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# NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)

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## Abstract

*The study of NATO military involvement in the Yugoslav crisis since 1992 is essential to understand the evolution of the Alliance which led to the recent intervention in the Federal Republic of Yugoslavia. During the crisis, NATO forces found themselves involved in military activities which went well beyond those foreseen in the 1949 Treaty. It is argued that NATO forces' activities may be construed either as the collective action of member states coordinated through the Alliance, or as the action of the Alliance itself functioning as a regional organization under Chapter VIII of the UN Charter. This essay attempts to assess, under both alternatives, the legality of these activities, bearing in mind their heterogeneity. Special attention is paid to the relationship between NATO and the United Nations, and in particular to the effectiveness of the control exercised over the operations authorized by the Security Council. It emerges that the Alliance has operated in an increasingly uncertain legal framework and cannot postpone any more a new definition of both its institutional structure and its role in maintaining international peace and security.*

## 1 Introduction

With the end of the Cold War, the North Atlantic Treaty Organization (NATO) entered into a process of evolution which basically followed two directions: (a) the strengthening of the relationship with Central and Eastern European states which has led to the launching of the Partnership for Peace initiative,<sup>1</sup> the accession of Poland, Hungary and the Czech Republic to the North Atlantic Treaty,<sup>2</sup> and the conclusion of

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<sup>1</sup> North Atlantic Council (NAC), 'London Declaration on a Transformed North Atlantic Alliance', 5–6 July 1990; 'Rome Declaration on Peace and Cooperation', 8 November 1991; 'Partnership with the Countries of Central and Eastern Europe', 6–7 June 1991; and 'Partnership for Peace. Framework Document', 10–11 January 1994. If not otherwise indicated, NATO documents cited in this article are available at [www.nato.int](http://www.nato.int) (last visited on 30 June 2000).

<sup>2</sup> See the three Protocols to the North Atlantic Treaty of 16 December 1997. See also the 'Study on NATO Enlargement', September 1995.

the NATO–Russia Founding Act;<sup>3</sup> (b) the revision of the strategic concept of the Alliance, which has progressively extended its range of activities in order to promote peaceful and friendly relations, support democratic institutions and manage crises affecting the security of the member states.<sup>4</sup> It was stressed that this broader approach would not imply any change of the main objective of the Alliance, namely, the safeguard of Allies' freedom and security.<sup>5</sup>

Up to 1992 NATO limited itself to prospecting in rather vague terms a closer cooperation with the Conference for Security and Cooperation in Europe (CSCE, later Organization for Security and Cooperation in Europe, OSCE), the Western European Union (WEU) and the European Community. The process of evolution gathered pace during the Yugoslav crisis when NATO and its member states assumed tasks and responsibilities which went well beyond those expressly included in the 1949 North Atlantic Treaty.<sup>6</sup>

The purpose of this essay is to provide a summary of the coercive military activities undertaken by NATO forces (Part 2), and to explore the main issues arising, focusing on the relationship between NATO and the United Nations as well as on the institutional evolution of the former (Part 3). The questions dealt with in Part 3 depend to a large extent on the qualification of NATO as a coalition of states or as a regional organization under Chapter VIII of the UN Charter (hereinafter Charter). Due to the controversy which still surrounds such a qualification, from a methodological point of view, it seems appropriate to study both alternatives.

## 2 NATO Coercive Military Activities in the Yugoslav Crisis

### A *The Naval Interception and the No-Fly Zone*

Up to summer 1992, NATO played a rather marginal role in the management of the Yugoslav crisis.<sup>7</sup> On 4 June 1992, the North Atlantic Council (NAC) expressed its willingness to support, on a case-by-case basis and in accordance with its own procedures, peacekeeping activities under the responsibility of the CSCE.<sup>8</sup> One month

<sup>3</sup> Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, Paris, 27 May 1997. On the political character of the Act, see the resolution adopted on 6 March 1998 by the US Senate Committee of Foreign Relations, in 92 *AJIL* (1998) at 497–498. See also the Charter on a Distinctive Partnership between NATO and Ukraine, Madrid, 9 July 1997.

<sup>4</sup> NAC, 'The Alliance's New Strategic Concept', Rome, 7–8 November 1991. See also NAC, 'An Alliance for the 21st Century', Washington, 24 April 1999.

<sup>5</sup> Para. 35 of 'The Alliance's New Strategic Concept' reads in part: 'The Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defence. . . . The role of the Alliance's military forces is to assure the territorial integrity and political independence of its member states.'

<sup>6</sup> 34 UNTS 243.

<sup>7</sup> See NAC, 'Statement on the Situation in Yugoslavia', Rome, 8 November 1991; 'Final Communiqué', Brussels, 19 December 1991.

<sup>8</sup> NAC, 'Final Communiqué', Oslo, 4 June 1992. See also Defence Planning Committee (DFC) and Nuclear Planning Committee (NPC), 'Final Communiqué', Brussels, 27 May 1992; and NACC, 'Statement', Oslo, 5 June 1992.

later, it decided to undertake with the WEU<sup>9</sup> a coordinated operation directed to monitor compliance with Security Council Resolutions 713 and 757.<sup>10</sup> Adopted under Chapter VII of the Charter, these Resolutions imposed a general and complete embargo on all deliveries of weapons to the territory of the former Yugoslavia,<sup>11</sup> and comprehensive economic sanctions against the Federal Republic of Yugoslavia (FRY).<sup>12</sup> NATO forces were ordered to conduct surveillance, identification and reporting of maritime traffic within defined areas in international waters in the Adriatic. The patrolling did not involve any coercive military measure and came therefore within the reach of Article 41 of the Charter.

The nature of the operation changed on 18 November 1992, when the NAC, acting upon Security Council Resolution 787,<sup>13</sup> authorized NATO forces to halt and inspect or divert to an approved port or anchorage all vessels in order to verify compliance with the relevant Security Council resolutions.<sup>14</sup> The German Government announced that its naval forces already engaged in the monitoring operation would not participate to any activities involving the use of force.<sup>15</sup> It was only on 17 December 1992, nonetheless, with naval operations well underway, that NATO officially affirmed its preparedness to support, on a case-by-case basis and in accordance with its procedures, peacekeeping operations under the authority of the

<sup>9</sup> WEU Council of Ministers, 'Extraordinary Meeting on the Situation in Yugoslavia', Helsinki, 10 July 1992, available at [www.weu.int](http://www.weu.int).

<sup>10</sup> NAC, 'Statement on NATO Maritime Operations', Helsinki, 10 July 1992. See Pagani, 'Le misure di interdizione navale in relazione alle sanzioni adottate dall'ONU', 76 *Rivista di diritto internazionale* (1993) 231. The monitoring operations relating to the traffic on the Danube were carried out in the territory and with the express consent of Hungary, Bulgaria and Romania and therefore did not infringe upon the sovereignty of any state.

<sup>11</sup> Resolution 713, 25 September 1991 (unanimously), at para. 6.

<sup>12</sup> Resolution 757, 30 May 1992 (13-0-2), at paras 4 *et seq.* It obliged member states to prevent the sale or supply from *their* territories or by *their* nationals or the vessels flying *their* flag.

<sup>13</sup> Adopted on 16 November 1992 (13-0-2). In operative para. 12, the Security Council, acting under Chapters VII and VIII, called upon states, nationally or through regional agencies or arrangements, to use such proportionate measures to halt all maritime shipping in order to ensure strict implementation of Resolutions 713 and 757. Up to November 1992, the WEU had recorded 3,649 controls and 71 possible violations (S/24847).

<sup>14</sup> On 8 June 1993, NATO and the WEU approved a combined concept (Operation Sharp Guard) and formed the Combined Task Force 440.

<sup>15</sup> See Heintschel von Heinegg and Haltern, 'The Decision of the German Federal Constitutional Court of 12 July 1994 in Re Deployment of the German Armed Forces Out of Areas', 41 *NILR* (1994) 285, at 288.

Security Council, and to offer its assistance in the implementation of Security Council resolutions.<sup>16</sup>

Enforcement activities were later extended, in accordance with Security Council Resolution 820,<sup>17</sup> to the territorial waters of the FRY.<sup>18</sup> The Greek Government declared that its forces would not take part in the new operations.<sup>19</sup> On 11 April 1994, due to growing concern over the legitimacy of the arms embargo with regard to Bosnia, the United States Government withdrew its participation to the enforcement operations in respect to vessels carrying weapons heading for Bosnia.<sup>20</sup> During Operation Sharp Guard, NATO registered six attempts to violate the relevant Security Council resolutions and claimed that no ship was able to elude NATO and WEU enforcement activities.<sup>21</sup> Resort to armed force was limited to very rare cases as the enforcement operations were tolerated by both the states against which they were directed<sup>22</sup> and third states.<sup>23</sup>

These enforcement measures have been legally defined by NATO and WEU as ‘maritime blocus’,<sup>24</sup> ‘maritime embargo’<sup>25</sup> or ‘embargo enforcement operations’.<sup>26</sup> In literature, such measures have been considered as instrumental to, or an integral part of, the measures decided under Article 41 of the Charter,<sup>27</sup> or as enforcement measures falling under the terms of Article 42.<sup>28</sup>

Reluctant to indicate a specific Article of the Charter as the legal basis of its

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

<sup>17</sup> Adopted on 17 April 1993 (13–0–2).

<sup>18</sup> *Atlantic News*, No. 2521, 30 April 1993.

<sup>19</sup> See Vos, ‘Cooperation in Peacekeeping and Peace Enforcement’, NAA/DSC, 1993 Reports, AK 230, DSC/DC (93) at 14.

<sup>20</sup> The NATO Secretary-General immediately declared that the United States decision would not prevent NATO and the WEU from continuing the enforcement activities: see *Atlantic News*, No. 2670, 16 November 1994. See also WEU Council of Ministers, ‘Noorddwijk Declaration’, 14 November 1994, at para. 24, available at [www.weu.int](http://www.weu.int).

<sup>21</sup> According to NATO Press Release (96) 94, 18 June 1996, 73,000 ships were challenged, 5,800 inspected, and 1,400 diverted and inspected in port. The operation was suspended on 18 June 1996 and terminated on 1 October 1996, following, respectively, Security Council Resolutions 1021 and 1074.

<sup>22</sup> It is significant that on 22 February 1993 the FRY protested against several alleged violations of Resolution 713 (S/25318).

<sup>23</sup> See, for instance, the letter of the Russian Federation dated 16 June 1995 (S/1995/492) urging a stricter implementation of the arms embargo.

<sup>24</sup> DPC/NPG, ‘Final Communiqué’, Brussels, 26 May 1993.

<sup>25</sup> See Joulwan, ‘The New NATO’, in *NATO on Track for the 21st Century* (1994) 29.

<sup>26</sup> See Van Aekelen, ‘WEU Prepares the Way for New Missions’, *NATO Review*, October 1993, 22.

<sup>27</sup> See, respectively, Pagani, *supra* note 10, at 729 *et seq.*; and Rosenweig, ‘United Nations Sanctions: Creating a More Effective Tool for the Enforcement of International Law’, 48 *ÖZöRV* (1995) 161, at 173.

<sup>28</sup> See Martin-Bidou, ‘Les mesures d’embargo prises à l’encontre de la Yougoslavie’, 39 *AFDI* (1993) 262, at 267.

action, the Security Council pragmatically limits itself to determining the existence of a threat to international peace and security (Article 39) and invoking Chapter VII. This approach facilitates a consensus among its members and leaves that organ a wide discretion on the course of action to be taken. In the case of the Yugoslav crisis — as during the Gulf crisis<sup>29</sup> — it permitted the Council gradually to introduce elements of enforcement typical of Article 42 in an operation originally falling within Article 41.<sup>30</sup> The idea of a *continuum*,<sup>31</sup> however, is misleading as the difference between an embargo and an operation of naval interdiction must be maintained. The former imposes on member states the obligation to take all measures necessary to prevent their own vessels from breaching the embargo. It does not allow them to use force against non-national vessels and therefore it does not involve any possible violation of state sovereignty. Conversely, under the second regime, the forces engaged are expressly authorized to resort to coercive measures against any vessel found in breach of the relevant Security Council resolutions, regardless of their nationality.<sup>32</sup>

Meanwhile, at the UN–EC sponsored Conference, the belligerent parties to the Bosnian conflict agreed upon a ban on military flights over Bosnian airspace.<sup>33</sup> Almost immediately the NAC decided to provide the UN with the technical means necessary to monitor the Bosnian airspace. One month later, Security Council Resolution 781 established a ban on all military flights except those authorized by UNPROFOR.<sup>34</sup>

Despite the reference in its preamble to Resolution 770,<sup>35</sup> several elements militate against the qualification of Resolution 781 as an exercise of Chapter VII powers. The Security Council practice unequivocally shows that all resolutions intended to impose legal obligations contain an express reference to Chapter VII. By contrast, in the case of Resolution 781, the attempt made by the United States to have the resolution

<sup>29</sup> See Resolutions 661 and 665, adopted respectively on 6 and 25 August 1990 (13–0–2). China agreed to abstain from voting on the adoption of Resolution 665 only after obtaining the deletion of the express reference to the use of force.

<sup>30</sup> On the occasion of the adoption of Resolution 820, China stated: ‘We find it difficult to support such elements in the resolution as the invocation of Chapter VII of the UN Charter, adoption of enforcement measures and the authorization of measures to strengthen and expand the existing sanctions regime against the FRY’ (S.PV/3200, 18 April 1993, at 32).

<sup>31</sup> See Lapidoth, ‘Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council’, 30 *AVR* (1992) 114, at 118.

<sup>32</sup> See ‘Guidance Issued by SACEUR Concerning the Procedures for Passing Legitimate Cargo Through the UN Embargo of the Former Yugoslavia’, partially reproduced in L.E. Fielding, *Maritime Interception and UN Sanctions* (1997) at 256–259.

<sup>33</sup> International Conference on Former Yugoslavia, ‘Documents Adopted at the London Conference’, 26–27 August 1992, 31 *ILM* (1992) 1527, at 1539.

<sup>34</sup> Adopted on 9 October 1992 (14–0–1).

<sup>35</sup> See *infra* section 2.C.

adopted under Chapter VII failed.<sup>36</sup> Additionally, during the discussion, several members declared that the ban was based on the consent given by the parties at the London Conference.<sup>37</sup> Some members emphasized — though rather unnecessarily — that the Security Council kept the right to take further actions to enforce the ban, resorting if necessary to military action.<sup>38</sup>

While UNPROFOR assumed overall responsibility for the operations NATO forces — for the first time engaged in ‘out-of-area’ military activities — started monitoring Bosnian airspace.<sup>39</sup> Prompted by the frequent violations of the ban, on March 1993 the Security Council, this time acting under Chapter VII, authorized member states to take, nationally or through regional organizations or arrangements, all necessary proportionate measures, including the use of force, to ensure compliance with the ban.<sup>40</sup> The NAC immediately decided to enforce, under the authority of the Security Council, the ban on military flights and agreed with the UN Secretary-General upon the rules of engagement as required by paragraph 5 of Resolution 816. These rules, described as particularly strict,<sup>41</sup> required NATO aircraft to issue a double warning before resorting to force. Due to their marginal military relevance, the enforcement operations were tolerated by the belligerent parties, and in particular by the Bosnian Serbs against which they were essentially directed.<sup>42</sup>

### **B Protection of UNPROFOR Forces and the So-Called ‘Safe Areas’**

Before addressing the military activities carried out by NATO to protect UNPROFOR forces and the so-called ‘safe areas’, it is worth considering the question of

<sup>36</sup> See Freudenschuß, ‘Between Unilateralism and Collective Security: Authorizations of the Use of Force by the Security Council’, 5 *EJIL* (1994) 492, at 502.

<sup>37</sup> See the declarations made by China, India, Austria and France, S/PV.3122, 9 October 1992, respectively, at 7, 11, 12 and 14. According to Higgins, ‘The New United Nations and Former Yugoslavia’, 69 *International Affairs* (1993) 465, at 469, ‘the only truly peacekeeping function assigned to UNPROFOR ... has been the call in Resolution 781’.

<sup>38</sup> See, in particular, the declarations made by the United States and Austria, S/PV.3122, 9 October 1992, at 9 and 11, respectively.

<sup>39</sup> Croatia and the FRY gave their consent to inspections at the airports of Belgrade, Spilt and Zagreb in a Joint Declaration made on 30 September 1992 (see S/24476, Annex). Additionally, the Hungarian Government authorized NATO to fly over its territory.

<sup>40</sup> Resolution 816 adopted on 31 March 1993 (14–0–1). UNPROFOR commander, however, expressed its scepticism on the military enforcement of the ban (see S/25457).

<sup>41</sup> Van Vlijmen, ‘The Bosnian Tragedy’, NAA/DSC, 1993 Reports, AK 228, NAA/DSC (93) 9, at 3, observed: ‘These NATO rules of engagement stood in sharp contrast to the aggressive enforcement of the air-exclusion zones over Northern and Southern Iraq. . . In the Iraqi case — where the Security Council has not even voted to establish a flight ban — planes violating the zone can be shot down by allied aircraft without warning. Nor were the NATO planes in Bosnia authorized to bomb anti-aircraft positions or surface-to-air missile sites if the air patrol is attacked by ground fire.’

