Spring 2004

Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: The Case of Regional Organizations

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CHALLENGES TO SECURITY COUNCIL MONOPOLY POWER OVER THE USE OF FORCE IN ENFORCEMENT ACTIONS: THE CASE OF REGIONAL ORGANIZATIONS.

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I. INTRODUCTION.

The controversy between the United Nations Security Council and the "Coalition of the Willing" (led by the United States and the United Kingdom) over the use of force in Iraq underscores challenges to the central role of the Security Council in authorizing the use of force that have taken place since the U. N. Charter was written in 1945.[1] That is, there has been

I would like to thank Irina Boulyjenkova, Lisa Mendola, Esa Paasivirta, and Dana Scalere for their help on this article.

[1] Forty-nine states were publicly and formally committed to the Coalition. Contributions of Coalition members included direct military participation, logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and re-

a long and continuing tension between the words of the United Nations Charter and the practice of regional organizations and regional arrangements that test some of the fundamental notions about the collective security system known since the creation of the United Nations[2]. Under the words of the United Nations Charter, the Security Council has primary responsibility to maintain international peace and security and to make decisions about the use of force in enforcement actions. The Iraq crisis may well be the most recent and controversial challenge to the role of the Security Council; however, it has not been the only one.

The present Iraq controversy over the role of the Security Council presents an opportunity to consider other occasions over the years that have challenged Security Council authority and the cumulative effect

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construction aid, and political support. The coalition members were: Afghanistan, Albania, Angola, Australia, Azerbaijan, Bulgaria, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Tonga, Turkey, Uganda, Ukraine, United Kingdom, United States, Uzbekistan. *See* http://whitehouse.gov/infocus/iraq/news/20030327-10.html last visited on May 15, 2003. More states supported materially the Coalition either non-publically and/or informally. (*e.g.* Qatar, The United Arab Emirates, Israel, and Saudi Arabia etc..).

[2] *See* definition of regional organizations and regional arrangements, *infra*, p. 86-88.

of those challenges. Over the past half century, regional organizations, not the Security Council, have been the primary users of force in enforcement actions. This dichotomy between Charter words and reality has led some to assert those uses of force violate the U.N. Charter and that Security Council authorization is needed for the use of force by regional organizations[3], and others to suggest that the Security Council has simply become irrelevant.[4]

This article explores whether either characterization is any longer accurate or appropriate. That is, does subsequent regional organization behavior and Security Council inaction or after-the-fact approval toward that behavior indicate that perhaps the meaning of the Charter has changed? Does the Charter no longer mean that the Security Council has monopoly power over enforcement actions? May regional organizations lawfully take enforcement actions independently of the Security Council -- except perhaps in the very narrow circumstance where the Security Council by resolution explicitly denies authorization to a regional organization prior to an enforcement action? If so, what becomes of the fundamental goal

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[3] *E.g.*, N. D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 204 (1996) ("When...regional organization(s)..(are) planning an action which is not entirely defensive, they must have approval of the Security Council for such an operation.")

[4] *E.g.* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001) at 98. "...[T]he [Security] Council is...a mere conference of states with no power to mandate action..."

of accountability to the *global* collective in the use of force that lies behind Charter words? If regional organizations may never lawfully take enforcement action without Security Council authorization, and if the Security Council does not act, then a strong incentive arises in regional organizations to find other legal grounds for the use of force, especially where a regional organization feels compelled to act. This, in turn, may unacceptably stretch other legal doctrines enlisted to justify non-enforcement-action-use-of-force to unacceptable limits, for example in robust peacekeeping, in anticipatory self-defense, and in humanitarian intervention.[5]

This article addresses those questions in Section II by briefly laying out the original Charter scheme on use of force and collective security reflected in Charter words and by defining both enforcement actions and regional organizations. Section III examines several instances of the use of force by regional organizations and their potential cumulative impact on the meaning of the Charter. Section IV comments on some of the implications of a changed meaning of the Charter and suggests that guidelines or criteria be articulated for regional organizations to follow where enforcement action is taken independently of explicit prior Security Council authorization in order to provide a requisite measure of accountability to the global collective. Section V concludes that the mean-

[5] *Infra* p. 121.

ing of the Charter may have changed and that regional organizations may now presumptively be entitled under the Charter to take otherwise appropriate enforcement actions unless the Security Council explicitly denies authorization. That conclusion would not dispense with the obligation of regional organizations to report to the Security Council,[6] or with the option of regional organizations to obtain prior authorization of the Security Council for an enforcement action.[7] It also would not challenge the existing substantive limits on the use of force in other circumstances.

