Council in the area of international peace and security is not exclusive one. While the Security Council is empowered to take various kinds of actions, the functions of the General Assembly are not confined to discussion, consideration initiation of studies and making of recommendations.¹⁸⁴ The General Assembly therefore assumes an important role in this field, subject only to express limitations imposed on its powers under the provisions of the Charter. The only relevant limitation in this regard is article 12 of the Charter, which proscribes the Assembly from dealing with an issue which is under consideration by the Security Council. This limitation is obviously in accordance with primary responsibility for maintenance of peace and security, assigned to the Security Council.

The first step by the General Assembly to assert its own role in the area of peace and security was the resolution “Uniting for Peace” (377) adopted in 1950 concerning the situation in Korea, and dealing with residual role of the GA in maintenance of international peace and security. According to paragraph A of that resolution, “if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security ... the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, *including* in the case of a breach of the peace or act of aggression the use of force when necessary” (emphasis added). This provision makes it clear that the GA did not consider its residual competence in the area of peace and security as limited to enforcement measures. And indeed, if the GA asserts its power to recommend forcible measures, it shall naturally be considered as asserting also its power to organise PK operations on the basis of consent given by the parties.

For the purposes of organising PK operations, the resolution “Uniting for Peace” is in accordance not only with purposes of the Charter but also with its textual context of distribution of competences between the principal organs.¹⁸⁵ It should be mentioned first of all, that the resolution assigns the respective role to the General Assembly only if “the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility”. This means that the resolution fully takes into account the operation of article 12 of the Charter and is thus not designed to obstruct the work of the Security Council when it is seised of the matter. Secondly, in the UfP resolution the General Assembly did not assert the power to bind the member-States. This power is exclusively reserved for the Security Council. Thirdly, the role of the GA as reflected in UfP resolution, is only residual one. It has in this sense a remedial nature. The primary responsibility is delegated to the Security Council in order to ensure prompt and effective action by

¹⁸⁴ *ICJ Reports*, 1962, 163. The reasoning by the Court clearly rejects the conclusion made by Kelsen that the General Assembly has been established merely as a “town meeting the world”, as a deliberative and criticising organ, Kelsen, *The Law of the United Nations* (1950), 199-200

¹⁸⁵ It has been suggested in this regard that UfP resolution is not in itself sufficient basis for establishment of PK forces, rather that the general Charter regulations must be adhered to, Rudolph, *Peace-Keeping Forces*, in Wolfrum, *United Nations, Law, Policies and Practice*, vol. II (1995), 962. As Kelsen emphasises, the constitutionality of UfP resolution depends on interpretation of articles 10, 11 and 14 of the Charter, Kelsen, *The Law of the United Nations* (1952), 959. UfP resolution is considered as an interpretation of the Charter, id., 960

the United Nations. When the Council is prevented from acting, this results not only in failure of the Council, but also in failure of the Organisation as a whole, because it does not act promptly and effectively, as required by the Charter.¹⁸⁶ This factor contributes to enhancing political accountability of the Security Council for not properly exercising its responsibilities in the area of concurrent jurisdiction of General Assembly and Security Council.¹⁸⁷

The text of the Charter, as interpreted by the International Court of Justice, may also be supportive of such an approach. The Court in *Certain Expenses* case directly referred to article 11, paragraph 2 of the Charter, which deals with power of the GA to issue recommendations to States concerning the “questions relating maintenance of international peace and security”. The Court indicated that this provision empowers the General Assembly to organise, by means of recommendations, PK operations. The General Assembly could act unless enforcement measures against a *State* are involved.^{188 189} At the example of UNEF, the Court indicated that the General Assembly may establish PK operations either under article 11 or under article 14.¹⁹⁰

Articles 10, 11(2) and 14 of the Charter are substantially overlapping in scope with one another. For all they foresee that the General Assembly may make recommendations on any matters within the scope of the present Charter or on any questions peace, security and general welfare.¹⁹¹ Equally, all those articles are limited by operation of article 12. There are some differences, however. Article 14 comprises only the measures of a peaceful nature, while articles 10 and 11(2) may serve as a basis of *all* recommendations except those relating to enforcement measures.

The General Assembly, as confirmed by way of negative plain meaning in *Certain Expenses* case, may not authorise forcible actions against a *State*. However, the PK forces established by the General Assembly, may, in our view, take forcible action against non-State secessionist or separatist entities. The Security Council has the force monopoly only in enforcement actions against *States*. This follows from the reasoning of the Court. However, the PK forces authorised by the General Assembly to use force against non-State actors shall necessarily be established under article 11(2) and not under article 14. For the latter relates to *peaceful* adjustment of situations only.

b) Institutional Prerequisites: Article 22 of the Charter – Article 22 empowers the General Assembly to establish subsidiary organs for performance of its functions and this power may be used for establishment of a PK force. UNEF, in particular, has been established under this article.¹⁹² As in case of the Security Council, (a) the General Assembly by virtue of its *Kompetenzkompetenz* may determine when the necessity to create a PK force exists and (b) it may invoke article 22 only in conjunction with one of its substantive powers – articles 10, 11 or 14.

IV. The Secretary-General

¹⁸⁶ As emphasised already, these conclusions relate only to relevance of UfP resolution in the area of PK and is without prejudice as to acceptability of that resolution to be the basis of enforcement measures.