<sup>42</sup> See Vos, *supra* note 19. See also the position of the Russian Federation (S/PV.3191, 31 March 1993, at 24). The only combat action took place on 28 February 1994, when four Galeb violating the no-fly zone were shot down near Banja Luka; see 88 *AJIL* (1994) at 524; 65 *BYIL* (1994) at 694. As Resolution 816 was limited to the Bosnian airspace, NATO aircraft did not enter Croatian airspace to engage the remaining two Galeb.

humanitarian relief. With Resolution 770,<sup>43</sup> the Security Council, acting under Chapter VII, authorized member states to take, nationally or through regional agencies or arrangements, all necessary measures to facilitate<sup>44</sup> the delivery of humanitarian assistance. The vague terms of Resolution 770 conceal the sharp divisions existing within the Security Council on the need for military measures,<sup>45</sup> or the degree of control over the operations to be exercised by the Security Council.<sup>46</sup>

At the London Conference held a week later, it clearly emerged that the international community was not prepared to intervene militarily in the conflict.<sup>47</sup> The UN Secretary-General submitted to the Security Council a plan to implement Resolution 770 based on the enlargement of UNPROFOR through additional forces made available by a number of states. As the right to resort to force would still have been limited to self-defence, including situations in which armed persons attempted by force to prevent UN troops from carrying out their mandate, no revision of the rules of engagement already in force was considered necessary.<sup>48</sup>

Expressly sharing the Secretary-General's approach, the Security Council adopted Resolution 776,<sup>49</sup> which realized a complete *revirement* in respect of Resolution 770.<sup>50</sup> Notwithstanding a rather controversial reference to operative paragraph 2 of Resolution 770,<sup>51</sup> Resolution 776 was not adopted under Chapter VII and was not intended to allow UNPROFOR forces — at which it was directed — to resort to armed force beyond the limits indicated by the UN Secretary-General. The UN Secretary-General and the military commanders in the field systematically declared that

<sup>43</sup> Adopted on 13 August 1992 (12-0-3).

<sup>44</sup> The further aim 'to establish the conditions for the delivery' contained in the United States draft resolution was eventually deleted: see Freudenschuß, *supra* note 36, at 502.

<sup>45</sup> See, in particular, the observations of India, Zimbabwe, Hungary, the United Kingdom and France, S/PV.3106, 13 August 1992, respectively at 13, 17, 32, 34 *et seq* and 47 *et seq*.

<sup>46</sup> India pointed out that it was 'highly advisable — indeed, imperative — that the operation, which could involve the use of force, should be and should remain under the command and control of the United Nations': *ibid.*, at 12. Zimbabwe required 'the full control and . . . accountability to the United Nations through the Security Council': *ibid.*, at 16; while China considered the authorization contained in the resolution as 'a blank check': *ibid.*, at 51.

<sup>47</sup> See the documents collected in B.G. Ramcharan (ed.), *The International Conference on the Former Yugoslavia. Official Papers* (1997) 58–158.

<sup>48</sup> See the report dated 10 September 1992 (S/24540). In the light of subsequent reports, when the Secretary-General referred to obstruction by armed persons, he had in mind 'random or unorganized attacks' and not those by the belligerent parties; see, in particular, the report dated 30 May 1995 (S/1955/444, at 9).

<sup>49</sup> Adopted on 14 September 1992 (12-0-3).

<sup>50</sup> For Zimbabwe, Resolution 776 was 'a wise and thoughtful escape route from the provisions of Resolution 770': S/PV.3114, 14 September 1992, at 4. See also the Indian comment, *ibid.*, at 7. See also Freudenschuß, *supra* note 36, at 504; Weller, 'Peace-Keeping and Peace-Enforcement in the Republic of Bosnia and Herzegovina', 56 *ZaōRV* (1996) 70, at 99.

<sup>51</sup> See the positions of Zimbabwe, India and China, S/PV.3114, respectively at 4, 8 and 12.

UNPROFOR had ‘neither the mandate nor the military resources to initiate operations to ensure that no party could block the convoy progress by any means’.<sup>52</sup>

It is against this background that, in April 1993, the Bosnian Serb forces entered Srebrenica. When informed of the imminent fall of the city,<sup>53</sup> the Security Council reacted by declaring Srebrenica a *safe area*.<sup>54</sup> With a view to stopping the territorial gains by the Bosnian Serbs and achieving a negotiated settlement of the conflict,<sup>55</sup> the Security Council charged UNPROFOR forces with deterring attacks on the safe areas, monitoring the ceasefire, promoting the withdrawal of military and paramilitary forces other than those of the Sarajevo government, occupying some key points on the ground, and participating in the delivery of humanitarian relief.<sup>56</sup> To carry out such mandate, UNPROFOR forces were authorized to take — acting in self-defence — the necessary measures including the use of force, in the event of bombardment against, or armed incursion into, the safe areas, as well as deliberate obstruction of UNPROFOR movement.<sup>57</sup> Although the vague wording of Resolution 836 left room for significantly different interpretations,<sup>58</sup> the crucial point was that UNPROFOR was not transformed into a combat force and was therefore bound to seek the consent of the belligerent parties.<sup>59</sup>

Additionally, member states were authorized to use, nationally or through regional organizations or arrangements, air power to support UNPROFOR in the performance of its mandate.<sup>60</sup> However ill-defined, ambiguous and even contradictory,<sup>61</sup> Resolution 836 paved the way to the direct military involvement of NATO forces in the Bosnian conflict. In addition to protective air power in case of attack against UNPROFOR,<sup>62</sup> the NAC decided to take, under the authority of the Security Council, the necessary measures, including air strikes, to put an end to the strangulation

<sup>52</sup> See the report dated 30 May 1995 (S/1995/444, at 9). See also McInnis, ‘Peacekeeping and International Humanitarian Law’, 3 *International Peacekeeping* (1996) 92, at 96. For the position of the UK Government, see ‘Third Report from the Foreign Affairs Committee’, HC Debs (1992–1993), vol. 235-I, at para. 70, and the restricted document partially reproduced in Weller, *supra* note 50, at 144.

<sup>53</sup> See the report of the mission put in place by the Security Council (S/25700).

<sup>54</sup> Resolution 819, 16 April 1993 (unanimously). Subsequently, also Sarajevo, Tuzla, Zepa, Gorazde and Bihac were declared ‘safe areas’: see Resolution 824, 6 May 1993 (unanimously).

<sup>55</sup> French Memorandum Relative to Safe Areas, dated 19 May 1993 (S/25800, Annex).

<sup>56</sup> Resolution 836, 4 June 1993 (13–2–0), at para. 5.

<sup>57</sup> Resolution 836, at para. 9. UNPROFOR forces were increased with a further 7,600 troops, instead of the 34,000 requested by the UN Secretary-General.

<sup>58</sup> See Weller, *supra* note 50, at 108–109.

<sup>59</sup> See, for instance, the UN Secretary-General’s report dated 9 May 1994 (S/1994/555, at 3). See also La Presle, ‘La FORPRONU et le rôle de sa composante militaire. Principes pour l’usage des forces armées dans les opérations de l’ONU’, in J.P. Cot (ed.), *Opérations des Nations Unies. Leçons du terrain* (1995) at 291; and McInnis, ‘The Rules of Engagement for the UN Peacekeeping Forces in Former Yugoslavia’, 39 *Orbit* (1995) 97, at 98.

<sup>60</sup> Resolution 836, at para. 10.

<sup>61</sup> See Owen, ‘The Limits of Enforcement’, 42 *NILR* (1995) 249, at 255; Owen, *Balkan Odyssey* (1997) at 355; Akashi, ‘The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Area Mandate’, 19 *Fordham International Law Journal* (1995) 312, at 315; and Weller, *supra* note 50, at 111.

<sup>62</sup> NAC, ‘Final Communiqué’, Athens, 10 June 1993.



of Sarajevo and other areas.<sup>63</sup> It also approved the command and control arrangements for air strikes: the first use of air power was to be authorized by the UN Secretary-General, while the political authority was to be exercised by the NAC in coordination with the UN.<sup>64</sup>

In January 1994, the UN Secretary-General introduced a distinction between the use of force to defend UNPROFOR (close air support) and that having pre-emptive or punitive character (air strikes). Referring to a letter from the NATO Secretary-General, he declared himself unable to request air strikes until the NAC had expressly authorized NATO forces to launch this kind of operation.<sup>65</sup> Indirectly, he admitted that Resolution 836 permitted NATO forces to carry out air strikes, although this would have allegedly required a further decision by the NAC.

On 6 January 1994, in fact, the UN Secretary-General asked NATO to launch air strikes, at the request of the UN, against artillery or mortar positions responsible for attacks against civilian targets in Sarajevo.<sup>66</sup> The NAC responded by ordering the Bosnian Serbs to withdraw or place under UNPROFOR control all heavy weapons located in an area within 20 kilometres of the centre of Sarajevo, by threatening to launch air strikes against heavy weapons at the disposal of any parties located within the exclusion zone after the expiration of a 10-day deadline, and by authorizing CINCSOUTH to launch air strikes as requested by the UN Secretary-General.<sup>67</sup> On that occasion, as well as later with regard to the decisions taken on 22 April 1994,<sup>68</sup> Greece dissociated her position, but did not oppose the adoption of the decision.

Protesting against the NATO ultimatum, the Russian Federation stressed the exclusive competence of the Security Council to decide on the substance of a settlement of the Bosnian conflict and urged the UN Secretary-General to consult the members of the Security Council before requesting the use of air power.<sup>69</sup> On 18 February 1994, the FRY filed an application before the International Court of Justice requesting the Court to give a judgment on the alleged violations by NATO members

<sup>63</sup> 'Press Statement by the Secretary-General Following the Special Meeting of the NAC', Brussels, 2 August 1993.

<sup>64</sup> 'Decisions Taken at the Meeting of the NAC on 9 August 1993', *NATO Review*, August 1993, at 26 *et seq.* See also 'Declaration of the Heads of State and Government', Brussels, 11 January 1994. The UN Secretary-General further specified that his decision would have been taken on the basis of a request by his Special Representative for the Former Yugoslavia, acting on a recommendation by the UNPROFOR commander (S/1994/50, at 2).

<sup>65</sup> Report dated 28 January 1994 (S/1994/94). Even if the NATO Secretary-General letter is not available, it may be argued that the NAC had already authorized NATO forces to conduct air strikes: see the text at *supra* notes 63 and 64.

<sup>66</sup> Letter from the UN Secretary-General, 6 February 1994, S/1994/131.

<sup>67</sup> 'Decisions Taken at the Meeting of the NAC in Permanent Session', Brussels, 9 February 1994.

<sup>68</sup> See *infra* notes 76 and 77.

<sup>69</sup> See the statement dated 10 February (S/1994/152, Annex). See also the UN Secretary-General's report dated 18 January 1994 (S/1994/50) and the letter from the Russian Federation dated 5 February 1994 (S/1994/138).

of Articles 2(4) and 53(1) of the Charter.<sup>70</sup> In conformity with Article 38(5) of the Rules of Court, however, the application was not entered in the General List as none of NATO member states accepted the Court's jurisdiction.

The overwhelming majority of UN members approved or acquiesced in the NATO ultimatum, which France described as falling 'squarely within the framework of Security Council Resolution 824 (1993) and 836 (1993)... Indeed, the lifting of the siege from those areas — Sarajevo in particular — is the purpose of those resolutions, which, *inter alia*, authorized UNPROFOR to use force, including air power, in fulfilling its mandate. Hence, there is no need for these decisions of the North Atlantic Council to be submitted to the Security Council for any further decision.<sup>71</sup> In any event, the Bosnian Serbs eventually complied with the NATO ultimatum.<sup>72</sup>

On 10 and 11 April 1994, NATO forces, responding to a request by the UN, executed two close air support missions against Bosnian Serb targets located around Gorazde. The action was justified under Resolutions 836 and 844 as necessary to protect UNPROFOR forces from tank and artillery fire.<sup>73</sup> Successively, the UN Secretary-General urged NATO to extend to the remaining safe areas the authorization granted to CINCSOUTH to launch air strikes to protect Sarajevo,<sup>74</sup> while the Security Council ordered the Bosnian Serbs to withdraw from the Gorazde area.<sup>75</sup> Noting Resolution 913, but not expressly basing its action upon it, the NAC issued an ultimatum similar to that tested in Sarajevo two months earlier.<sup>76</sup> With a separate decision, the NAC established a 'military exclusion zone' around Gorazde and the remaining safe areas and authorized, with immediate effect, NATO forces to conduct air strikes to stop any Bosnian Serb attacks involving heavy weapons against the safe areas.<sup>77</sup> The procedural arrangements were updated in order to allow not only the UN but also NATO to recommend the initiation of air strikes.

In spite of the apparent confirmation of the existing legal framework, NAC decisions seem to put the cooperation between NATO and the UN at the level of UNPROFOR and NATO commanders, thus undermining the role of the UN Secretary-General and the Security Council.<sup>78</sup> Equally important, the NAC assigned to the NATO military authority the exclusive responsibility for assessing when the mission was to be

<sup>70</sup> 'Application Instituting Proceedings Submitted by the FRY Against the Member States of the NATO', *Review of International Affairs*, April 1994, at 11; ICJ Communiqué 94/11.

<sup>71</sup> S/PV.3336, 14 February 1994, at 16. The imposition of an exclusion zone falls within the terms of Resolution 836 only through a teleological interpretation of that resolution read in conjunction with Resolution 824: see Weller, *supra* note 50, at 119; Siekman, 'The Lawfulness of NATO Ultimatums Concerning the "Safe Areas" in Bosnia', 1 *International Peacekeeping* (1994) 48.

<sup>72</sup> According to Vos, *supra* note 19, at 10, the Bosnian Serbs 'sensing the emptiness of the threat and conscious that they — the victors — now had more to gain by talking than further conquest ... undertook a militarily meaningless retreat from Mount Izman'.

<sup>73</sup> Report by President Clinton to the Congress, excerpts in 88 *AJIL* (1994) at 525.

<sup>74</sup> Letter dated 18 April 1994 (S/1994/466, Annex).

<sup>75</sup> Resolution 913 adopted on 22 April 1994 (unanimously).

<sup>76</sup> 'Decisions Taken at the Meeting of the NAC in Permanent Session', Brussels, 22 April 1994.

<sup>77</sup> NAC, 'Decisions on the Protection of Safe Areas', Brussels, 22 April 1994.

<sup>78</sup> *Ibid.*, in particular paras 8 and 9.

considered as accomplished,<sup>79</sup> and made an ambiguous reference to some additional measures it could have authorized upon a request channelled through the NATO chain of command.<sup>80</sup>

The firm NATO approach, clearly aimed at overcoming the reluctance of the UN Secretary-General and his delegates to authorize the use of force, inevitably provoked a growing rift between NATO and the UN, as well as among their respective member states.<sup>81</sup> In the following months, nonetheless, NATO forces conducted only the air strikes — all of marginal if not symbolic military importance — expressly authorized by the UN Secretary-General or his delegates.<sup>82</sup>

The enforcement of the protection of the safe areas was bound to failure due to the serious shortcomings of the concept of safe areas and, more generally, of the peacekeeping operation underway in Bosnia and Croatia. The UN Secretary-General accurately observed that 'the general imposition and stricter enforcement of exclusion zones around the safe areas in order to influence the outcome of the conflict . . . would change the nature of the UN presence in the area and imply unacceptable risks for UNPROFOR. In both cases the result would be a fundamental shift from the logic of peacekeeping to the logic of war and would require the withdrawal of UNPROFOR from Bosnia and Herzegovina.'<sup>83</sup>

### C *The Operation Deliberate Force*

In summer 1995, when a detailed plan to evacuate UNPROFOR forces was ready to be implemented,<sup>84</sup> the conflict registered a series of new dramatic events. After the Gorazde crisis, the UN Secretary-General interpreted the UNPROFOR mandate as limited to peacekeeping functions and considered a further Security Council resolution under Chapter VII indispensable to initiate military activities against any belligerent parties. In this regard, he foresaw the revision of the existing legal framework through the creation of a multinational force authorized by the Security Council and operating under the command of the contributing states.<sup>85</sup>

At the same time, France, the UK and the Netherlands further increased the international military involvement in the conflict by forming a 'Rapid Reaction Force' intended to provide UNPROFOR with effective protection. According to their proposal, the Force would have been an integral part of UNPROFOR and would have operated under the existing chain of command and rules of engagement. Interestingly, it was stated that a further Security Council resolution was requested to expand the

<sup>79</sup> *Ibid.*, at para. 9(e).

<sup>80</sup> *Ibid.*, at para. 9(d).

<sup>81</sup> See L. Silber and A. Little, *The Death of Yugoslavia* (1996) 333.

<sup>82</sup> See the UN Secretary-General's report dated 17 November 1994, S/1994/1067, at 16–17. As widely foreseen, the Bosnian Serbs retaliated by taking UNPROFOR personnel hostage.

<sup>83</sup> Report dated 17 November 1994 (S/1994/1067, at 13). See also the reports dated 16 March 1994 (S/1994/300, at 12), 9 May 1994 (S/1994/555), 1 December 1994 (S/1994/1389) and 30 May 1995 (S/1995/444).

<sup>84</sup> On 28 June 1995, the NAC provisionally approved a plan for UNPROFOR withdrawal under NATO exclusive command and control: see *Atlantic News*, No. 2731, 30 June 1995.