II. "ENFORCEMENT ACTIONS", "REGIONAL ORGANIZATIONS" AND THE CHARTER USE-OF-FORCE SCHEME.

A. The Charter Scheme on Use of force.

The question of the relationship of regional organizations and global organizations over the use or threat of force, arose with the establishment of global political organizations in the last century -- first the League of Nations after World War 1 and later the United Nations at the close of World War II. Article 2(4), Article 51, and Chapters VII and VIII of the UN Charter broadly reflect part of a sensible compromise

[6] Article 54 of the U.N. Charter.
[7] Article 53 of the U. N. Charter.

at the time in the area of collective security between the "universalists," favoring "supremacy" of the UN over regional organizations, and the "regionalists," favoring regional organization autonomy with a limited "supervisory" role for the UN.[8] While "[t]he whole emphasis of the Charter (was and) is on collective action in the sense of action undertaken by the collectivity of states and authorized by the United Nations itself,"[9] the question posed by the contrasting positions of the universalists and regionalists that persists today was: To what extent did the Charter embrace *decentralized* collective action?

The compromise on collective security struck a half century ago, which is formally reflected in the words of the UN Charter, was an attempt to avoid conflict on collective security arrangements between the United Nations and existing regional organizations (such as the OAS) and emerging collective self-defense organizations (such as NATO and the Warsaw Pact). The starting place is Article 2(4) of the UN Charter which comprehensively and strictly prohibits member states from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

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[8]Waldemar Hummer and Michael Schweitzer, *Chapter VII: Regional Arrangements, Article 52*, in THE CHARTER OF THE UNITED NATIONS, 679, 686.

[9] D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 218 (1958).

An exception was made to this blanket prohibition on the use of force by states in Article 2(4) in cases of unilateral or collective self-defense. The exception was accomplished through Article 51, which was inserted into the Charter in Chapter VII. Article 51 acknowledged that states have the inherent right to use or threaten force in "individual or collective self-defense if an armed attack occurs."[10] However, it is a temporary right because the right to use or threaten force lasts only "until the Security Council has taken measures necessary to maintain international peace and security."[11] Under Article 51, regional organizations may use or threaten force without prior authorization of the Security Council until the Security Council by resolution seizes the matter.

Regional organizations may also use or threaten force under the authority of the Security Council in Chapters VII and VIII of the Charter. The Security Council itself may use force under Articles 39 and 42 of Chapter VII "to maintain or restore international peace and security." Here, the Security Council, once seized of a matter under Chapter VII, may call on

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[10] *Id. See also* IAN BROWNLIE, THE USE OF FORCE BY STATES AND INTERNATIONAL LAW (1963).

[11] Article 51 kof the UN Charter provides in relevant part:

> Nothing in the present Charter Shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

members, including regional organizations, to provide needed military forces.[12] Whether specific Security Council authorization is needed for regional organizations to use or threaten force under Chapter VII after the Security Council is seized of a matter is an unsettled question because the Charter does not address the matter and Security Council resolutions often are unclear. For example in Iraq, the Security Council acted under Chapter VII, but never specified who would decide whether Security Council resolutions had been breached triggering enforcement.[13] To the extent that prior explicit Security Council authorization is found unnecessary under Chapter VII, it also calls into question whether prior explicit Security Council authorization may be needed under Chapter VIII.

Regional organizations also may use or threaten force in enforcement actions under Article 53 of Chapter VIII.[14] Here, however, the plain words and original meaning of the article require that regional organizations must have prior explicit Security Coun-

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[12]Under Article 43, the U.N. Charter contemplated agreements between the Security Council and members governing the disposition and use of member forces. Since no Article 43 agreements have been concluded, member forces have been provided on a voluntary basis. *See* Derek W. Bowett, *International Military Force* , 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1267 (Rudolf Bernhardt ed. 1995).

[13] *See* Thomas Franck, *Inspections and Their Enforcement: A Modest Proposal*, 96 AM. J. INT'L LAW 899, (2002).

[14] Article 53 of the U.N. Charter provides in relevant part that "no enforcement actions shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...".

cil authorization. The criterion for authorization is the same under Chapters VII and VIII; that is, there must be a breach of the peace, a threat to the peace, or an act of aggression in which the use or threat of force is needed to maintain or restore international peace and security.