¹⁸⁷ For the notion of political accountability see Shaw & Wellens, *First Report by the ILA-Committee on Accountability of International Organisations*, 14 February 1998, Chapter II, Section b, 14ff.

¹⁸⁸ *ICJ Reports*, 1962, 164. See again the hesitant approach by Kelsen, *The Law of the United Nations* (1950), 203-204. But the following analysis by Kelsen on the meaning of the word “action” under article 11(2) fully conforms with observations made by the Court in *Certain Expenses*. Kelsen states that “in Article 11, paragraph 2, the term ‘action’ can hardly mean ‘discussion’ and ‘recommendation by the General Assembly’. For if the term ‘action’ includes ‘discussion’ and ‘recommendation by the General Assembly’ the previous sentence is meaningless. ... ‘Action’ can only mean ‘enforcement action’. This is the specific function which is reserved to the Security Council”, *id.*, 204

¹⁸⁹ Kelsen correctly observes on the basis of several provisions of the UN Charter that enforcement measures against a *State* may be taken by the Security Council. The contextual analysis of articles 5, 50, 53 and 99 may provide appropriate evidence for assuming that the Charter envisages only the role of the Security Council in taking coercive measures against States, Kelsen, *The Law of the United Nations* (1950), 973-974

¹⁹⁰ *ICJ Reports*, 1962, 172

¹⁹¹ These notions enshrined in various articles are more or less identical, see Kelsen, *The Law of the United Nations* (1952), 202

¹⁹² Hilf, On Article 22, in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 386-387; Bothe, *Peace-Keeping*, *id.*, 591

1. Establishment of Peace-Keeping Forces by the Secretary-General in the Context of the UN Charter

The undisputed areas of competence of the Secretary-General in organising PK operations include the reporting to Security Council and General Assembly on situations likely to endanger international peace and security,¹⁹³ as well as the negotiation and conclusion of agreements with Governments concerning the PK force.¹⁹⁴ Nor is it in fact disputed that the Secretary-General may establish and conduct peace-keeping operation if appropriate functions are delegated on it by the Security Council.¹⁹⁵ But this undisputed circumstance says little about the role of the Secretary-General as such, because it relates in fact only to the powers of Security Council or of General Assembly.

According to Higgins, there is a general consensus that the Secretary-General is not empowered to establish the peace-keeping forces even with the consent of the parties.¹⁹⁶ It has been suggested that the Secretary-General may act in this area only on the basis of powers delegated to it. The power to provide legal basis for PK operations is therefore argued to be exclusively reserved for the Security Council and the General Assembly.¹⁹⁷

The assertion by Higgins is tantamount to arguing that the Secretary-General is not empowered to commit the United Nations, or in other words, it is not a proper organ for expression of the will of the UN. However, in *Certain Expenses* case the International Court of Justice has clearly emphasised that “obligations of the organisation may be incurred by the Secretary-General”.¹⁹⁸ Moreover, even the action taken by an organ not properly empowered thereto is nevertheless an action by Organisation, because “both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.”¹⁹⁹ In addition, the consent by the host State may be considered as a circumstance validating *ultra vires* decisions by an international organ having established a PK force.²⁰⁰ The decision by the Secretary-General in response to initiative by parties concerning establishment of a peace-keeping force has therefore to be considered as a decision taken by the United Nations. At least two reasons may be advanced in favour of such a reasoning: (1) Neither the UN Charter nor any other UN document contemplates any division or distribution between the UN bodies of the

¹⁹³ UN Charter, articles 12(2), 99

¹⁹⁴ Seyersted, *United Nations Forces in the Law of Peace and War* (1966), 99, referring to regulations of various PK forces.

¹⁹⁵ UN Charter, article 98; Sarooshi, *The United Nations and the Development of Collective Security* (1998), 64; Dahm on the Secretary-General: “Er ist insoweit nicht Traeger einer selbststaendigen Initiative, sondern bedarf zu seiner Taetigkeit der Ermaechtigung durch andere Organe. Eben hierin findet die Stellung des Generalsekretaers als eines den uebrigen Organen der Organisation der Vereinten Nationen dienstbaren Hilfsorgans ihren Ausdruck”, in Dicke & Rengeling, *Die Sicherung des Weltfriedens durch die Vereinten Nationen* (1975), 145

¹⁹⁶ Higgins, A General Assessment of UN Peace-Keeping, in Cassese (ed.), *UN Peace-Keeping, Legal Essays* (1978), 6, “The Secretary-General’s powers under Articles 97-99 of the Charter, even when taken with the consent of the host State and all parties concerned, apparently are not a sufficient basis for a United Nations peace-keeping mission”, id., 7; For views supporting such an approach see: Sarooshi, *The United Nations and the Development of Collective Security* (1998), 123-124; Suy, Peace-Keeping Operations, in Dupuy (ed.), *A Handbook of International Organisations* (1988), 385; McCoubrey & White, *The Blue Helmets: Legal Regulation of the United Nations Military Operations* (1996), 53ff.; Bothe, Peace-Keeping, in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 592; Rudolph, Peace-Keeping Forces, Wolfrum (ed.), *United Nations: Law, Policy and Practice*, vol. II (1996), 961

¹⁹⁷ Sarooshi, *The United Nations and the Development of Collective Security* (1998), 124. In this regard it has been stated that SG is not a principal organ of the UN, Dicke & Rengeling, *Die Sicherung des Weltfriedens durch die Vereinten Nationen* (1975), 141. For such a sceptical view see also Elarab, The Office of the Secretary-General and the Maintenance of International Peace and Security, *The United Nations and the Maintenance of International Peace and Security* (UNITAR-edited) (1987), 182 ff. On the other hand, Alf Ross considers that the characterisation of the UN Secretariat as a principal organ would be unwarranted if it were merely regarded as a clerical department with no initiative of its own, whose sole function was limited to administrative work only. Cited in Simmonds, *Legal Problems Arising from the United Nations Military Operations in Congo* (1968), 71.