<sup>85</sup> S/1995/444, at 22.

authorized level of force.<sup>86</sup> The initiative was approved by the Security Council,<sup>87</sup> but provoked contrasting reactions from those states which welcomed a stronger approach to the enforcement of the existing UNPROFOR mandate,<sup>88</sup> and those opposing what was seen as a creeping abandonment of the peacekeeping principles.<sup>89</sup>

Meanwhile, the Bosnian Serbs brutally entered the so-called safe areas of Srebrenica and Zepa, immediately meeting Security Council condemnation.<sup>90</sup> At the London Conference convened following such attacks, the UN, NATO, Russia, the United States and several other states warned the Bosnia Serbs that an attack against Gorazde would have sparked a substantial and decisive military response.<sup>91</sup> The United States further elaborated on the statement by adding that the ‘pin-prick strikes’ policy would be replaced by stronger action, while the existing command and control arrangement for use of NATO air power would be significantly adjusted to ensure responsiveness and unity.<sup>92</sup> A few days later the NAC decided to launch extensive air strikes under the authority of existing Security Council resolutions, in the event of a Bosnian Serb attack against Gorazde.<sup>93</sup> Clearly departing from his own previous approach, the UN Secretary-General immediately expressed his support for the NAC decision, at the same time stressing that the ‘dual-key’ arrangements would remain in place.<sup>94</sup>

These developments must be considered in the light of the changing military and political situation. In the first place, the FRY had progressively reduced its involvement in the conflict and accepted the international monitoring of its border with the Republika Srpska,<sup>95</sup> an attitude rewarded by the Security Council with a

<sup>86</sup> S/1995/470, Annex.

<sup>87</sup> Resolution 998 adopted on 16 June 1995 (13–0–2).

<sup>88</sup> See, in particular, the observations made by the United Kingdom and France, S/PV.3543, 16 June 1995, respectively at 18–19 and 19–20.

<sup>89</sup> China, in particular, stated that: ‘Once the force is put into operation, it is bound to become a party to the conflict, thus depriving UNPROFOR of its status as a peacekeeping force’ (*ibid.*, at 14). Similarly, see the position of the Russian Federation (*ibid.*, at 9 *et seq.*).

<sup>90</sup> See Resolutions 1004, 12 July 1995 (unanimously); and 1010, 10 August 1995 (unanimously), and the Presidential Statements issued on 14, 20 and 25 July 1995, respectively, S/PRST/32, S/PRST/33 and S/PRST/34.

<sup>91</sup> ‘Déclaration finale de la Conférence’ (London, 21 July 1995), in *Documents d’actualité internationale* (1995) No. 249, at 585.

<sup>92</sup> United States Secretary of State, ‘Opening Remarks’, London, 21 July 1995, in *Dispatch*, 24 July 1995, at 583.

<sup>93</sup> NATO Secretary-General, ‘Press Statement on Gorazde Following the NAC Meeting’, 25 July 1995, *NATO Review*, September 1995, at 7. The warning was later extended to the remaining safe areas: see NATO Secretary-General, ‘Press Statement on Other Safe Areas Following the NAC Meeting’, 1 August 1995, *ibid.* On that occasion, it was also stated that, if requested by the UN, NATO would use air power to provide close air support to any UN personnel throughout Bosnia and in the UN protected areas in Croatia.

<sup>94</sup> Letter dated 26 July 1995 (S/1995/623). The UN Secretary-General delegated to the UNPROFOR commander the authority to request air strikes and, through the Special Representative (see the letter dated 11 February 1994, S/1994/159), close air support.

<sup>95</sup> See the UN Secretary-General’s report dated 19 September 1994 (S/1994/1074).

partial suspension of the economic sanctions.<sup>96</sup> In the second place, the Zagreb government launched a massive military operation to gain control over the so-called UN protected areas established in 1991 within some areas of Croatia as an interim arrangement.<sup>97</sup> The offensive caused the forced displacement of hundreds of thousands of Croatian Serbs<sup>98</sup> and met the condemnation of the Security Council.<sup>99</sup> The imposition of sanctions against Croatia, nevertheless, was not seriously considered. Additionally, Croatian forces invoked an agreement concluded on 21 July 1995 with the Sarajevo government<sup>100</sup> to enter Bosnia, despite Resolution 752,<sup>101</sup> and jointly with the forces of the Sarajevo government occupied vast areas previously controlled by the Bosnian Serbs. As a result of the offensive, the territory of Bosnia controlled by the Sarajevo government and the Bosnian Croats for the first time approached the 51 per cent considered since the Owen–Stoltenberg plan<sup>102</sup> as the basis for a settlement of the conflict. Finally, a further disturbing element was introduced by the United States Congress voting on August 1995 a law — immediately vetoed by the President — aimed at exempting the Sarajevo government from the arms embargo.<sup>103</sup>

It was in this context that on 10 August 1995 CINCSOUTH and UNPROFOR commanders concluded a memorandum of understanding on the execution of air strikes by NATO forces. The memorandum became operative on 30 August 1995, when the second Sarajevo market massacre triggered massive NATO air operations,<sup>104</sup> supported on the ground by artillery attacks carried out by the Rapid Reaction Force. The decision to initiate the Operation Deliberate Force was jointly taken by NATO and UNPROFOR commanders. More importantly, it was apparently agreed that the operation would have continued until both commanders had

<sup>96</sup> Resolution 943, 23 September 1994 (11–2–2). The simultaneous strengthening of the sanction against the Republika Srpska imposed by Resolution 942 (14–0–1) denotes that at the time the Security Council considered the latter as independent from Belgrade.

<sup>97</sup> Security Council Resolutions 740 and 743, adopted respectively on 7 and 21 February 1992 (both unanimously). See also the UN Secretary-General's report dated 15 May 1993 (S/25777, at 2).

<sup>98</sup> See Boyd, 'Making Peace with the Guilty. The Truth About Bosnia', 74 *Foreign Affairs* (1995) 22, at 25.

<sup>99</sup> Resolution 1009 adopted on 10 August 1995 (unanimously). For the military activities carried out by Croatian forces in January 1993 and May 1995, see respectively the reports of the UN Secretary-General dated 10 February 1993, S/25264, and 9 June 1995, S/1995/470, as well as the Presidential Statement issued on 16 June 1995, S/1995/30.

<sup>100</sup> According to the letter of the Sarajevo government dated 1 August 1995, the agreement was based on Article 51 of the UN Charter and allowed Croatia 'to assist in helping the Republic of Bosnia and Herzegovina to repel the aggression, relieve the humanitarian situation and lift the siege of Bihac': S/1995/737.

<sup>101</sup> Adopted on 15 May 1992 (unanimously).

<sup>102</sup> The essence of the plan can be found in S/26337, Annex and S/26486, Annex.

<sup>103</sup> See 'Statement Vetoing Legislation to Lift the Arms Embargo Against Bosnia', 11 August 1995, in *Papers of the Presidents of the United States*, vol. II (1995) 1253.

<sup>104</sup> During the operation, NATO and its member states operated 3,515 sorties and dropped 1,026 bombs. The United States operated about 66 per cent of the sorties.

determined that they had achieved their aims,<sup>105</sup> which essentially included: (a) cessation of attacks against Sarajevo and the other safe areas; (b) withdrawal of heavy weapons from the total exclusion zone around Sarajevo; (c) complete freedom of movement for UN troops and unrestricted use of Sarajevo airport.<sup>106</sup>

On 8 September 1995, the Russian Federation requested the immediate cessation of the operations and strongly contested their legitimacy on several grounds. Due to their punitive, disproportionate and extensive nature, the operations were considered as contrary to existing Security Council resolutions which were based on the principle of proportionality<sup>107</sup> and limited to the defence of UNPROFOR and the safe areas. As for the procedure, the Russian Federation objected to the fact that the Security Council had not been consulted as required by Resolution 844, while the memorandum of understanding had not been made available to all the Council members. It was further argued that the arrangements substantially revised the 'dual-key' procedure, thus depriving the UN of the power to suspend or terminate the operations. Finally, according to the Russian Federation, the direct military intervention of the Rapid Reaction Force violated the limits set in Resolution 988 and radically altered the nature of UNPROFOR.<sup>108</sup> Within the Security Council, only China<sup>109</sup> and the FRY<sup>110</sup> supported the Russian position. All other states rejected the Russian objections and admitted — though in a rather summary fashion<sup>111</sup> — the conformity of Operation Deliberate Force with existing Security Council resolutions, and in particular with Resolution 836.<sup>112</sup>

The same day the Contact Group announced the conclusion of an agreement among the governments of Sarajevo, Zagreb and Belgrade, the latter also representing the Bosnian Serbs.<sup>113</sup> In the following week, the Bosnian Serbs agreed to comply with the conditions established by UNPROFOR and NATO commanders, thereby obtaining the cessation of Operation Deliberate Force. Meanwhile the Sarajevo government decided to put an end to the military offensive jointly undertaken with Croatian forces. The conclusion of the conflict was then formalized with the peace accords concluded in Dayton and signed in Paris.<sup>114</sup>

<sup>105</sup> See the letter by the US President to the Congress, dated 1 September 1995, in *Public Papers of the Presidents of the United States*, vol. II (1995) 1279–1280.

<sup>106</sup> NATO Press Release (95) 79, 5 September 1995.

<sup>107</sup> See J.-F. Meiers, *NATO's Peacekeeping Dilemma* (1996) 45.

<sup>108</sup> S/PV.3575, 8 September 1995, at 2–4. See also the letter dated 7 September 1995, S/1995/776.

<sup>109</sup> *Ibid.*, at 8.

<sup>110</sup> *Ibid.*, at 12–13. See also the Statements dated 30 August, 7 and 8 September 1995, respectively S/1995/759, S/1995/777 and S/1995/778.

<sup>111</sup> See Weller, *supra* note 50, at 161.

<sup>112</sup> It is curious that the UK representative affirmed the legality of the operations as far as the United Kingdom was concerned: *ibid.*, at 4.

<sup>113</sup> S/1995/780. On 29 August the Bosnia Serbs agreed to appoint three members in a single delegation of six, headed by the President of Serbia and charged with negotiating the peace accords. See the text in 46 *Review of International Affairs*, August–September 1995, at 18.

<sup>114</sup> S/1995/999. See Sorel, 'L'accord de paix sur la Bosnie-Herzégovine du 14 Septembre 1995: un traité sous bénéfice d'inventaire', 41 *AFDI* (1995) 65; and Szasz, 'The Dayton Accord: The Balkan Peace Agreement', 30 *ILJ* (1997) 759.

## D The Military Intervention in Kosovo

Whereas the NATO-led multinational force deployed in accordance with the Dayton accords and Security Council Resolution 1031<sup>115</sup> managed to keep the fragile peace in Bosnia-Herzegovina, the situation in Kosovo rapidly degenerated and recorded massive violations of human rights. The Security Council reacted by condemning the use of excessive force by the Serb forces as well as the terrorist acts perpetrated by the Kosovo Liberation Army (KLA), by calling upon the parties to reach a political solution of the crisis, and by imposing an arms embargo.<sup>116</sup> Successively, it qualified the situation as a threat to peace and security in the region and ordered the Belgrade government to withdraw the security forces used for the civilian repression, to facilitate the humanitarian relief, and to permit an effective international monitoring of the compliance of the obligations imposed upon the parties. Member states were urged to provide the human and technical resources for the monitoring mission.<sup>117</sup> The brief debate within the Security Council reveals the significantly divergent interpretations given to the resolution. The Russian Federation emphasized that despite the reference to Chapter VII no use of force was contemplated,<sup>118</sup> whereas the United States announced that NATO was planning military operations to guarantee, if necessary, compliance with the resolution.<sup>119</sup>

A couple of weeks later, the NATO Secretary-General declared that, although the adoption by the Security Council of a further resolution clearly authorizing an enforcement action was unlikely, the Alliance could legitimately resort to force to put an end to the humanitarian catastrophe and ensure compliance with the relevant Security Council resolutions.<sup>120</sup> On 13 October 1998, the NAC issued an activation order for limited air strikes and a phased air campaign in the FRY.<sup>121</sup>

The military threat pushed the Belgrade government to sign two agreements. The first agreement, concluded with the OSCE, established the Kosovo Verification Mission (KVM) which was charged with monitoring compliance with Security Council Resolution 1199.<sup>122</sup> The KVM would have operated on an entirely consensual basis and would not have been allowed to enforce compliance, respond to local

<sup>115</sup> Adopted on 15 December 1995 (unanimously).

<sup>116</sup> Resolution 1160, 31 March 1998 (14–0–1), at para. 8. The resolution imposed an embargo under the terms of Article 41 of the UN Charter as states were obliged to prevent sale and supply to the FRY from *their* territories and by *their* nationals or the vessel flying *their* flag.

<sup>117</sup> Resolution 1199 adopted on 23 September 1998 (14–0–1), at para. 9.

<sup>118</sup> S/PV.3930, 23 September 1998, at 3.

<sup>119</sup> *Ibid.*, at 5.

<sup>120</sup> See the letter dated 9 October 1998, partly quoted in Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1, n. 13.

<sup>121</sup> 'Statement by the Secretary-General Following Decision on the ACTORD', Brussels, 13 October 1998. The order put the national forces designed for the operation under the operational command of SACEUR.

<sup>122</sup> 'Agreement on the OSCE Kosovo Verification Mission', Belgrade, 16 October 1998, in S/1998/978. See also 'OSCE Permanent Council Decision No. 263', 15 October 1998, in S/1998/994, Annex; UN Secretary-General's report dated 12 November 1998, in S/1998/1068, at para. 43; OSCE report for September–October 1998, in S/1998/1068, Annex I, at para. 30; 'OSCE Oslo Ministerial Draft Statement on Kosovo', in S/1998/1221, Annex II, at para. 10.

disturbances or react to hostilities or enforce access by relief organizations. Relying on Article 7, which obliged the FRY to permit and cooperate in the evacuation of KVM members caught in emergency situation, NATO placed a rescue force in the Republic of Macedonia. The second agreement, concluded with NATO, on the occasion represented by Supreme Allied Commander Europe (SACEUR), established a NATO air surveillance mission over Kosovo and defined the main technical aspects of the operation, and also included a rather obscure article on ‘Force Protection’ according to which violations of the agreement would have been ‘immediately arbitrated through bilateral channels to determine liability and appropriate action to be taken’.<sup>123</sup>

The Security Council rapidly endorsed both agreements and confirmed that, in the event of an emergency situation, action may be needed to ensure the safety of the OSCE personnel involved in the monitoring mission.<sup>124</sup> Other references to the use of force included in the draft resolution were deleted in order to avoid a Chinese veto. Concern over the NATO military threat was expressed by the Russian Federation, which urged NATO to abstain from taking unilateral action and to withdraw the activation order.<sup>125</sup> China qualified the NATO initiative as contrary to the Charter and general international law.<sup>126</sup> The United Kingdom and the United States, in turn, underlined the need to take concrete action to ensure the effective compliance with Security Council resolutions, and ultimately to prevent a humanitarian catastrophe.<sup>127</sup> Adopting a more prudent approach, France affirmed the centrality of the Security Council in the field of use of force and considered Resolution 1203 as necessary to legitimate the accords signed by the FRY.<sup>128</sup>

Despite the intense diplomatic activities by the EU, the United States and the Contact Group, the crisis degenerated further. On 19 January 1999, the Security Council condemned, through a Presidential statement, the attitude of the Belgrade government as contrary to its resolutions and the relevant agreements.<sup>129</sup> On 28 January 1999, the NAC did not rule out any measure that would have ensured full respect for the demands of the international community and the observance of all relevant Security Council resolutions.<sup>130</sup> The following day the Contact Group called upon both sides to put an end to the violence and summoned their representatives to Rambouillet to hammer out a political settlement of the crisis.<sup>131</sup> The decision of the Contact Group, which did not mention the NATO threat to use force, immediately found the support of

<sup>123</sup> ‘KVM Agreement Between NATO and the FRY’, Belgrade, 15 October 1999, in S/1998/991 Annex.

<sup>124</sup> Resolution 1203, adopted on 24 October 1998 (13–0–2), at para. 9.

<sup>125</sup> S/PV.3937, 24 October 1998, at 12.

<sup>126</sup> *Ibid.*, at 14. See also the criticism expressed by Costa Rica, *ibid.*, at 6; and Brazil, *ibid.*, at 10.

<sup>127</sup> *Ibid.*, respectively at 13 and 15.

<sup>128</sup> *Ibid.*, at 15–16. Subsequently, France declared that NATO actions not based on Article 5 of the 1949 Treaty ‘doivent être placés sous l’autorité du Conseil de sécurité’: ‘Discours du Ministre des Affaires étrangères’, Brussels, 8 December 1998, in *Documents d’actualité internationale*, 15 January 1999, 59, at 60.

<sup>129</sup> S/PRST/1999/2.

<sup>130</sup> NATO Press Release (99) 11.

<sup>131</sup> ‘Statement by the Contact Group’, London, 29 January 1999, in S/1999/96, Annex.



the Security Council.<sup>132</sup> On 30 January 1999, the NAC gave the NATO Secretary-General the power to authorize air strikes against targets in the FRY territory.<sup>133</sup> The FRY participated in the negotiation — not without protesting against the NATO threat to resort to force, considered as a violation of Article 53 of the Charter<sup>134</sup> — but refused to sign the Interim Agreement for Peace and Self-Government in Kosovo.<sup>135</sup>

On 23 March 1999, the NATO Secretary-General directed SACEUR to initiate a broad range of air operations against the FRY.<sup>136</sup> Behind the rhetorical references to the support of the international community, the intervention was decided upon and executed by a limited group of states and provoked a rift among UN member states. A draft resolution submitted before the Security Council and calling for an immediate cessation of the air operations<sup>137</sup> gathered only the votes of the Russian Federation, China and Namibia. The debate within the Security Council witnessed a sharp division. On the one hand, the intervention was justified as necessary to prevent a humanitarian catastrophe,<sup>138</sup> to guarantee respect by the Belgrade government of its international obligations,<sup>139</sup> to protect the international personnel, to contain the flow of refugees pressing on neighbouring countries, and to prevent a further deterioration of peace and stability in the region.<sup>140</sup> On the other hand, NATO action was criticized by a significant number of states as contrary to Articles 2(4) and 53 of the Charter as well as to the customary norm prohibiting the use of force in international relations. It was made abundantly clear that no coercive action could be undertaken by states or

<sup>132</sup> 'Statement by the President of the Security Council', 29 January 1999, S/PRST/1999/5.

