

Regionalism under the United Nations Framework

**Exploring the limits and possibilities for regional enforcement action
under the UN Charter with a special focus on Chapter VIII UN Charter**

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Preface

A stormy enterprise, that's what it was. A thesis in 1,5 month, that was the task. And I'm proud and happy to say: the task has been accomplished. As always, it would not be possible if I wasn't surrounded by lovely people. My family and friends, who I haven't been able to see that much in the past year. prof. Van Genugten for the flexible and stimulating attitude and the possibility to conduct my own research which made it possible for me to write this thesis in such a pace. Stefanie, for all the comments at impossible times, cheering words and endless trust and last but certainly not least, Stéphane, for your enduring patience, comforting words and your presence when I needed it the most.

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Introduction

1. Context of the Research

One of the essential features of the UN since its establishment in 1945 has been its monopoly on the use of force, accompanied with a general prohibition on to resort to use of force by states. The purpose of this prohibition is to minimize the recourse to coercive action when conflict arises between or within states. The prohibition on the use of force as envisaged in the UN Charter does not preclude the use of force by a state or group of states in case of self-defence (Article 51 UN Charter). Hence, apart from self-defence, it is the sole competence of the UN, more precisely the Security Council, to authorize forceful intervention to restore international peace and security.

The UN Charter has always kept elbow-room for regional organizations to contribute to the maintenance of international peace and security.¹ The cooperation between the UN and regional organizations in the field of international peace and security has been put forward in Chapter VIII of the UN Charter and gives way for regional organizations to settle disputes peacefully without authorization of the Security Council. As a last resort, the Chapter subsequently allows regional organizations to coercively intervene in situations, albeit under the auspices of the Security Council. Hence, under Chapter VIII of the UN Charter the cooperation of regional organizations with the UN should be seen as a partnership, in which the Security Council always has the final word on authorizing coercive action. This perfectly mirrors the preference for a universal approach towards peace and security with acknowledgement of conditioned regionalism which formed the foundation of the United Nations ideology.²

In order to achieve its core objective, the maintenance of international peace and security, the UN increasingly relies on regional organizations. The inability of the UN to effectively intervene and prevent massive humanitarian catastrophes from happening in the 1990s, initiated the call for greater involvement of regional organizations.³ Moreover, the changing character of conflicts, which became more complex and increasingly required more in-depth knowledge about specific regions, have put regional organizations to the forefront in the field of peace and security. Financial and political constraints made it furthermore impossible for the UN to (effectively) respond to all conflicts that arose. Consequently, regional organizations came to realize that they cannot depend solely on the UN to ensure peace and security in their region. They understood that they had to step in and provide for security mechanisms themselves. Illustrative of such a response was the way in which African States embraced the slogan 'African solutions

¹ A.K. Henrikson, 'Chapter 5: the Growth of Regional Organizations and the Role of the United Nations', in: L. Fawcett & A. Hurrell (eds.) *Regionalism in World Politics: Regional Organization and International Order* (OUP: Oxford: Oxford 1995) 126.

² This conditioned regionalism in the UN Charter will further be clarified in Chapter 1, section 2.

³ UN Secretary-General *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peacekeeping*, UN doc. A/47/277-S/24111, 17 June 1992, para. 64; UN Secretary-General *Supplement to an agenda for peace. Preventive Diplomacy, Peacemaking and Peacekeeping*, UN Doc. A/50/60-S/1995/1, 3 January 1995.

for African Problems', which became the mantra for the active involvement of regional organizations in conflict situations on African soil.⁴

Regional organizations have been taking up a role which was initially not envisaged for them in the UN Charter, which initially resulted in overstressing the UN collective security system at an ad hoc basis. Although only a minor role was assigned for regional organizations under the UN Charter, increasingly they appropriated a larger role for themselves, sometimes without but more often with Security Council authorization, either prior or after the intervention in question. One could think of the interventions of the Economic Community of West African States (ECOWAS) in both Liberia and Sierra Leone, in which inaction of the Security Council led to intervention by ECOWAS without the required Security Council mandate. With regard to Liberia, for example, the Liberian Ambassador already brought the issue before the Security Council in June 1990. Although it was a case in which immediate action was required, the Security Council waited with addressing the issue until January 1991. As this delay could have disastrous effects, ECOWAS already took action five months earlier, in August 1990. Both the intervention in Liberia and Somalia received Security Council support afterwards. Some scholars argue that these cases, among others⁵, have created a precedent for intervention without security council authorization and thereby contribute to the erosion of the Security Council's primary responsibility. On the other hand, these regional organizations could be seen as having stepped up to fill a security vacuum which the United Nations has left open.

Apart from these ad hoc cases, a more fundamental challenge to the UN collective security scheme seem to have emerged in 2002, with the establishment of the African Union under its Constitutive Act. The African Union (AU) has created a shift in the settled practice on the use of force. It has been the first regional organization which explicitly mentions a right to intervene in its member states in given circumstances (Article 4(H) of the 2002 Constitutive Act). As far as the right to intervene has met the criteria of being under the approval of the UN Security Council, there appears to be no problem with this newly evolved right. It becomes however different, since it seems unclear whether the AU intent is to get Security Council authorization for coercive action. The AU Constitutive Act, despite a general reference to the primacy of the UN Security Council, makes no reference in the operative part of the document to the need for advance approval by the Security Council of *any* AU intervention in a Member State.⁶ In subsequent documents it has been determined that Security Council authorization should be sought in principle, but situations could arise in which immediate action would legitimize *ex ante* approval of the

⁴ This slogan has its roots in the New Pan Africanism movement after the decolonization in the early 1960s, when African politicians and intellectuals strived for African Unity. They founded their ideas on the Pan Africanism of the 1900s which urged the emancipation of all Africans by cooperation, wherever they were living in the world. The Politicians in the 1960s wanted to end the subordinate positions of Africans and wished to independently build and ensure peace, security and development for their own people. In order to empower this ambition 'African Solutions to African Problems' became their philosophy. For further reading see: H. Verhoeven, *African Solutions to African conflicts? De ontwikkeling van een continentaal veiligheidsbeleid door de Afrikaanse Unie en haar Peace and Security Council* (University of Gent: Gent 2007).

⁵ The NATO intervention in Kosovo in 1999 can be seen as such a case. For further reading on regional intervention without Security Council authorization, see: A. Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organizations' (2002) 6 Max Planck Yearbook of International Law 535. Specifically on Liberia: p. 542-544; Specifically on NATO in Kosovo: p. 544-549.

⁶ Graham, K and Felicio, T, *Regional Security and Global Governance. A Study of Interaction between regional agencies and the UN Security Council with a proposal for a regional-global security mechanism* (Brussels University Press, Brussels 2006) 156.

Security Council.⁷ This remark has major implications for the doctrine on the use of force, given that as soon as the AU is prepared to intervene in its member states, without (prior) SC authorization, it seems that the AU is undermining the UN's monopoly on the use of force all together.

Besides the Constitutive act, other peace and security aspirations have been established by the African Union. The Protocol Relating to the Establishment of the Peace and Security Council of the African Union provided for the establishment of the AU Peace and Security Council, entrusted with the enforcement of AU decisions and the implementation of the Common African Defence and Security Policy.⁸ Although the protocol stresses the cooperation between the AU Peace and Security Council and the UN Security Council in the maintenance of peace and security, the nature of the relationship remains unclear as the partnership between them is not crystallized and therefore could lead to practical problems. On the basis of all these obscurities, it is very challenging to see whether the peace and security aspirations of the African Union are either compatible or undermining the UN framework and to see how and effective partnership between the Security Council and the African Union can be established. Since these questions ask for intensive research, they will be answered within a larger PhD-project.

2. Focus of the Current Research

Within this thesis a more general, introductory question will be explored. Interesting to research and is feasible within this thesis is what precisely, in the light of the changing role of regional organizations, are the competences of regional organizations for taking action under the UN Charter. Clarity on their mandate and role is firstly necessary before the parameters for effective cooperation can be clarified in future. As peaceful measures already form part of the competences of regional organizations and have not been a point of major discussion, the focus will be placed on enforcement action. It is after all the authorisation on the use of force which has been the sole competence of the UN Security Council. The question that will be central will then be as follows:

What are the limitations and possibilities for regional organizations to legally conduct enforcement action under the UN Charter?

3. Limitations and research methods

While within the UN Framework two different types of regional organizations are distinguished, a typology which by itself is the subject of an enormous political and academic discussion, it is necessary in the light of feasibility to delimit this research to regional organizations in the sense of Chapter VIII UN Charter and thereby exclude regional defence alliances, such as NATO, which primarily enforce action on

⁷ See, for example, AU, Executive Council, EXT.EX.CL/2 (VII), 'The Common African Position on the Proposed Reform of the United Nations : "The Ezulwini Consensus"', seventh Extraordinary Session, 7-8 March 2005, p. 6.

⁸ AU, Heads of State and Governments, 'Protocol relating to the Establishment of the Peace and Security Council of the African Union', first ordinary Session, 9 July 2002 ; AU, Heads of State and Governments 'Solemn Declaration on a Common African Defence and Security Policy', Second Extraordinary Session, 28 February 2004.

the basis of collective self defence, i.e. Article 51 UN Charter.⁹ Furthermore, as this thesis will be part of a larger research project, it is by no means meant to give definite and exclusive answers. It should be merely seen as an exploring expedition through the UN Charter to signal where potential limitations and possibilities can be identified for regional organizations to take enforcement action. Therefore a special emphasis will be placed upon Chapter VIII UN Charter since it has been specifically designed for regional actions in the field of peace and security, supplemented with a more general exploration of other possibilities under the UN Charter to authorize regional enforcement action. In order to determine whether within the UN Charter possibly other legal grounds can be found for regional organizations to enforce coercive action, additionally the development of international customary law will be hinted. In the light of practicability this will however not be an extensive and thorough examination but merely stipulating the general development and signalling where further research is still required which will be taken up in the upcoming research. Thereby, most importantly, it will be signalled where possible developments has been emerged and where further research is required which will be taken up in future research.

The research will be conducted by analyzing the content and scope of relevant provisions.. Therefore secondary literature on the *travaux préparatoires* has been examined. Furthermore, other relevant legal literature as well as literature from political science and international relations has been studied.

4. Outline of the Thesis

The thesis will be structured as follows. First a general introduction will be given on the changing role and growing importance of regionalism as it is important to place the new trend of regionalism in its political context. Thereafter, the character of Chapter VIII UN Charter will be explored, which will be divided in a normative part (Chapter 2) and an operational part (Chapter 3). Afterwards, a general exploration will be given (Chapter 4) to determine possible other grounds under the UN Charter to legalize enforcement action for regional chapter VIII organizations. The thesis will be rounded up by answering the research question in a concluding matter and by making some recommendations for further research

⁹ A more extensive consideration of the differences between these types of regional organizations and a further clarification of what constitutes a regional chapter VIII- organization will be given in chapter 2.

Chapter I

Contextualization: the growing importance of regionalism

1. Introduction

In 1945 the drafters of the UN Charter could not have foreseen the extensive role that regional organizations would have more than sixty years later in achieving international peace and security. Interestingly, quite the reverse can be said, as the role for regional organizations to contribute to what has been one of the UN's core objectives¹, was fiercely played down during the debates in the San Francisco conference which led to the codification of the UN Charter and the establishment of the UN. This chapter will give some insights in the way in which regional organizations initially have been given a moderate role within the UN collective security scheme and how over the years regional organizations increasingly took up the lead themselves and proved to be in time crucial players in the maintenance of international peace and security. It will be shown that regional organizations departed from a subordinate, underdog position vis-à-vis the Security Council which slowly evolved in a partnership on a more reciprocal, equal footing, sometimes even with a slightly haughtiness about their role and position within the collective security scheme which resulted in instances in which the system clearly has been overstretched at the expense of the authority of the Security Council as already has been highlighted shortly in the introduction.

2. Moderated regionalism: from the League of Nations to the UN

The tension between regionalism and universalism has always been at the surface in international efforts to organize peace and security and has its roots in the traditional divide between centralism and local government at the domestic level.² Within international law on the use of force, the tension became apparent around 1918. After the outbreak of the First World War states felt the necessity to organize themselves in an international community, which resulted in 1919 in the establishment of the first international organization aiming at the promotion of international cooperation and achievement of international peace and security, the League of Nations.³ Despite the universal approach towards achieving peace, the Covenant of the League of Nations acknowledged that regional between states has to be recognizes, since these forms of collaboration already existed prior to its establishment and to achieve the

¹ Article 1 (1) of the UN Charter which portrays the purposes and principles of the UN states: The purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

² C Schreuer, 'Regionalism v Universalism' (1995) 6 *European Journal of International Law* 477

³ The League of Nations was established after the Treaty of Versailles.

same end.⁴ However, apart from the acknowledgement of their existence, the League of Nations did not give regional organizations a specific role and therefore regionalism within the League of Nations did not receive major academic attention.⁵ The existence of the League of Nations turned out to be relatively short-lived, since the outbreak of the Second World War eventually led to the collapse of the League of Nations as it failed to achieve its primary objective.⁶

Already during the Second World War, several conferences were held between the Great Powers to decide upon a way in which security could be organized internationally after the war would come to an end, in order to avoid that a conflict of such a magnitude would ever happen again.⁷ Not everyone was nonetheless eager to establish yet another international organization, probably because the failure of the League of Nations was still fresh in mind. The English Prime Minister Winston Churchill, for example, pleaded in 1943 for the creation of a number of regional councils rather than a world organization.⁸ In his view *'only those affected by a dispute could be expected to apply themselves with sufficient vigour to secure a settlement'*.⁹ Despite these reservations towards a world organization, the Four Superpowers (USA, USSR, UK and China) decided upon the establishment of the United Nations during the Washington Conversations on International Peace and Security Organization, commonly known as the Dumbarton Oak Conference in 1944.¹⁰ The United Nations would become an international organization entrusted with the maintenance of international peace and security. During this conference not merely the establishment of the UN was concluded, but also the basic guidelines on how the UN should ensure its objectives were sketched. The foundation was laid on how membership should be arranged, the formation of the Security Council as final authority to decide upon the use of force and the allocation of the permanent seats within the Security Council accompanied with the veto right.¹¹ They took a universalist approach since the primary responsibility of the permanent members of the Security Council was envisioned, leaving almost no room for regional organizations.¹²

After the major Allied powers¹³ managed to end the Second World War, the Dumbarton Oaks Proposals formed the basis for the United Nations Conference on International Organizations (commonly known as the San Francisco conference). As the suggestions were heavily influenced by a global focus, the

⁴ Article 21 Covenant of the League of Nations.

⁵ A Abass, *Regional organizations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter* (OUP: Oxford 2004) 3.

⁶ Although formally the league of Nations was replaced by the United Nations in 1945, the Second World War already turned the League in an institution on paper. During the War the headquarters of the league, the Palace of Peace, remained unoccupied for nearly six years until the Second World War ended.

⁷ S Neff *War and the Law of Nations: A General History* (Cambridge University Press, Cambridge 2005) 315

⁸ FO Wilcox, 'Regionalism and the United Nations' (1953) 3 *International Organization* 789, 790

⁹ Churchill, cited in: AK Henrikson, 'Chapter 5: the Growth of Regional Organizations and the Role of the United Nations', in: L. Fawcett & A. Hurrell (eds.) *Regionalism in World Politics: Regional Organization and International Order*, (OUP: Oxford 1995) 122

¹⁰ Hummer, W & Schweitzer, M, 'Chapter VIII regional arrangements' in: B. Simma (ed) *The Charter of the United Nations. A Commentary* (OUP: Oxford 1994) 685. The conference was held in 1944 from August 21-29 1944 wherein 39 nations attended.