¹⁹⁸ *Certain Expenses*, ICJ Reports, 1962, 169

¹⁹⁹ *Certain Expenses*, ICJ Reports, 1962, 168

²⁰⁰ Compare with ILC draft articles on State responsibility, article 29

powers relative to establishment of peace-keeping forces. There is no explicit provision that this area belongs to exclusive competence of Security Council and/or General Assembly. (2) The approach depriving the Secretary-General the power to establish the peace-keeping force in case of consent of parties fails also to reflect the policy considerations surrounding the establishment of forces. Failure by SC and GA to act, often being based on geopolitical and national interest considerations of permanent members of the SC, fails to respond to the need to end hostilities and large-scale human suffering. Secretary-General could be an appropriate body for ensuring that in case of inaction by Security Council and/or General Assembly, the effectivity and credibility of the Organisations shall not be undermined. If the Secretary-General manages to negotiate cease-fire and establishment of force with parties to conflict, as well as provision of military units with third States, the absence of SC or GA resolution shall not be considered as a circumstance preventing, in a legal sense, establishment of a peace-keeping mission. A necessary reservation is, of course, that this power of the Secretary-General is limited exclusively to non-coercive operations, because as far as coercive operations are concerned, the Charter clearly allocates the exclusive responsibility in this regard to the Security Council.

The Secretary-General might be said to have secondary responsibility for maintenance of international peace and security. Such a secondary responsibility is not exclusively reserved for the General Assembly, if we look for relevant Charter provisions. The only condition laid down by the Charter is that the Security Council has the primary responsibility in this field. Other organs including the Secretary-General may assume secondary responsibility if achievement of purposes of the Organisation makes it necessary.

The need for organising preventive peace-keeping operations might be referred to as a basis for Secretary-General's powers to establish such forces. As majority of conflicts require rapid response before or after they break out, the Secretary-General might be an appropriate body in this regard. For instance, if a State feels that an armed invasion on its territory is being prepared and is expected to occur, it may ask the UN for its mandate for stationing preventive peace-keeping forces along its border. The deliberations in SC or in GA may require huge amount of time and the response, even if made, may prove ineffective. The Secretary-General, if he manages in cooperation with an affected State, to secure necessary military units, shall be empowered to grant the UN mandate to such units for the purpose of prevention of alleged expected invasion. In such a case, the affected States will not have to wait for approval by permanent members of the Security Council, one of which will surely have political affiliation or geopolitical interest in the region concerned. Such an approach is the only one in conformity with the circumstance that the United Nations as an international person shall possess the capacity of independent decision-making in the area or peace and security, or, more precisely, decisions in the area of peace and security shall be taken not only by bodies composed of member-States and expressing their compromised will, but also by the Secretary-General as a person representing the United Nations as such and moreover being the chief administrative officer thereof.²⁰¹ Recognition of the power of the Secretary-General to organise peace-keeping forces (1) is therefore a necessary constructive step in establishing the primacy of common interests in prevention of conflicts over the self-interest of Member-States and (2) does not affect the powers of any other principal organ of the UN, because it does not involve elements of enforcement action.

The PK forces established by the Secretary-General in cooperation with interested States may be authorised to use force against non-State entities. Insofar such forces are based on consent of and do not use force against a given *State*, they may not be considered as established in contravention of primary responsibility of the Security Council in the area of peace and security. The line of reasoning is here similar to that developed above at the example of the General Assembly.

²⁰¹ UN Charter, article 99

2. The Law of Treaties as a Basis of Secretary-General's Powers to Establish Peace-Keeping Forces

As an alternative basis for Secretary-General's power to establish PK operations, its treaty-making power may be invoked. As it will be clarified below, the PK operations are, as a rule, based on treaties between UN and host State or States delivering military units. According to article 6 VCLT, the capacity to conclude treaties on behalf of an international organisation is governed by relevant rules of that organisation. In adopting that provision, the ILC refused to elaborate the universal approach applicable to all international organisations.²⁰²

SG in practice has represented the UN in concluding agreements on PK forces. Article 7(4) of the VCLT 1986, "a person is considered as representing an international organisation for the purpose of expressing the consent of that organisation to be bound by treaty if: (a) he produces appropriate powers; or (b) it appears from the practice of the competent organs of that organisation or from other circumstances that that person is considered as representing the organisation for such purpose without having to produce full powers". From practice it appears undoubtedly that SG as chief administrative officer may conclude agreements on behalf of UN. This power has never been disputed. As the ILC determined, in this case it is acquiescence by other organs that produces practice in sense of powers to conclude treaties. The abstention by other organs of organisation to limit such solution signifies that the practice in question acquires legal standing.²⁰³

Generally, in case the treaty is concluded by the Secretary-General in violation of rules of an organisation concerning treaty-making powers, this violation may be cured by subsequent confirmation by an organisation, as confirmed by article 8 VCLT 1986. Article 46 VCLT, dealing with invalidity of treaties due to procedural irregularities, does not envisage any limitations on the rule embodied in article 8.