<sup>133</sup> NATO Press Release (99) 12.

<sup>134</sup> See the Letter to the Security Council, dated 1 February 1999, in S/1999/107, Annex. During the negotiations, the NAC renewed the threat to resort to force: see Press Releases (99) 20 and (99) 21.

<sup>135</sup> S/1999/648, Annex. See Weller, 'The Rambouillet Conference on Kosovo', 75 *Journal of International Affairs* (1999) 211.

<sup>136</sup> According to the SACEUR, during Operation Allied Force, NATO aircraft performed 37,465 missions of which more than 14,000 were of an offensive nature.

<sup>137</sup> S/1999/328.

<sup>138</sup> The United Kingdom, in particular, described the intervention as an exceptional measure on the grounds of overwhelming humanitarian necessity: S/PV.3988, 23 March 1999, at 12. See also 'Chairman's Summary of the Deliberations on Kosovo of the Informal Meeting of EU Heads of States', 14 April 1999, S/1999/429, Annex.

<sup>139</sup> *Ibid.*, at 9.

<sup>140</sup> See, in particular, the position of the United States, S/PV.3989, 26 March 1999, at 4–5.

regional organizations without a Security Council authorization.<sup>141</sup> The contrast within the Security Council was further exasperated following the accidental NATO bombing of the Chinese Embassy in Belgrade which occurred on 8 May 1999. China, supported by several states, accused NATO of a flagrant violation of the Convention on the prevention and punishment of crimes against internationally protected persons including diplomats,<sup>142</sup> and insisted on the immediate cessation of the military activities.<sup>143</sup>

Meanwhile, at the end of April 1999, the FRY instituted before the International Court of Justice separate proceedings against 10 NATO member states on the basis of Article IX of the Genocide Convention and Article 38(5) of the Rules of the Court. The Belgrade government denounced the intervention in Kosovo as contrary, *inter alia*, to Articles 2(4) and 53(1) of the Charter and asked the Court to adopt some provisional measures, and specifically to order NATO to terminate immediately the air strikes and refrain from any threat or use of force.<sup>144</sup> On 2 June 1999, the Court rejected the request for lack of *prima facie* jurisdiction and dismissed the cases against the United States and Spain as manifestly ill-founded but decided to remain seized of the others.<sup>145</sup>

The air campaign ended on 9 June 1999 after the FRY and Serbian Governments signed an agreement with NATO, again represented by SACEUR, along the lines of the general principles previously adopted by the G8.<sup>146</sup> The agreement established the procedures for the full withdrawal of the Yugoslav security forces from Kosovo and the deployment by the Security Council, acting under Chapter VII of the Charter, of a multinational force operating with a unified NATO chain of command and under the political control of the NAC, in consultation with non-NATO force contributors. The force was charged with taking any measure, including the use of force, necessary to maintain a secure environment in the province and facilitate the return of displaced peoples and refugees.<sup>147</sup> The Security Council immediately endorsed the agreement and authorized member states and the relevant organizations to create a multina-

<sup>141</sup> See, in particular, the intervention of the Russian Federation, China, RFY, India, Cuba, S/PV.3988 and S/PV.3989, respectively 24 and 26 March 1999. See also 'Communiqué of the Rio Group of Latin American States', 25 March 1999, S/1999/347, Annex; 'Declaration of the Inter-Parliamentary Assembly of the Commonwealth of Independent States', 3 April 1999, S/1999/461, Annex II; 'Statement of the Movement of Non-Aligned Countries', 9 April 1999, S/1999/451, Annex.

<sup>142</sup> General Assembly Resolution 3166 (XXVIII), 14 December 1973, in 13 ILM (1974) 41.

<sup>143</sup> For the debate, see S/PV.4000 and S/PV.4003, respectively 8 and 14 May 1999.

<sup>144</sup> See the applications instituting proceedings and the requests for provisional measures submitted by the FRY, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>145</sup> *Legality of the Use of Force*, Provisional Measures, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>146</sup> 'Statement by the Chairman', 6 May 1999, in S/1999/516. The conditions were substantially identical to those listed by the NAC on 12 April 1999: stop to all military action; withdrawal of the military, police and paramilitary forces from Kosovo; stationing in Kosovo of an international military presence; unconditional and safe return of all refugees and displaced persons; unhindered access to international humanitarian assistance; credible assurance of the FRY willingness to work on the basis of the Rambouillet Accords in the establishment of a political framework agreement; see M-NAC, Press Release 1 (99) 51.

<sup>147</sup> 'Military Technical Agreement Between the KFOR and the Governments of the RFY and the Republic of Serbia', Belgrade, 9 June 1999.

tional force whose responsibilities included deterring the renewal of the hostilities, maintaining and, where necessary, enforcing a ceasefire, ensuring the withdrawal of the Federal and Republic military, and demilitarizing the KLA.<sup>148</sup> The states which had opposed the NATO intervention welcomed the reaffirmation of the principles of the Charter, the primary responsibility of the Security Council, and the setting of clear limits to the use of force contained in the Resolution.

### 3 The General Legal Framework of, and the Main Questions Raised by, NATO Coercive Military Activities

#### A *The Resort to Force by Regional Organizations*

NATO military involvement in the Yugoslav crisis could in the first place be considered as an action by the Alliance functioning as a regional organization under Chapter VIII of the Charter.<sup>149</sup> Leaving aside the constitutional problems that may arise within NATO member states,<sup>150</sup> the issue must be analyzed from two perspectives: the relationship between NATO and the Security Council, and the institutional transformation of the Alliance.

The notion of a regional organization still remains rather controversial as any attempt to define a region for the purpose of Chapter VIII is bound to failure.<sup>151</sup> Additionally, neither the *travaux préparatoires* nor the subsequent practice offer cogent criteria to distinguish regional agencies from regional arrangements. It has convincingly been argued that:

the degree of institutionalization required of regional 'arrangements or agencies' is not predetermined by the UN Charter: members of a 'region' can certainly create a full-fledged 'organization', meaning an intergovernmental organization with a separate legal personality, operating through organs of its own; but nothing prevents them from setting up a less developed 'institutional union', operating through common organs of the Member States, or even a 'simple union', operating through the (mere) cooperation of its Members.<sup>152</sup>

This view is supported by the *travaux préparatoires* of the Charter since the Act of Chapultepec of 3 March 1945<sup>153</sup> was expressly considered as a regional arrangement

<sup>148</sup> Resolution 1244, adopted on 10 June 1999 (14–0–1), at para. 9.

<sup>149</sup> This expression may be considered, for all practical purposes, as equivalent to 'regional arrangements or agencies' which appears in the Charter.

<sup>150</sup> The question of the control by the national parliaments over NATO military activities in Bosnia has been raised before the German Constitutional Court, Judgment of 12 July 1994, 90 BVerfGE (1994) 286.

<sup>151</sup> See, for instance, G. Schwarzenberger, *Power Politics: A Study of International Society* (1951) 521; Yaremtchouk, 'Le régionalisme et l'ONU', 59 *RGDIP* (1955) 406, at 409; and Gioia, 'The United Nations and Regional Organizations in the Maintenance of Peace and Security', in M. Bothe, N. Ronzitti and A. Rosas, *The OSCE in the Maintenance of Peace and Security* (1997) 191, at 196–197.

<sup>152</sup> Gioia, *supra* note 151, at 198 (footnotes omitted).

<sup>153</sup> In 39 *AJIL* (1945 Supplement) 108.

under the terms of Article 52.<sup>154</sup> Thus, even a simple union of states, functioning as the coordination centre for national activities carried out through common organs, may qualify as a regional organization, provided it has ‘as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security’.<sup>155</sup> Consequently, whether the organization possesses international personality is irrelevant for the applicability of the provisions of Chapter VIII.<sup>156</sup> Even more importantly, given the silence of Article 53 and the lack of a sufficiently consistent practice, authors are divided on whether a regional organization is entitled to carry out enforcement action against a non-member state.<sup>157</sup>

This uncertain legal framework brought about an impressive expansion of the range of organizations potentially able to perform Chapter VIII activities. In the *Agenda for Peace*, in particular, the UN Secretary-General included among others ‘regional organizations for the mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern’.<sup>158</sup>

As to the role of regional organizations in the collective security system, the ‘decentralized option’ envisaged in Chapter VIII of the Charter as an alternative to the enforcement action of Articles 42 *et seq.*, includes two phases.<sup>159</sup> The normative phase consists in the Security Council resolution recommending or authorizing resort to

<sup>154</sup> See, in particular, the discussion within the Advisory Committee of Jurists, UNCIO XVII, at 396. Mr Golunsky and Sir Malkin further argued that Article 52 was applicable also to the Anglo-Soviet and the Franco-Soviet pacts.

<sup>155</sup> *Land and Maritime Boundary Between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports (1998) 275, at 307.

<sup>156</sup> The question was not raised during the Conference. For the issues of international responsibility, see *infra* section 3.E.

<sup>157</sup> For the admissibility of such an action, see Kelsen, *The Law of the United Nations* (1951) 327; Starace, ‘Uso della forza nell’ordinamento internazionale’, 32 *Enciclopedia giuridica* (1994) 1, at 7; Morrison, ‘The Role of Regional Organizations in the Enforcement of International Law’, in J. Delbrück, *Allocation of Law Enforcement Authority in the International System* (1994) 39, at 52; Villani, ‘Il ruolo delle organizzazioni regionali per il mantenimento della pace nel sistema dell’ONU’, 53 *Com. Int.* (1998) 428, at 447; and Gioia, *supra* note 151, at 202. *Contra* P. Vellas, *Le régionalisme international et l’Organisation des Nations Unies* (1948) at 206; Wolf, ‘Regional Arrangements and the United Nations Charter’, 6 *EPIL* (1999) 289, at 294; and Gaja, ‘Use of Force Made or Authorized by the United Nations’, in Tomuschat (ed.), *The United Nations at Age Fifty* (1995) 39, at 41. Taking an intermediate view, Akehurst, ‘Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States’, 42 *BYIL* (1967) 175, at 221, notes that ‘if a non-regional State disturbs the peace within the region, this is unquestionably a matter which is “appropriate for regional action”’.

<sup>158</sup> Report dated 17 June 1992 (S/24111). The report marked a significant *revirement* of its author who was formerly an advocate of a particularly strict notion of regional organization: see B. Boutros Ghali, *Contribution à l’étude des ententes régionales* (1949). On the occasion of the 1991 London Conference on Yugoslavia sponsored by the EC, he did not hesitate to consider the EC as a regional organization before affirming, in a rather clumsy way, the supremacy of the Security Council in the field of the maintenance of peace and security. See also General Assembly Resolution 49/57, adopted on 9 December 1994.

<sup>159</sup> Forlati Picchio, ‘La difesa dell’armamento marittimo nazionale sul mercato dei noli: profili giuridici’, 24 *Rivista di diritto internazionale Privato e Processuale* (1988) 400, at 412, describes the two moments as ‘giuridico-volitivo’ and ‘coercitivo-operativo’.

military force by the regional organization, and the decision of the regional organization offering or accepting its military involvement in the management of the crisis.

If the regional organization permanently disposes of armed forces, the normative phase is followed by the operative phase directly conducted by the regional organization. Otherwise, the decision of the regional organization is vested with permissive or mandatory character according to its constituent instrument, and the enforcement action takes place only if, and insofar as the member states of the regional organization provide, on a case-by-case basis, the forces asked for or requested.

The crucial question, however, remains the conditions under which a regional organization can carry out enforcement actions pursuant to Article 53(1) of the Charter, and, in particular, what degree of control the Security Council ought to exercise over the operations. Conflicting views have been put forward in this regard, ranging from strict control,<sup>160</sup> which presumably implies that the Security Council envisages the start-up, supervision and termination of enforcement action,<sup>161</sup> to a mere authorization which, according to some authors, may even be implicit or expressed *ex post facto*.<sup>162</sup>

Article 53(1) introduces a twofold distinction: the utilization of regional organizations by the Security Council, and the autonomous enforcement by regional organizations acting upon a Security Council authorization.<sup>163</sup>

Under the first option, the Security Council exercises an effective control over the operations. The control necessarily includes the power to revise the objectives of the enforcement action, to assess when they are achieved, and ultimately to suspend or terminate the operations.<sup>164</sup> Operational command and control, and possibly strategic direction,<sup>165</sup> are left to the regional organization. As the UN members have no obligation to take part in enforcement action in the absence of an agreement under Article 43, *a fortiori* such an obligation does not exist with regard to regional organizations, which are entitled to negotiate the conditions of their possible involvement or simply decline the Security Council invitation.<sup>166</sup>

<sup>160</sup> Gioia, *supra* note 151, at 194; Villani, *supra* note 157, at 444.

<sup>161</sup> D. Sarooshi, *The United Nations and the Development of Collective Security* (1999) 250.

<sup>162</sup> Walter, 'Security Council Control over Regional Action', 1 *Max Planck Yearbook of UN Law* (1997) 129, at 179; Simma, *supra* note 120, at 4.

<sup>163</sup> According to Villani, *supra* note 157, at 456, however, the distinction may have lost any relevance.

<sup>164</sup> This kind of control may be defined as 'political control': see MacDougall, 'United Nations Operations: Who Should Be in Charge?', 33 *Revue de droit militaire et de droit de la guerre* (1994) 21, at 27.

<sup>165</sup> According to D.W. Bowett, *United Nations Forces. A Legal Study* (1964) at 359, 'strategic direction' means the translation of the political policies and objectives into military terms.

<sup>166</sup> NATO Secretary-General Claes, 'NATO's Ambitious Agenda', in *NATO on Track for the 21st Century* (1994) 54, at 57, points out that NATO is not a subcontractor to the United Nations but a sovereign organization with a duty to discuss the conditions for supporting the United Nations. As the role of the regional organization is limited to the execution of Security Council decisions and the Council itself retains an effective control over the military operations, the United Nations bears international responsibility, although subsidiary or even concurrent responsibility of regional organizations, and possibly of its member states, cannot be ruled out.

Under the second option, the Security Council merely authorizes the resort to armed force following a determination on the existence of a threat to international peace and security. The view that the authorization — which is basically aimed at establishing the consent of the whole UN membership, represented by the Security Council, upon the necessity of the military action — must be given beforehand is to be preferred.<sup>167</sup> Unlike the case of authorization to member states,<sup>168</sup> enforcement by regional organizations finds its legal basis in the Charter, regardless of the degree of control the Security Council exercises beyond the review of periodic reports.<sup>169</sup>

In any case, Article 54 imposes upon regional organizations the obligation to keep the Security Council fully informed on the activities they contemplate to undertake or have already undertaken. The general application of Article 54 to all activities carried out or planned by regional organizations has been significantly contradicted in practice, with the possible exception of the Organization of American States, to the point of rendering it obsolete.<sup>170</sup> When regional organizations undertake enforcement action, however, the obligation to submit periodic reports to the Security Council must be maintained, as demonstrated by the Security Council recent practice.

### B *The Evolution of the Alliance*

With the ratification of the Washington Treaty, the Contracting Parties intended first and foremost to establish a defensive military alliance, as demonstrated by the express reference to Article 51 of the Charter embodied in Article 5 of the Treaty. Opposing views were put forward as to the possibility that the Alliance could also operate as a regional organization.<sup>171</sup> Eventually, the position held by the United Kingdom<sup>172</sup> and the United States<sup>173</sup> that NATO was exclusively a defensive alliance prevailed over the French proposal to qualify NATO in the preamble of the Treaty also as a regional organization.<sup>174</sup> During the Cold War, when the Security Council was virtually

<sup>167</sup> Akehurst, *supra* note 157, at 214 concludes that admitting *ex post facto* authorization would encourage illegal acts.

<sup>168</sup> See *infra* sections 3.C and 3.D.

<sup>169</sup> When the regional organization exercises political authority and strategic direction, it also assumes international responsibility for the operations carried out, although member states may share it in accordance with the degree of integration of the forces involved.

<sup>170</sup> Akehurst, *supra* note 157, at 214.

<sup>171</sup> See N. Henderson, *The Birth of NATO* (1982) 101 *et seq.*

<sup>172</sup> During the debate before the House of Commons, the UK Government declared: 'The Treaty is not a regional arrangement under Chapter VIII of the Charter. The action envisaged is not enforcement action in the sense of Article 53 at all': see *Hansard* (Session 1948–1949), vol. 464, cols 2018–2019.

<sup>173</sup> The United States Government excluded that the Alliance could take 'enforcement action, aggressive action, preliminary action, any sort of action at all, except defensive action, after an attack has occurred': 'Hearings Before the Committee on Foreign Relations', US Senate Reports, No. 48, 81st Congress, 1st Session (1949) at 31. According to the Committee on Foreign Affairs, however, NATO could 'be utilized as a regional arrangement under Chapter VIII of the Charter or in any other way': *ibid.*, at 22.