¹¹ Id. 685

¹² Hummer & Schweitzer (n 10) 686

¹³ The major allied powers were the former USSR, USA, UK, France and China. These countries had granted themselves the permanent seats within the Security Council, which provided them a veto-right by which they could block SC action.

universalist approach has moulded the tone of the San Francisco debates. Despite the strong emphasis by the victorious powers on a universal focus of the UN system, some, in particular Latin American and Arab states, wanted recognition of the legitimacy and role of regional organizations in securing peace.¹⁴ The almost inexistence of regional organizations at that time made the contextual basis for cooperation to achieve a prominent place for regionalism within the UN Charter, however, limited.¹⁵ Only the Arab and the American states had created regional charters in that time.¹⁶ Despite the lack of coordination between regional adherents, the vigorous debate between universalists and regionalist tendencies that followed, forced the universalists to make fundamental concessions in favour of regionalism.¹⁷

The regionalist concern was focused upon the fact that permanent members of the Security Council not coming from a certain region, could prevent regional enforcement measures, by using its veto right. This anxiety led the Latin American States to defend the stance that they wanted either to reserve dispute settlement exclusively for regional organizations or to exclude the Organization of Inter American States from the subordination of regional agencies to the UN. Although most states agreed upon the necessity of SC authorization and therefore saw it as no option to exclude the OAS from the subordination to the UN, a compromise was reached to 'secure the regional need for autonomy',¹⁸

In the Dumbarton Oaks Proposals already some reference were made to regional organizations, which would form the basis of the separate Chapter of the UN Charter which would be exclusively devoted to regional organizations (Articles 52-54 Chapter VIII). To strengthen the position of regional organizations in the UN collective security Framework, some important revisions were made during the San Francisco Conference.¹⁹ The first way in which the Dumbarton Oaks Proposals were modified was that priority was given to regional agencies to settle disputes in a friendly manner, before turning to the Security Council for help. The Security Council should then function as a means of last resort. This compromise can be found in two places of the final text of the UN Charter. Firstly, it has been mirrored in Article 33(1) of Chapter VI which focuses upon the pacific settlement of disputes in general. The provision stipulates that: '*parties to any dispute (...) shall first (...) seek a solution by negotiation enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice*'. In addition, Article 52(2) of Chapter VIII UN Charter states that UN Members which unite themselves in a regional arrangement or agency should '*make every effort to achieve pacific settlement of local disputes (...) before referring them to the Security Council*'. By including these two provisions, there was both room for regional organizations to contribute to the maintenance of peace by giving them a crucial role in the peaceful settlement as well as for the Security Council to function as the final authority to decide upon enforcement action.

¹⁴ Zwanenburg, M, 'regional organizations and the maintenance of International peace and security: three recent regional African peace operations' (2006) 11 Journal of Conflict & Security Law 484, 488

¹⁵ International organizations indeed existed but mostly focused on economic issues rather than security issues, see Abass (n 5) 2

¹⁶ Felicio, T, 'The United Nations and Regional Organizations: the Need for Clarification and Cooperation' (2009) 3 LXII Studia Diplomatica 13, 13

¹⁷ Wilcox (n 8) 791

¹⁸ Hummer & Schweitzer (n 10) 687

¹⁹ Hummer, W & Schweitzer, M, 'Chapter VIII regional arrangements' in: B. Simma (ed) *The Charter of the United Nations. A Commentary* (OUP: Oxford 2002) 815

The second, and most important concession, was the acknowledgement of the collective right to self-defence, laid down in Article 51 of the UN Charter. It was acknowledged that the inherent right to self-defence of states is also present when states organize themselves and consequently enforcement measures as part of self-defence were not put under Security Council scrutiny. Therefore, Article 51 UN Charter reads:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security(...)’

The third and last compromise was made by allowing the continued operation of mutual assistance pacts, such as the 1942 Anglo-Soviet Treaty of Alliance against Nazi Germany and its European associates.²⁰ An important exception was however made by concluding that measures against enemy states could be taken immediately and without prior Security Council Authorization (Article 53(1) UN Charter). According to Article 53(2) UN Charter enemy states had to be defined as the enemies of the signatory parties during the war.

Hence, albeit some concessions had been made, regional arrangements or agencies were ultimately still under the absolute supremacy of the Security Council, as the final text of Article 53 UN Charter reads: ‘*no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council*’. Thus it can be said that with regard to enforcement measures, in general the universalist approach towards peace and security prevailed. Consequently, the UN Charter can be seen as a formula in which universalism and regionalism was both facilitated, but at the same time delimited regionalism, especially in the case of coercive action.²¹ The compromise between universalism and regionalism thus resulted in a universal approach with conditioned regionalism.

3. Regionalism and Cold War tensions in the Security Council

Despite the idealism which marked the establishment of the UN, the period after 1945 turned out to be far from without conflict. The Cold War tensions between the two Super Powers (USA and USSR) which were already influencing international politics in 1947, prevented the development of a close relationship between the Security Council and existing regional arrangements. The Security Council itself was paralyzed by the veto since the USA and the Soviet Union were blocking UN involvement in regional conflicts in which they themselves were either directly or indirectly involved. Regional arrangements were used to keep disputes out of UN hands.²²

As a result, the era has been marked by a cross over between regionalism and universalism. As Akindele appropriately argued: ‘*the constitutional history of the United Nations shows that there has been*

²⁰ Hendrikson (n 9) 127

²¹ Felicio (n 14) 14

²² B Rivlin, ‘Regional Arrangements and the UN System (1992) 11 International Relations 95, 97-98

*a de facto revision of the Charter law of universal-regional relationships in favour of greater autonomy for regional organizations*²³

The greater autonomy was however not achieved by all regional organizations. Within this period a difference in development can be seen between regional defence alliances and other regional organizations.²⁴ Alliances increasingly took up broader security responsibilities which were originally part of the Security Council mandate, while the UN itself mostly involved itself in local peacekeeping duties. Chapter VIII regional organizations played a much less significant role than the creators of the UN charter originally had envisaged. had planned. They were not used as ‘*shock absorber or a forum of first resort*’²⁵. By *Hendrikson* and *Wilcox* it has been suggested that this is mainly due to the fact that the Security Council had not been able to discharge effectively its responsibility for the maintenance of peace.²⁶ According to them effective dispute settlement depends on effective un security council peacemaking. Once one of the relevant actors is not performing its role duly, the other actors are not in a position to do what is expected of them as well. The cold war period can therefore be typified as one of individual action rather than teamwork in the field of peace and security. Despite this false start for their role in maintaining peace and security, Chapter VIII regional organizations would become major players in the decades to come, when the dissolution of the Cold War tensions opened up the international arena once more.

4. 1990s: new regionalism until now

With the end of the Cold War, the Security Council found itself in the position again to act as decisive and final authority in the maintenance of peace and security. In particular when the Security Council successfully stopped the Iraqi invasion of Kuwait in August 1990, the Security Council was believed to be fully functioning again.²⁷ This renewed optimism however hastily gone astray as in the remainder of the 1990s the Security Council turned out to be unable to effectively intervene in Rwanda, Somalia and Yugoslavia, which undoubtedly can be seen as some of the major conflicts of this decade.

The inability to effectively intervene was further enhanced by the changing character of conflicts. Although the original focus of the UN Charter was on interstate conflicts, the period marked the near absence of armed conflict between states. Conversely, there was an enormous increase of inter-state violence. Civil wars, guerrilla strives and terrorist acts would become the major challenges of international peace. The character of the conflicts increasingly acquired more knowledge of the state structure involved. As regional organizations were more likely to be in tune with the conflict at hand and were more likely to ensure a timely response, the UN started to rely on them on a regular basis. Additionally, since the number of conflicts rose explosively by including interstate conflicts to the mandate of the Security Council, the UN faced severe financial hardships to respond to all clashes at once. Furthermore, although the cold tensions were eroded and the Security Council was fully in function again, the veto system still turned out

²³ AK Akindele, *The Organization and Promotion of World Peace* (University of Toronto Press: Toronto 1976) 63

²⁴ The difference is already shortly explain in the introductory pages and will be further clarified in Chapter 2.

²⁵ Hendrikson (n 9) 133

²⁶ Id; Wilcox (n 8) 431

²⁷ FJ Marchal, *Growing regionalism under the United Nations Framework. The eroding of the primary responsibility of the SC in favor of regional organizations* (Vrije Universiteit Amsterdam, Amsterdam 2009) 6

to be too politicized to function properly. Often veto-rights were used to block action in a befriend state, while the necessity for action was evident. These political constraints made regional organizations come to realize that there was a void in the collective security framework. As (one of) their objective(s) was to ensure peace and security within their region, they took up what has left to be done by the Security Council as part of their own regional mandate.

Due to these political, financial and practical constraints, prominents within the United Nations began to realize that the involvement of regional organizations could relieve some of the burden of the Security Council and the UN in the pursuit of peace and security. In the publication of *An Agenda for Peace*, pursuant to the Security Council Summit meeting in January 1999, this realization was for the first time openly expressed by Security-General Boutros-Ghali:

‘What is clear (...) is that regional arrangements or agencies in many cases possess a potential that should be utilized in serving (...) preventive diplomacy, peace-keeping, peacemaking and post-conflict peace-building. Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.’²⁸

This statement could be seen as a turning point as finally the role of regional organizations was recognized and it was acknowledged that the Security Council alone would not be capable to ensure international peace and security. This statement can be viewed as the birth of the development of a regional-universal security-partnership.²⁹ Hence, the focus was one again on cooperation and teamwork rather than on individual action.

The importance of regional organizations has been emphasized ever since. Leading is the idea that collective security can only be ensured when all actors are involved, with the United Nations and its Security Council as overarching organization from where the cooperation should be arranged. This idea had been expressed in a large number of declarations in which the role of regional organizations was recognized and encouraged. Since 1993, seven High Level Meetings have been convened on security matters in which regional organizations were involved.³⁰ During the Sixth High Level meeting, for example, a joint statement was issued in which the need for a more reciprocal relationship was expressed, build on comparative strengths of each organization’.³¹

Next to High Level Meetings, the Security Council increasingly puts regional organizations to the forefront. The last relevant action, was the debate in January 2010 on the cooperation between the UN and

²⁸ UN Secretary-General *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peacekeeping*, UN doc. A/47/277-S/24111, 17 June 1992, para. 64.

²⁹ Security Council, *The UN and Regional Organizations*, Update report no. 3, 23 March 2007, available via: www.securitycouncilreport.org

³⁰ R Tavares, *Regional Security. The Capacity of International Organizations* (Routledge, New York 2009) 6

³¹ Tavares (n 30) 6

regional organizations in the maintenance of international peace and security.³² The emphasis on cooperation can also be found in other relevant reports which were issued in the last decade. In the 2005 report of Secretary-General *In Larger Freedom*, Kofi Annan pleads for the introduction of a memoranda of understanding to improve the partnership between the UN and regional organizations:

‘To improve coordination between the United Nations and regional organizations, within the framework of the Charter of the United Nations, I intend to introduce memoranda of understanding between the United Nations and individual organizations, governing the sharing of information, expertise and resources, as appropriate in each case.’³³

In 2006 the necessity to improve cooperation was further enhanced by the Secretary-General in the report on Regional-Global partnerships, which aimed at:

‘The establishment of a more effective partnership in close cooperation with the Security Council and based on a clear division of labour that reflects the comparative advantage of each organization’.³⁴

Clearly the future ahead is on cooperation and partnership. Regional organizations in the field of peace and security are here to stay. Their position and value has increasingly been acknowledged by the United Nations. In order to ensure that regional organizations will not be expanding their mandate at the expense of the Security Council, the UN need to make sure that a cooperation model is set up in which the division of labour and, probably more importantly, the mandates are clear. Otherwise the rise of regionalism will result in an erosion of the SC primary responsibility in the maintenance of international peace and security.

5. Conclusion

The tension between universalism and regionalism has always heated the debate within the organization of peace and security. The role of regionalism has been changed remarkably over the years. During the drafting procedure of the UN Charter, regionalism was acknowledged, but more to temper the unease of some states than to effectively give them leeway to enforce action. Their role was focused upon the peaceful settlement of disputes, with the Security Council as decisive and leading authority when enforcement measures should be authorised. The focus therefore was on cooperation with the Security Council but with regional organizations in a subordinated role. In that way the universal approach prevailed.

Although initially visualized in another manner, the focus shifted in the cold war period from cooperation to individual action to ensure international peace and security. Regionalism was used to

³² Security Council, ‘Cooperation between the United Nations and regional and sub regional organizations in maintaining international peace and security’, S/PRST/2010/1, 13 January 2010.

³³ Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, A/59/2005, 21 March 2005, at 213.

³⁴ Report of the Secretary General, ‘A regional-global security partnership: challenges and opportunities’, A/61/204–S/2006/590, 28 July 2006, at 6.

bypass the Security Council, which was paralyzed by the Cold war tensions. After the Cold war the Security Council at first was seen as having retained all its powers, but this turned out to be relatively short lived. Due to political, financial and economical constraints within the UN framework, regional organizations increasingly took up a role in ensuring peace themselves. This resulted in the acknowledgement of the importance of regionalism. Focus on regional-global partnerships, albeit with the Security Council as primary responsible authority. Although the rules remained the same, this marked a significant change. Important in this regard is the acknowledgement that in certain situations regional organizations are the better-equipped to perform the task, a development which was during the establishment of the UN unthinkable (apart from peaceful settlement of disputes).

Chapter 2

The normative framework of Chapter VIII UN Charter

1. Introduction

In the previous chapter it became clear that regional organizations increasingly have attained a more significant role in the field of peace and security. As their influence seems to expand further and increasingly enforcement action is involved, it becomes crucial to specify their role in more detail and determine what kind of coercive activities they are allowed to perform under the UN Charter and under which circumstances. As already mentioned in the introductory pages, the UN Charter devotes a specific chapter to the role of regional organizations in the maintenance of international peace and security, Chapter VIII. Before a closer look can be taken to the operational part of Chapter VIII UN Charter (and thus establishing which enforcement actions are allowed under what circumstances), it is first necessary to determine who can be classified as addressee of the provisions.

2. The absence of a clear definition

A difficulty in determining which organization can be labelled as a regional organizations in the sense of Chapter VIII is that from the establishment of the UN onwards relevant actors have failed to provide a clear definition. Already at the San Francisco conference the participants deliberately refused to further characterize regional Chapter VIII-organizations. As the final text of article 52(1) UN Charter reads:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

The only criteria which can be distracted from this article is that regional arrangements should be dealing with peace and security issues, appropriate for regional action and consistency with the purposes and principles of the United Nations. This is still however insufficient clarification about which regional organizations are referred to in Chapter VIII UN Charter. In an *Agenda for Peace*, the Security-General once again stressed the value of having a flexible definition:

'The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United

Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.¹

Although flexibility presupposes adaptability under changing circumstances, the lack of definition can also pose problems since organizations can use this lack of clarity to determine their organization in a way which suits them best at that moment.² Tavares stresses the importance of ‘injecting some clarity’ in this definition: ‘the most basic prerequisite for an operational global-regional mechanism to work is to clarify regional organizations and the differences that exist between them.’³

Therefore, a closer look will be taken at criteria which are set forth by scholars in order to determine which organizations can be defined as Chapter VIII regional organizations.

3. Some leading criteria for defining Chapter VIII Regional Organizations

3.1 Regionalism

Regionalism has been a highly disputed term in academic circles. This is partly due to the fact that the UN Charter itself remains silent about how to define ‘regional’. Some characteristics nonetheless seem to receive large support among scholars.⁴ First and foremost it can be said that ‘regional’ implies that an organization is non-universal.⁵ It presumes the creation of some sort of frontiers, decisive characteristics that create an inner and an outer world. Additionally, members of regional organizations must be smaller in number than the UN itself.⁶ Finally, from the wording of the Charter, the universal approach towards peace and security with the UN as the final authority in enforcement measures, indicates a hierarchical relationship between the UN and regional organizations.⁷ This implies that regional organizations cannot have the same size or be larger than the UN itself.