The Security Council authorization requirement of Article 53 reflects the genuine concern at the time it was written that isolated or polarized regional organizations that were emerging, especially regional military alliances and counter-alliances (like NATO and the Warsaw Pact), might act for their own ends, without accountability, and without the requisite interest in international peace and security. If regional autonomy were to develop "too far," there might not be "any real guarantee" that regional organizations would be "subject to the safeguards of world opinion" which are reflected "in UN organs."[15] Another part of the concern was that if Security Council authorization was not made mandatory under Article 53, a member of the Security Council either could deliberately veto Security Council action under Chapter VII, or could veto a denial of authorization to use force under Chapter VIII. This would free a regional organization over which the vetoing state had dominance to act without accountability to the global-collective. For example, the United States certainly would have

[15] BOWETT, *infra* note 18, at 164.

vetoed a resolution introduced to the Security Council to either seize the Cuban Missile Crisis in 1962 under Chapter VII or to deny authorization to the OAS to take enforcement action under Article 53 of Chapter VIII. The suggestion in this article that enforcement action now may be taken under Chapter VIII unless the Security Council explicitly denies authorization reduces the impact of a veto but does not dispense with it. A permanent member could, of course, veto any resolution denying authorization to take enforcement actions.

B. Enforcement Actions and Regional Organizations.

Enforcement actions are not defined in the U.N. Charter. This article focuses on actions covering the use of military force rather than dealing with all actions envisaged under Articles 41 and 42 of the U. N. Charter. For purposes of this article, enforcement actions are coercive, non-consensual, use-of-force measures addressed to a breach of the peace, threat to the peace, or an act of aggression taken in an effort to maintain or restore international peace and security.[16]

The emphasis here is not on the technical procedure under which enforcement action is taken by a regional organization but objectively on whether force is, in fact, used. For example, in the 1962 Cuban

[16] *See* Certain Expenses of the United Nations, 1962 I.C.J. 151.

missile crisis, the U.S. State Department asserted that no Security Council authorization was needed because the quarantine imposed by military means technically was not an enforcement action.[17] According to the State Department, a resolution by the Organ of Consultation of the OAS under the Rio Treaty could only "recommend" that members participate in the quarantine and could not obligate members to use or threaten force. The State Department asserted that unless a regional organization could *obligate* members to take action there is no enforcement action. [18] Under the definition used in this article, the OAS military quarantine was an enforcement action and would not escape Chapter VIII on a technicality.

Not included in enforcement actions are economic and diplomatic sanctions, like trade sanctions and the severance of diplomatic relations, because these and similar measures fall short of the use of force and have always been acknowledged not to be within the

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[17] *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (1987) 141.

[18] This notion that enforcement actions do not embrace uses or threats of force by regional organizations that are taken under a recommendation rather than an obligation has been rightly rejected. *See* D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS, at 163-164 (4th ed. 1984); Michael Akehurst, *Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States,* 52 BRIT. Y.B. INT'L L. 175, 185-86, N.D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 214-15(1996). This argument was also abandoned by State Department lawyers in later law journal articles. Those articles conceded that the OAS action was an Article 53 enforcement action but that the Security Council either had "acquiesced" in OAS action or had *ex posto facto* authorized the OAS action.

monopoly power of the Security Council. That is, such non-use-of-force measures may be imposed unilaterally or collectively by states without Security Council authorization.

The Charter also does not define regional organizations. This article accepts a broad definition of regional organizations as less-than-global, state-based entities or associations that need not be treaty-based and that may include geographically, politically, or economically oriented organizations. It would seem inappropriate to adopt a limiting definition when the Charter leaves the term open-ended and undefined. With regard specifically to enforcement actions, the Charter refers generously to "regional arrangements or agencies" rather than formally, or in limited fashion, to regional "organizations" or "institutions."[19] A broad definitional approach to regional organizations focuses appropriately on function rather than form.[20] That is, the focus of the Charter is, as it should be, on the Security Council and not on the authority, structure, or processes of regional organizations *qua* regional organizations. Thus, under regional organizations as defined in this article, states acting multilaterally but not in conformance with the "constitution" of some regional organization, (like the NATO use of

[19] Article 53 of the Charter provides in relevant part:
1. The Security Council shall, where appropriate, utilize such *regional arrangements or agencies* for enforcement action under its authority. (emphasis added).