Which organ of the UN is required to validate unauthorised entry into treaty relations by the SG? As the ILC explained, there are no general guidelines or standards according to which the organs empowered to conclude a treaty on behalf of an IO could be identified. "The titles, competence and terms of reference of the agents responsible for the external relations of an organisation differ from one organisation to another".²⁰⁴ This requires clarification of two issues: (1) an organ whose confirmation is allegedly required must itself, according to rules or practice of the UN, possess treaty-making capacity; the area in which SG enters into commitments shall belong to exclusive competence of that organ. (2) the SG acting in implied powers while concluding agreement on PK forces may not be held to have exceeded its powers unless it is identified what the limits on these powers are. As far as PK operations are not exclusively reserved for the SC or GA on the basis of the Charter, these organs may not be considered as appropriate for confirming allegedly unauthorised commitments by the SG. Therefore, refusal by SC or GA to validate allegedly *ultra vires* PK agreements concluded by the SG does not render those agreements invalid.

3. Institutional Prerequisites: Article 7 of the Charter

The Charter does not explicitly empower the Secretary-General to establish the subsidiary bodies of the United Nations, as it empowers General Assembly and Security Council.²⁰⁵ But the Charter contains also the general authorisation to create subsidiary organs.²⁰⁶ This general authorisation, as evidenced by practice, warrants establishment of subsidiary organs beyond the scope of concrete authorisations, such as articles 22 and 29. According to Jaenicke, "the better interpretation of Art. 7(2) seems to be that the authority to establish subsidiary organs may also be

²⁰² Commentary to article 6, ILC's draft articles, UN Doc. A/CONF.129/16/Add.1(Vol.II), 11

²⁰³ Commentary to article 7, ILC's draft articles, UN Doc. A/CONF.129/16/Add.1(Vol.II), 14

²⁰⁴ Commentary to article 46, ILC's draft articles, UN Doc. A/CONF.129/16/Add.1(Vol.II), 35

²⁰⁵ UN Charter, articles 22 and 29

²⁰⁶ UN Charter, article 7(2)

inferred from it, *either directly* or in combination with other articles of the Charter”.²⁰⁷ The general nature of power based on article 7(2) is affirmed also by Kelsen.²⁰⁸

It could be questionable to what extent may this circumstance influence the existence the power of the Secretary-General to create a force on initiative of its own. However, the need to achieve the purposes of the United Nations provides for justification for action by the Secretary-General, insofar this is not prohibited by the text of the Charter. Establishment of subsidiary organs are thus allowed by article 7 “in accordance with” the Charter and not “as provided by” the Charter. The wording of article 7 shall be therefore understood as permitting establishment of subsidiary organ insofar this is not prohibited by the Charter.

Lastly, the provisions of constituent instruments of international organisations should be interpreted “in a way which is considered to be most likely to advance the particular objectives of the Organisation”.²⁰⁹ This is true also for article 7. It is more than clear that the primary purpose of the United Nations – the maintenance of international peace and security – will be promoted more if delay in decision-making and political controversies have less influence on process of establishment of PK operations.

V. Regional Organisations

1. Legal Principles and Policy Considerations

There is a strongly supported assumption that regional organisations may establish PK forces without authorisation by United Nations.²¹⁰ PK operations are as such not enforcement actions and provided they involve no enforcement elements, they do not fall within the scope of article 53 of the UN Charter.

The theory, as well as the practice, may indicate to the trends towards decentralised approach to PK operations. The UN, acting in situations involving possible or actual threats to peace and security, is subject to certain constraints of financial, of political and, in certain cases, possibly of legal character. This circumstance leads to consideration of the role of regional organisations in PK operations to be stationed within the region concerned. The preferability of regional organisations for purposes of PK operations has been explained or may be explained by reference to following circumstances of legal and factual/political nature:

- article 52 of the UN Charter endorses the role of regional organisations in settling or adjusting disputes or situations arising in the region concerned. It could even be inferred from the text of this article that regional organisations possess the primary competence of dealing with such disputes and situations;²¹¹
- decision-making process within regional organisations is less complicated than in the UN. There is no danger of use of veto, as in the UN Security Council, and generally, the members of the regional organisations are relatively more like-minded in dealing with issues of peace and security than members of the UNSC or of UNGA.

²⁰⁷ Jaenicke, On Article 7, in Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), 201-202 (emphasis added)

²⁰⁸ Kelsen, *The Law of the United Nations* (1952), 138

²⁰⁹ Lauterpacht, Development of the law of International Organisations by International Courts and Tribunals, *Recueil des Cours*, 1974(IV), 421

²¹⁰ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 334; On the contrary, it has been argued by Kourula that RO's are not empowered to establish PK forces without approval by the SC. If the SC refers a dispute or a situation to a RO, it does so because of convenience and effectiveness and not because of a legal obligation, Kourula, Peace-Keeping and Regional Arrangements, in Cassese (ed.), *UN Peace Keeping. Legal Essays* (1978), 117, even host State's consent does not change the situation, id., 118; consent under certain circumstances may not be genuine, id.