Although the above mentioned criteria are seen as supportive, scholars agree that these are insufficient to determine what constitutes the term ‘regional’.⁸ When looking strictly at the wordings of article 53, Zwanenburg, for instance, argues that ‘regional’ also seems to imply a geographical closeness between members of a regional arrangement or agency.⁹ This has been affirmed by others.¹⁰ Most authors however,

¹UN Secretary-General *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peacekeeping*, UN doc. A/47/277-S/24111, 17 June 1992

² Most importantly, this has to do with the competences regional organizations can appropriate for themselves and the way in which their actions can most easily be justified under the UN Charter.

³ R. Tavares, *Regional Security. The Capacity of International Organizations* (Routledge, New York 2009) 12

⁴ W Hummer and M Schweitzer, ‘Chapter VIII regional arrangements’ in: B. Simma (ed) *The Charter of the United Nations. A Commentary* (OUP, Oxford 1994) 693; C Schreuer, ‘Regionalism v Universalism’ (1995) 6 *European Journal of International Law* 477, 480; T Felicio, ‘The United Nations and Regional Organizations: the Need for Clarification and Cooperation’ (2009) 3 *LXII Studia Diplomatica* 13, 14

⁵ W Hummer & M Schweitzer, ‘Chapter VIII regional arrangements’ in: B. Simma (ed) *The Charter of the United Nations. A Commentary* (OUP, Oxford 2000) 693

⁶ Schreuer (n 4) 480

⁷ Felicio (n 4) 14

⁸ Hummer and Schweitzer (n 5) 821; M. Zwanenburg ‘regional organizations and the maintenance of International peace and security: three recent regional African peace operations’ (2006) 11 *Journal of Conflict & Security Law* 484, 488

⁹ M. Zwanenburg (n 8) 488

acknowledge that this criterion should not be applied strictly.¹¹ Hummer and Schweitzer, for example, argue that an absolute application of a geographical criterion is unsustainable since the possibility to take measures does not depend on whether a state belongs to a region but whether a state is a member of a certain organization.¹² This argument has however been rejected by Graham and Felicio. They argue that there is nothing in the Charter that explicitly renounces this criterion, which, in their view, even seems to be gaining support politically.¹³

Although the present author is rejecting the application of the geographical criterion in the strict sense, some geographical connection remains essential when 'regional' is read in combination with another criteria, the ability of Chapter VIII organizations to settle local disputes peacefully. This connection can be traced back to the intention behind the regulation. The purpose of Chapter VIII was to grant certain organizations the power to resolve local disputes with local means and on a local basis (thereby excluding third parties from the process), through which the maintenance of international peace and security was served.¹⁴ Therefore, it can be argued that both the term 'local dispute' as the exclusion of third party influence tend to support the necessity of some degree of territorial closeness of members, but not in the aforementioned sense of a compulsory connection between all states in the region.

Moreover, by the very nature of the UN,¹⁵ the UN Charter focuses upon regional organizations which aim at safeguarding regional peace and security. This criterion is clear and has not been a major point of discussion between scholars, probably partly due to the fact that article 53(1) clearly refers to regional organizations that are dealing with 'matters relating to the maintenance of international peace and security'. The only discrepancy that exists is whether the maintenance of regional peace and security should be the principle task of regional organizations (advocated by Hummer and Schweitzer¹⁶) or '*primus inter pares*'¹⁷ (put forward by Graham and Felicio¹⁸). As example they refer to the African Union, which has more general competences in other fields as well.¹⁹ This latter argument can be considered as persuasive. It is important that regional organizations have as one of their main tasks striving towards peace and security within their region, but it does not have to be *the* essential task.

In sum, the term 'regional' seem to entail that members of the organization must be smaller in number than the UN itself and must be 'so closely linked in territorial terms' that effective peaceful dispute settlement is possible. In connection to the UN's principle purpose – the maintenance of international

¹⁰ K Graham and T Felicio *Regional Security and Global Governance. A Study of Interaction between regional agencies and the UN Security Council with a proposal for a regional-global security mechanism* (Brussels University Press, Brussels 2006) 87

¹¹ Graham and Felicio (n 10) 87; Hummer and Schweitzer (n 4) 692; A Abass *Regional organizations and the development of collective security. Beyond chapter VIII of the UN Charter* (Hart Publishing, Oxford 2004) 10

¹² Hummer and Schweitzer (n 4) 692

¹³ Graham and Felicio (n 10) 87

¹⁴ Hummer and Schweitzer (n 5) 822

¹⁵ The ambition to create and safeguard international peace and security.

¹⁶ Hummer and Schweitzer (n 1) 699

¹⁷ First among equals

¹⁸ Graham and Felicio (n 10) 88

¹⁹ Other competences are, inter alia the promotion of political and socio-economic integration, promotion of sustainable development, and the coordination and harmonization of policies among Member States. See further: <<http://www.african-union.org/>>

peace and security – the regional organization should have as one of its *main* tasks the preservation of peace and security within its region.

3.2 *Arrangement or Agency*

Chapter VIII UN Charter furthermore speaks of regional ‘arrangements’ or ‘agencies’ as the addressees of these provisions. A definition of arrangements or agencies has however (deliberately) not been given. With regard to these definitions, two opinions can be distinguished: on the one hand both terms seems to be used synonymously and on the other hand they are viewed as alternatives.²⁰ Hummer & Schweitzer prefer the latter opinion. By providing an alternative option through the ‘use of arrangements *or* agencies’, an indication is indeed given that at least some difference exists between the two definitions. According to Tavares the distinction concerns the degree of formality of the entity in question:

a regional agency is a recognized organization with legal personality and an organizational structure located in a member country. A regional arrangement is a grouping of states under a treaty for a specified common purpose without any organization to personify that arrangement. Organizational functions are carried out by the member states themselves.²¹

That both ‘arrangement’ as well as ‘agency’ has been mentioned in the provision has more to do with the desire to make an exhaustive provision (and thereby being sure that all relevant regional entities are involved) than that there are practical consequences attached to it. Whether an entity is defined as arrangement or agency, the same rules for enforcing action apply. The crucial factor for regional action is thus not the nature of the organization but the type of action that is undertaken and the attitude of Security Council towards it. To avoid further confusion in the remainder of the thesis the terms regional organizations or regional organizations in the sense of Chapter VIII UN Charter will be used by which reference is made to arrangements as well as agencies.

3.3 *Internal Focus*

Scholars widely consent that the logic of the UN Charter presupposes a traditional distinction between two types of regional organizations. The Charter distinguishes between on the one hand regional organizations which are established as collective self-defence mechanisms and act against external threats and on the other hand regional organizations which are founded to preserve peace and security within the region. While the actions of the latter regional institution fall under articles 52-54 of the UN Charter, the actions of the former regional institution have to be justified under article 51 of the UN Charter, which has implications for the criteria that have to be met to legalize their actions. Graham and Felicio typified this distinction as a difference between regional collective *defence* organizations and regional collective *security* organizations.²² In other words, the difference is explained by stating that defence alliances are

²⁰ Hummer and Schweitzer (n 5) 822

²¹ Tavares (n 3) 9

²² Id. 112

focused externally (against an external threat from a third state), whereas regional organizations are primarily focused internally (upon the maintenance of peace within the region and thus between their Member States).

Despite the fact that most scholars agree that the UN Charter originally envisaged a firm distinction between these two regional organizations, deviation exists as to whether this distinction still holds at present time. While some scholars perceive the above-mentioned distinctive characteristic as still valuable, by stating that the internal focus 'distinguishes them [Chapter VIII organizations - EdV] from externally focused systems of collective self-defence under article 51',²³ others disagree with the significance of this distinction. Schreuer, for instance, argues that the fact that regional organizations can be defined as Chapter VIII organizations, does not impair them of the right to defend themselves against external threats.²⁴ The inherent right to self-defence for individual states does not suddenly ceased to exist when states decide to organize themselves. Consequently, Chapter VIII regional organizations are not necessarily excluded to act as collective self-defence mechanism.²⁵ Vice-versa, the same holds for self-defence alliances, according to Abass.²⁶ NATO, for example, is increasingly taking action on its own within its region and therefore not functioning as a defence mechanism against external threats. Regional enforcement action within the region can only be justified within the framework of Chapter VIII UN Charter. Therefore, the fact that regional organizations are founded as collective self-defence mechanisms does not necessarily exclude them from acting under Chapter VIII as well.²⁷

Just as Hummer and Schweitzer hold on to the value of the traditionally created distinction, so argues Tavares that the value of distinction should not be underestimated: 'clarification of their roles should be seen as the most basic prerequisite for an operational global-regional mechanism to work'.²⁸ We need to know who can be expected to do what if any division of labour has to be set up between UN and regional organizations in an effective partnership.. In order to make a more or less clear distinction between these two organizations distinction by Abass can be considered fruitful:

(..) whereas collective security organizations restrain their members from using force collective self-defence organizations are concerned with acting against external aggressors .²⁹

Despite the call for differentiation, Schreuer and others argue that current practice has shown that the traditional distinction must be considered as obsolete.³⁰ In an attempt to overcome what they consider as an out of date distinction, Graham and Felicio proposed to determine the legal basis for regional organizations not on their initial aims in their establishing treaties but on their mandate when taking action

²³ Hummer and Schweitzer (n 4) 699

²⁴ Schreuer (n 4) 490

²⁵ Id.

²⁶ Abass (n 11) 14

²⁷ Id.20,21

²⁸ Tavares (n 3) 12

²⁹ Abass (n 26) 14

³⁰ Schreuer (n 4) 490

in practice.³¹ This indeed seems to be more in line with practice. Since both type of organizations can perform tasks in the other sphere (either to ensure peace within the region or to act against external aggression), their mandate should be considered as decisive. By acknowledging that they should be distinguished on the basis of their mandate, Graham and Felicio underline that it is indeed still important to make a distinction between these two security purposes, since both have other legal implications.³²

For practical purposes,³³ this thesis only focuses on regional organizations in the sense of Chapter VIII UN Charter that *primarily* are concerned with collective security within their region, thereby excluding self defence alliances that have as their *primarily* focal point the protection of their Member States against external aggression.³⁴

3.4 *Peaceful settlement of local disputes*

The necessity of a division between self-defence alliances and collective security has further been enhanced by Hummer and Schweitzer through pointing to another criterion which has illustrious prominence in Chapter VIII of the UN Charter, namely the priority given to regional organizations to peacefully settle disputes.³⁵ As a result, in order to be classified as regional organization in the sense of chapter VIII of the UN Charter, regional organizations need to be able to provide some sort of mechanism by which local disputes within their region can be settled in a peaceful manner. Consequently, Hummer and Schweitzer conclude that defence alliances are by their character excluded, since they do not provide mechanisms by which local disputes within the alliances can be settled. Abass disagrees with the conclusion. He argues that although NATO as a collective does not provide peaceful dispute settlements explicitly, the NATO members individually have committed themselves under article 1 of the North Atlantic Treaty to settle any dispute by peaceful means.³⁶ This argument seems not convincing, however, since this provision refers to international disputes and therefore aims at peaceful settlement mechanisms within the UN framework, rather than within their alliance.

In order to be classified as regional organization under Chapter VIII of the UN Charter, regional organizations thus need to be able to provide some sort of mechanism in which disputes can be settled peacefully.³⁷ This does not have to be a highly sophisticated mechanism since all peaceful means to settle disputes will do, following Article 33 UN Charter, which gives some examples of peaceful dispute settlement mechanisms but is concluded in a non-exhaustive manner with the words ‘(...)or any other peaceful means of their own choice’.

³¹ Graham and Felicio (n 10) 129

³² Most important legal difference is that self-defence (Article 51 UN Charter) can be evoked without permission of the Security-Council, whereas regional enforcement action for the maintenance of peace within the region under Article 53 (1) UN Charter has to be accompanied with a Security Council authorization. This will thoroughly be examined in chapter 3 of this thesis.

³³ Time constraints and feasibility. In further research this distinction and overlap will however be thoroughly scrutinized

³⁴ As was already mentioned in the introduction, this thesis will only focus on regional organizations in the sense of Chapter VIII and thereby self defence organizations, such as NATO, are excluded from the research.

³⁵ Hummer and Schweitzer (n 4) 696

³⁶ Abass (n 26) 38

³⁷ What exactly is meant with ‘peaceful settlement of disputes’ will be discussed in chapter 3 section 2 of this thesis.

3.5 *Consistency with purposes and principles*

Finally, both the constitution as well as the activities of regional organizations must be consistent with the purposes³⁸ and principles³⁹ of the UN in order to speak of a regional organization in the sense of Chapter VIII UN Charter.⁴⁰ Although organizations cannot be member of the UN itself, (article 4 UN Charter), the members of the regional organizations are bound by the obligations under the UN Charter on the basis of their UN membership in accordance with Article 103 UN Charter:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Therefore, UN members cannot avoid their obligations under the UN Charter by hiding behind the constitution of the regional organization of which they are also members.⁴¹ Since the rights and obligations under the UN Charter directly apply to the individual UN Member States, these indirectly apply to the regional organizations themselves. The regional organizations structure and activities therefore need to be in conformity with the principles and purposes of the UN Charter, in order to be labelled as such in the UN collective security framework.

4. Conclusion

Before looking at the operational part of Chapter VIII of the UN Charter, it was firstly necessary to determine which organizations on the basis of what criteria can be classified as regional organizations in the sense of Chapter VIII. On the basis of the above mentioned characteristics, a regional Chapter VIII-organization has to be an organization which is smaller in number than the UN itself and is territorially so closely linked that effective peaceful dispute settlement is possible. Furthermore, the organization has to have as one of its main tasks the maintenance of peace and security within their region. This implies primarily an internal focus upon collective security rather than an external focus upon self-defence. Finally, the constitution and activities of the regional organization has to be consistent with the principles and purposes of the UN Charter. On the basis of these criteria, annex 1 gives an overview of which regional organizations until present day could be seen as regional Chapter VIII-organizations. After clarifying the normative framework of Chapter VIII UN Charter, the next chapter will deal with the operational part of Chapter VIII and will observe which measures regional organizations are allowed to enforce under what circumstances.

³⁸ Article 1 UN Charter.

³⁹ Article 2 UN Charter.

⁴⁰ Goodrich, LM, Hambro, E and Simons, AP, *Charter of the United Nations. Commentary and Documents*. (3th edn Columbia University Press, New York 1969) 359

⁴¹ Hummer and Schweitzer (n 5) 26

Chapter 3

The operational framework of Chapter VIII UN Charter

1. Introduction

After characterizing Chapter VIII regional organizations, this chapter deals with the operational part of Chapter VIII and will observe which forceful measures regional organizations are allowed to initiate under Chapter VIII and under what circumstances. Although the main focus is on enforcement measures, for the sake of completeness the attention will first be placed upon the peaceful settlement of disputes (§ 2). Afterwards the scope (§ 3) and criteria (§ 4) for enforcement action will be scrutinized. The most prominent issue with regard to conducting forceful measures is determining the moment and form of Security Council authorization. For imposing regional forceful measures, determining the form and moment of Security Council authorization is crucial. Since these are not clearly defined but form the crux in legalising enforcement measures under Chapter VIII, this criterion has been fiercely debated and this will be discussed thoroughly. In addition, some attention will be given to the scope of regional enforcement action: in which places are they allowed to impose coercive measures? Finally, in the conclusion, the operational framework of Chapter VIII UN Charter will be summarised (§ 6).

2. The peaceful settlement of disputes

Regional Chapter VIII- organizations fulfil an important role in the collective security framework of the UN by enabling the peaceful settlement of disputes as a sort of ‘forum of first instance’.¹ The peaceful settlement of disputes can take various forms. The UN Charter enumerates peaceful means in a non-exhaustive manner by referring to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of choice.² As will be shown in section 3 of this chapter, enforcement action under Chapter VIII gradually has become restricted to merely referring to military or armed measures. Therefore, economic sanctions should also be considered as included in Article 33(1) of the UN Charter.

According to Eide, pacific settlement refers to:

¹ This has already been mentioned in Chapter 1 § 2; and Chapter § 3. The regional organization in question does not have to be able to provide for all peaceful means to settle conflicts between parties referred to in Article 33(1) UN Charter. Sufficient is that the organization can mediate between their members in a dispute. Therefore this criteria is relatively easy met by regional organizations.