[20] *See* BOWETT, *supra* note 18 at 10-12.

force in Kosovo[21] or the ECOWAS use of force in Liberia[22]), would nonetheless be considered within the ambit of the Charter with regard to enforcement actions. The definition used in this article would also include enforcement actions taken multilaterally by states without a formal organizational structure under "arrangements" like the "Coalition of the Willing."[23] Such coalitions of states and *ad hoc* multinational forces are a regular feature in collective actions under Chapter VII. For example, UNOSOM II was a multilateral coalition of willing states that replaced U.S. forces in Somalia[24] and UNPROFOR was an *ad hoc* coalition of the willing in the former Yugoslavia.[25]It would seem that the informal Coalition of the Willing of around 50 states that used force in Iraq would be as much a regional arrangement of states as a more formal but very much smaller organization like the Organization of Eastern Caribbean States (OECS) that used force in Grenada in 1983.[26] Politically, of course, the fewer states involved and the less representative those states are of the global community (whether acting within a paper organization or more informally), the greater the incentive, on the one

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[21] *Infra* p. 108-110.
[22] *Infra* p. 106-107.
[23] *See*, Thomas M. Franck,*"When, if ever, May States Deploy Military Force Without Prior Security Council Authorization?"*, 5 WASH. U. J. L + POL'Y 51, 55 (2001).
[24] *See* S.C. RES 814, U.N.S.C.O.R., 48th Sess., 318th mtg. at 1, U.N. Doc. S/RES 814(1993).
[25] *See* S.C. Res 743, U.N. Scor 48th Sess. 3055th mtg. at 8, U.N. Doc S/RES/743 (1992).
[26] *See infra* p. 103-106.

hand, of those states to obtain prior authorization of the Security Council and, on the other hand, of the Security Council explicitly to deny authorization.

III. THE U.N. CHARTER MEANING ON ENFORCEMENT ACTIONS BY REGIONAL ORGANIZATIONS MAY HAVE CHANGED.

A. Changes in the Charter meanings.

As a general matter, it is not new to assert, as this article does, that regional organizations in certain circumstances may be entitled to take enforcement action unless the Security Council explicitly denies authorization to do so.[27] However, those assertions in general have rested on the rather questionable ground of a "reasonableness" approach to Charter obligations, Charter meanings, and Charter applications.[28] This approach leaves the meaning of the Charter in the hands of an individual state or regional organization. Under a reasonableness approach, the Charter is viewed as a malleable document, open to differing interpretations depending on the circumstances and on the needs of individual member states or a re-

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[27] *See,* John Norton Moore, *The Role of Regional Arrangements in the Maintenance of World Order, in* THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 122, 159-60 (Cyril E. Black and Richard A. Falk eds. 1971).

[28] *See* Abraham D. Sofaer, *International Law and Kosovo,* 36, STAN J. INT'L.L 1, 8 (2000); Abram Chayes, *A Common Lawyer Looks at International Law,* 78 HARV.L. REV. 1396(1964/65).

gional organization.

The reasonableness (or common law approach) correctly has not been accepted by the majority of writers as a legitimate device for straying from the words of the Charter.[29] There are problems in applying, *mutatis mutandis*, the common law method to the UN Charter and to Article 53 in particular. In common law municipal systems, there are constitutionally binding legislatures and effective enforcement mechanisms for executive branches of government to reign in abusively interpretative members of common law society (courts, governmental agencies, or human and corporate citizens). However, no comparable international legislature or effective executive enforcement mechanism exists in the international system. Under a common law approach applied to the plain words of the UN Charter, there is nothing systemic to keep UN members from bending Charter provisions beyond recognition on grounds of reasonableness, especially if the interpreting state is a Security Council permanent member that can veto any attempt by the Security Council to counter aberrant

[29] *See*, Akehurst, *supra* note 10, at 182 ("[T]he Security Council must *in all cases* order or authorize the [enforcement] action [under Article 53].") (emphasis added); Erkki Kourula, *Peace-keeping & Regional Arrangements*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 95, 118 ("Authorization can *only* be given by the Security Council before a regional arrangement takes an enforcement action") (emphasis added); White, *supra* note 10, at 204 ("When a regional organization such as the . . .OAS . . . is planning an action which is not entirely defensive, they *must* have approval of the Security Council for such an operation.") (emphasis added).

interpretations. The strongest states would tend to interpret the Charter as they pleased and the weakest states, dependent on others for economic and other aid, would be pressured to interpret the Charter the way the strong states demanded.

If the Charter is to be taken as accommodating regional organization enforcement actions taken without prior Security Council authorization it should be based on firmer ground than a reasonableness approach to Charter interpretation. One such ground would be because the Charter meaning has changed with regard to Security Council authorization.