²¹¹ For instance, the primacy of Arab League over the UN has been asserted by Arab States in Lebanon crisis, where they opposed involvement of the UN Security Council, in Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 337

- involvement of regional organisations in PK operations may help avoid to face severe financial problems present within the UN. Governments are generally more reluctant to spend within the UN than within regional organisations;
- PK operations by regional organisations are without prejudice to powers of principal organs of the UN: (a) according to article 52 and other provisions of the UN Charter, the SC possesses the residual competence with regard to PK operations by regional organisations. This circumstance opens the door for accountability of regional organisations towards the UN. (b) The PK operations by regional organisations do not affect the force monopoly of the UNSC, because they do not involve elements of enforcement.
- PK operations are based on consent given by the parties. The fact whether the forces are mandated by the UN or by a regional organisation is not decisive for legal nature or legal basis of a PK operation.

All these factors may bring us to the conclusion that the role of regional organisations in PK operations is necessary and appropriate. Yet, this still begs the question to clarify the frontiers of this necessity and appropriateness. The consideration of role of the UN in PK operations undertaken by regional organisations is crucial for understanding this problem.

Under certain circumstances, the involvement of a regional organisation in PK operations may serve to undermine rather to strengthen the role to be played by the UN in pursuance to its purposes and functions. As a matter of policy, the different geopolitical considerations are present within the UNSC itself, clash between different geopolitical interests is characteristic for the work of UNSC or UNGA and balance (although imperfect one) between different geopolitical interests is maintained.

The regional organisations, on the other hand, which are as a rule dominated by one or more Great Powers having far-reaching geopolitical interests, do not offer such a chance of checks and balances as the UN does. It should be borne also in mind that after the PK force has been mandated by a regional organisation, it becomes difficult if not impossible to hold a regional organisation accountable within the UN, because of possible involvement of SC permanent members. The UN purposes and functions may suffer therefore to important and irreparable extent.

The use of regional organisations by Great Powers for maintaining or enlarging their own spheres of influence has become an usual practice in international relations. An obvious consequence of this practice is the fact that the functions and powers of the UN in the area of peace and security becomes paralysed in the region or area concerned. The Great Powers prefer to have the presence of regional organisations accumulating their dominant interests rather than the presence of the UN within which the conflicting geopolitical interests have to be balanced. These circumstances support survival and effective operation of old doctrines and categories as to division of spheres of influence between Great Powers. The dominant role of a regional organisation, including the area of PK operations, may contribute to strengthening assertions of regional dominance, such as Monroe Doctrine with its modern continuations,²¹² as well as Brezhnev Doctrine, being currently succeeded by Russian conception of “near abroad”.²¹³ The procedural technicalities of asserting and enforcing these assertions are very simple: after a regional organisation has acted (in proper or improper way), a permanent member of the Security Council may in any case prevent effective response or supervision by the UN by using its right of veto.

2. Case Study: CIS Forces in Abkhazia(Georgia)

Practice may offer many examples where old doctrines of regional hegemony are being revived in the context of modern peace-keeping by regional organisations.²¹⁴ The PK operations by

²¹² Nolte, *Eingreifen auf Einladung* (1999), 269

²¹³ Nolte, *Eingreifen auf Einladung* (1999), 440, emphasising in particular, that political interests of Russian Federation contribute to preventing involvement of the UNPK activities in conflicts on territories of States of former Soviet Union. On further elaboration on “near abroad” doctrine see 475.

²¹⁴ Nolte, *Eingreifen auf Einladung* (1999), 440

Commonwealth of Independent States (CIS) may serve as an evidence in this regard. This organisation, established in 1991²¹⁵ in order to fill vacuum emerged after dissolution of Soviet Union, serves as an instrumentality of maintenance of Russian political and military hegemony over the area of former Soviet Union. Although the CIS, according to its founding instruments, is an association “of Independent States”, in practice as well as in its underlying conceptual background this organisation merely serves to limit the sovereignty of its member-States in sense of Warsaw Pact and Brezhnev-doctrine.²¹⁶ The consequence of such an approach is the assertion of primacy of CIS in conflict resolution on territories of former Soviet republics over organisations like UN and OSCE.²¹⁷ The PK forces of CIS are an integral part of this task.

After genocide and ethnic cleansing in Abkhazia (Georgia), committed in 1992-1993 against Georgian population, which has involved tens of thousands of killings and hundreds of thousands of displacements and deportations, the resistance and reluctance by Russian Federation has prevented the establishment of UN peace-keeping force for Abkhazia. The UN involvement in the resolution of conflict is limited to small United Nations Observers Mission in Georgia (UNOMIG) and Human Rights Office in Sukhumi. In accordance with Russia’s geopolitical interests, in 1994 the CIS peace-keeping troops of exclusively Russian composition have been stationed in the region. The involvement of the UN has been signified merely by approval of CIS PK force by resolutions of the Security Council 934 (1994) and 937(1994).²¹⁸ The SC even indicated that establishment of CIS PK force took place “in accordance with the established principles and practices of the United Nations”.²¹⁹

As far as this PK operation by CIS as a regional organisation (a) is based on consent by the parties and (b) does not involve enforcement action, the approval or authorisation by the UN is not a necessary element in its legal basis. An important point is here the legal background as well as legal consequences of UN approval of a regional action where such an approval is not required under the law in force.

As far as the political context is concerned, the approval of sending CIS troops may be characterised as entrusting the outcome of conflict to a directly interested State, while the peace-keeping function has originally been considered as an impartial one.²²⁰ the approval by the SC of sending CIS PK troops to Abkhazia has been the part of more broad “package deal” between United States and Russian Federation, both of whom needed UN mandate for presence of their troops in Haiti and in Georgia, respectively. The role of the SC has in this case in fact been limited to giving its mandate to assertion of spheres of influence by Great Powers respectively in the Americas and the Caucasus.