² Article 33(1) UN Charter.

Non-mandatory recommendations to the parties involved in a dispute or a situation, aiming at assisting them in finding a peaceful solution of their conflict. Such recommendations may most properly be conceived as an advice, and may concern the procedures which the organization finds suitable to recommend.³

More general, in the present author's opinion, peaceful dispute settlement can be explained as all non-mandatory and non-forceful measures by regional organizations in order to settle a conflict peacefully between parties.

Since the Security Council remains the coordinating and final authority within the collective security framework,⁴ the cooperation between the UN and regional organizations under Chapter VIII combined with the preference for attempting to settle disputes peacefully on a regional level, can be considered as an attempt to form a multilayered, comprehensive collective security system. One reason for this layered approach is the practical and financial inability of the Security Council to consider all issues. Even more importantly, it can be argued that some disputes are just better dealt with when they are considered more locally. A regional mediating partner tends to have a better understanding of specific circumstances and is at times in a better position to take local customs and norms into account. Furthermore, the disputes in question do not always necessitate far-reaching enforcement measures. In most cases non-forceful measures are considered to be more satisfactory and sufficient to reconcile parties. Finally, in the light of the main purpose of the UN Charter, i.e. the maintenance of international peace and security⁵, the recourse to force should be limited as much as possible. Just as it is prohibited for states to use force or threat with the use of force, in accordance with Article 2(4) UN Charter, the Security Council too should aim at restricting the authorization of forceful measures as much as possible. Therefore, Article 52(3) emphasizes that the Security Council has to encourage regional peaceful dispute settlement.⁶

Although there is a preference for seeking regional peaceful settlement of disputes first, Article 52(4) UN Charter⁷ stresses that the preference for these peaceful measures will not impair the right of UN Members to bring disputes that are likely to endanger international peace and security to the attention of the Security Council or the General Assembly.⁸ Article 52(4) UN Charter furthermore emphasizes that the Security Council preserves the right to investigate whether the aforementioned disputes or situations are indeed endangering international peace and security.⁹ This reservation is in conformity with the complementary role of the Security Council under Chapter VIII of the UN Charter.¹⁰ The Security Council

³ A. Eide 'peacekeeping and enforcement by regional organizations: its place in the United Nations system' (1966) 3 *Journal of Peace Research* 125, 125

⁴ As Article 52(2) stipulates: The Members of the United Nations (...) shall make every effort to achieve pacific settlement of local disputes through (...) regional arrangements or by (...) regional agencies before referring them to the Security Council.

⁵ R. Wolfrum 'Article 1' in B. Simma (ed) *The Charter of the United Nations. A Commentary* (2nd edn OUP, Oxford 2002) 39-47, 42

⁶ Article 52(3) stipulates: The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

⁷ Article 52(4) reads: This Article in no way impairs the application of Articles 34 and 35.

⁸ Article 35 UN Charter.

⁹ Article 35 UN Charter

¹⁰ Under Chapter VII UN Charter, the system is not based on completion. Although even under that Chapter preference has been given to peaceful settlement of disputes, The Security Council has more far-reaching powers under this chapter to consider issues which are not yet properly attempted to settle in a peaceful manner.

is only allowed to interfere when the regional organization is clearly unable to perform duly in settling the conflict peacefully. As Hummer & Schweitzer underline: ‘The SC is barred from taking definitive measures as long as the mechanisms adopted by the regional agency have not proved to be overtly ineffective.’¹¹ The Security Council, however, does not have to wait until all means are exhausted under Article 34 UN Charter. Sufficient is that a serious effort is made to peacefully dissolve a dispute.¹²

Yet, the privileged right for regional chapter VIII-organizations to settle disputes in a peaceful manner, is not free of obligations. In order to have an effective, multi-layered collective security framework, the dispute settling efforts of regional organizations have to be integrated in the system through reporting their activities to the Security Council, in accordance with Article 54 UN Charter, which stipulates that:

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

In this way the Security Council can perform its coordinating tasks as decisive authority and is able to determine whether they have to perform their primary obligations under Article 24 UN Charter, i.e. ensuring prompt and effective action to maintain international peace and security. In order to adequately establish this, the Security Council has to have effective control over regional peace and security activities through the information given to them by the regional organizations. As the reporting obligation refers to the ‘activities undertaken or in contemplation’ all the information from the moment that a dispute arises until the final resolution or recommendation that has adopted, stipulating the peaceful means of dispute settlement, has to be transferred to the Security Council.¹³

However, regardless of the reporting obligations, regional organizations could be seen as relatively autonomous actors in peaceful settling conflicts within their regions. Their competences to impose enforcement action, in contrast, are restricted more vigorously since these competences are put under the scrutiny of the Security Council. Before examining the supervision of regional enforcement action by the Security Council, the meaning of enforcement action will first be clarified.

3. The meaning of enforcement action

What enforcement action exactly entails has been subject to change in the years that followed the establishment of the UN Charter. This is partly due to the fact that the UN Charter itself lacks a further definition of what enforcement action precisely is. After illustrating what during the negotiations on the text of the UN Charter was seen as enforcement action, it will be discussed that the meaning increasingly has been limited in state practice, after which a definition will be given that can be seen as representative currently.

¹¹ Hummer and Schweitzer (n 4) 840

¹² Id. 839

¹³ Id. 894

3.1 *The original meaning of enforcement action during the San Francisco Conference*

Even though the UN Charter contains frequent references to enforcement action,¹⁴ the term has not been defined further in the final text of the separate provisions. At the San Francisco Conference, the meetings in which the text of the UN Charter was discussed and finalized, most states were of the opinion that enforcement action under Article 53(1) of the UN Charter was intended to mean all measures that the Security Council was authorized to take under Articles 41 and 42 UN Charter.¹⁵ These provisions refer to measures short of war (Article 41) and military measures (Article 42). According to Article 41:

(...) [measures short of war – Edv] may include complete or partial interruption of economic relations and of rail, sea, air postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The formulation of the provision in permissive terms ('may include') reveals that the enumeration is non-exhaustive. Measures short of war therefore are considered to include *all* measures not involving force (i.e. peaceful measures) whereas forceful measures¹⁶ of any kind are covered by Article 42. The meaning of 'forceful measures' is also loosely defined:

(...).it [the Security Council-EdV] *may take* such action by air, sea, or land forces... Such action may include demonstrations, blockade and other operations by air sea, or land forces. [emphasis added]

On the basis of the meaning given to 'enforcement action' in other provisions of the UN Charter, one may also be inclined to give a wide interpretation to the term 'enforcement action' under Article 53(1) UN Charter. Both in article 2(5) as in article 2(7) enforcement action or enforcement measures are considered to refer to measures under Article 41 and 42 of the Charter. In Article 2(7) this is even explicitly articulated as the article reads: '...this principle [i.e. non-intervention in domestic affairs – EdV] shall not prejudice the application of enforcement measures under Chapter VII.' Hence, on the basis of the *travaux préparatoires* both the terms 'enforcement action' as 'enforcement measures' in Article 2 UN Charter refer to Chapter VII measures, laid down in Articles 41 and 42 of the UN Charter. Furthermore, the *travaux préparatoires* of Article 5 of the UN Charter (dealing with the possible suspension of a UN member against which preventive or enforcement action has been taken) show that 'it would seem *prima facie* to be justified to interpret the expression [i.e. enforcement action – EdV] in terms of the measures provided for in Chapter VII'¹⁷. Finally, the term 'enforcement action' can also be found in Article 50 of the UN Charter (on the solution of special economic problems of any state arisen from carrying out of preventive or

¹⁴ Artt. 2(5), 2(7), 5, 45, 50 and 53(1) of the UN Charter.

¹⁵ LM Goodrich, E Hambro and AP Simons, *Charter of the United Nations. Commentary and Documents. Third and Revised Edition* (CUP, New York 1969) 365.

¹⁶ Forceful, military, armed coercive and enforcement measures are used in this thesis interchangeably and are all referring to the same measures, i.e. Any action involving the use (or threat) of armed force which would itself be a violation of the prohibition of the Use of Force (Article 2(4) UN Charter, if taken without either some special justification or authorization. This will further be explained in the current section.

¹⁷ Schütz, 'Article 5' in B. Simma (ed), *The Charter of the United Nations: A Commentary* (OUP, Oxford 1994) 175, 177

enforcement measures taken by the Security Council against another State¹⁸) and carries the same meaning as the former mentioned articles, i.e. measures under Articles 41 and 42 of the UN Charter.¹⁹

The only provision which deviates in its interpretation of 'enforcement action' from all the aforementioned UN Charter Articles, is Article 45 which calls upon UN Members to make air forces available to the UN for combined international enforcement action. As the purpose is to make the imposition of urgent military measures possible, enforcement action is clearly conceived to include only armed or military measures.²⁰

Thus, apart from Article 45 of the UN Charter, all other provisions referring to enforcement action initially were considered to include all measures that the Security Council can impose under Chapter VII of the UN Charter at the San Francisco Conference.

3.2 Deviation in Practice

In spite of the tendency towards a broad interpretation of the term 'enforcement action' during the drafting procedure of the UN Charter, the scope of enforcement action under Chapter VIII gradually has been restricted by state practice to include only military or armed measures.²¹

The first time that the scope of regional enforcement action was extensively debated in the Security Council was in 1960, with regard to the measures that the Organization of American States (OAS) had taken against the Dominican Republic.²² The question that stood central was whether economic sanctions should be seen as regional enforcement action. The OAS had decided to take collective action against the dictatorship of General Trujillo, who had committed acts of aggression against Venezuela.²³ The collective action consisted of an interruption of diplomatic relations and a partial economic boycott. The OAS considered the actions as falling under the pacific settlement of disputes and accordingly reported their measures to the Security Council, as requested under Article 54 UN Charter.²⁴ The Soviet Union found, however, that the economic sanctions had to be considered as enforcement action, since these measures are those that the Security Council is allowed to take under Article 41 of the UN Charter.²⁵ Other Members argued that economic sanctions should not be seen as an enforcement action but as a peaceful measure to settle a dispute and therefore that the report to the Security Council on the action taken was a sufficient notification in accordance with the procedure in Article 54 of the UN Charter. Within the debate, the

¹⁸ U. Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organizations' (2002) 6 Max Planck Yearbook of International Law 535, 538.

¹⁹ Bryde, 'Article 50' in B. Simma (ed), *The Charter of the United Nations: A Commentary* (OUP, Oxford 1994) 659, 659

²⁰ The difference between armed and military is in the authors present opinion a difference between public actors and private actors which are contracted to assist regional organizations in the conduct of enforcement action.

²¹ See, for instance, U. Villani, (n 7) 535; There are, however, some scholars who think that enforcement measures entail more than just military or armed measures, see *inter alia* : Cha, K, 'Humanitarian Intervention by Regional Organizations Under the Charter of the United Nations' (2002) 3 Seton Hall Journal of Diplomacy and International Relations 134, 135; J.N. Moore 'The Role of Regional Arrangements in the Maintenance of World Order' (1971) 3 The Future of the International Legal Order 122, 153.

²² Eide (n 3) 127

²³ *Id.*

²⁴ J.W. Halderman, 'Regional Enforcement Measures and the United Nations, (1963-1964) 52 The Georgetown Law Journal 88, 95

²⁵ M. Akehurst, 'Enforcement Action by regional agencies, with special reference to the organization of American States' (1967) 42 British Yearbook of International Law 175, 189

majority of States believed that non-military sanctions should not be seen as enforcement action.²⁶ According to Zwanenburg, 'this view is strengthened by the argument that individual states are always free to end economic relations'.²⁷ It would therefore be strange to argue that when individual states organize themselves in a group, this freedom will cease to exist since economic sanctions then form part of enforcement actions which require Security Council authorization. Even more bizarre would this argument be when considering that in this case this would only count for regional organizations which are defined as such under Article 53(1) UN Charter, but not for other groups of states.²⁸ Finally, recent state practice further supports the view that economic sanctions should not be regarded as enforcement action. Both the OAS (in 1991 against Haiti)²⁹ as well as the AU (against Togo 2005)³⁰ recommended their Member States to impose sanctions without Security Council authorization.³¹ Nowadays scholars widely agree that enforcement action in article 35(1) of the UN Charter are only those involving the use (or the threat) of armed force.³² As Villani rightfully argues, this interpretation is also consistent with the object and purpose of the UN Charter:

The purpose of that provision [i.e. Article 53(1) – EdV] is to enable the Security Council to control the enforcement action of regional organizations through its authorization. Now, an authorization is only necessary to allow an action which, in the absence of such an authorization, would be prohibited.³³

In sum, it can be concluded that enforcement measures nowadays only refer to forceful or military measures and that economic sanctions are excluded from its scope.

Another question which was raised through practical application was whether the manner in which regional organizations come to decide upon the use forceful measures (either on the basis of a voluntary recommendation or a mandatory resolution) was of relevance for defining action as such. In the Cuban Quarantine Case in 1962, the OAS namely stated that since they *recommended* their Member states to take enforcement action against Cuba, these measures could not be seen as enforcement measures, based upon the *Certain Expenses Case*.³⁴ In this case the ICJ held that measures did not constitute were not enforcement action since they were recommendatory to participating states.³⁵ This cross reference should however be considered as incorrect since the *Certain Expenses Case* was focussing upon UN peace missions with the consent of the state, whereas in this case it concerned regional enforcement action..³⁶ In addition, following Villani, it can be argued from the UN Charter that both recommendations as well as

²⁶ Id, 190.

²⁷ M. Zwanenburg, 'Regional Organizations and the Maintenance of International Peace and Security: three recent Regional African Peace Operations' (2006) 11 Journal of Conflict and Security Law 483, 489

²⁸ Villani (n 7) 540

²⁹ OAS doc. MRE/RES.1/91, OAS Ser. F/V/ 3 October 1991

³⁰ AU Peace and Security Council, PSC/PR/Communique. (XXV) 25 February 2005

³¹ Zwanenburg (n 25) 490

³² Villani (n 6); Abass (n) 50; Hakimi, M. 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization' (2007) Jacob Burns Institute for Advanced Legal Studies Working Paper 9

³³ Villani (n 6) 539

³⁴ ICJ, *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20 July 1962

³⁵ ICJ, *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20 July (1962), ICJ Report 19.

³⁶ Id.; Halderman (n 22) 202

resolutions facilitating enforcement action should be regarded as such, since article 2(4) of the UN Charter prohibits both the use as the threat to use force. The recommendation to use of force, *implies* a threat to use force.³⁷ Furthermore, for the targeted state it makes no difference if states are called upon voluntarily or are obliged to do so, the effects are the same.³⁸ Therefore, it can be concluded that the manner in which regional organizations decide upon imposing forceful measures is of no relevance to define them as enforcement action in the sense of article 53(1) UN Charter.

A third and final question has preoccupied state practice and relates to the issue whether or not peacekeeping should be regarded as enforcement action. This question came up after the United States intervened in the Dominican Republic in 1965. At first the USA claimed that their purpose was to rescue their citizens from the uprising that took place, but shortly after they admitted that the main reason for intervention was to prevent that the Dominican Republic would be taken over by communist forces.³⁹ After the intervention, the US force was replaced by an OAS peace force for the purpose of maintaining order in the region. The USA claimed that the military force was only used for 'peacekeeping' not for enforcement.⁴⁰ The Soviet Union opposed to this claim and held that any use of military force, whatever the purpose may be, should be considered as enforcement. The decisive argument was put forward by Uruguay which alleged that the force could only be seen as enforcement action when the consent of the state concerned is absent.⁴¹ This argument correlates with the former mentioned *Certain Expenses Case*, in which the ICJ decided that peacekeeping should not be seen as enforcement action if the force was set up 'with the consent of the nations concerned'.⁴² With the rise of more complex peacekeeping operations this criteria seems difficult to apply. Still it can be said that when traditional peacekeeping activities are conducted, it will not be seen as enforcement action. When peacekeeping activities have an enforcement element, Security Council authorization is required and thus will the action be labelled as enforcement.