Traditionally, changes in the meaning of a treaty such as the U. N. Charter have to be by amendment.[30] However, since it came into force in 1945, the meaning of the U. N. Charter, and in particular the voting procedures of the Security Council, clearly has changed in several respects without formal amendment. As a general matter, this is not a unique phenomenon in international treaty law and especially with treaties involving international institutions. Here, constituent treaties over time frequently come to reflect the international practice of states after the treaty comes into force. Article 31 (3) (6) of the Vienna Convention on the Law of Treaties explicitly adopts the notion of the relevance of "subsequent practice" in accurately interpreting the meaning of

[30] *See,* Vienna Convention on the Law of Treaties, Art. 39.

any treaty. In addition, there have been instances where the meaning of a treaty has changed to accommodate subsequent customary international law.[31]

1. Security Council Voting.

The voting procedure of the Security Council according to the plain words of the Charter requires that decisions on substantive matters, like authorization to take enforcement action, have the affirmative vote of nine of the fifteen members "including the concurring votes" of the five permanent members.[32] Here, it would seem that the plain words "concurring vote" would require first an actual vote (yes or no) and second an affirmative vote. The words of the Charter on their face seem to preclude an abstention qualifying as a concurring vote of the Security Council on substantive matters. However, "[p]ractice reveals great flexibility in the application of" Security Council voting under the Charter.[33] This is certainly the case with concurring votes and abstentions - in which it is now unanimously accepted that abstention from voting by voluntary absence (like the Soviet Union absence from the Security Council in the case of Korea in 1950) and abstention from voting by a permanent

[31] *See generally*, NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW (1994).

[32] Article 27 of the U. N. Charter. The five permanent members are China, France, Russia, the U.K., and the U.S.A.

[33] Stefan Brummer and Bruno Simma *Article 27, Voting* I THE CHARTER OF THE UNITED NATIONS, 476, 520 (Simma et al. eds. 2002).

member in attendance both constitute concurring votes of permanent members on substantive matters.[34]

The Charter also makes no mention about votes taken by consensus. Yet, the generally accepted view is that consensus decisions are "recognized" as a "permissible" form of making Security Council decisions at least where all members may comment on the matter and there is no expressed opposition to it.[35] That is, the Security Council President may now determine that a consensus on a matter has been achieved and that the matter will be pursued consistent with that consensus and without a formal vote.[36]

2. Security Council Inaction and The General Assembly.

The words of the U. N. Charter do not bestow upon the General Assembly any enforcement power under the Charter. The General Assembly is entitled only to "discuss" and "make recommendations" to the Security Council.[37] However, in the face of Security Council veto paralysis in 1950, the General Assembly acted to authorize the use of force under its Resolu-

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[34] *Id.* at 449-52. Modification of the meaning of the Charter has been justified on a variety of grounds including the "widespread view" that the concurring vote provision of article 27 "has been modified by customary law " between the contracting parties. Other justifications for ignoring a strict view of the Charter's words include liberal treaty interpretation, waiver of voting rights, and spontaneous consent.

[35] *Id.*

[36] SIMMA, *supra* note 33, at 512-513.

[37] Article 10 of the U. N. Charter.

tion on Uniting for Peace (RUP) procedure even though the Charter gave it no such authority. Under the RUP, the General Assembly may determine a threat to the peace, breach of the peace, or act of aggression and may recommend the use of force by members "if the Security Council, because of lack of unanimity, fails to exercise its primary responsibility for the maintenance of international peace and security."[38] Thus, although not authorized by the U. N. Charter, an organ of the United Nations (i.e. The General Assembly) may share the enforcement action responsibility with the Security Council without Security Council authorization. It is not a great step to also say that enforcement action responsibility may be exercised by regional organizations in appropriate circumstances unless the Security Council denies authorization.

3. The Doctrine of Implied Powers.

The U.N. Charter does not confer by its words any authority upon the U.N. organization to bring an international claim. However, the International Court of Justice in the *Reparations* case implied the power of the organization to bring a reparations claim on behalf of a U.N. employee[39]: "Under international

[38] G.A. 377 (V) November 3, 1950. *See also* Certain Expenses Case, *supra* note 8, at 163, *et seq*; BOWETT, *supra* note 18, at 49-52.

[39] Reparations for injuries suffered in the service of the United Nations, advisory opinion, [1949], ICJ at 182. *See generally*, JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW, 67 (2002).

law, the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

The ability of the international community to address international peace and security through enforcement actions arguably is as "essential to the performance" of the U.N. Organization as making claims on behalf of employees. If so, then it might appropriately be an "implied power" of regional organizations to take enforcement action when needed in circumstances where the Security Council fails to act or fails to authorize others to act.