The mandate of CIS forces in Abkhazia describes the functions of that force as (a) to exert its best efforts to maintain the cease-fire and to see that it is scrupulously observed and (b) to promote safe return of refugees and displaced persons.²²¹ The troops, however, do not possess willingness and, to a certain extent, resources to meet these requirements. They lack necessary capabilities as well, such as anti-landmine capability. They are in fact perpetuating separatist regime and failing to promote return of refugees.²²² In the period after stationing CIS PK forces in Abkhazia, several thousands of killings and deportations of Georgian population took place in the region including the zone of immediate responsibility of CIS forces. CIS forces did not in fact respond to that.

The CIS considers itself as a regional organisation in sense of Chapter VIII of the UN Charter. It is also established that CIS is bound to report concerning its PK operations to UN under

²¹⁵ The Charter of CIS has been adopted in 1993

²¹⁶ Nolte, *Eingreifen auf Einladung* (1999), 439

²¹⁷ Nolte, *Eingreifen auf Einladung* (1999), 475

²¹⁸ Nolte, *Eingreifen auf Einladung* (1999), 472-473

²¹⁹ UNSC Res. 937(1994)

²²⁰ Nolte, *Eingreifen auf Einladung* (1999), 468

²²¹ S/1994/583, 17 May 1994

²²² Wedgwood, Remarks at 1997 Joint Conference of ASIL/NVIR, in *Contemporary International Law Issues: New Forms, New Applications*, The Hague (1998), 69

article 54 of the UN Charter.²²³ Moreover, the UN supervises the activities of CIS forces through UNOMIG. Nevertheless, the organs of the United Nations have shown no willingness to determine consequences of failure by CIS forces to perform their mandate.

VI. Consent by Affected Parties as an Element of the Legal Basis of UN Peace-keeping Operations

Consent is an ordinary instrumentality for creation of international obligations in general. It is even a factor capable of validating the behaviour which would otherwise be illegal. Therefore, consent is an inevitable element in legal basis of establishment of peace-keeping operations.²²⁴ Requirement of consent by States to establishment of a PK operation has two dimensions. Consent is a necessary element of legal basis of a PK force; on the other hand, the continuing consent, as seen in dynamic perspective, is a precondition of effective accomplishment of a PK mission in a practical sense. "It is the United Nations' choice not to take a coercive action, which gives relevance to the expression of consent".²²⁵

For actual stationing of a PK force on the territory of a State the consent of latter is indispensable. If UN forces are stationed on the territory of a State without its consent, they necessarily involve use of force against that State and are therefore *peace-enforcement* and not peace-keeping forces. The necessity of consent in case of PK operations does not prejudice the power of the Security Council to take binding decisions under Chapter VII. But the Council must simply make a choice as to which means would be appropriate for maintaining or restoring international peace and security in a given situation. If establishment of a PK force is considered by the Council to be appropriate option, the consent by the host State shall be necessarily sought for.

Chapter VII decisions are expected to be involved in establishment of PK operations only if sufficient consensus is achieved in the Security Council for making determination under article 39. Consent remains therefore an usual part of this enterprise. Higgins considers that even in case of Chapter VII action the consent by affected parties is necessary. Although this conclusion may not be reached by textual interpretation, practice has supported necessity of consent also in case of Chapter VII decisions.²²⁶

The practice knows the examples where notwithstanding the legal force of Chapter VII decisions the consent of host/target State has been asked for initiation of respective measures. Establishment of UNPROFOR has effected on the basis of request by Yugoslavia.²²⁷ Similarly, the consent of Indonesia has been asked when decision has been taken to establish (again under Chapter VII) UNTAET force in East Timor and FRY has consented to stationing of KFOR in Kosovo.²²⁸ The relevance of consent by the host State in case of PK operations established within the framework of Chapter VII depends therefore not on the nature and legal force of Chapter VII decisions, but on the nature of PK operations as such.

Consent may be expressed in an organ establishing a given PK force and also in agreement between UN and relevant States.²²⁹ In practice, the consent by host State is inferred from the fact of exchange of notes between the Secretary-General of the UN and the host State. It is established that

²²³ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 361

²²⁴ Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 321-322

²²⁵ Di Blase, The Role of the Host State's Consent with regard to Non-coercive Actions by the United Nations, in Cassese (ed.), *UN Peace-Keeping, Legal Essays* (1978), 57; But it should be mentioned that refusal of consent may under circumstances lead to adoption of coercive measures under articles 41 and 42. This assumption has the basis in the Charter.

²²⁶ Higgins, A General Assessment of UN Peace-Keeping, in Cassese (ed.), *UN Peace-Keeping, Legal Essays* (1978), 5

²²⁷ Further Report of the Secretary-General pursuant to Security Council Resolution 721(1991), S/23240, 8-13; UNSC res. 743(1992), preambular para. 2

²²⁸ UNSC resolutions 1264(1999) para 4, 1272(1999), 1244(1999)

²²⁹ Di Blase, The Role of the Host State's Consent with Regard to Non-Coercive Actions by the United Nations, in Cassese (ed.), *United Nations Peace-Keeping. Legal Essays* (1978), 55-56

such an exchange of notes constitutes an agreement under international law governed by the law of treaties, in particular, by Vienna Convention on the Law of Treaties of 1986.²³⁰

According to article 2 VCLT 1986, a treaty is an agreement concluded between States and organisations or between organisations, governed by international law, embodied in single or in two or more related instruments and whatever its particular designation. This exchange of notes is in fact a treaty, based on free will of the host State. This is particularly evidenced by article 13 VCLT 1986 (as well as article 13 VCLT 1969) clearly providing that exchange of instruments constituting the treaty expresses the consent by parties to be bound by a treaty. In the light of these considerations, particular aspects of consent shall be focused upon.