Combining the above arguments with elements set forth by other scholars⁴³, the following definition of enforcement action will be utilized: Any action involving the use (or threat) of armed or military force which would itself be a violation of the prohibition of the Use of Force (Article 2(4) UN Charter, if taken without either some special justification or authorization.

The heated debates about what constitutes regional enforcement action under Chapter VIII of the UN Charter has been intrinsically connected to the legal consequences of defining regional action as such. Whereas regional organizations have a relative autonomous competence in the peaceful settlement of disputes, their competences with regard to regional enforcement action is much more restricted since it is put under the scrutiny of the Security Council through the required authorization. Therefore, regional organizations attempt to justify their actions under peaceful measures, since then the Security Council's scrutiny can be circumvented. The only obligation that then remains is the reporting obligation under

³⁷ Villani (n 6) 542

³⁸ Eide (n 3) 140

³⁹ Id. 128

⁴⁰ Id.

⁴¹ Zwanenburg (n 25) 490

⁴² ICJ (n 33) 170

⁴³ Wolf in Hummer & Schweitzer (n 9) Morrison in A. Abass *Regional organizations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter* (Oxford, OUP 2004), 43.

Article 54 UN Charter. When, however, measures should be considered as enforcement measures, permission from the Security Council need to be attained to render the imposition of the measures lawful. Since the Charter itself remains silent about how and at what moment Security Council authorization should be given, this has been subject of large discussions, both within academia as well as in politics.

4. Obtaining Security Council's authorization: criteria for regional enforcement action

As stressed previously, the character of Chapter VIII UN Charter on regional arrangements can be defined as a cooperation model between the UN and regional organizations in the maintenance of international peace and security with the Security Council as ultimate and decisive authority in the multi-layered system. Article 53(1) UN Charter creates the possibility of two forms of cooperation. In the first place, the Security Council itself can utilize regional arrangements to enforce action. In this case, action has been taken on the basis of the initiative of the Security Council. In the second place, a regional agency can take action more autonomously, but an authorization by the Security Council is required. Thus, either way, the Security Council will be authorizing the use of force. That an authorization is needed is clear when reading the text of Article 53 (1) UN Charter:

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

Less clear is the manner in which the Security Council should give its authorization (either explicit⁴⁴ or implicit⁴⁵) and the moment in which the authorization should be given (prior or after the enforcement action), since the UN Charter lacks a further description about how and when this authorization should be obtained. These options will be looked on more closely.

4.1 Prior or subsequent authorization

Strictly speaking, only prior authorization fully ensures the Security Council control over regional enforcement action. When taking into account the general prohibition to use force (article 2(4) UN Charter) and the Security Council's primary responsibility in the maintenance of international peace and security (Article 24 UN Charter), forceful measures can only be imposed when Security Council authorization has been given or when force can be justified otherwise, i.e. self-defence. Moreover, it has been argued that when subsequent authorization would be the rule rather than prior authorization, regional organizations might be encouraged to commence enforcement actions in the hope that the Security Council would give

⁴⁴ In a security council resolution clearly stating that it authorises action on the basis of a particular provision of the UN Charter.

⁴⁵ From the Security Council resolutions on a specific matter it can be derived that they authorise action in that circumstance although a clear authorisation is lacking.

authorization afterwards.⁴⁶ Consequently, the authorization of the Security Council under article 53 UN Charter would then merely be a reviewing competence to see whether regional enforcement action has been imposed legally and that does not correlate with their position as key authority to decide upon the use of force in the collective security framework.⁴⁷ If deviations from the system increasingly occur it can result in an undermining of the system all together. This can be seen as an undesirable outcome as then the use of force will be back in the hands of individual states and, consequently, it will be up to their judgement to impose forceful measures. Furthermore, it has been argued that if indeed the text of the UN Charter would presuppose the admissibility of subsequent authorization this would certainly not be defined as ‘authorization’ but as an ‘approval’ or ‘ratification’.⁴⁸

In addition, various scholars affirm that on the basis of the Security Council’s primary responsibility, the Security Council should have effective control over enforcement action, also when authorized to be conducted by a regional organization.⁴⁹ Effective control would mean that the Security Council can influence concrete enforcement action intended by a regional organization. Therefore, the Security Council has to be fully aware of what is happening and what causes the regional organization to decide upon a future enforcement action as the only possible solution in a given case. Consequently, proportionality and subsidiarity should be reviewed *before* forceful measures are authorized, which would only be possible when prior authorization is necessitated.

On the other hand, it can be argued that Article 53 UN Charter does not explicitly determine that a prior authorization should be given. Furthermore, it is not always possible to get prior Security Council authorization, seen from a practical point of view. Factual circumstances can deteriorate so rapidly that a quick reaction is necessary.⁵⁰ As a result, several interventions are conducted without obtaining a prior authorisation, due to Security Council’s inaction. One could think of the intervention in Liberia by ECOWAS or the intervention of NATO in Kosovo.⁵¹ Afterwards, the Security Council did not take action to condemn these interventions as unauthorised action. In the case of Liberia, the Security Council even subsequently gave its tacit approval, which will be further discussed in the following section.

In response to these unauthorised interventions, Hakimi underlines that while the logic of the UN collective security is such that prior, explicit approval should be given by the Security Council, deviations should be seen possible if the enforcement action satisfies important substantive interests.⁵² Humanitarian intervention, for example, can be seen as such an interest.⁵³ Therefore, it could be argued that prior authorization should be seen as the rule but that exceptional circumstances can alter the moment of authorization. It is up to the Security Council to evaluate the exceptional circumstances of the case and the risk of not gaining prior authorization lies with the acting states.

⁴⁶ K Cha, ‘Humanitarian Intervention by Regional Organizations Under the Charter of the United Nations’ (2002) 3 *Seton Hall Journal of Diplomacy and International Relations* 134, 137.

⁴⁷ Villani (n 7) 551

⁴⁸ *Id.*

⁴⁹ C. Schreuer, ‘Regionalism v Universalism’ (1995) 6 *European Journal of International Law* 477, 492; Moore (n 19) 122; Hummer and Schweitzer (n 4) 864 (2002)

⁵⁰ Hummer & Schweitzer (n 4) 865

⁵¹ Cha (n 47) 138.

⁵² Hakimi (n 22) 36.

⁵³ This form of intervention will be further discussed in the following chapter.

On the basis of all the above arguments, the present authors opinion is such that the whole idea and logic of the collective security framework of the UN (the abolition of the use of force, replaced by a centralisation of the use of force in the Security Council as final authority to authorise the use of force except in the case of self-defence) entails that in principle prior authorisation should be sought to legalise enforcement action. Only in this way the Security Council could effectively exercise control over the enforcement action, as they are obliged to do under their primary responsibility. However, it has to be acknowledged that circumstances can be such that a fast response is necessary, which would result in the execution of enforcement action without prior Security Council Authorisation. In this regard, the reasoning of Villani can be considered fruitful. According to Villani the only possible deviation which can be seen as compatible with the rationale of Article 52 (1) UN Charter is that an authorization is given after the beginning of regional enforcement action, but which is still in progress.⁵⁴ Only in this case the Security Council can still exercise some effective control by determining the direction of the regional action. A case which can be seen as illustrative in this regard is the ECOWAS intervention in Sierra Leone. From August 1997 onwards, ECOWAS imposed in August 1997 commercial and economic measures against Sierra Leone since the military junta had come into power. Additionally, a military force was established, ECOMOG, which was given the mandate to ensure peace by using all necessary means, which included the use of force. All this was done without the permission of the Security Council. Despite this lack of authorization, the Security Council authorized ECOWAS in October 1997 to use all means in ensuring the implementation of Security Council Resolution S/RES/1132 which would ensure the peace in the region. Although ECOWAS already military intervened prior to the Security Council authorization, it can still be argued that in the rationale of Article 53(1) UN Charter this subsequent authorization while the action is still in progress can be justified.

Thus, enforcement measures should in principle be preceded by a Security Council Authorization. Merely exceptional circumstances, upon which the Security Council itself decides, can lead to a subsequent authorization, but only if the enforcement action is still in progress. Complete *ex post* authorization would be incompatible with the purpose of the UN Charter, i.e. the general prohibition to use force combined with the Security Council as decisive authority to decide upon forceful measures when a threat to the peace, a breach of peace or an act of aggression occurs. When the Security Council should authorize the action afterwards, they cannot exercise control over the use of force as it has already been conducted and the damage yet caused. Therefore, legalising enforcement action is only possible when the intervention is not yet terminated.⁵⁵ Just for the sake of clarity, it needs to be emphasised here that although enforcement action cannot be considered lawful in the absence of prior or subsequent authorisation (since the procedural requirements laid down in law are not satisfied), this does not mean that the action cannot be justified under certain circumstances. This discrepancy between legitimised and legalised enforcement action will be briefly discussed in the following chapter in the section on humanitarian intervention, yet the focus in this thesis is on *legalising* regional enforcement measures.

⁵⁴ Villani (n 7) 556 et seq.

⁵⁵ That there might be circumstances in which intervention are not lawful (not satisfied the procedural requirements laid down in law)

4.2 Necessity of expressed or implicit authorization

Another important issue that has arisen is which form the authorization of the Security Council ought to take. Should the authorization explicitly been given or would an implicit permission also meet the requirements of Article 53(1) UN Charter? When reading the wordings of Article 53(1) ('no enforcement action shall be taken...*without* the authorization of the Security Council'⁵⁶) the impression is given that an expressed authorization is necessary in order to impose forceful measures.

In accordance with Article 27(3) UN Charter, explicit Security Council authorization on issues relating to regional enforcement action entails the acceptance of a resolution on the basis of a majority of nine out of fifteen votes in the Security Council, including the 'concurring votes of the permanent members'.⁵⁷ If, however, one of the members is a party to the dispute, then this member should abstain from voting.⁵⁸ Finally, due to the paralysis of the Security Council in the Cold War era, Schrijver argues that: 'an early practice emerged that an abstention by one or more permanent members would not block the adoption of a legally valid decision by the Council'.⁵⁹ Within the Security Council authorisation it should be univocal and clearly stated that enforcement action is authorised in that specific situation on the basis of a particular provision of the UN Charter. The manner in which the Security Council explicitly authorizes regional enforcement action thus can be considered as clear.

The picture becomes however less comprehensive, if one starts to wonder whether such authorization can also be given implicitly, as some scholars argue.⁶⁰ A situation in which implicit but definite authorization is given is when ECOWAS intervened in Liberia, without prior Security Council authorization. In 1990, Liberia was trapped in a civil war, after Charles Taylor gained power through a coup in late 1989. Although the issue was brought before the Security Council, they failed to consider the issue in a timely manner. The grave circumstances in Liberia consequently led ECOWAS to decide upon enforcement action without prior permission of the Security Council. In S/Res/788 of 19 November 1992, the Security Council expressed its approval of the initiative undertaken by ECOWAS:

(..) Commends ECOWAS for its efforts to restore peace, security and stability in Liberia (...) and condemns the continuing armed attacks against the peacekeeping forces of ECOWAS in Liberia by one of the parties to the conflict⁶¹

Therefore it can be argued that the Security Council undisputable expressed its support for the military action by ECOWAS, although this was not explicitly given. Its approval to the military action can

⁵⁶ Italics added by author.

⁵⁷ Article 27(3) reads: Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

⁵⁸ Article 27(3) UN Charter, second sentence. See former note.

⁵⁹ N. Schrijver 'The Future of the Charter of the United Nations (2006) 10 Max Planck UNYB 1-34, at 13. The permanent members of the Security Council are the USA, Russia, China, France and UK. The other seats are currently held by Austria, Japan Mexico, Turkey Uganda (all until 2010) Bosnia and Herzegovina, Brazil, Gabon and Lebanon (all until 2011).

⁶⁰ Villani (n 7) 542

⁶¹ UN Security Council Resolution S/RES/788 19 November 1992

further be distracted from the fact that in September 1993 the Security Council decided upon the establishment of a United Nations Mission (UNOMIL⁶²) which should cooperate with the peacekeeping mission which was already set up by ECOWAS. As Villani points out, the mandate of UNOMIL was restricted to coordinate with ECOWAS without participating in enforcement operations.⁶³ Through this, the Security Council shows that it has been well aware of the use of force by ECOWAS but still gave its full support by setting up a peacekeeping force of its own. In this regard it can be argued that although implicitly, Security Council authorization can be deduced from their actions and positive attitude towards ECOWAS actions in Liberia.

Some authors even go as far as claiming that tacit authorization can be acquired through the silence or inactivity of the Security Council.⁶⁴ In the present authors view this shall however not be considered as a valid authorization. Although the inactivity of the Security Council can lead to moral justifications for regional organizations to take action ('fill in the security vacuum that the SC has left'), in the present authors opinion it cannot be considered as a legally valid ground for imposing forceful measures under the UN Charter. This will be explained further in Chapter 4 of this thesis. There could, however, be circumstances in which an implicit authorisation can be given, which in the present authors view, would merely justify, but not legalise further action. If implicit authorisation would be justified, it is up to the interpretation skills of individual states to determine whether authorisation could be derived from the resolutions. This would result in a too large margin of discretion for individual states to determine upon the use of force.

In conclusion, regional enforcement action, i.e. all forceful or military measures, should in principle be preceded by an explicit Security Council authorization in order to be deemed lawful. Only exceptional circumstances (upon which the Security Council decides) will allow for a more implicit and subsequent authorization, but only in thus far that the regional enforcement action is not yet terminated. In this way the Security Council can still exercise effective control over the regional enforcement action. A complete *ex post* authorization would be incompatible with the rationale of Article 53(1) UN Charter and therefore should not be seen as not within the scope of the UN Charter.

After determining who can enforce⁶⁵, which action, under what circumstances, the final issue that needs to be addressed is to whom regional action can apply.

5. Determining the scope of application of regional enforcement action

According to Article 52(1) regional organizations could deal with matters that are appropriate for regional action. Consequently, it is logical to conclude that enforcement measures can be imposed on members of the regional organization in question, since these matters form part of the region. But what if action is taken against a certain state which is not a member of the regional organization, a so called third state? A striking example of this is the intervention of the Arab League in Palestine in 1948. The day after Israel

⁶² United Nations Observer Mission in Liberia

⁶³ Villani (n 7) 544

⁶⁴ Cheyes 'law and the Quarantine of Cuba' (1962-1963) 41 Foreign Affairs; L.C. Meeker 'Defensive Quarantine and the Law' (1963) 57 American Journal of International Law 515

⁶⁵ Chapter II of this thesis

proclaimed its independence, the Arab League executed an attack on the State of Israel which marked the beginning of the 1948 Arab Israeli war.⁶⁶ As Israel is not a member of the Arab League, this means that the Arab League has operated outside its region, against a non-member.

The scope of Article 52 UN Charter gives itself a limitation: regional organizations acting under Chapter VIII are allowed to consider matters which are appropriate for regional action. This entails that on the basis of Chapter VIII regional organizations are allowed to impose forceful measures –either by themselves or through the initiative of the Security Council- within their own region, against their own member states and therefore means that Chapter VIII UN Charter is inapplicable to action against third states.⁶⁷

This is furthermore confirmed by the fact that, as we have seen in chapter 2 of this thesis, regional organizations acting under chapter VIII are focussed internally, upon the maintenance of peace within their region and thus between their Member States.⁶⁸ Regional enforcement measures against a non-member within the same region (i.e. in the case of Israel and the Arab League) or a non-member of another region (i.e. the Arab League against the Netherlands) could merely be authorised as a case of self-defence, in accordance with Article 51 UN Charter, since this entails a third state.⁶⁹

As will be shown in the subsequent chapter of this thesis, the Security Council itself can finally also utilise regional organizations to enforce collective measures on the basis of their Chapter VII competences. Whereas within the region, the Security Council can utilise regional organizations on the basis of Chapter VIII UN Charter, on the basis of their competences under Chapter VII regional organizations can be used to enforce measures outside their region. Regional organizations can then conduct measures in every territory if the Security Council so requests. This is due to the fact that Member States have failed to make formal agreements with the UN to provide forces for the imposition of collective measures, as will be further explained in the next chapter. Therefore the Security Council relies on states or organizations of states which are willing and able to provide forces for the sake of collective security.⁷⁰ Since, however, the operations are then executed in name of the UN and the regional organization is merely providing the means (forces) to the Security Council's end (implementation of collective measures), it cannot be said that it is the regional organization in its autonomous form who is then enforcing military measures.