4. Peacekeeping.

Nowhere in the Charter is peacekeeping by the U.N. Organization or its members referred to. However, over the years since the Charter was adopted "a clear pattern" of "arrangements and operations have evolved" "which taken together" allow the Security Council, General Assembly and Secretary General to one degree or another to be involved in peacekeeping.[40] In fact, peacekeeping concepts have been expanded to include "robust peacekeeping" which is difficult to distinguish from enforcement actions.[41] If

[40] MALCOLM N. SHAW, INTERNATIONAL LAW (4th Ed.) 846. *See*, KLABBERS, *supra* note 39 at 91.
[41] *See infra* p. 122.

robust peacekeeping can be conducted by ad hoc forces, it is not very different from having regional organizations take enforcement actions.

Thus, U.N. Charter meanings have changed without amendment in voting by the Security Council, and in sharing responsibility in collective security matters. Viewed in that light, it would not be startling or unusual, as a general matter, to find that the Charter's authorization voting by the Security Council for enforcement actions by regional organizations has similarily changed.

B. The Practice of the Security Council and Regional Organizations.

The practice of the Security Council and regional organizations supports a change in the U.N. Charter's meaning with regard to enforcement actions.

In the six decades since the U.N. Charter scheme on use of force was put in place, enforcement action has been taken on several occasions by regional organizations in ways that challenge the primary power of the Security Council as illustrated in the following seven examples.

1. Cuba 1962.

The most serious threat of mutually destructive nuclear force to date occurred during the Cuban missile

crisis in 1962. In political terms, the crisis arguably was the most successful enforcement action undertaken by a regional organization. Nuclear war was averted. Nuclear missile facilities were removed from Cuba. Cuba was not invaded and its territorial sovereignty was guaranteed. In legal terms, the collective action of the Organization of American States (OAS) during the crisis directly challenged the primacy of the Security Council to authorize the use or threat of force by regional organizations in enforcement actions.

On October 15, 1962, the United States learned, primarily by military air reconnaissance, that the Soviet Union and Cuba were installing Soviet medium and intermediate range ballistic missiles and missile facilities in Cuba for the first time.[42] These were surface-to-surface missiles that had an offensive capability, that were capable of carrying nuclear warheads, and that had ranges over a thousand miles. Previously, the U.S. government knew that Cuba was receiving from the Soviet Union defensive SAM surface-to-air antiaircraft missiles of limited range and other military arms.

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[42] The facts of the crisis are drawn from THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS (Ernest R. May and Philip D. Zelikow, eds.,1997); MICHAEL R. BESCHLOSS, THE CRISIS YEARS: KENNEDY AND KHRUSHCHEV, 1960-1963 (1991); ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (University Press 1987); GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (Harper Collins 1971); ELIE ABEL, THE MISSILES OF OCTOBER (1969).

The U.S. faced a legal dilemma. Cuba had not violated international law, and self-defense could not justify a unilateral use of force because no armed attack had occurred,[43] and the Soviet Union was guaranteed to veto a resolution authorizing the U.S. to take enforcement action under the U.N. Charter. Yet, because of the failed 1961 Bay of Pigs invasion of Cuba by U.S. armed and trained Cuban exiles undertaken in violation of international law, the U.S. wanted to find and articulate a legal justification for an enforcement action in this crisis.[44]

The U.S. Government's options narrowed to taking regional collective enforcement action through the Organization of American States (OAS).

On October 22, 1962, President Kennedy declared

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[43] *See* KENNEDY TAPES, *supra* note 42 at 197-98 (noting that Secretary of State Dean Rusk reportedly said that "a sudden air strike had no support in law or morality, and, therefore must be ruled out; *see* CHAYES, *supra* note 41, at 65 ("Intra-office discussions at the time emphasized that it would set a bad precedent if the United States were to rely on a self-defense theory ***[T]he central difficulty with the Article 51 argument was that it seemed to trivialize the whole effort at legal justification.").

[44] Leonard Meeker, the acting legal advisor at the State Department during the crises, wrote later the U.S. government was "concerned that any actions to be taken by the United States should rest on the soundest foundation in law and should appear in that light to all the world, including the Government of the Soviet Union." Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM J. INT'L LAW. 515 (1963); *See also*, KENNEDY TAPES, *supra* note 41, at 170-72; CHAYES *supra* note 42 at 14-24, 30-35; LOUIS HENKIN, HOW NATIONS BEHAVE 280 (2 ed. 1979).

on national television that the presence of the Soviet missiles on Cuban soil constituted "an explicit threat to the peace and security of all the Americas, in flagrant and deliberate defiance" of the Rio Treaty, and that any substantial increased possibility of the use, or sudden change in deployment, of nuclear weapons delivered by ballistic missiles "may well be regarded as a definite threat to the peace."[45] He announced "a strict quarantine on all offensive military equipment under shipment to Cuba," which, if found, would be "turned back," and he called for a meeting of the Organ of Consultation under articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).[46]

On October 23, 1962, the Organ of Consultation provided for under the Rio Treaty and the OAS Charter met and found that:[47] "Incontrovertible evidence has appeared that the Government of Cuba, despite repeated warnings, has secretly endangered the peace of the Continent by permitting the Sino-Soviet powers to have intermediate and middle-range missiles on its territory capable of carrying nuclear warheads."