<sup>174</sup> See the report of the Foreign Affairs Commission, in *Assemblée Nationale, Documents Parlementaires*, Annex 7849, at 1343 *et seq.*

paralyzed by the veto, the question of whether NATO could function as a regional organization was essentially limited to the academic debate.<sup>175</sup>

It was only with the end of the bipolar world that NATO member states unanimously affirmed their readiness to undertake, through the organization and under the authority of the Security Council, enforcement actions that would undoubtedly fall outside the express provisions of the 1949 Treaty.<sup>176</sup> Several views have been put forward concerning the legal nature of the NAC decisions taken in the 1990s. According to one view, apparently supported by the Government of Germany<sup>177</sup> and the United States Congress,<sup>178</sup> the recent expansion of NATO activities is based on a dynamic interpretation of the 1949 Treaty and particularly of its Article 4.<sup>179</sup> It has also been argued that NATO decisions and subsequent military involvement in the Yugoslav crisis have led to a tacit revision of the Treaty,<sup>180</sup> or at least to the creation of soft law or quasi-legal obligations,<sup>181</sup> thus rendering advisable, if not indispensable, a formal review of the Treaty itself.<sup>182</sup> The most convincing view, however, underlines the clear unwillingness of NATO member states to create new legal obligations. NAC decisions are therefore qualified as documents having political character.<sup>183</sup> They were intentionally drafted in extremely vague terms in order to avoid any suggestions of legal engagement, nor even were they limited to compulsory consultation among member states.<sup>184</sup> As member states remain free to determine within the NAC the very existence of any obligations or their extent, the documents lack 'an essential condition of validity of legal instruments'.<sup>185</sup>

Whether NAC decisions may provide 'un fondement juridique et une légitimation

<sup>175</sup> The qualification of NATO as a regional organization was generally ruled out: see E.W. Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950); Goodhart, 'The North Atlantic Treaty of 1949', 79 *Recueil des cours* (1951-II) 183; Miele, 'NATO', 11 *Novissimo Digesto* (1965) 21; Durante, 'Organizzazione del trattato dell'Atlantico del Nord', 31 *Enciclopedia giuridica* (1981) 211. See, however, Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?', 45 *AJIL* (1951) 162; Bowett, *Self-Defence in International Law* (1958) 222; Akehurst, *supra* note 157, at 184; and Bakhshab, 'The Concept of Regional Arrangements', 40 *Revue Egyptienne de Droit International* (1984) 196, at 200.

<sup>176</sup> See *supra* Introduction.

<sup>177</sup> König, 'Putting an End to an Endless Constitutional Debate', 38 *GYIL* (1995) 103; and Zöckler, 'Germany in Collective Security System. Anything Goes', 6 *EJIL* (1995) 274.

<sup>178</sup> See the report *supra* note 3, at 499.

<sup>179</sup> This view is shared by the President of the NAA, Roth, *NATO in the 21st Century* (1998) at 8. NATO consultations, however, have traditionally been related to actions unilaterally taken by states: see Kirgis, 'NATO Consultations as a Component of National Decisionmaking', 73 *AJIL* (1979) 371.

<sup>180</sup> Cannizzaro, 'NATO', in *Digesto Discipline Pubblicistiche*, vol. X (4th ed., 1995) 52, at 58.

<sup>181</sup> See the opinion held by the minority in the decision cited *supra* note 150, at 372 *et seq.*

<sup>182</sup> Dekker and Myjer, 'Air Strikes on Bosnian Positions: Is NATO Also Legally the Proper Instrument of the UN?', 9 *LJIL* (1996) 411.

<sup>183</sup> This is notably the position of the majority in the decision cited *supra* note 150, at 359 *et seq.*

<sup>184</sup> An obligation to consult in 'any situation which constitutes a threat to or a breach of the peace' appeared under Article 4(b) of the 1948 draft text of the North Atlantic Treaty, but was eventually deleted.

<sup>185</sup> See, in general, the dissenting opinion of Judge Ad Hoc Lauterpacht in the *Case of Certain Norwegian Loans*, ICJ Reports (1957) 9, at 48.

à une action future',<sup>186</sup> not contemplated by the 1949 Treaty, can be left aside, if it is accepted that the principle of legality — intended as the requirement of a legal basis for every action of a public body or a corporation in general — is not necessarily applicable to international organizations.<sup>187</sup> Member states remain 'the transaction exclusive and absolute *domini*', or, in other words, 'the masters of the existence, or the survival, of the duration of the treaty's rules and of any rights and duties deriving therefrom'.<sup>188</sup> Accordingly, nothing would have prevented NATO member states from performing activities entirely outside those included in the 1949 Treaty, but not expressly prohibited thereby, provided that the relevant NAC decisions were taken unanimously or at least without opposition. The position of the Greek Government not to concur with certain NAC decisions, but not to oppose them either, could be considered as an example of abstention. For want of any provisions in the 1949 Treaty, the admissibility of decisions taken without the participation of all members has emerged in the Alliance practice alongside the general application of the unanimity rule, originally foreseen only for the admission of new members.<sup>189</sup>

NATO military coercive activities in the Yugoslav conflicts offer some indicia of the capability of the Alliance to function as a regional organization. The forces involved were fully integrated in the Alliance military structure,<sup>190</sup> and operated under

<sup>186</sup> Virally, 'La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique', 60 *Annuaire de l'Institut de Droit International* (1983) 166 (Rapport provisoire) and 328 (Rapport définitif), at 224.

<sup>187</sup> M.L. Forlati Picchio, *La sanzione nel diritto internazionale* (1974) 307. Such a requirement, however, may derive from the institutive instrument of the organization, as in the case of Article 5 of the EC Treaty. See also the Opinion 2/94 of the European Court of Justice, [1996] ECR I-1759. Nonetheless, it may be argued that this requirement can be stretched beyond any limit, if not circumvented, as has occurred, for instance, with regard to certain aspects of Council Regulation 990/93, especially the prohibition imposed on all commercial vessels to enter FRY territorial waters (OJ 1993 L 102/14). This attitude was condoned by the European Court of Justice, which summarily dismissed the objections raised by the UK, French and Italian Governments, in Case C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della provincia di Brindisi and Others*, [1997] ECR I-1111.

<sup>188</sup> Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, with an Appendix on the Concept of International Law and the Theory of International Organization', 137 *RdC* (1972-III) at 714–715, n. 183. The author, however, immediately admits the difficulties in distinguishing subsequent practice of the organ from that of member states.

<sup>189</sup> Article 10. See Cannizzaro, *supra* note 180, at 61–62.

<sup>190</sup> With regard to the United Nations, Forlati Picchio, *supra* note 187, at 212, indicates in the degree of integration of the forces the crucial test for considering the action as 'collective' or simply 'associated'.



NATO rules of engagement and the NATO chain of command.<sup>191</sup> Throughout the crisis, the NAC exercised political control — up to August 1995 jointly with the Security Council — and strategic direction over the operations, while the troops were under exclusive NATO command and control. Thus, no military activity was undertaken by NATO forces without a formal decision by the NAC. As for the UN, whereas Security Council resolutions were generally addressed to member states, the attitude of the Council itself<sup>192</sup> and that of the Secretary-General<sup>193</sup> suggest that NATO was regarded as a regional organization. The Secretary-General, in particular, clearly considered the resort to force by NATO forces legitimate only within the limits set not only by the Security Council resolutions, but also by the NAC decisions.<sup>194</sup> This was also the way third states<sup>195</sup> perceived the involvement of NATO forces.

Two interrelated elements, however, militate against the qualification of NATO as a regional organization: the Alliance has so far avoided defining itself as a regional organization, and has only occasionally submitted to the Security Council the periodical reports on its military activities as required for regional organizations under the terms of Article 54.

Adopting a pragmatic approach, it seems appropriate to focus on whether NATO may effectively function as a regional organization rather than whether it qualifies as such.<sup>196</sup> It may be argued that the Alliance has reached quite an advanced level of institutionalization and integration which certainly permits its utilization by the Security Council or its autonomous performance of enforcement activities upon a Security Council authorization.<sup>197</sup>

<sup>191</sup> Additionally, aircraft belonging to NATO took part in the operations, including Operation Deliberate Force and the air campaign against the FRY.

<sup>192</sup> According to Ress, 'Article 53', in B. Simma (ed.), *The Charter of the United Nations* (1995) 722, at 730, the relevant resolutions adopted during the Yugoslav crisis 'manifestly show that NATO has been considered by the Security Council as one of the regional organizations which might be entrusted with specific enforcement actions'.

<sup>193</sup> See, for instance, the exchange of letters dated 20 August 1993 between the UN Secretary-General and the Security Council; and the UN Secretary-General letter dated 18 April 1994 (S/1994/466, at para. 2) and report dated 19 May 1994 (S/1994/600, at para. 3).

<sup>194</sup> See *supra* note 65.

<sup>195</sup> See, for instance, the attitude of the FRY, *supra* notes 70 and 144 and the Russian Federation statement dated 10 February 1994 (S/1994/152, Annex). See also the text above and *supra* note 141.

<sup>196</sup> See Bowett, *supra* note 175 at 222; and Akehurst, *supra* note 157, at 180. According to the latter author, 'the question is not whether an organization is a regional agency, but whether it is *functioning* as one *in a given situation*' (emphasis in the original).

<sup>197</sup> Perrin de Brichambaut, 'Les Nations Unies et les systèmes régionaux', in Société Française pour le droit international, *Le Chapitre VII de la Charte des Nations Unies* (1995) 97, at 103, points out that 'l'OTAN n'est pas une organisation régionale reconnue et pourtant ... elle en exerce concrètement tous les attributs tels qu'ils sont prévus par l'Article 53 de la Charte'. *Contra* Verhoeven, *ibid.*, at 111; Iovane, 'La NATO, le organizzazioni regionali e le competenze del Consiglio di Sicurezza in tema di mantenimento della pace', 53 *Com. Int.* (1998) 43; Picone, 'La "guerra del Kosovo" e il diritto internazionale generale', 83 *Rivista di diritto internazionale* (2000) 309, at 317 *et seq.*

### C *The Use of Force by States Authorized by the Security Council*

Since both the qualification of NATO as a regional organization and the admissibility of enforcement actions carried out by regional organizations against non-member states are far from being undisputed, it is necessary to alternatively consider NATO as a coalition of states for the collective performance of national activities. In this perspective, NATO involvement in the Yugoslav crisis could represent an instance of joint use of force by UN member states authorized by the Security Council.

In the last decade, the Security Council has attempted to overcome the non-implementation of Article 43 of the Charter by authorizing member states to adopt the necessary measures, including the use of armed force, to ensure respect for its resolutions.<sup>198</sup> Mainly due to the general acquiescence expressed by UN member states within and outside the Security Council, this practice has found large support in literature, although often coupled with significant reservations as to the vagueness of the legal framework,<sup>199</sup> the risk of marginalizing the Security Council,<sup>200</sup> and the unavoidable selectiveness of such types of enforcement mechanism.<sup>201</sup> This line of argument accepts, or at least does not object in principle, that ‘the system has evolved a viable alternative, within the terms of its Charter, that permits the Council to authorize states to join in a police force ad hoc, instance by instance’.<sup>202</sup> To support this view, authors rely on Article 42,<sup>203</sup> possibly read in conjunction with Article 48<sup>204</sup> or Article 106,<sup>205</sup> solely on Article 106,<sup>206</sup> on ‘some assumed penumbra of powers available under Chapter VII’,<sup>207</sup> on a customary norm which have emerged,<sup>208</sup> or is still taking shape,<sup>209</sup> within the Charter, probably out of political expediency.<sup>210</sup> Other authors, however, object that, in the legal vacuum resulting from the non-

<sup>198</sup> Qualifying the practice as a delegation of powers, on the contrary, does not appear entirely accurate as it presupposes that the Security Council possesses the capability to directly exercise these powers. See Arangio-Ruiz, ‘Postfazione’, in M.L. Picchio Forlati (ed.), *Le Nazioni Unite* (1998) 221, at 242. But see Sarooshi, *supra* note 161, especially chapter I. On the precedent of the Korean War, see Kunz, ‘Legality of the Security Council Resolutions of June 25 and 27, 1950’, 45 *AJIL* (1951) 137; Vallat, ‘The General Assembly and the Security Council of the United Nations’, 29 *BYIL* (1952) 63, at 89 *et seq.*; and L.M. Goodrich, *Korea: A Study of US Policy in the UN* (1956).

<sup>199</sup> Weston, ‘Security Council Resolution 678 and the Persian Gulf Decision: Precarious Legitimacy’, 85 *AJIL* (1991) 516, at 522.

<sup>200</sup> Quigley, ‘The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism’, 17 *Michigan Journal of International Law* (1996) 249.

<sup>201</sup> Higgins, ‘Peace and Security. Achievements and Failures’, 6 *EJIL* (1995) 445.

<sup>202</sup> Franck and Patel, ‘UN Police Action in Lieu of War: “The Old Order Changeth”’, 85 *AJIL* (1991) 63, at 74.

<sup>203</sup> *Ibid.*, at 66.

<sup>204</sup> Weller, *supra* note 50, at 175.

<sup>205</sup> Starace, *supra* note 157, at 9.

<sup>206</sup> Miller, ‘Universal Soldiers: UN Standing Armies and the Legal Alternatives’, 81 *Georgetown Law Journal* (1993) 773. *Contra* Geiger, ‘Article 106’, in Simma, *supra* note 192, at 1149.

<sup>207</sup> Weston, *supra* note 199 at 522.

<sup>208</sup> Schachter, ‘United Nations Law in the Gulf War’, 85 *AJIL* (1991) 453; Gaja, ‘Problemi attuali concernenti l’uso della forza nel sistema delle Nazioni Unite’, in SIOI, *L’ONU: Cinquant’anni di attività e prospettive per il futuro* (1996) 416.

<sup>209</sup> B. Conforti, *Le Nazioni Unite* (1994) 204.

<sup>210</sup> Freudenschuß, *supra* note 36, at 526 *et seq.*

implementation of Article 43, member states could unilaterally resort to force upon a determination by the Security Council of the existence of a threat to international peace and security.<sup>211</sup> The intervention is consequently governed by general international law, with member states acting either *uti singuli* on the basis of the state of necessity theory,<sup>212</sup> or *uti universi* to protect the fundamental values of the international community.<sup>213</sup> In this sense, the Security Council authorization is not directed at removing a legal hurdle<sup>214</sup> — namely, the prohibition to resort to armed force — but rather amount to a procedural guarantee.<sup>215</sup>

The common feature of all these views is the paramount importance given to the question of the control exercised by the Security Council. The creation of a force permanently available to the Security Council, either through the conclusion of *una tantum* or ad hoc agreements under Article 43 of the Charter,<sup>216</sup> or even on a different basis,<sup>217</sup> would guarantee to that organ the political control and the strategic direction over the operations,<sup>218</sup> and possibly — depending on the content of the accords — the operational command over the troops.<sup>219</sup> During the operations, therefore, the Security Council would exercise a direct and continuous control, retain the right to revise the objectives, assess when they are achieved, and ultimately suspend or terminate the operations. Mainly for political reasons which were immediately evident after the creation of the UN<sup>220</sup> and which are to a large extent still valid, however, both alternatives appear rather remote.<sup>221</sup>

The failure to implement Article 43, nonetheless, has not deprived Article 42 of any significance.<sup>222</sup> An extensive interpretation of Article 42, in the light of the

<sup>211</sup> Lattanzi, 'Consiglio di sicurezza ed emergenza umanitaria', in SIOI, *supra* note 208, at 503, at 510.

<sup>212</sup> F. Lattanzi, *Assistenza umanitaria e intervento di umanità* (1997) at 97.

<sup>213</sup> Picone, 'Interventi delle Nazioni Unite e obblighi erga omnes', in Picone (ed.), *Interventi delle Nazioni Unite* (1995) 517, at 552 *et seq.*; and Picone, 'Valori fondamentali della comunità internazionale e Nazioni Unite', 50 *Com. Int.* (1995) 439.

<sup>214</sup> Lattanzi, *supra* note 211.

<sup>215</sup> Picone, 'Interventi delle Nazioni Unite', *supra* note 213, at 556.

<sup>216</sup> Forlati Picchio, *supra* note 187, at 211, notes that *una tantum* agreements could be concluded on an individual basis. Gaja, *supra* note 157 at 41, observes that ad hoc agreements may be considered as an 'operational alternative'.

<sup>217</sup> See Sohn, 'The Authority of the United Nations to Establish and Maintain a Permanent Force', 52 *AJIL* (1958) 230; and Forlati Picchio, *supra* note 187, at 209.

<sup>218</sup> According to Article 47(3) of the Charter, the Military Staff Committee may assume strategic direction of the armed forces.

<sup>219</sup> See the Report prepared in 1947 by the Military Staff Committee, S/336.

<sup>220</sup> See Bowett, *supra* note 218 at 12–18.

<sup>221</sup> See 'Key Elements of the Clinton Administration's Policy on Reforming Multilateral Peace Operations', 33 *ILM* (1994) 800; and Glennon, 'The Constitution and Chapter VII of the United Nations Charter', 85 *AJIL* (1991) 75.