Thus as long as the regional organization enforces military measures on the basis of Chapter VIII UN Charter (either on its own or on the initiative of the Security Council), the scope of application is within their region and against own Member-States. Outside the own territory, other provisions (i.e. either self-defence or Chapter VII competences of the Security Council) apply.

6. Conclusion

Chapter VIII UN Charter should be considered as a cooperation model between the UN and regional organizations, in which the Security Council would always function as a coordinating and decisive

⁶⁶ J.B. Quigly *The case for Palestine: an International Law Perspective* (Duke University Press: Duke 2007) 80

⁶⁷ Schreuer, C. 'Regionalism v Universalism' (1995) 6 *European Journal of International Law* 477, 491

⁶⁸ See chapter 3 section 3.3 of this thesis

⁶⁹ Self-defence will be discussed in chapter 4 section 2 of this thesis

⁷⁰ The so-called 'coalitions of the willing and able'

authority. Since within the collective security scheme preference is given to attempt to settle disputes peacefully before bringing issues to the attention of the Security Council, regional organizations have an important task in providing for these peaceful means. Although they have reporting obligations to the Security Council under Article 54 UN Charter, regional organizations could be considered as relatively autonomous actors in peaceful settlement of conflicts within their regions. The Security Council is only allowed to interfere when the regional organization is clearly unable to perform duly, until that moment they are barred from acting under Chapter VIII UN Charter. This division of competences alters however completely when regional organizations want to impose enforcement measures, i.e. forceful or military measures, to settle a dispute. Then their intended action comes under the scrutiny of the Security Council as decisive authority to decide upon the use of force. Albeit the form and moment of Security Council Authorization is heavily debated, it has been concluded that in principle regional enforcement action should be preceded by an explicit Security Council authorization. Only under extraordinary circumstances, upon which the Security Council decides, a more implicit and subsequent authorization can be considered in accordance with the rationale of Article 53 UN Charter, but only when the regional enforcement action is not yet terminated. Since a complete *ex post* authorization would mean that the Security Council merely has a reviewing power, rather than having effective control over the action in question, this has to be considered as incompatible with the UN Charter. Whether a situation which is unlawful can still be legitimised will be clarified in the subsequent chapter when discussing humanitarian interventions. Finally, the scope of regional enforcement measures, on the basis of Chapter VIII UN Charter is within their region and against own Member-States. Outside the own territory, other provisions apply, i.e. self-defence or Chapter VII competences of the Security Council) apply that will be further explained in the following chapter in which possible other grounds for legalising regional enforcement action will be considered.

Chapter 4

Other possible grounds for enforcing action

1. Introduction

Although Chapter VIII is especially designed for regional organizations, other provisions can be found within the UN Charter, which allow regional enforcement action to be conducted. Subsequently, within practice other grounds have emerged based upon which it is said that regional organizations can legally impose forceful measures. Whether these grounds are compatible with the UN Charter is yet to be seen. The structure of this chapter already gives away some idea about which grounds can be considered to be within the realm of the UN Charter and which are not (yet). General provisions in the UN Charter, Charter-related measures and extra-charter measures will be discussed to determine where the possibilities and limitations lay for regional organizations to enforce forceful measures on the basis of any other ground than Chapter VIII- provisions.¹

2. Charter provisions other than those of Chapter VIII UN Charter

2.1 *Self-defence*

A general UN Charter provision which is important for legalizing regional enforcement action is article 51 UN Charter that focuses upon the individual and collective right to self-defence. As was already illustrated in chapter 2 of this thesis, the fact that this provision was included in the UN Charter was the result of one of the compromises, which were made in favour of a more regionalist approach towards achieving international peace and security.² Whereas the Dumbarton Oaks Proposals prohibited regional enforcement without Security Council authorization, at the San Francisco Conference the final draft of the UN Charter included the collective right to self-defence due to a number of proposals, which were put forward by participating states to loosen this prohibition.³ Consequently, Article 51 UN Charter determines that:

¹ The idea of dividing measures in charter measures, charter-related measures and extra-charter measures has derived from N. Schrijver, 'Does the Straitjacket of Article 2(4) UN Charter begin to Gall too much?' in: N. Blokker & N. Schrijver (eds) *The Security Council and the Use of Force: Theory and Reality. A Need for Change*. (Martinus Nijhof Publishers: Leiden 2005) 34

² Chapter 2, section 2 of this thesis

³ RA Akindele, 'From the Covenant to the Charter: Constitutional Relations between Universal and Regional Organizations in the Promotion of Peace and Security'(1973) 8 *Israel Law Review* 9, 110

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.

Self-defence is thus the legitimate reaction to an armed attack. An ‘armed attack’ refers to an attack of armed forces by one state against another or an equivalent to an armed attack, such as the terrorist attacks of 11 September 2001.⁴ It both entails a direct armed attack, wherein a state is involved, as well as an indirect armed attack wherein a state uses non-state actors to perform the attack. The scope of the right to self-defence has been subject to the most fundamental disagreement between states and among scholars. This is partly due to the fact that after the establishment of the UN, self-defence has been the only right which allows a state to use force upon another state without the Security Council’s approval. Therefore states increasingly search for arguments to justify their enforcement action under the right to self-defence, which result in continuous attempts to broaden the scope of self-defence.⁵

Although the full discussion about the broadening of the interpretation of self-defence is too lengthy to discuss in detail here, some developments can be highlighted. The discussion mainly focuses upon the question whether an ‘armed attack’ could be broadened to also include an imminent threat (i.e. a visible threat which on the basis of reliable information is likely to materialize in an armed attack) or even a future threat (i.e. a threat which did not yet evolve into an imminent threat).⁶ Whereas the latter, pre-emptive action against a future threat, could be considered as an absolute violation of the UN Charter, the former, preventive or anticipatory action against an imminent threat, seems to gain more support. This is as a result of the fact that anticipatory action has a basis in customary law which existed even prior to the UN Charter, also known as the Caroline doctrine.⁷ On the basis of this doctrine, self-defence is lawful when a threat is so ‘instant, overwhelming, and is leaving no choice of means and no moment for deliberation’.⁸ Some scholars argue that the Carolina doctrine is indeed part of the right to self defence since it has been part of customary law since the period of 1837-1941,⁹ other argue that this is not the case since it has not been incorporated into the UN Charter.¹⁰ Additionally, state practice shows reluctance to a clear broadening of the interpretation of self-defence.¹¹ In contrast, it can be argued that current new threats are calling for

⁴ Advisory Council on International Affairs (AIV) ‘Pre-emptive action’(2004) No 36/AIV 15, 15

⁵ Neff, S, *War and the Law of Nations: A General History* (Cambridge University Press, Cambridge 2005) 326.

⁶ N. Ronzitti, ‘The Expanding Law of Self-Defence’ (2003) 11 *Journal of Conflict and Security Law* 343, 347.

⁷ The doctrine is named after the sailing boat ‘Caroline’ which was involved in a conflict between the USA and the UK in 1837. The American Caroline were bringing enforcements to insurgents rebelling against the British authorities in Canada., The British responded with an armed intervention in US territory at sea and captured and destroyed the ship. In this action two US citizens were killed.. The British authorities claimed that the British forces had acted in self-defence. The American foreign minister Daniel Webster said that the British could only claim that, if they could prove that the threat was ‘so instant overwhelming and leaving no choice of means and no moment for deliberation’. For further reading see: N. Ronzitti (n 6) 347 AIV (n 4) 16

⁸ Id.

⁹ Schrijver, N. ‘The Future of the Charter of the United Nations’ (2006) 10 *Max Planck UNYB* 1, 22;

¹⁰ A comprehensive discussion of supporters and opponents of the question whether the Caroline doctrine is still applicable or not can be found in comparison of the following articles which react on one another: T. Kearly, ‘raising the Caroline’ (1999) 17 *Wisconsin International Law Journal* 325; M. Ocelli ‘Sinking the Caroline: Why the Caroline Doctrine’s restrictions on self-defence should not be regarded as Customary International Law’ (2003) 4 *San Diego International Law Journal* 467; J.A. Green, ‘Docking the Caroline: Understanding the Relevance of the Formula in Contemporary International Law concerning Self-Defense’ (2006) 14 *Cardozo Journal of International Law and Comparative Law* 429.

¹¹ AIV (n 4) 19

faster responds than traditionally were foreseen.¹² But as long as either state practice or international law is not able to provide a clear-cut right to preventive action, these actions should nonetheless be deemed unlawful.

Self-defence under Article 51 UN Charter is thus lawful when an indirect or direct armed attack occurs. In response to such an attack, states are allowed to use force individually or as a collective, since an armed attack on one state can result in self-defence by multiple states since an attack to one, constitutes an attack to all.¹³

Regional organizations that justify their action on the basis of Article 51 UN Charter can act independently, since no Security Council authorisation is required. The autonomy for regional organization is however not unrestricted, but confined to an immediate reporting obligation.¹⁴ In this way the Security Council preserves some effective control over the action of the regional organizations. This correlates with the fact that the right to self-defence is of a temporary nature. Regional organizations are only allowed to respond to an armed attack, 'until the Security Council has taken measures necessary to maintain international peace and security'. The Security Council's final authority is, furthermore, underlined by the remainder of Article 51 UN Charter:

'The exercise of the right to self defence shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'

Therefore, the autonomous role of regional organizations to respond to an armed attack is still placed under the authority of the Security Council, but in a less decisive manner than under Article 53(1) UN Charter as in that regard the authorization of the Security Council is required.

Overall it can be concluded that a regional organization is allowed to impose military measures upon (a) state(s) which conducted a (direct or indirect) attack upon (one of) its Member-State(s) on the basis of Article 51 UN Charter. The right to self-defence is, however, not unrestricted, as the right is a temporary right, which will be ceased immediately when the Security Council has taken action accordingly. In addition, the regional organization is under an immediate reporting obligation to the Security Council, which will review whether their response could be considered lawful. Although regional organizations are autonomous in conducting these responses, the primary responsibility of the Security Council has been safeguarded, as the right to self-defence does not affect their authority to take necessary action to maintain international peace and security. Finally, it should be stressed that regional organizations are allowed to enforce action on the basis of self-defence but that this is always an external threat, not from within. Therefore it should not be seen as enforcement action within the region of the organization.

¹² The AIV concludes therefore that although the Caroline doctrine cannot be seen as being part of current international customary law due to the lack of clarity in state practice, the Caroline criteria can be a useful tool in determining how new threats can be countered. AIV (n 4) 32

¹³ See for instance Article 5 of the North Atlantic Treaty of the NATO, which stipulates: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all (...)'.
¹⁴ Article 51 UN Charter stresses with regard to the reporting obligation: '(...) Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council (...)'

2.2. *Chapter VII competences of the Security Council*

As has become clear in Chapter 3 of this thesis, the Security Council can, on its own initiative, utilize regional organizations to engage in military action on the basis of Article 53 (1) UN Charter.¹⁵ This utilization is limited to enforcement action within the region and against the organization's own Member States. When, however, the Security Council wants to enable the military utilization of a regional organization outside the organization's territory and/or against non-members, the legal basis has to be sought in the Security Council's competences under Chapter VII UN Charter.¹⁶

If the Security Council determines that a situation can be considered as a threat to the peace, a breach of the peace or an act of aggression, it can decide to take measures, following Article 39 UN Charter. The measures the Security Council is authorized to take are measures short of war (Article 41 UN Charter) and military measures (Article 42 UN Charter).¹⁷

The Security Council is responsible for the implementation of the military measures in Article 42 of the Charter, in accordance with Articles 43 and 47 UN Charter. Article 43 UN Charter reads:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

On the basis of the UN Charter, Member States thus need to provide armed forces to the Security Council when it requests so. These forces would then be employed and commanded by the Military Staff Committee, composed of the Chiefs of Staff of the five permanent members of the Security Council or their representatives, in accordance with Article 47 UN Charter. In addition, Article 43 UN Charter obliges that the forces should be made available on the basis of a voluntary agreement between the Security Council and UN Member States, either individually or collectively.

However, since until now no such agreement has been concluded, the system of Article 43 in conjunction with Article 47 UN Charter did not materialize yet.¹⁸ Therefore, the Security Council had to find alternative ways to implement military enforcement measures.¹⁹ A solution was sought in authorizing 'willing or able' states or regional organizations to impose enforcement measures on behalf of the Security Council, better known as 'the coalitions of the able and willing'.²⁰ This authorization

¹⁵ Chapter 3, section 4.

¹⁶ E. de Wet 'The Relationship between the Security Council and Regional Organizations during Enforcement Action Under Chapter VII of the United Nations Charter' (2002) 71 *Nordic Journal of International Law* 1, 7-8

¹⁸ Schrijver (n 9) 20

¹⁹ De Wet (n 13) 2

²⁰ The first time this form of authorization was used was during the Korean war in 1950. Due to the absence of the soviet Union in protest against the membership of Taiwan in the UN, the Security Council could establish a threat to the peace and recommend UN Member states to make forces available, on the basis of Security Council Resolution 83 of 27 June 1950. See further: Schrijver (n 9) 20.

model could also be described as a model of delegated enforcement, since the Security Council delegates its competences to individual states or regional organizations.²¹

When the Security Council entrusts its competences to regional organizations they enforce military action in the name of the UN.²² Therefore it is important that the Security Council preserves overall control of the operation.²³ Since it has been agreed within the UN Charter that the collective use of force has been centralised within the UN, in particular the Security Council, the control over military action carried out for collective purposes has to be centralized as well. As de Wet argues univocally:

The authorization of a regional organization to use force can reflect the collective will of the SC only if and to the extent that the Security Council as a collective entity retains overall control of the military operation.²⁴

Particularly under Chapter VII, which is essentially designed for the Security Council and therefore contain its exclusive powers, the Security Council's central role requires maintaining overall control over an authorized military operation at all times. Therefore, reporting has become an established procedural practice for monitoring a military operation in terms of Chapter VII of the Charter.

Restated briefly, regional organizations can thus conduct a military operation in name of the UN if it is willing and able to do so, after being authorized Security Council. As the operation is conducted in name of the UN, the Security Council should remain the overall control over the military operation. The regional organization is merely providing the means to an end, on which the Security Council decides. Reporting plays a crucial role since only then the Security Council is fully aware of what is happening in the operations that are conducted in name of the collective, i.e. the UN.

3. Charter related measures: uniting for peace procedure

Although originally not foreseen in the UN Charter, a charter related measure emerged in 1950 by which a deadlocked Security Council that blocks intervention can be circumvented, in order to ensure action under exceptional circumstances. This measure, known as the 'Uniting for Peace'-resolution,²⁵ allows the UN General Assembly²⁶, as secondary responsible UN organ for safeguarding international peace and security, to discuss a situation and decide upon necessary action.²⁷ Therefore, the 'Uniting for Peace'- procedure can be seen as yet another ground on which regional enforcement action possibly can be decided upon.

The original text of the UN Charter itself preserved merely a restrictive role for the General Assembly. In accordance with Article 11(2) of the Charter, the General Assembly is allowed to discuss questions relating to the maintenance of international peace and security and make recommendations. Nevertheless, when action is considered necessary, the General Assembly has to refer the questions to the Security

²¹ N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by Coalitions of the 'Able and Willing' (2000) 11 *European Journal of International Law*, 542

²² These operations are known as UN operations.