It then unanimously adopted a resolution recom-

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[45] 47 DEP'T ST. BULL. 715-16 (Nov. 12, 1962).

[46] *Id.* at 716-18.

[47] *Id.* at 723. Cuba could not vote on the resolution because its government had been suspended from the OAS, although technically the *State* of Cuba was still an OAS member.

mending "that the member states, in accordance with Articles 6 and 8 of the [Rio Treaty], take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military materiel and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent."

It also resolved to "inform the Security Council . . . in accordance with Article 54 [of Chapter VIII] of the Charter."[48] The OAS resolution endorsed the State Department's legal rationale by basing its authority on article 6, which addresses only non self-defense grounds for the use of force. If the OAS resolution was meant to rely on self-defense grounds, it would have had to invoke article 3 of the Rio Treaty dealing with armed attacks and not article 6.[49] Thus, the *opinio juris* of the OAS and the United States at least was clear in rejecting self-defense as a justification for the quarantine and in accepting that Articles 52 and 54 of Chapter VIII of the UN Charter applied.

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[48] *Id.* Article 54 of Chapter VIII of the UN Charter requires that the "Security Council shall at all times be kept fully informed" of actual or contemplated activities of regional organizations "for the maintenance of international peace and security."

[49] The text of the Rio Treaty is set out in 43 AM. J. INT'L L. Supp. at 53 (1949).

The United States issued a proclamation on the evening of October 23, 1962, to go into effect the next day.[50] The proclamation ordered U.S. armed forces "to interdict . . . the delivery of offensive weapons and associated materiel to Cuba." It also authorized the "designation . . . of prohibited or restricted [maritime] zones and of prescribed [travel] routes." Finally, it set out the operation of the quarantine as follows:

> Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which it is believed is en route to Cuba and may be carrying prohibited materiel or may itself constitute such materiel shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.

The United States, Cuba, and the Soviet Union all requested a meeting of the Security Council. The United States proposed and tabled a draft resolution that,

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[50] *See* 47 DEP'T OF ST. BULL. *supra* note 45, at 717.

among other things, called for withdrawal of all offensive weapons from Cuba. This proposed resolution would certainly have been vetoed by the Soviet Union. And, the United States would certainly have vetoed any proposed Security Council resolution sponsored by the Soviet Union and Cuba. The certainty that the Security Council would never authorize the OAS enforcement action pushed the OAS and the United States into the awkward position of asserting that the quarantine fell under Articles 52 and 54 of Chapter VIII of the UN Charter, but not Article 53. That awkwardness would be removed today if the Charter meaning on Security Council votes on authorization of enforcement action has changed.

Other OAS member nations (Argentina, the Dominican Republic, and Venezuela) joined the United States in carrying out the quarantine. In addition, Colombia, El Salvador, Costa Rica, Guatemala, Haiti, Honduras, and Nicaragua put their port facilities at the disposal of the quarantine forces.[51] During the quarantine, which lasted until November 20, 1962, Soviet vessels were boarded, inspected, and allowed to proceed. Soviet submarines were tracked. Other vessels changed course and did not enter restricted maritime zones and did not go to Cuba. No military force was used and no vessels were forcefully intercepted or seized. However, the threat that force would be used, if necessary, to enforce the quarantine

[51] *See* Akehurst, *supra* note 18, at 198.

was clear and present throughout the crisis.[52]

The crisis ended when the Soviet Union agreed to stop putting missiles in Cuba and to remove missiles already there. The Soviet Union also agreed to allow its ships entering or leaving Cuba to be inspected.[53] The United States in turn guaranteed the territorial integrity of Cuba.

In the Cuban missile crisis, the OAS took enforcement action in recommending a quarantine on Soviet shipments of offensive military equipment to Cuba without Security Council authorization and the Security Council did not object due to the cold war guarantee of veto by the United States.

2. Lebanon 1976.

In June, 1976, the Arab League deployed a peacekeeping force (the Symbolic Arab Security Force) in Lebanon with the permission of the Lebanese government. However, in October, 1976 the Arab League transformed the Symbolic Arab Security Force into the Arab Deterrent Force. The tasks of the new force included "maintaining internal security," "removing all military installations" and "when nec-

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[52] *See id.* at 199; Meeker, *supra* note 44, at 523. *But see*, HENKIN, *supra* note 44, at 299 ("The quarantine did not involve the actual use of force, and the threat of force in the background . . . was minimal . . .").