<sup>222</sup> Kelsen, *supra* note 157, at 756; Schwarzenberger, 'Problems of a United Nations Force', 12 *Current Legal Problems* (1959) 247, at 254; Seyersted, 'United Nations Forces: Some Legal Problems', 37 *BYIL* (1961) 351, at 438–439 and 463; and Bowett, *supra* note 218, at 277. This view seems supported by the *travaux préparatoires*: see Amerasinghe, 'The Charter Travaux Préparatoires and United Nations Powers to Use Armed Forces', 4 *CYIL* (1966) 81, at 91. *Contra* Verhoeven, 'Etats alliés ou Nations Unies? L'ONU face au conflit entre l'Irak et le Koweït', 36 *AFDI* (1990) 145, at 175.

conclusions reached by the International Court of Justice,<sup>223</sup> could provide a legal basis for the practice of authorization to member states to resort to armed force.<sup>224</sup> Article 42 *in fine* can be read as allowing the inclusion of activities directly carried out by member states, regardless of the conclusion of a prior agreement under Article 43, within the action taken by the Security Council.<sup>225</sup> It is submitted that the contribution by member states, which according to the wording of Article 42 *in fine* would have a complementary nature, could assume an exclusive character. At the same time, insofar as Article 42 is silent on the issue, it may be argued that the Security Council could take all necessary actions to maintain international peace and security without necessarily assuming control and command over the forces provided by member states.<sup>226</sup>

This interpretation leads to a ‘decentralized option’ composed of two phases. In the normative phase, the Security Council acting under Chapter VII determines the existence of a threat to international peace and security and authorizes member states to take the measures necessary to eliminate it. In the operative phase, member states individually or jointly undertake the enforcement of the Security Council resolution. The resolution produces a permissive effect and allows — but certainly does not oblige — member states to take part in the military operations (such an obligation could derive exclusively from an agreement concluded under Article 43). As member states freely decide whether, how and for how long to participate in the enforcement mechanism, there is no guarantee of functioning.<sup>227</sup> In this sense, it is inaccurate to read Article 42 in conjunction with Article 48 since the latter Article relates to the power of the Security Council to exempt some member states from compliance with mandatory measures otherwise binding on all members.<sup>228</sup> Resolution 770 showed well how without the enforcement phase the Security Council deliberation remains a dead letter.<sup>229</sup>

#### D *The Question of Control*

If there is nothing inherently wrong with the practice of authorization, the crux of the matter remains the degree of control. The debate within the Security Council has focused on the need for an effective system of control, rather than on the admissibility of the authorization practice as such. Hence, during the debate on the military

<sup>223</sup> In *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports (1962) 151, at 167, the Court concluded: ‘It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.’

<sup>224</sup> See Kirgis, ‘The Security Council’s First Fifty Years’, 89 *AJIL* (1995) 506, at 521.

<sup>225</sup> Kelsen, *supra* note 157, at 756.

<sup>226</sup> On this point, see N.D. White, *Keeping the Peace. The United Nations and the Maintenance of International Peace and Security* (1997) 117 *et seq*; Franck and Patel, *supra* note 202, at 66; Schachter, *supra* note 208, at 462.

<sup>227</sup> See the German and Greek attitude towards the operations of naval interception in the Adriatic Sea, *supra* notes 15 and 19. See also the United States’ partial withdrawal from Operation Sharp Guard, *supra* note 20.

<sup>228</sup> See Schachter, *supra* note 208, at 463.

<sup>229</sup> See *supra* section 2.C.

intervention against Iraq in 1991,<sup>230</sup> Malaysia declared: 'When the Security Council provides the authorization for countries to use force, these countries are fully accountable for their actions to the Security Council through a clear system of reporting and accountability, which is not adequately covered in Resolution 678 (1990)'.<sup>231</sup>

The suggested extensive interpretation of Article 42 cannot be stretched beyond the point at which the Security Council leaves to the states the operational control and even the strategic direction, but maintains an effective political control over the operations. Such a control necessarily includes the power to verify through the reporting system the respect for the limits set in the authorization, to assess the objectives achieved, and ultimately to suspend or put an end to the operations. The practice in question may be described as a form of utilization of member states by the Security Council comparable with that foreseen in Article 53(1) of the Charter with regard to regional organizations.<sup>232</sup>

The voting system established by the Charter exposes the Security Council to the risk that this body cannot suspend or terminate an operation owing to the opposition of one or more permanent members, and in particular the members which are carrying out the enforcement measures (the so-called reverse veto). The problem could be overcome, it has been proposed, by including in the resolution a temporal limit to the authorization, or a provision allowing a particularly high number of members of the Security Council, without distinction between permanent and non-permanent, to suspend partly or completely the authorization.<sup>233</sup> Neither of the options is completely satisfactory. The first would not affect the virtually absolute unaccountability of member states until the expiration of the deadline, while the second implies a significant reduction of the veto power unlikely to be accepted by permanent members. Alternatively, the resolution providing for the authorization could allow the Security Council members, and perhaps the General Assembly, to

<sup>230</sup> The intervention involved complex questions related to the exercise of the right to collective self-defence which is not necessary to analyze here.

<sup>231</sup> S/PV.2963, 29 November 1990, at 76. Even more radically, Yemen observed that 'the command of those forces will have nothing to do with the United Nations, although their actions will have been authorized by the Security Council': *ibid.*, at 57. See also the positions of India, Zimbabwe and China, *supra* note 46. During the debate on the crisis in Somalia, Zimbabwe declared that 'in any enforcement action the United Nations must define the mandate ... monitor and supervise its implementation ... [and] determine when the mandate has been fulfilled': S/PV.3145, 3 December 1992, at 7. Ecuador added that 'the Security Council is the body that will authorize start-up, continued execution and termination': *ibid.*, at 13–14. India in turn pointed out that 'the United Nations would keep effective political command and control while leaving enough flexibility for the contributing States to retain on the ground the operational autonomy they had requested': *ibid.*, at 51. R. Falk, 'Questioning the UN Mandate in the Gulf', IFDA Dossier (1991–1992) 81, at 82, points out that the United Nations has 'an obligation to control the definition of war goals, the means chosen to achieve them and to use its authority to impose a ceasefire'. Sarooshi, *supra* note 161, at 35, observes that 'the Security Council must at all times retain overall authority and control over the exercise of its delegated Chapter VII powers ... and the competence to change the way that the delegated powers are being exercised'.

<sup>232</sup> See *supra* section 3.A.

<sup>233</sup> See Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* (1993) 552, at 577 *et seq.*

request during an operation the verification of the existence within the Security Council of a majority qualified to adopt a resolution under Chapter VII of the Charter. The majority could be different from that which originally voted in favour of the authorization. However unpopular, the strengthening of the veto power appears a more viable option — although not exempt from criticism — to render the control exercised by the Security Council effective.<sup>234</sup>

Without an effective control, the role of the Security Council is reduced to providing some degree of legitimization to actions unilaterally decided and carried out by member states, which are individually responsible on the international plane.<sup>235</sup> In this case, the Security Council authorization is downgraded to a procedural guarantee and resembles a blank cheque.<sup>236</sup> As the authority of the Security Council is purely formal, Article 42 ceases to be applicable. In these circumstances, the legal foundation of the enforcement action has to be looked for in general international law. This approach necessarily implies an interpretation of Article 2(4) as not embodying an absolute prohibition to the use of force.<sup>237</sup> At least until recently, the overwhelming opinion, solidly supported by several decisions of the International Court of Justice<sup>238</sup> and by UN and state practice,<sup>239</sup> admitted no exception to the ban on the use of force — apart from self-defence and action under Chapter VII of the Charter — regardless of the effective functioning of the system of collective security and of the objectives pursued. A more flexible and teleological interpretation of Article 2(4), however, has been gaining ground since the recent military activities in Somalia, Bosnia, Rwanda,

<sup>234</sup> Reisman, 'The Constitutional Crisis in the United Nations', 87 *AJIL* (1993) 83, at 95 rightly observes: 'As a victors' creation, the only real control [over the Security Council action] was the veto assigned to the permanent members of the Council.'

<sup>235</sup> See R. Ago, 'Third Report on State Responsibility', *Yearbook of the International Law Commission*, vol. II, Part One (1971) at 272.

<sup>236</sup> See *supra* note 46. See also Verhoeven, *supra* note 222; Weston, *supra* note 199 at 526; Quigley, *supra* note 200.

<sup>237</sup> For a representative bibliography on humanitarian intervention, see P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993). See also Simma, *supra* note 120; Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23; Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis', 10 *EJIL* (1999) 791; 'Editorial Comments: NATO's Kosovo Intervention', 93 *AJIL* (1999) 824; Zappalà, 'Nuovi sviluppi in tema di uso della forza in relazione alle vicende del Kosovo', 82 *Rivista di diritto internazionale* (1999) 975; Kohen, 'L'emploi de la force et la crise du Kosovo: vers un nouveau desordre juridique international', 32 *RBDI* (1999) 122; Picone, *supra* note 197; Tsagourias, 'Humanitarian Intervention After Kosovo and Legal Discourse: Self-Deception or Self-Consciousness?', 13 *LJIL* (2000) 11. See also the authors cited *infra* note 240. In the Foreign Office Policy Document No. 184, in 57 *BYIL* (1986) at 614, the UK Government stated: 'The best case that can be made in support of humanitarian intervention is that it is not unambiguously illegal'.  
<sup>238</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, Merits, Judgment, ICJ Reports (1986) 14, at 134–135. In the *Corfu Channel Case*, ICJ Reports (1949) 4, at 35, the Court observed that 'the alleged right of intervention as the manifestation of a policy of force ... cannot, whatever be the present defects in international organization, find a place in international law'.

<sup>239</sup> See, for instance, the General Assembly Resolutions 2625 (XXV) and 37/10, adopted respectively on 24 October 1970 and 15 November 1982.

Haiti and Liberia.<sup>240</sup> According to this latter view, intervention may be justified if it is genuinely aimed at putting an end to massive and widespread violations of human rights. It remains to be seen — and the burden of proof is very heavy<sup>241</sup> — whether state practice is sufficiently uniform to demonstrate the emergence of such a customary norm.

A thorough analysis is beyond the purpose of this paper. Suffice it to note that state practice is ambiguous and even contradictory. The relevance of Operation Provide Comfort, for instance, is undermined by the almost immediate conclusion of the Memorandum of Understanding of 18 April 1991<sup>242</sup> and by the serious doubt that Resolution 688 authorized the use of force.<sup>243</sup> Operation Restore Hope, in turn, was expressly undertaken on the premise that at the time there was in Somalia no government that could request and allow the use of force.<sup>244</sup> The intervention in Haiti, conversely, allegedly took place to implement the 'Governor Island Accords' upon the request of the legitimate — although not effective — government.<sup>245</sup> Equally interesting, Resolution 1080, authorizing a military intervention in Zaire, remained a dead letter as the local government never expressed its consent.<sup>246</sup>

The use of force against Iraq in January 1993 was justified by the United States, the United Kingdom and France<sup>247</sup> as necessary to guarantee the respect of Security Council Resolution 687<sup>248</sup> whose violations by the Iraqi Government<sup>249</sup> rendered applicable the authorization to use military force included in Resolution 678.<sup>250</sup> The same legal grounds were invoked by the United States and the United Kingdom to

<sup>240</sup> Scheffer, 'Toward a Modern Doctrine of Humanitarian Intervention', 23 *University of Toledo Law Review* (1992) 253; Lillich, 'Humanitarian Intervention Through the United Nations: Towards the Development of Criteria', 53 *ZaöRV* (1993) 564; F. Tesón, *Humanitarian Intervention. An Inquiry into Law and Morality* (2nd ed., 1996); and N. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (2000).

<sup>241</sup> Brownlie, 'Humanitarian Intervention', in R. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 217, at 218.

<sup>242</sup> 30 *ILM* (1991) 862.

<sup>243</sup> The intervention was criticized by the UN Secretary-General: see S/22531. In literature, see, among others, Malanczuk, 'The Kurdish Crisis and the Allied Intervention in the Aftermath of the Second Gulf War', 2 *EJIL* (1991) 114; and Gaja, 'Réflexions sur le rôle du Conseil de sécurité dans le nouveau ordre mondial', 97 *RGDIP* (1993) 297, at 314.

<sup>244</sup> See the report by the UN Secretary-General dated 24 April 1992, S/24868, at 3.

<sup>245</sup> See the report of the UN Secretary-General dated 15 July 1994, S/1994/828, at 6–7.

<sup>246</sup> The resolution was adopted on 15 November 1996 (unanimously). On the point, see Lattanzi, *supra* note 212 at 88.

<sup>247</sup> See, respectively, US State Department, 'Press Briefing', 19 January 1993, at the State Department website, [www.state.gov](http://www.state.gov); the documents collected in 64 *BYIL* (1993) 736; and 'Press Statement Issued by the Ministry of Foreign Affairs of France', 14 January 1993, in Weller, *supra* note 255, at 744. This position was endorsed by the UN Secretary-General: see the Press Release, 14 January 1993, in Weller, *supra* note 255, at 741–742.

<sup>248</sup> Adopted on 3 April 1991 (12–1–2).

<sup>249</sup> See the Statements issued by the President of the Security Council on 8 and 11 January 1993, respectively, S/25081 and S/25091.

<sup>250</sup> Adopted on 29 November 1990 (12–2–1).

justify the air attacks against military targets in Iraq in December 1998.<sup>251</sup> The UK Government, in particular, maintained that Resolution 1205,<sup>252</sup> which condemned the attitude of the Iraqi Government as a flagrant violation of Resolution 687, implicitly revived the authorization to use force given in Resolution 678. On both occasions, the theory of the reviviscence of Resolution 678 has been considered as legally unconvincing.<sup>253</sup>

It appears quite certain, nonetheless, that — at least until the recent intervention in Kosovo — the Security Council authorization was widely considered by the proponents of this doctrine as a procedural requirement essential to qualify the military intervention as legally admissible.<sup>254</sup> The procedure established on the occasion of Operation Restore Hope is illustrative. First, the United States communicated to the UN Secretary-General their availability to intervene militarily to establish a secure environment for the humanitarian relief operations.<sup>255</sup> Secondly, the Security Council welcomed the offer (without mentioning the United States) and, acting under Chapter VII, authorized the resort to force.<sup>256</sup>

The authorization was intended to include not only a determination on the existence of a situation envisaged in Article 39 of the Charter,<sup>257</sup> but also a positive evaluation of the effectiveness — based on a costs and benefits analysis — of the

<sup>251</sup> See, respectively, the letters sent to the Security Council, S/1998/1181 and S/1998/1182 as well as the interventions before that organ, S/PV 3955, 16 December 1998, at 5 and 9.

<sup>252</sup> Adopted on 5 November 1998 (unanimously). In Resolution 1154, adopted on 2 March 1998 (unanimously), the Security Council warned that any violation of Resolution 678 would have the 'severest consequences' for Iraq.

<sup>253</sup> See, in particular, Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *BYIL* (1994) 135; Villani, 'La nuova crisi del Golfo e l'uso della forza contro l'Iraq', 82 *Rivista di diritto internazionale* (1999) 451; and White and Cryer, 'Unilateral Enforcement of Resolution 678: A Threat Too Far?', 29 *California Western International Law Journal* (1999) 243.

<sup>254</sup> The only possible exception concerns the UK Government which defended — in a rather inconsistent way — the legality of Operation Provide Comfort as based on humanitarian grounds under general international law: see M. Weller (ed.), *Iraq and Kuwait. The Hostilities and their Aftermath* (1993) 714–720.

<sup>255</sup> See the UN Secretary-General's report, *supra* note 244. Similarly, before starting Opération Turquoise, France declared: 'In the spirit of Resolution 794 of 3 December 1992, our Government would like, as legal framework for their intervention, a resolution under Chapter VII': see the letter dated 20 June 1994, S/1994/734. During the debate in Parliament, it further stated: 'La France n'agira qu'avec un mandat du Conseil de Sécurité': *Journal Officiel, Débats parlementaires*, 23 juin 1994, at 3339.

<sup>256</sup> Resolution 794 adopted on 3 December 1992 (unanimously).

<sup>257</sup> See, in general, Conforti, 'Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix', in Dupuy (ed.), *Le développement du rôle du Conseil de sécurité. Peacekeeping and Peace-Building* (1993) 51; Sorel, 'L'élargissement de la notion de menace contre la paix', in *Le Chapitre VII de la Charte des Nations Unies* (Colloques de Rennes, 1995) 3; and Freudenschuß, 'Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council', 46 *ÖZÖRV* (1993) 1. See also the dissenting opinion of Judge Ad Hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measure, Order of 13 September 1993, ICJ Reports (1993) at 439.



military intervention.<sup>258</sup> The obligation to obtain such an authorization does not derive from the UN Charter. It derives from an emerging customary norm allowing the use of military force conditional upon the approval of the Security Council. The overwhelming majority of states, but also the organs of the UN, have concurred to the emergence of such a norm and entrusted the Security Council with the determination of the conditions which may trigger the resort to force.

The Security Council authorization expresses the consent of the whole international community.<sup>259</sup> It permits a switch from the regime established in the Charter — based on the restriction on the use of force to cases of self-defence and enforcement actions carried out either directly by the Security Council under Chapter VII or by regional organizations under Chapter VIII — to general international law. Reminiscent of Article 2 of the 1924 Geneva Protocol,<sup>260</sup> the authorization mechanism guarantees a preventive control, limited to the starting phase, over the military enforcement carried out by states. Clearly, the functioning of the authorization mechanism presupposes the consent of all the permanent members of the Security Council on both the existence of a threat to peace and the military measures necessary to cope with it. The mechanism becomes ineffective as soon as one of them opposes the resort to force.