1. Consent *ratione personae* – The general assumption is that the consent of the host State is asked for due to its sovereignty over the territory on which the forces have to be located. The consent by the State as represented by its government is necessary even when the government is in exile. This means that the consent is asked from the State not because it is in effective control of the territory, but because it is the sovereign on the territory according in legal sense.

In case of so-called “failed States” it might be suggested that because of absence of effective government no consent of host State is necessary. In purely legal sense this might be true. Also the need for maintenance of international peace and security may dictate necessity of UN intervention in a situation where absence of effective government may endanger international peace. However, the nature and function of PK operations inevitably make necessary the consent by the government. Non-consensual operations are subject to risk of being unsuccessful.²³¹ PK operations are by their very nature highly consensual and presence of consent by the government is a prerequisite that stationing and operation of a PK force will not be interfered with. The conclusion therefore is that situations involving absence of government shall be addressed not through peace-keeping, but through peace-enforcement operations in conjunction with creation of transitional authorities.

It is widely accepted that in inter-State conflicts the stationing of a PK force needs the consent by both States.²³² But the majority of contemporary conflicts are not inter-State but internal ones. This begs the question how the practice could be explained when the consent is asked for not only from the host State but also from other parties of the conflict, such as rebels or separatists. The sovereignty-based approach to consent is obviously not in position to explain this circumstance. It may therefore be asked whether the requirement of consent by parties other than host States has the legal background or is based only on considerations of expediency.

The functional nature of peace-keeping operations may explain the circumstance that the consent of parties other than States is required. This functional nature consists in maintenance of international peace and security in the area concerned subject to respect of territorial integrity and sovereignty of the host State.²³³ The fact that the host State has given the consent to stationing of forces means in itself that its territorial sovereignty is respected. But once this requirement is satisfied, it should be borne in mind that the core function of peace-keeping operations is the maintenance of peace in the area (respect for territorial sovereignty being the limitation on this function). For the successful performance of that function the consent by all affected parties is necessary and this circumstance is entirely without prejudice to territorial sovereignty or to settlement of the controversy in question.

It should be noted at the end, that there is no legal imperative necessitating the consent by non-State actors for establishment of a PK force, although requirement of such a consent emanates from the nature of PK operations. Consent by non-State actors is asked for as a matter of

²³⁰ This Convention, even if not entered into force, contains nevertheless, as a codification of customary international law, the rules and principles governing treaties concluded by international organisations.

²³¹ McCoubrey & White, *The Blue Helmets: Legal Regulation of UN Military Operations* (1996), 72

²³² Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 322. UNEF, for instance, was located only on territory of Egypt, because Israel has not consented to stationing of troops on both sides of armistice line, id.

²³³ Resolution 1272(1999) on creation of UNTAET force referring to respect for territorial sovereignty of Indonesia; Resolution 1244(1999) establishing KFOR referring to respect for territorial integrity and sovereignty of FRY (preambular para. 10 and Annex II).

expediency²³⁴ and not as a matter of legal imperative. UNFICYP, for instance, has been established on the basis of consent by the government of Cyprus only.²³⁵

Although not directly with regard to the issue of consent, the ICJ in *Certain Expenses* case made a difference between measures taken against States and those taken against non-State entities, including secessionist ones. Operation of the United Nations in Congo (ONUC) has not been considered by the Court as an enforcement measure in sense of Chapter VII, but as a PK operation.²³⁶ The Court has reached this conclusion notwithstanding the fact that the Security Council, by resolution 161(1961) extended the mandate of ONUC by authorising it to take “all appropriate measures to prevent the occurrence of civil war in the Congo”, including “the use of force, as a last resort, if necessary”.²³⁷ The decisive point for the Court was that ONUC was “not authorised to take military action against any State”.²³⁸

Therefore, it has to be assumed that UN military operations not involving the forcible action against a State cannot be regarded as enforcement actions and fall within the notion of peace-keeping. But as far as they may involve the use of force against non-State entities, including secessionist ones, it appears that consent by such non-State entities is not legally imperative.²³⁹ When such a consent is asked for, this is based simply on convenience and the need to prevent aggravation of a conflict.

2. Consent *ratione materiae* – There can be diversity of opinions as to whether the consent by a host State shall extend not only to establishment of a PK force, but also to the scope of their mandate and to their composition. powers and functions of the mission, composition of the mission; The power to determine composition of the mission lays in principle with the Security Council or with the Secretary-General.²⁴⁰ In practice, however, “attempts have been made to meet as much as possible the desires of all parties concerned”.²⁴¹ Such a practice is no doubt reasonable, because the host State may always make its consent to stationing a PK force dependent on conditions concerning composition of such a force.

Nevertheless, the exception to that circumstance may occur if PK forces are established in context of Chapter VII. If the Organisation is ready to support its proposals concerning composition of a PK force by further enforcement actions, the host State may decide to accept composition of a force as proposed by the Organisation.