²³ De Wet (n 13) 11

²⁴ Id.

²⁵ UN General Assembly 'Uniting for Peace Resolution' UN doc. 377 (V) A, 3 November 1950

²⁶ The General Assembly is comprised of representatives of all 192 UN Member-States.

²⁷ Tomuschat, T. 'Uniting for Peace' (2008) *United Nations Audiovisual Library of International Law* 2008, 1

Council. Within the *Certain Expenses Case*, the ICJ determined that ‘action’ in the sense of Article 11(2) UN Charter refers to coercive action. Hence, the General Assembly is allowed to recommend non-violent measures, whereas the authorisation to impose coercive measures has to be left to the Security Council. To avoid any conflict between the two bodies, Article 12 UN Charter furthermore determines that whenever the Security Council is already taking up its responsibility with regard to a specific situation, the General Assembly is not allowed to make any recommendations, unless the Security Council so requests.

Yet, the deadlock of the Security Council during the Cold War years resulted in a quick loosening of the strict division between these two bodies, since the impasse led to growing doubts about the ability of the Security Council to perform its primary role in the maintenance of international peace and security duly. Consequently, the General Assembly passed the ‘Uniting for Peace’-resolution in 1950.²⁸ This resolution determined that if the Security Council fails to respond to an urgent matter, which can be seen as a threat to the peace, breach of peace or an act of aggression,²⁹ due to lack of unanimity between the permanent members, the General Assembly could discuss the situation in a special session. The special session can be initiated at the request of either a majority of the UN Member States or the Security Council. As commencing a special session of the General Assembly is a procedural matter, the veto powers are not able to block this appeal, in accordance with Article 27(2) UN Charter. During the special session, the General Assembly could then recommend collective measures and thereby international peace and security would still be safeguarded. The most important paragraph of the resolution reads as follows:

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 in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, 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 armed force when necessary*, to maintain or restore international peace and security.³⁰

Hence, especially the last sentence could be seen as important for legalising the conduct of regional enforcement action on the basis of the ‘Uniting for Peace’-resolution, since it stresses that the General Assembly can recommend the use of force if a situation so demands. But simultaneously this sentence also underscores the weakness of the procedure, since it merely gives the General Assembly the competence to make recommendations to states, not to initiate the use of force or to take enforcement action.³¹ The ICJ has affirmed this advising competence. The ICJ determined in the *Certain Expenses Case* that the primary responsibility of the SC did not mean an ‘exclusive’ responsibility and therefore leaving

²⁸ D. Zaum ‘uniting for peace procedure’ in: V. Lowe, A. Roberts, J. Welsh & D. Zaum (eds) *The UN Security Council and War: the evolution of thought and practice since 1945* (OUP: Oxford 2008, 155

²⁹ In accordance with Article 39 UN Charter and upon which the Security Council should act on the basis of their primary responsibility under the UN Charter.

³⁰ UN General Assembly (n 25) 2)

³¹ M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Post conflict Issues After the Cold War* (United States Institute for Peace: Washington 2006) 104

room for the General Assembly to play a complementary role.³² Nonetheless, it only stressed the enhanced role of the General Assembly with regard to peaceful measures as the case revolved around peacekeeping operations without a forceful mandate and thus the ICJ did not determine the legality of the initiation of the use of force under this procedure.

Apart from the fact that it is highly questionable whether the procedure can be evoked for imposing (regional) enforcement measures, the procedure furthermore has not proven to be very momentous, since it has not been evoked very often. Since November 1950, it has been used twelve times.³³ The lack of practical significance was furthermore caused by the fact that the enhanced role of the General Assembly deteriorated in the decennia after passing the Uniting for Peace Resolution. The shift of political power in the General Assembly to developing countries as a result of decolonization and the emergence of new states, along with the increased unity within the Security Council after the end of the Cold War, discouraged the resort to the General Assembly to discuss issues under the Uniting for Peace procedure.³⁴ Additionally, whereas the procedure initially has been used to circumvent a deadlocked Security Council in order to ensure the maintenance of international peace and security, increasingly the procedure has been evoked to raise issues of political importance for states. As Zaum concludes:

The use of the procedure has changed over the years from a mechanism to enable the UN to address conflicts despite the veto of a Permanent Member of the Security Council, to a way for states in the General Assembly to promote political concerns important to them, in particular decolonization and the Palestinian question.³⁵

Therefore it can be argued that overall the procedure did not turn out to be that decisive in the maintenance of international peace and security.³⁶

In conclusion, the 'Uniting for Peace'-procedure has not been proven relevant for legalising enforcement action by regional organizations. The reason to use the procedure has altered from an alternative way to intervene in an urgent situation to a political tool to discuss issues. In addition, the role for the General Assembly in the maintenance of international peace and security deduced significantly due to the shift in political power in the UN organ itself and the increased unity within the Security Council has

³² ICJ, *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, 166.

³³ Although formally the first case in which the General Assembly discussed an issue (Korea 1951) cannot be seen as a uniting for peace procedure (After the Soviet had blocked action by using its veto, the Security Council had just removed the item from their agenda before the General Assembly made their recommendations. Therefore the General Assembly could discuss the matter without the need for any transfer of power under the Uniting for Peace resolution. and therefore the General Assembly could discuss the matter without the need for any transfer of power under the Uniting for Peace resolution), the resolution passed makes clear reference to the Uniting for Peace procedure. Therefore the consideration of this situation is also included in instances in which the Uniting for Peace procedure has been evoked. Others were British and French troops in Suez Canal (1956), Soviet Troops in Hungary (1956), British and American troops in Jordan and Lebanon (1958), question of neutrality of UN troops in Congo (1960), Six days war Middle East (1967) Conflict India and Pakistan over Bangladesh (1971), Occupation of Palestine and rights for Palestinian People (1980), Soviet intervention in Afghanistan (1982), South African occupation of Namibia (1981) Israeli annexation of the Golan Heights (1982) and the issue of East Jerusalem and the occupied territories (1997): see for detailed description Zaum (n 28)160-163.

³⁴ Zaum (n 28) 164

³⁵ Zaum (n 28) 155.

³⁶ The Uniting for Peace procedure has been very important for the development of key principles in peacekeeping, i.e. host consent, financing of peace keeping and impartiality. See Matheson (n 31) 234. The competences of the GA under the Uniting for Peace procedure are regaining interest since scholars increasingly see this as an important tool for enforcing RtoP, a concept which will be discussed in the following section of this chapter

made it less unlikely that the Council would be inclined to use the procedure. Finally, and most importantly, since the 'Uniting for Peace'-procedure does not clearly enable the General Assembly to initiate enforcement action, since it merely has recommendatory competences, the procedure does not seem to be of relevance for the enforcement of regional military action, in the absence of the required Security Council's authorisation.

§ 4 Extra-Charter measures: from humanitarian intervention to RtoP

When considering whether other options for justifying (regional) enforcement action have emerged outside the UN Charter, the most relevant measure that needs to be addressed is the so-called humanitarian intervention, i.e. the (military) response to gross and large-scale human rights violations within a particular state without the consent of the state concerned.³⁷ Humanitarian intervention can be seen as the most fiercely discussed and most controversial extra-charter measure that has been developed till thus far. In order to determine whether this ground has been developed thoroughly enough to speak of a clear legal ground to enforce regional military action, the main points of discussion will be highlighted.

One of the core issues with regard to humanitarian intervention is that the execution of this form of interference in a state's affairs causes a clash between fundamental principles of international law, i.e. the principle of non-interference on the one hand and universal respect for human rights on the other hand. Situations in which populations are faced with severe human rights violations are often not (yet) part of a larger (international) conflict and do not necessarily entail an armed conflict between two parties, thus belonging to the internal affairs of the targeted state.³⁸ As within the UN Charter the focus has been upon regulating interstate violence, rather than intrastate violence, the original text of the Charter was clear about the way in which states should respond to violence within another state, by the introduction of the principle of non-interference in Article 2(7) UN Charter:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.

Hence, on the basis of the UN Charter, states should not interfere in the internal affairs of other states, as this interference was shielded by the sovereignty of the state. Thus, within the state's own borders, it was up to the state itself to determine how it should arrange its policies. This sovereignty principle was further enhanced in the decades after the establishment of the UN, in which decolonization resulted in the emergence of many new states in the developing world. Sovereignty for them was seen as the defence against threats and pressure from more powerful international actors, the shield against external

³⁷ Within the past decades, two forms have emerged, namely humanitarian intervention on behalf of the Security Council and humanitarian intervention by a state or group of states without Security Council's authorization

³⁸ Advisory Council on International Affairs (AIV) 'Humanitarian Intervention' No 13/AIV, April 2000, 25.

suppression under which they had lived for centuries. Therefore, based on the sovereignty-principle and in accordance with Article 2(7) UN Charter, states should not interfere in the internal affairs of other states.³⁹

On the other hand, states are under a duty to uphold and promote human rights. Universal respect for human rights has been perceived as a precondition for a stable international legal order and therefore gross human rights violations can be seen as a threat to international peace in accordance with Article 39 UN Charter.⁴⁰ Whereas the original focus of the UN was on the interest of states, the focus increasingly was placed upon the interest and the rights of individuals due to the emergence of important human rights instruments during the Cold War period, including the Universal Declaration of Human Rights, the Convention on Civil and Political Rights as well as the Convention on Economic Social and Cultural Rights.⁴¹ Furthermore, the period after the establishment could be seen as one with a merely absence of interstate violence and a massive increase of intrastate conflict, civil war and internal violence. Taken together with the increased focus on human rights and the Security Council's large discretion to determine what constitutes a threat to the peace, breach of peace or act of aggression upon which they can authorize collective measures, resulted in a broadening of the threat to peace as encompassing also civil war and gross human rights violations.⁴²

Therefore it can be concluded that this fundamental clash between important international law notions, i.e. non-intervention and respect for human rights, in principle has been corrected by the Security Council's discretion. So if the Security Council decides on the basis of Article 39 UN Charter that a situation in which gross human rights violations occur can be seen as a threat to the peace, they can authorize the imposition of collective measures, which then can be seen as compatible with the UN Charter. Yet, another problem emerged, however, since the Security Council did not turn out to (be able or willing to) respond consistently and effectively towards gross human rights violations. Illustrative in this regard are, *inter alia*, the devastating UN intervention in Somalia in 1993, the catastrophe of the inadequate UN response to the genocide in Rwanda in 1994 and the failure to prevent ethnic cleansing in the Balkan, particular in Srebrenica in 1995.⁴³ All these interventions led to a very fierce debate about the idea of humanitarian intervention, in which supporters pleaded for a right to intervene, whereas opponents hold on to the concept of sovereignty, which would stand in the way of humanitarian intervention.⁴⁴

The inability to come to consensus about the idea of humanitarian intervention and for the Security Council to incorporate it consistently as a threat to peace in accordance with Article 39 UN Charter, led some states to take up the right to coercive intervention in cases of humanitarian disasters themselves

³⁹ The only agreed upon exception to the principle of non-interference was the conclusion of the Genocide Convention in 1948. On the basis of this Convention, interference in the internal affairs of people was allowed when a Genocide occurred. However, the application of the covenant proved to be difficult in the years immediate after the adoption of the convention since clarification of definitions did not develop further.

⁴⁰ AIV (n 28) 9

⁴¹ G. Evans, 'From Humanitarian Intervention to the Responsibility to Protect (2006-2007) 24 Wisconsin International Law Journal 703, 705

⁴² Cha, K, 'Humanitarian Intervention by Regional Organizations Under the Charter of the United Nations' (2002) 3 Seton Hall Journal of Diplomacy and International Relations 134, 136

⁴³ Evans (n 41)703. An extensive discussion of these humanitarian interventions can be found in T.B. Seybolt, *Humanitarian Military Intervention: the Conditions for Success and Failure* (OUP: Oxford 2007)

⁴⁴ Evans (n 41) 706

without prior and explicit Security Council authorization, one of the most controversial points of discussion with regard to humanitarian intervention.

Humanitarian intervention without the required authorization is posing a dilemma since on the one hand it completely falls outside the scope of the UN Charter and therefore should be considered unlawful. On the other hand it can be argued that some situations are so devastating, that they cannot be left untouched merely because the Security Council cannot reach agreement on whether to enforce measures. An example of such an intervention is *Operation Provide Comfort*, which aimed at the protection of Kurds and Shiites in Iraq after the 1991 Iraq/Kuwait Conflict.⁴⁵ In addition, a more recent and complicated example is the NATO intervention in Kosovo in 1999, in response to the suppression of the Albanian minority in Kosovo by the Serbs in power.⁴⁶ In the discussion about the legitimacy of this case, UN Member States were strongly divided in their opinions.

As a result, still no consensus has been reached about the acceptability of humanitarian intervention, but this did not alter reality: situations continued to arise in which human rights violations took place and a growing dissatisfaction spread among states and prominents that no action could be taken to defend the people within a state. Secretary-General Kofi Annan expressed his worries several times and the following words would be quoted extensively in the years to come:

if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that affect every precept of our common humanity? In essence the problem is one of responsibility: in circumstances in which universally accepted human rights are being violated on a massive scale we have a responsibility to act.⁴⁷

In response to the persistent request of the Secretary-General and the growing dissatisfaction among states and prominents, the International Commission for Intervention and Sovereignty (ICIS) issued a report in 2001 and introduced the concept of the Responsibility to Protect (RtoP), in which humanitarian military intervention (upon which now the focus is) is merely one of total range of ideas.⁴⁸

RtoP firstly entails that human rights should not merely be seen as a right for individuals or groups but also as a shared responsibility for states.⁴⁹ States should protect people at great risk, those in need of support. Consequently, RtoP encompasses that sovereignty should not be seen as a form of control over the people within a state, but as a responsibility for the own population. In principle it is up to the state itself to protect its own people but when the state is clearly unable or unwilling, the responsibility also rests on the larger community of states to protect the people in question.⁵⁰ Finally, as stressed earlier, the protection according RtoP covers more than humanitarian intervention or, in particular, military intervention. It

⁴⁵ T.M. Franck, 'When, if Ever, May States deploy Military Force without Prior Security Council Authorization?' (2004) 4 *Singapore Journal of International and Comparative Law* 365.

⁴⁶ J. Allain, 'The True Challenge to the United Nations System of the Use of Force: the Failures of Kosovo and Iraq and the Emergence of the African Union' (2004) 8 *Max Planck UNYB* 237.

⁴⁷ K.A. Annan, 'Two Concepts of Sovereignty' (1999) 352 *The Economist* 49,50. Cited in: T.B. Seybolt (n 13) 13.

⁴⁸ International Commission on Intervention and State Sovereignty (ICISS) 'The Responsibility to Protect', International Development Research Center, 2001.

⁴⁹ Id. 17

⁵⁰ ICISS (n 48) 17

entails a responsibility to prevent, a responsibility to react and the responsibility to rebuild, wherein the prevention should be seen as the most important stage.⁵¹

Although military action should be seen as a last resort, it remains the most prominent and controversial aspect in the debate. The Commission has been given guidelines how to decide upon the legitimacy of military action. They suggest that enforcement action can be considered legitimate if it serves a just cause, is conducted with the right intention and as a means of last resort. In addition it should be done with proportional means and there should be reasonable prospects for a positive outcome. The question then remains what to do when military action has been considered legitimate but cannot be considered legal as no security Council authorization and the Security Council is considered as the only authority for the use of military force except in cases of self-defence? Then the old dilemma rises again, as Evan puts forward:

In these cases a very real dilemma arises as to which of two evils is the worse: the damage of to international order if the Security Council is bypassed or the damage to that order if human beings are slaughtered while the Security Council stands by.⁵²

So while the concept of RtoP seems to entails much more than humanitarian intervention, the part of military action in case of a humanitarian catastrophe seems to remain the most important aspect and appears to be 'old wine in a new bottle' as the most prominent dilemma is still not solved: how to deal with humanitarian intervention which is not legalized by a Security Council authorization? The yet remaining obscurity also has its effects on the acceptance of the concept by the UN Member States. Although they have embraced the concept at the World Summit in 2005,⁵³ the concrete implementation of RtoP as proposed by Secretary-General Ban Ki-Moon,⁵⁴ seems to be a bridge too far for States as they are reluctant to put principle in practice.