### ***E The International Responsibility for NATO Coercive Military Activities***

The question of the international responsibility for acts committed by NATO forces, which can be dealt with here only in a rather sketchy manner, is independent from the qualification of the Alliance as a regional organization for the purposes of Chapter VIII.<sup>261</sup>

The personality of international organizations derives, similarly to that of states, from the effective capacity to enter into relations with other members of the

<sup>258</sup> M. L. Forlati Picchio, 'Introduzione', in Forlati Picchio, *supra* note 198, at 15. According to N. Bobbio, *Una guerra giusta? Sul conflitto del Golfo* (1991), the existence of a threat to peace is merely a prerequisite for the decision to resort to force which should follow only as *extrema ratio* and provided that the remedy is not worse than the evil (what the author calls 'the ethic of responsibility'). In para. 7 of Resolution 794, *supra* note 256, for instance, the Security Council shared the evaluation made by the UN Secretary-General that the resort to military measures under Chapter VII was necessary.

<sup>259</sup> Forlati Picchio, *supra* note 198, at 32, points out that only the consent of all states, except those responsible for the threat to peace, could replace the Security Council's authorization.

<sup>260</sup> Article 2 of the Protocol, which was never ratified, would have imposed upon states a prohibition to resort to war except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly: in 19 *AJIL* Supplement (1925) 9.

<sup>261</sup> In this sense, the Alliance may be considered as a regional organization without possessing an international personality. At the same time, especially if it is accepted that a regional organization cannot undertake enforcement activities against non-member states (see *supra* note 157), an organization possessing international personality may act outside the framework of Chapter VIII.

international community and thus is not functionally limited.<sup>262</sup> A disposition embodied in the constituent instrument declaring the international personality of the organization is neither necessary nor sufficient. On the contrary, the question requires an objective assessment<sup>263</sup> of the capacity to possess international rights and duties<sup>264</sup> which implies the capacity to bring and to respond to international claims.<sup>265</sup> However difficult it may be to establish when an international organization becomes a legal entity distinct from member states, the crucial test is the exercise, based on an autonomous decision-making process, of powers not limited to the national systems of one or more member states.<sup>266</sup>

When the unanimity rule is strictly observed, as it is in the case of NATO, the distinction between a union of states having common organs expressing the identical will of participating states and an organization having distinct legal personality may become evanescent. In particular, on the occasion of the negotiation and conclusion of the accords with the UNPROFOR commander and the FRY Government,<sup>267</sup> NATO military authorities could have been acting either as common organs of member states — even if it is accepted that the Alliance possesses the legal personality<sup>268</sup> — or as the organ of the Alliance.

Particularly interesting are the events related to the accidental NATO bombing of the Chinese Embassy in Belgrade on 7 May 1999. Before the Security Council, China considered NATO as responsible for the bombing,<sup>269</sup> while NATO immediately expressed its regrets and opened an investigation on the matter.<sup>270</sup> In the following months, however, the United States (the state to whom the aircraft involved belonged) and China entered into bilateral negotiations. The offer of immediate *ex gratia*

<sup>262</sup> See, in particular, Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', 8 *EJIL* (1997) 1, at 15–18; G. Balladore Pallieri, *Diritto internazionale pubblico* (1962) at 206. Seyersted, 'International Personality of Intergovernmental Organizations. Does Their Capacity Really Depend upon Their Constitution', 4 *IJIL* (1964) 1, at 20, observes that there may be 'a difference of fact, not of inherent legal capacity' between the personality of states and that of international organizations. *Contra* P.H.F. Bekker, *The Legal Position of Intergovernmental Organizations. A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) 75–85.

<sup>263</sup> See Arangio-Ruiz, *supra* note 188, at 676–678; Seyersted, *supra* note 262, at 40; and R. Higgins, *Problems and Process. International Law and How We Use It* (1994) at 46–48.

<sup>264</sup> According to Ago, an international organization becomes an autonomous subject of international law through 'the concrete exercise of certain rights and the fulfilment of certain obligations': *Yearbook of the International Law Commission*, vol. I (1963) 302.

<sup>265</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174, at 179.

<sup>266</sup> See I. Brownlie, *Principles of Public International Law* (5th ed., 1998) at 678–680.

<sup>267</sup> See *supra*, respectively, text and notes 104 *et seq.*, 123 and 146 *et seq.*

<sup>268</sup> The International Law Commission has noted that 'it is not always sure that the actions of an organ of an international organization acting in that capacity will always be purely and simply attributed to the international organization as such rather than, in appropriate circumstances, to the States members of the organization': *Yearbook of the International Law Commission*, vol. II (1975) at 87.

<sup>269</sup> S/PV.4000, 8 May 1999, at 2.

<sup>270</sup> See the intervention by the United States, France and the United Kingdom, *ibid.*, respectively at 3, 4, and 7.

payments to the victims made by the United States<sup>271</sup> was finalized on 16 December 1999 when the two states signed an agreement providing for a US\$28million compensation damages in favour of China.<sup>272</sup> Through the agreement, the United States assumed the responsibility for the acts performed by their military force involved in the NATO operations although it did not admit any violation of international law.

The episode strongly militates against the attribution of international personality to NATO. The assumption of international responsibility, or, conversely, the bringing of international claims, by an international organization are the most reliable, if not the only, proof of its enjoyment of legal personality distinct from those of the member states.<sup>273</sup> For the time being, NATO remains an institutional union acting through common organs. Accordingly, each member state bears international responsibility for the acts committed by its forces engaged in NATO operations and may respond to allegation of violations of international law submitted by other subjects before the International Court of Justice or other international tribunals.<sup>274</sup>

### F *The Naval Interdiction and the No-Fly Zone*

Starting with the measures aimed at containing the Yugoslav conflicts, the operations of naval and air interdiction were carried out within the limits set by the relevant Security Council resolutions, including respect for the proportionality principle, the obligation to report periodically to the Security Council, and, with regard to Operation Deny Fly, the obligation to agree with the Secretary-General upon the rules of engagement.<sup>275</sup> The NAC exercised exclusive political and strategic control over the operations, while the forces were put under the operational command of the NATO commanders according to the NATO chain of command. Although the relevant Security Council resolutions were systematically indicated as the exclusive legal bases of the military operations,<sup>276</sup> the Security Council control was limited to the initial phase, namely, the determination of the existence of a threat to peace and the authorization to use armed force. During the operations the opposition of one or more permanent members would have prevented the Security Council from revising the objectives of the operations or suspending them.

<sup>271</sup> US State Department, 'Report on Accidental Bombing of Chinese Embassy', 6 July 1999, available at <http://usinfo.state.gov/regional/ea/uschina/bombrpt.htm> (visited on 7 June 2000).

<sup>272</sup> Press Statement of 16 December 1999 of the US State Department, available at [www.state.gov](http://www.state.gov). The agreement also provided for the payment of US\$2.87million for damages to US facilities in China resulting from demonstration that occurred in the aftermath of the bombing.

<sup>273</sup> See Quadri, *Diritto internazionale pubblico* (1968) 534; and Giardina, *Comunità europee e Stati terzi* (1964) 177.

<sup>274</sup> In this regard, the UK declaration referred to *supra* note 112 may be of some interest. For the questions of the international responsibility for acts of state organs placed at the disposal of the United Nations, see De Visscher, 'Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies', in 60 *Annuaire de l'Institut de Droit International* (1971) 46; *Yearbook of the International Law Commission*, vol. II, Part 1 (1975) 267; and Di Blase, 'Sulla responsabilità internazionale per attività dell'ONU', 57 *Rivista di diritto internazionale* (1975) 250.

<sup>275</sup> See *supra* section 2.A.

<sup>276</sup> See *supra* text at notes 13, 16, 34, 41, 62 *et seq.*, and 67.

If NATO is considered as a coalition of states, then the two-stage authorization practice described above takes place: the normative phase consisting of the Security Council authorization and having permissive character is followed by the operative phase coordinated and collectively performed by NATO member states under the umbrella of the Alliance. Due to the lack of effective control by the Security Council, the operations represent a significant case of the use of force by a group of states based on general international law with the initial approval of the Security Council.<sup>277</sup> The relevance of this case as proof of *opinio juris* is amplified by the fact that during the operations no state challenged the operations on legal or political grounds.

Alternatively, it could be argued that NATO functioned as a regional organization under Chapter VIII of the Charter. The implementation of NAC decisions, which completed the normative phase, was conditioned upon the willingness of NATO member states to assign armed forces to the organization. This practice recalls the *una tantum* accords states may conclude under Article 43<sup>278</sup> and was exposed to the risk of withdrawal *ad nutum*. Considering that, after the adoption of the relevant resolutions, the role of the Security Council was limited to the analysis of the periodic reports submitted by NATO through the UN Secretary-General, the operations must be qualified as enforcement action by NATO upon a mere authorization of the Security Council (the second option envisaged in Article 53(1) described above).<sup>279</sup>

### **G The Protection of UNPROFOR and the So-Called ‘Safe Areas’**

The operations carried out in Bosnia to protect UNPROFOR and the ‘safe areas’ are more complex since they supported the *peacekeeping* operation, whose operative aspects had been delegated to the UN Secretary-General. As a result, NATO operations were to be carried out not only under the authority of the Security Council, but also in cooperation with the UN Secretary-General. In these circumstances, the UN Secretary-General played a crucial role. By interpreting the rather vague mandate of UNPROFOR, he indirectly defined and revised the limits of the use of force by NATO. Besides, he exercised on behalf of the Security Council his political judgment on the opportunity of a military response each time the use of force was foreseen. This innovative solution, based on the dual-key procedure, enabled the UN to exercise a continuous and effective control over the operations. The risk of *reverse veto* was significantly reduced if not eliminated as the UN Secretary-General would have refrained from authorizing further military operations had a significant opposition arisen within the Security Council.

The overlapping between the peacekeeping operation and the coercive military activities proved to be rather distressing. In the words of the UN Secretary-General, ‘peacekeeping and the use of force (other than self-defence) should be seen as alternative techniques and not as adjacent points on a continuum permitting easy

<sup>277</sup> See *supra* sections 3.C and 3.D.

<sup>278</sup> See *supra* text and note 216.

<sup>279</sup> See *supra* notes 167 *et seq.*

transition from one to the other'.<sup>280</sup> NATO enforcement action was systematically frustrated by the reluctance of the UN Secretary-General — but also of some NATO member states — to resort to force. With the possible exception of the Sarajevo ultimatum and the Gorazde decisions, NATO nonetheless accepted the authority of the Security Council and respected — however reluctantly — the dual-key procedure.

Considering NATO as a coalition of states, the two-stage authorization procedure remains unchanged, but the legal basis of the operations is different. The effective and punctual control exercised up to August 1995 by the Security Council, directly or through the UN Secretary-General, permits a description of the operation as the first and so far only instance of the utilization of member states by the Security Council in accordance with the extensive interpretation of Article 42 suggested above.<sup>281</sup>

Similarly, if NATO is regarded as a regional organization, the control exercised by the Security Council suggests the qualification of the operations as a case of the utilization of NATO by the Security Council under the first option foreseen in Article 53(1).<sup>282</sup>

### H *Operation Deliberate Force*

NATO's attempts to gain more independence from the UN Secretary-General and the Security Council, which so far were limited to the Sarajevo ultimatum and the decisions related to the Gorazde crisis, became evident in August 1995 when the NAC unilaterally assumed entire political control over the operations. Departing from the principle of proportionality which had up to then inspired the international involvement in the crisis — and is to be considered as a general principle of the Charter<sup>283</sup> and of the use of force in international law<sup>284</sup> — Operation Deliberate Force was expressly founded on the idea of a disproportionate military reaction to an attack by the Bosnian Serbs. Such a radical transformation of the military operations, which assumed a clearly hostile nature,<sup>285</sup> could have been decided exclusively by the Security Council.<sup>286</sup> Moreover, serious doubt may be cast on the impartiality of the

<sup>280</sup> See the report dated 3 January 1995 (S/1995/1, at 9). The departure from the previous approach (see the report *supra* note 158) is rather significant.

<sup>281</sup> See *supra* sections 3.C and 3.D.

<sup>282</sup> See *supra* text at notes 167 *et seq.*

<sup>283</sup> See Condorelli, 'La Corte internazionale di giustizia e gli organi politici delle Nazioni Unite', 77 *Rivista di diritto internazionale* (1994) 897, at 913.

<sup>284</sup> Gardam, 'Proportionality and Force in International Law', 87 *AJIL* (1993) 391; Gardam, 'Legal Restraints on Security Council Military Enforcement Action', 17 *MJIL* (1996) 285.

<sup>285</sup> In the report dated 23 November 1995 (S/1995/987, at 3), the UN Secretary-General observed that there had been a change in the roles of UNPROFOR and NATO, both of which became militarily engaged against the Bosnian Serbs. In a document issued on 8 June 1995, the International Committee of the Red Cross stated that UNPROFOR personnel held hostage by the Bosnian Serbs were entitled to the status of prisoners of war under the 1949 Geneva Conventions (document on file with the author).

<sup>286</sup> See the reports by the UN Secretary-General dated 1 December 1994 and 30 May 1995, respectively S/1994/1389 and S/1995/444. He maintained this position even after Operation Deliberate Force, when he envisaged the creation of a multinational force acting upon a Security Council mandate: see the letter dated 18 September 1995, S/1995/804.

operation given the simultaneous military offensive by the Croatian forces substantially tolerated by the Security Council despite the strong formal condemnation.<sup>287</sup>

Equally important, the so-called dual-key procedure operating on a case-by-case basis was replaced by an authorization valid until NATO and UNPROFOR commanders had jointly agreed upon the suspension or termination of the operations. In principle, nothing would have prevented the UN Secretary-General, to whom the Security Council had delegated the definition of the procedural arrangements, from giving an authorization of continuous character and also delegating the power to request or authorize the use of air power. What appears irreconcilable with the relevant Security Council resolutions is that, despite the lip service paid to the authority of the Security Council and the consultations with the UNPROFOR commander, the operations could not have been revised, suspended or terminated without NAC consent.

The unilateral character of Operation Deliberate Force is confirmed by the asymmetric structure of the memorandum of understanding. On the one hand, the NAC was fully operating: it authorized CINCSOUTH to negotiate the memorandum, exercised its political control over the operations, imposed the conditions for a ceasefire, and eventually suspended and terminated — jointly with the UNPROFOR commander — the operations. On the other hand, the Security Council was completely excluded to the point that only the members which were also NATO members knew the content of the memorandum of understanding. Under these conditions the Security Council could not exercise any control whatsoever over the operations. Finally, the competence of such an ‘expert in mission’<sup>288</sup> as the UNPROFOR commander to conclude a memorandum aimed at radically transforming the nature of the international involvement in the crisis is extremely doubtful and can certainly not derive from a delegation of the UN Secretary-General.<sup>289</sup>

The attempt made by several states, including obviously those involved in the operations, to invoke the relevant Security Council resolutions as the legal basis for Operation Deliberate Force is far from convincing.<sup>290</sup> Up to then, NATO member states had respectfully accepted the Security Council authority to the point that they systematically renounced taking any military action unless authorized by the UN. The

<sup>287</sup> *Supra* text notes 97 *et seq.* The Croatian military offensive did not spare UNPROFOR, see the UN Secretary-General’s report dated 7 August 1995 (S/1995/666). Despite previous commitments (see *supra* note 93), no NATO military response followed.

<sup>288</sup> See *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports (1989) 177, at 193–196. See also Condorelli, ‘Le Status des forces de l’ONU et le droit international humanitaire’, 78 *Rivista di diritto internazionale* (1995) 881.

<sup>289</sup> Sandoz, ‘L’application du droit humanitaire par les forces armées de l’Organisation des Nations Unies’, 60 *Revue Internationale de la Croix Rouge* (1978) 274, at 279, notes that ‘le commandement de la force relève du Secrétariat général, mais l’autonomie de ce dernier est très réduite, tout problème nouveau devant être soumis pour décision au Conseil de Sécurité’.

<sup>290</sup> Germany, for instance declared: ‘what is being enforced is international law, in the form of decisions by the competent United Nations organ, that is the Security Council’: S/PV.3575, 8 September 1995, at 6. Similarly, see the declarations by France, the United States and Italy, *ibid.* respectively at 4 *et seq.*, 5 *et seq.* and 9 *et seq.*

essence of Operation Deliberate Force, on the contrary, was its disproportionate character as well as the intentional and complete exclusion of the Security Council from the decision-making process.<sup>291</sup>

NATO operations in support of the peacekeeping operation and in protection of the safe areas performed after August 1995 ceased to be legally based on the Charter. Not only were they governed by general international law, but they brought about an evident deviation from the authorization practice. NATO used force beyond the existing authorization thus eluding the initial control of the Security Council, consisting in the authorization resolution which had up to then been considered as a prerequisite to lawful resort to force outside the circumstances expressly envisaged in the Charter.

It may be argued that the operation was the first genuine case of humanitarian intervention carried out by a group of states without a clear mandate from the Security Council.<sup>292</sup> If the existence of a customary norm sanctioning the right to intervene on humanitarian grounds without a Security Council resolution appears still controversial, the relevance of Operation Deliberate Force as a manifestation of *opinio juris* is doubtful owing to the strong Russian protests and, more importantly, to the invocation by the intervening states of the relevant Security Council resolutions as the *exclusive* legal basis for the operations. Even admitting the existence of such a norm, the partial and disproportionate character of the operation cast serious doubts on its conformity with the principles governing the use of force under general international law.