3. Consent *ratione temporis* – PK operations are always considered as a temporary measure. Therefore, as a rule, the duration of their mandate are laid down in resolutions establishing them. It is usual in practice that the mandate of PK forces are limited to a certain period (mostly to six months) and are periodically prolonged. Such a periodical prolongation of mandate may be considered as a tool for maintaining viability of consent given by parties concerned.

²³⁴ Walter refers to the relevance of factual influence of parties in a civil war in this context, Walter, *Vereinte Nationen und Regionalorganisationen* (1996), 324

²³⁵ McCoubrey & White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996), 70

²³⁶ *ICJ Reports*, 1962, 177

²³⁷ UNSC res. 161(1961), paragraph 1

²³⁸ *ICJ Reports*, 1962, 177

²³⁹ Nolte considers that as far as States are regular subjects of international law, as represented by their respective governments, these governments may treat rebellion movements by force and may therefore avail themselves of appropriate assistance by foreign States, Nolte, *Eingreifen auf Einladung* (1999), 133. By way of analogy to approach of Nolte, we conclude that States may also use assistance by international organisations while dealing with rebellion movements, as well as with secessionist and separatist units.

This conclusion by us is supported in the practice of the Security Council, which, in case of Congo, expressly stated that its aim was to support Congolese government in fighting against secessionist Katanga and to enable national security forces to meet fully their tasks, UNSC res. 161(1961), para. 2

²⁴⁰ Sarooshi, *The United Nations and the Development of Collective Security* (1998), 65; consent in connection with composition of forces is dealt in details by Di Blase, *The Role of the Host State's Consent with Regard to Non-Coercive Actions by the United Nations*, in Cassese (ed.), *United Nations Peace-Keeping. Legal Essays* (1978), 58-69

²⁴¹ Suy, *Peace-Keeping Operations*, in Dupuy (ed.), *A Handbook of International Organisations* (1988), 389

VII. Concluding Remarks on Legal Basis of Peace-Keeping Operations

To give the satisfactory analysis of legal basis of PK operations within the frameworks of one paper is considerably hard and complex task. Nevertheless, attempt has been made to analyse several bases provided in the UN Charter and in general international law which may be resorted to in case of establishment of PK operations. The several general conclusions may be advanced in this regard:

(a) The provisions of the Charter of the United Nations governing maintenance of international peace and security are conferring on the UN the powers sufficient for finding legal basis of establishment of PK operations, as well as for adapting the PK forces already established to particular needs dictated by an environment in which they operate and by general needs of maintenance and restoration of international peace and security. In particular, PK forces may be transformed into peace-enforcement ones.

(b) The several bases provided in the Charter for establishment of PK operations should be interpreted and applied in a mutually supportive and not in mutually exclusive way. Such an approach may guarantee the effective realisation of political discretion conferred upon principal UN organs and afford performance of their powers to a fullest possible extent.

(c) The (consensual) nature of PK operations, as understood in conjunction with purposes and principles of the United Nations, may contribute to empowering the organs of the UN – in our case the Secretary-General – to establish PK forces when the need of maintenance of peace and security so requires. The need of effective application of Charter provisions should be borne in mind. Also it should be emphasised that such an approach does not envisage to encroach upon exclusive competences of any other UN principal organ.

(d) The (consensual) nature of PK operations shall be a necessary criteria for the United Nations in order to decide which situations involving or likely to involve threats to peace may be addressed through peace-keeping operations. The need to maintain peace and security and the suitability of a particular situation for establishing a PK force shall be considered as equally significant factors in each case.

Some Conclusions

The establishment and development of safeguards of collective interests is a characteristic feature of any society, whether national or international. Yet, the societies differ from each other in this regard, some of them having attained more high level of progress than others. The international community may hardly be considered to belong to the champions' club. The decentralised and anarchical nature of international legal order obviously hinders the international community to achieve fast progress in protection of its own interests. The institutions available at an international level are political and mainly dependent on the will of States.

The current state of things is therefore far from being satisfactory. On the other hand, it should be kept in mind that international community, like the national societies, is moving and evolving towards more effective, just and non-selective application of practices and institutions it has at its disposal. In national societies, which may be considered to have more or less achieved this goal, the Rule of Law has always been the principal determining factor in this field. In democratic societies, collective interests are embodied by the law and are enforced through the rules and mechanisms of the law. However important the values and interests affected or encroached upon, the preservation of those values is strictly subjected to the law. This circumstance provides the lion's share in building-up the belief and trust in an existing political and economic system.

The authoritarian societies and societies with incomplete democracy show important differences in this regard. In such societies, the role of the law is far from being predominant in determining and enforcing common interests. A "common" interest may be invoked as justifying neglect of applicable rules of the law. The benefit of the whole society may be considered as a factor justifying violations of the law. Such societies, despite of being located in various parts of the world and being parts of various cultures, have nevertheless one thing in common: they suffer greatly from poverty, instability and lack of education.

The international community shall not fail to observe these developments. Rather, it must draw a good lesson from them. And the lesson is that the common interests are never possible to be effectively safeguarded by actions unjustified under the law. The societies whose governments perform such actions in international relations should ask themselves whether they would welcome actions of similar nature within their domestic political, economic or social systems. Democratic societies would most probably not.

Likewise, the international community shall make a choice of direction of its development. Stability and development in international relations is in no way supposed to be achieved if the policy decisions within the international community are not adopted on due representative basis and in due respect for the law in force.