In this stage of the research it is difficult for the present author to take a stance in this discussion, since this is where possible some margin can be found for regional organizations to enforce action for humanitarian purposes. On the other hand the present author is conscious about the danger of acting outside the realm of the Security Council on a continuous basis since it can have enduring serious consequences for the standing and credibility of the UN itself and can lead to a practice in which states undermine the collective security system all together. At this point it would be argued that if military action to relief people on humanitarian grounds meets the legitimizing criteria of the ICISS (i.e. just cause, right intention, last resort, proportional means and reasonable prospects) it should be possible to intervene without Security Council authorization for the sake of the interest of people. This means that under exceptional circumstances which should be further defined it should be sufficient to legitimize action without legalizing it, rather than providing both. In this thesis, the focus is, however, upon legalizing

⁵¹ Evan (n 41) 709

⁵² Id. 712.

⁵³ 2005 World Summit Outcome, UN Doc A/60/L.1, 15 September 2005.

⁵⁴ UN Secretary General, 'Implementing the Responsibility to Protect', UN Doc A/63/677/GA, 12 January 2009

enforcement action by regional organizations and this is without Security Council authorization not possible on the ground of gross human rights violations.

In conclusion it can be said that enforcement action for a humanitarian cause is compatible with the UN Charter when the Security Council authorizes it on the basis of Article 39 in conjunction with Article 42 UN Charter. As has been illustrated in section 2 of this Chapter, this can be conducted by regional organizations when they are willing and able to do so. They are then just providing the means to enforce action in name of the UN. Without Security Council authorization, humanitarian intervention by regional organizations (or states) is still highly controversial. In the present authors opinion, humanitarian catastrophes are so devastating and in urgent need of an adequate response that when on the basis of the above-mentioned criteria the legitimacy of action has been established this can be seen as sufficient ground to allow enforcement action under exceptional circumstances. These actions are, however, then still not legal as the required Security Council authorization for military action is lacking. Therefore, regional military humanitarian intervention without Security Council Authorization cannot be considered as compatible with the UN Charter.

§ 5 Conclusion

In this chapter a brief discussion has been given of important grounds other than Chapter VIII UN Charter upon which possibly regional organizations can justify enforcement action. It has been shown that within the UN Charter, regional organizations have a temporarily right to defend themselves against external threats, on the basis of Self-defence This right is restricted since it is merely a temporary right which focuses upon the protection against external threats. Additionally, regional organizations are under an immediate reporting obligation towards the Security Council, what limits their autonomous position in enforcing action on the basis of self-defence. Apart from self-defence, the Security Council can delegate the conduct of enforcement measures under Chapter VII to regional organizations that are willing or able to do so. This form of enforcement is however conducted in a complete dependent position, since the regional organizations are merely providing the means to ensure the effectuation of UN measures and are therefore acting in name of the UN. Consequently, they are under a full reporting obligation.

In contrast, the charter-related 'uniting for peace'-procedure has been proven to be lacking significance for legalising enforcement action by regional organizations since it has proven to be relevant for the recommendation of non-forceful measures only. In addition, the procedure has not been evoked very often and on the basis of the current power balance within and between the Security Council and the General Assembly, it seems unlikely that the procedure will be used frequently in the near future.

Less clear has been the final, extra-charter ground that has been discussed, i.e. humanitarian intervention. It has been concluded that regional enforcement action can be conducted for humanitarian purposes if the Security Council authorises so under its Chapter VII powers. Then the regional organizations acts as 'a coalition of the willing and the able', in a dependent, subordinate relationship to the UN. In contrast, it has finally be concluded that military humanitarian intervention by regional

organizations, without Security Council authorization can under exceptional circumstances be considered legitimate, but cannot be considered lawful.

Conclusion

In this thesis it has been researched what the limitations and possibilities are for regional organizations to legally conduct enforcement action under the UN Charter.

To show the relevance and context of this question, the first chapter emphasized the growing importance of regional organizations in the collective security framework of the UN. It has been shown that regionalism was acknowledged during the drafting procedure of the UN Charter, but the main and decisive approach towards achieving international peace and security was a universal one. Consequently, the UN Charter provided for a subordinated, minor position for regional organizations, in a close cooperation with and subordinated to the Security Council in a way that all measures would be centralized and the universal approach would be safeguarded. Although a predominantly universal approach was foreseen, the cold war tensions soon resulted in increased regional action, as regional organizations were used to circumvent the deadlocked Security Council. Although the Cold War eventually came to an end and the Security Council was retaining its powers again, political, financial and economical constraints within the UN framework led regional organizations to increasingly take up a role in ensuring peace themselves. Consequently, prominents within the UN started to acknowledge the crucial role that regional organizations play in the maintenance of international peace and security. To ensure a coherent collective security framework, the focus therefore shifted until present day to the development of effective regional-global partnerships.

After clarifying the importance of regional organizations in the UN collective security framework, in chapter 2 it has been illustrated how regional organizations can be defined. Since only after it has been established whom the addressees are in this thesis their competences to enforce measures can be discussed.

Already in the introductory pages it became clear that the focus of this thesis was on regional organizations which are defined as such under Chapter VIII UN Charter. Since the UN Charter itself and the *travaux préparatoires* lack a proper definition of regional organizations in the sense of Chapter VIII, some important characteristics have been discussed which were of significance in this thesis. It has been argued that a regional Chapter VIII-organization has to be an organization which is smaller in number than the UN itself and is territorially so closely linked that effective peaceful dispute settlement is possible. This derives from the fact that the most important role assigned to regional organizations under Chapter VIII has been the peaceful settlement of disputes between their Member States. In addition, the organization's main task should be the maintenance of peace and security within the region. This implies that these organizations primarily are focussed internally (upon collective security) rather than primarily focussing upon external threats (upon self-defence). By this characteristic regional defence alliances are excluded from the definition in this thesis since their main task has been the protection of the own members against external threats. It has been stressed however, that both types of organizations can perform tasks on the basis of the other competence, depending on their mandate. For the sake of feasibility, though, the focus in

this thesis has been on regional organizations with the main task of preserving collective security within their region. Finally, the structure and activities of the regional organization has to be consistent with the principles and purposes of the UN Charter.

After explaining which regional organizations are the subject of this research, chapter 3 focussed upon the limits and possibilities of regional enforcement action under Chapter VIII of the UN Charter, i.e. Articles 52-54 UN Charter. It has been explained that the most important role for regional organizations on the basis of this chapter is not the enforcement of military measures but providing peaceful settlement of disputes.

while with regard to peaceful measures regional organizations are relatively autonomous, with regard to enforcement action this alters completely. What constitutes enforcement action has been subject to major changes due to state practice. Whereas initially enforcement action entailed all measures falling under the competence of the Security Council under Chapter VII (i.e. non-forceful and forceful measures), the term evolved due to state practice in merely involving forceful measures. Therefore, enforcement measures nowadays seem to entail any action involving the use (or threat) of armed force which would itself be a violation of the prohibition of the Use of Force (Article 2(4) UN Charter, if taken without either some special justification or authorization.

Regional enforcement action under Chapter VIII UN Charter will be initiated either by the regional organization itself or by the Security Council. The scope of the imposition of regional forceful measures has been determined to encompass the territory of the regional organization itself and involving disputes between the own Member states. Although Article 53(1) requires a Security Council Authorisation for regional enforcement measures, it remains quiet about the moment in which it should be given and the form it should take which consequently has been subject to fierce political and academic discussions. On the basis of the information put forward, it has been concluded that in principle regional enforcement action should be preceded by an explicit Security Council authorization. Only under extraordinary circumstances, a more implicit and subsequent authorization can be considered to be in accordance with the rationale of Article 53 UN Charter, but only when the regional enforcement action is not yet terminated. Since a complete *ex post* authorization would mean that the Security Council merely has a reviewing power, rather than some effective control, this is deemed to be incompatible with the UN Charter. Thus, the enforcement action can only be considered legal when Security Council authorisation has been required (preferably explicit) before the action is terminated. This is were the legality of enforcing military action under Chapter VIII UN Charter in the present authors opinion ends.

Finally, in Chapter 4, it has been determined whether other grounds could be found in the UN Charter or could be derived from it, upon which regional organizations could legalise their enforcement action. First, it has been determined that regional organizations can justify action on the basis of self-defence, in the case of an immediate external attack. Although on the basis of self-defence the regional organization acts relatively autonomous since no Security Council authorisation is required, the cases in which it can be applied are limited. Furthermore, the right is merely a temporary right and the regional organization is

under an immediate reporting obligation towards the Security Council, what limits their autonomous position in enforcing action on the basis of self-defence.

Apart from self-defence, the Security Council can delegate the execution of enforcement measures under Chapter VII to regional organizations that are willing or able to do so. This form of enforcement is however performed in a complete dependent position, since the regional organizations are merely providing the means to ensure the effectuation of UN measures and are therefore acting in name of the UN. Consequently, they are under a full reporting obligation. In contrast, it has been shown that the charter-related 'uniting for peace'-procedure has been proven irrelevant for legalising enforcement action by regional organizations since it has been used for the recommendation of non-forceful measures only. In addition, the procedure has not been used often and the current political landscape does not give the impression that the procedure will be evoked shortly.

More controversial has been the final discussed, extra-charter ground that has emerged, the so-called humanitarian intervention. Although with the required Security Council authorisation it has been argued that regional enforcement action for humanitarian purposes can be legalised under the competences of the Security Council under Chapter VII UN Charter, in particular article 42 thereof, without the approval of the Security Council humanitarian intervention cannot be considered lawful. Although in the present authors opinion exceptional circumstances can justify (regional) enforcement action for humanitarian purposes on the basis of some criteria inspired by ancient just-war theory (just cause, proportional means) this will merely legitimise the action but not legalise it, since the formal legal procedures that have to be followed are not met.

In sum, the limits and possibilities for Chapter VIII-regional organizations to impose enforcement measures under the UN Charter can be clarified as follows. Regional organizations are primarily allowed to enforce military measures on the basis of Article 53(1) UN Charter. Whereas with regard to providing peaceful measures to settle disputes, regional organizations can be considered as acting relatively autonomous, their competences with regard to enforcing military measures are severely limited given that then their action is placed under the scrutiny of the Security Council. Since the Security Council has to have some sort of effective control over the use of force, the authorisation should be given before the regional enforcement action has been terminated. Authorisation afterwards does not legalise the action, it can at the very most lead to a justification of the action when it concerns an enforcement action for humanitarian purposes. Chapter VIII UN Charter can therefore be seen as a cooperation model in which regional organizations are subordinated to the more powerful UN, wherein regional organizations themselves have the lead in executing the action in their own manner but the Security Council has the decisive and final authority in determining the legality of the action. The cooperation lays in the centralisation of the maintenance of international peace and security, which consequently leads to the situation that every form of force should be brought within the realm of the collective security scheme.

Since article 53 (1) UN Charter only focuses upon action within the region, against the own member states, regional organizations have to rely on other provisions if they want to enforce measures outside their region, i.e. either on the basis of self-defence (Article 51 UN Charter) or been authorised by the

Security Council under its Chapter VII competences (Article 42 UN Charter). The provision on self-defence (the lawful response to an immediate armed attack) gives regional organizations the most autonomous role in enforcing measures since they are allowed to act without the Security Council's authorization. The scope of application is nevertheless limited since regional organizations are only allowed to impose military action upon a state which conducted a direct or indirect attack upon one of its Member States. Additionally, they are under a immediate reporting obligation, and the right is merely a temporary right which will be ceased when the Security Council itself takes action accordingly. Under Chapter VII UN Charter, the autonomy of the regional organization is even absent. As through the authorisation of the Security Council, the Security Council's enforcement powers are delegated to the regional organizations, which will operate in name of the UN, the regional organization is merely providing forces.¹

Finally, regional organizations are under circumstances allowed to enforce military measures for humanitarian purposes if Security Council is attained. Humanitarian intervention should be seen as a form of a threat to the peace and it is the Security Council's discretion to determine whether action is necessary. On the basis of where the humanitarian catastrophe is occurring, the legal ground for enforcing action can be determined. If it is in the region, regional enforcement action can be authorised by the Security Council on the basis of Article 53 UN Charter. If it is outside the region, enforcement action can be delegated by the Security Council to regional organizations on the basis of Article 39 in conjunction with Article 42 of the UN Charter. Without Security Council authorisation, regional enforcement measures for humanitarian purposes cannot be considered lawful and therefore regional organizations competences to intervene in a humanitarian crisis is limited to situations in which Security Council authorisation is required.

Now that clarity has been given on the competences of Chapter VIII-organizations to enforce military measures, the foundation has been laid for further research in which the parameters for effective cooperation between the UN and regional organizations, in particular the African Union, will be clarified.

¹ A schematic clarification can be found in Annex II.

Annex 1

Classification of actors with regional security Mandate¹

Regional and Sub regional organizations (Chapter VIII)

African Union
 Andean Community
 Arab Maghreb Union (AMU)
 Association of Southeast Asian Nations (ASEAN)
 Black Sea Economic Cooperation Council (BSECC)
 Caribbean Community (CARICOM)
 Collective Security Treaty Organization (CSTO)
 Common Market for Eastern and Southern Africa (COMESA)
 Commonwealth of Independent States (CIS)
 Community of Sahelo-Saharan States (CEN-SAD)
 Community of Democratic Choice (CDC)
 Conference on Interaction and Confidence-Building Measures in Asia (CICA)
 Council of Europe (COE)
 East African Community (EAC)
 Economic and Monetary Community of Central African States (ECCAS)
 Economic Community of West African States (ECOWAS)
 GUAM Organization for Democracy and Economic Development (GUAM)
 Gulf Cooperation Council (GCC)
 Intergovernmental Authority for Development (IGAD)
 International Conference on the Great Lakes Region (IC/GLR)
 League of Arab States (LAS)
 Mano River Union (MRU)
 Organization for Security and Cooperation in Europe (OSCE)
 Organization of American States (OAS)
 Organization of East Caribbean States (OECS)
 Pacific Islands Forum (PIF)
 Rio Group (GRIO)
 Shanghai Cooperation Organization (SCO)
 Southern Africa development Community (SADC)
 Union of South American Nations (UNASUR)

Other intergovernmental organizations (Non-Chapter VIII)

African-Caribbean-Pacific Group of States (ACP)
 Commonwealth Secretariat (COMSEC)
 Community of Portuguese-Speaking States (CPLP)
 European Union (EU)
 North Atlantic Treaty Organization (NATO)
 Organization of Islamic Conference (OIC)
 International Organization of Francophone (IOF)

¹ Classification made by: Tavvers 2009, p. 10-11

Annex II

Overview of lawful regional enforcement action under the UN Charter

Legal basis	Who initiates	Criteria for enforcement	Scope of enforcement	Extra obligations
Art. 53 UN Charter	Security Council Regional Organizations	Authorization	Within the region, against member states	Reporting (art. 54)
Art. 51 UN Charter (self-defence)	Regional Organization	Immediate armed attack	Against external aggressor (third state)	Reporting as soon as possible (art. 51)
Chapter VII	Security Council	Authorization/delegation of competences, prior to the intervention and explicit	Outside regional organization's territory, against non-member states	Reporting (procedural requirement, derived from the delegation of powers)
Humanitarian intervention, on the basis of art. 53 UN Charter	Security Council Regional organizations	Authorisation (preferably prior and explicit but under circumstances subsequent until intervention is not terminated)	Within the region, against own member states.	Reporting (art. 54)
Humanitarian intervention, on the basis of Article 42 UN Charter	Security Council, which delegates executing competence to regional organizations	Authorization, delegation of competences, prior to the intervention and explicit	Outside regional organization's territory, against non-member states	Reporting (procedural requirement, derived from the delegation of powers)

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