Similar questions arise if it is assumed that NATO functioned as a regional organization. In this case, the Security Council does not necessarily have to exercise its control beyond the preventive authorization and the review of periodical reports. What is problematic with Operation Deliberate Force is that NATO intentionally acted well beyond the existing Security Council authorization. Besides, although state practice is yet not sufficiently developed to reach a definitive conclusion on the implications of Article 54, it is clear that by no standard did NATO comply with the obligation to report to the Security Council, which would have in first place implied the transmittal of the memorandum of understanding. In these circumstances, the operation clearly finds no basis in the Charter. Quite the contrary, Article 53(1) expressly prohibits enforcement action by regional organizations without Security Council authorization. This further complicates the emergence of a customary norm allowing intervention on humanitarian grounds. Allowing states or groups of states but not regional organizations to invoke such a norm would lead to an absurd result, considering that the action of the regional organization would be submitted to a

<sup>291</sup> Quite surprisingly, given the premises, Sarooshi, *supra* note 161, at 262–263, concluded that Operation Deliberate Force was a legitimate exercise of the delegation by the Security Council of Chapter VII powers.

<sup>292</sup> Tesón, 'Collective Humanitarian Intervention', 17 *MJIL* (1996) 323, at 368, admits that NATO intervention far exceeded the limits set in the relevant resolutions and qualifies it as a clear case of collective humanitarian intervention. On the reluctance of states to rely on humanitarian grounds to justify military interventions, see N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Humanitarian Grounds* (1985) at 109.

preventive control at the regional level. It appears that the eventual acceptance of such a norm would necessarily imply not only an extensive interpretation of Article 2(4) of the Charter, but also an interpretation *contra legem*, if not even a tacit revision, of Article 53(1).

Under both alternatives, the exclusion of the Security Council from the decision-making process as well as the partial and disproportionate character of the operations make the lawfulness of Operation Deliberate Force extremely precarious. The evident deviation from the authorization practice, however, was considered acceptable by the overwhelming majority of states due to its positive impact on the peace process.

### **I *The Intervention in Kosovo***

The gradual affirmation of the Alliance as an independent actor in the field of collective security and the corresponding erosion of the primacy of the Security Council therein, which characterized the Bosnian experience, were brought to the extreme in the recent crisis in Kosovo. The October 1998 agreements were deliberately obtained through a military threat<sup>293</sup> and may be regarded as void *ab initio* under the terms of Article 52 of the Vienna Convention on the Law of Treaties, which is unanimously considered to be declaratory of customary international law, at least as far as military coercion is concerned.<sup>294</sup> The Security Council manifestly lacks the competence to validate the agreements. Far from affecting the legal value of the agreements, Resolution 1203 imposed upon the FRY entirely new obligations having an identical substantive content to those included in the agreements. It rendered the illegal procurement of the agreements irrelevant and, more importantly, replaced the alleged consensual basis of the monitoring missions with a mandatory decision under Chapter VII of the Charter. Besides, although the sharp division between the members of the Security Council prevented that organ from taking any position on the legality of the NATO military threat, the strong Chinese and Russian opposition greatly reduced the relevance of the NATO initiative as a case of departure from the prohibition on the threat of force.

Resolution 1203 did not authorize the use of force with the exception of the measures necessary to rescue international monitors caught in emergency situations. The previous qualification of the Kosovo crisis as a threat to peace and security in the region and the adoption of the relevant Security Council resolutions under Chapter VII do not amount to an implicit authorization to use force. Both elements are

<sup>293</sup> See *supra* notes 122 *et seq.* The United States admitted that the credible threat of force was essential to conclude the two agreements: S/PV.3937, 24 October 1998, at 15.

<sup>294</sup> 1155 UNTS 331. See also the *Fisheries Jurisdiction Cases*, Jurisdiction of the Court, Judgment, ICJ Reports (1973) 3, at 14 and 49, at 59, and the ILC Commentary (Article 49), *Yearbook of the International Law Commission*, vol. II (1966) at 246. As the ILC itself acknowledged, however, it may be argued that the same threat or compulsion that procured the conclusion of the treaty could also procure its execution. See also Fitzmaurice, A/CN.4/115, at para. 62.



necessary but not sufficient: such an authorization must necessarily include a positive assessment by the Security Council on the effectiveness of the military intervention.<sup>295</sup>

Nevertheless, NATO claimed the right to enforce independently, allegedly on behalf of the international community, the relevant Security Council resolutions and when the Belgrade government refused to sign the Rambouillet accords it carried out the air strikes as threatened before and during the negotiations. Aware of the insurmountable opposition by two permanent members, NATO deliberately ignored the Security Council and unilaterally assumed entire control over the operations. The failed adoption of the draft resolution calling for the immediate cessation of the air strikes cannot be treated as an implied authorization.<sup>296</sup> It was precisely the impossibility of obtaining an authorization from the Security Council that pushed NATO member states to act unilaterally, thus departing from their own previous approach.<sup>297</sup>

The question of whether NATO functioned as a coordination centre for national activities or as a regional organization lost any practical relevance as the legal basis for the intervention must necessarily be looked for in general international law.<sup>298</sup> Considering the rather ambivalent state practice, it seems premature to affirm a right to intervene on humanitarian grounds regardless of a Security Council authorization.<sup>299</sup> The most relevant possible deviations from the authorization procedure concern Operation Deliberate Force and the military interventions in Iraq in the aftermath of the 1991 Gulf War. Operation Deliberate Force was generally tolerated, despite its precarious legitimacy, thanks to a series of concomitant factors. In first place, the existence of previous Security Council resolutions allowing the use of force permitted NATO to avoid, at least formally, a clear repudiation of the Security Council authority. Besides, the operation was limited in time and considered as necessary to avert UNPROFOR withdrawal and the risk of the unilateral lifting of the arms embargo which would have severely undermined Security Council authority. Finally, the operation was not openly directed against the sovereignty of a state.

As for the interventions in Iraq, the theory of reviviscence of Resolution 678 was aimed at safeguarding the authority of the Security Council in the field of international peace and security. Whereas the 1993 intervention was eventually

<sup>295</sup> See *supra* text and note 258. At the same time, Resolution 1244 cannot be seen as a retrospective endorsement of NATO bombings: see Ronzitti, 'Raids aerei contro la Repubblica federale di Jugoslavia e Carta delle Nazioni Unite', 82 *Rivista di diritto internazionale* (1999) 476, at 481 *et seq*; Picone, *supra* note 197, at 350 *et seq*; and White, 'The Legality of Bombing in the Name of Humanity', 5 *Journal of Conflict and Security Law* (2000) 27, at 32.

<sup>296</sup> In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971), at 36, the Court made it clear that the failure to adopt a proposal does not necessarily imply a collective pronouncement in a sense opposite of that proposed.

<sup>297</sup> See, in particular, the position expressed by France in December 1998, *supra* note 128.

<sup>298</sup> During the debate before the Security Council, the Netherlands sharply pointed out that 'the Charter is not the only source of international law': S/PV.4011, at 12.

<sup>299</sup> See Ronzitti, *supra* note 295, at 480.

tolerated by the Security Council, which met in a private session,<sup>300</sup> in 1998 the Russian Federation and China strongly protested against the resort to force which was described as a violation of both the Charter and general international law.<sup>301</sup>

The Kosovo crisis had even more devastating effects since there was no previous Security Council resolutions that could have been invoked to justify the intervention. In the last few years governments and scholars were troubled by the lack of an effective control over Security Council activities, and in particular the controversial power of judicial review by the International Court of Justice.<sup>302</sup> They overlooked the risk that the Security Council may be blocked by the opposition of one or more permanent members.

In the early 1990s, UN member states were able to overcome the non-implementation of Article 43 of the Charter by hammering out the authorization mechanism alternative to the enforcement action by regional organizations under Article 53. The short, and nonetheless controversial, season of intense activity of the Security Council, however, abruptly ended as soon as the common will among the permanent members faded away. Once again, the Charter reveals its main inadequacy: the use of force has been put into a straitjacket without providing any effective means to enforce the respect of international law,<sup>303</sup> especially when the Security Council's permanent members are unable to reach an agreement.<sup>304</sup>

The NATO decision to elude the initial centralized control exercised until then by the Security Council disregards as inapplicable or obsolete the customary norm — whose existence, however, is not yet completely undisputed — on the use of force by member states authorized by the Security Council. This brings us back to the Covenant of the League of Nations when the consent of the Council — and in particular a recommendation under Article 11 or 16 — was not a prerequisite to resort to force. The Covenant expressly permitted member states to resort to force not only against the party which did not comply with the report on the dispute unanimously adopted by the Council, but also in the event the Council had failed to adopt any report. In both cases, the restrictions embodied in Article 12 ceased to be applicable and member states were allowed to resort to force under general international law.

Unlike the Covenant, the Charter is founded on the general prohibition of the threat or use of force apart from the exceptions provided for in Article 51, Chapter VII and Chapter VIII. Consequently, it remains silent on the conditions to resort to force

<sup>300</sup> For the position of the Russian Federation, see the 'Statement of the Foreign Minister', in Weller, *supra* note 255, at 744–745.

<sup>301</sup> S/PV.3955, 16 December 1998, respectively at 4 and 5.

<sup>302</sup> See, in general, Alvarez, 'Judging the Security Council', 90 *AJIL* (1996) 1.

<sup>303</sup> See Kunz, 'Bellum Justum and Bellum Legale', 46 *AJIL* (1951) 528, at 533. See also the Dissenting Opinion of Jennings in the *Nicaragua Case*, *supra* note 238, especially at 543–544.

<sup>304</sup> In a rather simplistic manner, the Italian Government maintained the existence of an 'operative flexibility' which would allow the Alliance to intervene in case of paralysis of the Security Council: see 'Comunicazioni del governo sulla conclusione del Consiglio Atlantico di Washington', Senato, Affari esteri, Emigrazione (3) 204 seduta, 12 maggio 1999.

under general international law to maintain international peace and security or to settle international disputes. In the Kosovo crisis, NATO member states tried to reduce the role of the Security Council to the determination of a threat to peace and the indication of the measures to be taken by the parties directly involved. Then, they arrogated to themselves the right to enforce the obligations deriving from the UN Charter and the Security Council resolutions. The crisis recorded a further erosion of Security Council authority, as compared with the recent interventions in Iraq,<sup>305</sup> as the alleged violations — however well documented — were not the object of a determination by the Security Council.<sup>306</sup> Leaving aside the question of the exercise by the Security Council of judicial functions — which certainly do not derive from the Charter<sup>307</sup> — the Kosovo intervention must be considered as contrary to both the Charter and general international law,<sup>308</sup> even if before intervening NATO member states made every effort to get as close as possible to legality.<sup>309</sup>

At the same time, due to strong opposition, the contribution of the Kosovo intervention to the formation of a customary norm allowing resort to force on humanitarian grounds without the Security Council authorization remains extremely doubtful. It is certainly possible to list the conditions in which such a norm may come into existence, but for the time being the intervention can be justified only on the political plan.<sup>310</sup> More than indicating the legal basis of the intervention, in fact, NATO and its members emphasized the intrinsic justice of their action. Given the paralysis of the Security Council and the consequent usefulness of the notion of *bellum legale*,<sup>311</sup> unilateral intervention — in breach of the prohibition to threaten or use force — appeared to NATO member states as the only viable manner to put an end to the humanitarian crisis in Kosovo. In these conditions, the ‘inorganic’ structure which continues to characterize the international community<sup>312</sup> makes it impossible to

<sup>305</sup> In the case of the interventions in Iraq in 1993 and 1998, the violations of the international obligations imposed by Resolution 687 were established by the Security Council through resolutions or presidential statements: see *supra* notes 249 and 252.

<sup>306</sup> The Presidential Statement of 19 January 1999, *supra* note 129, must be read in the light of subsequent developments.

<sup>307</sup> See, in particular, Higgins, ‘The Place of International Law in the Settlement of Disputes by the Security Council’, 64 *AJIL* (1970) 1. According to Arangio-Ruiz, ‘although the Security Council has the right to take measures to put an end to fighting, it was not empowered to settle disputes or to impose a solution to a dispute’: *Yearbook of the International Law Commission*, vol. I (1992) 91. More extensively, see by the same author, ‘On the Security Council’s Law-Making’, 83 *Rivista di diritto internazionale* (2000) 609.

<sup>308</sup> If an analysis of the *jus in bello* is beyond the purposes of this paper, suffice it to note that NATO operations hardly respected the principles of necessity and proportionality which govern the use of force. See also Picone, *supra* note 197, at 348 *et seq.*

<sup>309</sup> On this point, see Simma, *supra* note 120.

<sup>310</sup> The position of D. Anzilotti, *Corso di diritto internazionale* (1915) at 138–139, according to whom intervention exclusively concerns actions not based on any legal norm and therefore must be assessed exclusively from a political point of view, retains intact its value. According to A. Miele, *La Comunità internazionale* (1997) at 40, the antinomy between the principles of non-intervention and of the protection of fundamental human rights can be overcome only through the resort to non-legal criteria.

<sup>311</sup> See Kunz, *supra* note 303.

<sup>312</sup> See Arangio-Ruiz, *supra* note 262.

establish and apply objective criteria to distinguish just wars from unjust wars.<sup>313</sup> No differently from what happened in the past, ‘justice’ rests on the side of the victor as the latter is ultimately in a position to impose its own terms of settlement, regardless to the causes of the conflict. It appears difficult to disagree with the conclusion reached in 1863 by Harcourt that ‘in the case of Intervention, as in that of Revolution, its essence is illegality, and its justification is its success’.<sup>314</sup>

## 4 Concluding Remarks

During the relative short span of time taken into account, the system of collective security established by the Charter recorded significant developments and deviations. With minor reservations, up to August 1995, the Security Council response to the Yugoslav crisis confirmed the recent practice of authorization to use military force. Depending on the qualification of NATO as a coalition of states or as a regional organization under Chapter VIII of the Charter, the naval operations in the Adriatic Sea and the air interception over Bosnian air space were authorized, respectively, under general international law and under Article 53(1) of the Charter.

The enforcement activities performed in Bosnia to protect UNPROFOR and the so-called safe areas, conversely, found under both alternatives a legal basis in the Charter. Due to the effective and continuous control exercised by the Security Council, NATO activities can be seen as the utilization by that organ of either a group of states under an extensive interpretation of Article 42 (probably the only instance in the Council’s practice), or a regional organization under Article 53(1).

In August 1995, for the first time substantially defying the Security Council authority, NATO assumed entire control of coercive military activities and unilaterally imposed a resolution to the conflict. Under both alternatives, the operation found no legal basis in the Charter and can hardly be justified on the basis of the controversial right to intervene on humanitarian purposes under general international law. Additionally, its relevance as a manifestation of *opinio juris* with regard to the emergence of such a right is greatly reduced by the firm Russian opposition and the invocation by the intervening states of previous Security Council resolutions as the exclusive basis of the operations.

Three years later, the Charter provisions in the field of the maintenance of international peace and security, already stretched to the limit by the authorization practice, were openly challenged by NATO threatening and eventually launching a massive air campaign against the FRY. This meant the repudiation of the initial control exercised by the Security Council which distinguished the recent authorization practice from the regime existing under the Covenant of the League of Nations.

<sup>313</sup> See Battaglini and Fioravanti, ‘Nazioni Unite e NATO negli interventi armati’, 30 *Politica e diritto* (1999) 259. In general, see Von Elbe, ‘The Evolution of the Concept of Just War in International Law’, 33 *AJIL* (1939) 665; Nussbaum, ‘Just War. A Legal Concept?’, 42 *Michigan Law Journal* (1943–1944) 453.

<sup>314</sup> Historicus (Harcourt), *Letters by Historicus on Some Questions of International Law* (1863, reprinted 1971) 41.

The deviation may remain an isolated case of the violation of international law deliberately aimed at overcoming the Security Council paralysis,<sup>315</sup> or stimulating the development of a new customary norm permitting intervention without Security Council authorization,<sup>316</sup> or may even lead to a wider review of the rules governing the use of force.<sup>317</sup> The sharp division existing within the international community, however, makes the emergence of any consensus on the issue rather unlikely. In any case, the Kosovo intervention represents the culmination of the process of erosion of the authority of the UN and could inaugurate a new phase in international relations characterized by a more liberal resort to the use of force and ultimately the imposition on recalcitrant states of some rules of international law as perceived by Western democracies.

The Alliance emerged radically changed from the crisis. Alongside the consolidation and expansion of the original defensive military alliance, NATO has claimed a prominent role in the management of a crisis outside the area defined in Article 6 of the 1949 Treaty. At the international level, nothing prevents NATO member states from assuming tasks and performing activities not foreseen in, but not prohibited by, its constituent instrument, provided the Charter and general international law are respected.

At the institutional level, the Alliance demonstrated its capacity to function not only as a sophisticated coalition of states, but also, at least potentially, as a regional organization under Chapter VIII of the Charter. Unfortunately, NATO member states have so far systematically neglected to analyze the legal consequences of these developments on the structure and nature of the Alliance.<sup>318</sup> The magnitude of the developments of, and the deviations from, the existing collective security system require the definition of a clearer legal framework, which will inevitably prompt a debate in the member states.

<sup>315</sup> As anticipated by Schachter, *International Law in Theory and Practice* (1991) at 126.

<sup>316</sup> See, for instance, Charney, 'Anticipatory Humanitarian Intervention in Kosovo', 93 *AJIL* (1999) 834, at 841.

<sup>317</sup> Glennon, 'The New Interventionism', 78 *Foreign Affairs* (1999) 2.

<sup>318</sup> In this regard, the documents adopted during the 1999 Washington Summit failed to throw light on the question: see Cassese, *supra* note 237, at 30, n. 9.