[53] *See* 47 DEP'T ST. BULL., *supra* note 45, at 741-47.

essary" "taking over public utilities and institutions" and "guarding military and civilian establishments."[54] This force was almost 30,000 soldiers strong and its functions included enforcement functions and its actions became an enforcement action using "military coercion beyond that in strict self-defense."[55] No Security Council authorization was obtained before or after the peacekeeping effort became an enforcement action.[56] The Security Council predictably never condemned the unauthorized enforcement action.

3. Grenada (1983).

In 1983, the OECS (Organization of Eastern Caribbean States) and the United States (not an OECS member) landed military forces in Grenada. At the time of the landing, there were about 1000 American citizens on the island. The OECS use of force came in the twilight of the cold war and the East-West political and ideology contest. The Security Council did not take any action to authorize or condemn the use of force by the OECS and the United States.[57] The OECS justified the use of force by asserting, after the fact, that the situation in Grenada (a military build-up by a Marxist government with support from Cuba and

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[54] *See* Istvan Pogany, THE ARAB LEAGUE AND PEACEKEEPING IN THE LEBANON, p. 83 (1987).

[55] WHITE, *supra* note 10 at 216-7.

[56] *But see* POGANY, *supra* note 54 at 102("... the Arab Deterrent/Force... operations... did not amount to 'enforcement action' ").

[57] *See* G.A. Res. 38/7, 38 U.N. GAOR Supp. No. 47, U.N. Doc. A/38/L. 8 (1983).

the Soviet Union) "posed a serious threat to the security of the OECS countries and other neighboring states."[58] The United States offered "three well established legal principles" as the legal basis for the use of force.[59] First, the Governor-General of Grenada was a lawful government authority of Grenada and lawfully invited the U.S. and OECS forces into Grenada to deal with "internal disorder as well as external threats." Second, the OECS was competent to use force "to maintain international peace and security." And, third, the United States was justified in "landing" "United States military forces" "to secure" the "evacuation" of U.S. nationals. Here, the United States stressed that it was not basing the U.S. use of force on unilateral or collective self-defense under Article 51 of the UN Charter or on the doctrine of humanitarian intervention.[60] However, others have justified the OECS and U.S. action in precisely those terms.[61] Those offered justifications correctly have been challenged as "unconvincing both individually and collectively."[62] The Grenada episode is probably

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[58] 83 DEP'T ST. BULL. 67, 68 (1983).

[59] Davis R. Robinson, *Letter from the Legal Advisor, United States Department of State*, 18 INT'L LAW. 381, 382 (1984).

[60] In rejecting self-defense justifications for the use of force in Grenada, the United States said this was "for the same reason that the United States eschewed . . . [self-defense] in response to the Cuban missile crisis." *Id.* at 385.

[61] *See* John Norton Moore, *Grenada and the International Double Standard*, 78 AM J. INT'L L. 145, 153-56 (1984).

[62] Rein Mullerson, *Intervention By Invitation in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 127, 130 (Lori Fisler Damrosch & David Scheffer eds., 1991) (citing W.C. GILMORE,) GRENADA INTERVENTION: ANALYSIS & DOCUMENTATION 74 (1984).

most accurately viewed as an enforcement action. It was a use of force that was not undertaken in unilateral or collective self-defense. It also was not peacekeeping because no proper host-state invitation was extended and the military action was not politically neutral. The action is best characterized as an enforcement action in which Security Council authorization was necessary under the words of the Charter and not obtained in practice. The Governor-General of Grenada (a largely ceremonial post) issued the invitation to intervene to the OECS and to the United States after the fact and at a time when there was no effectively functioning government on the island. In addition, the OECS and U.S. military forces that took control of the island did not conduct operations under an implementing agreement by contending forces to keep the peace as would normally be required in traditional peacekeeping.

The Grenada episode is another example of Article 53 being ignored in reality, with the United States using a regional organization, the OECS to take enforcement action without Security Council authorization.[63] Whether that is an accurate characterization or not,[64] the Grenada episode emphasizes that reliance

[63] *See* White, *supra* note 18, at 21. *But see* Moore, *supra* note 61, at 156-57 (referring to the OECS and U.S. use of force as being justified on the interrelated grounds, of peacekeeping, self-defense, and humanitarian intervention).

[64] *See* Moore, *supra* note 61, at 156-57, (referring to the OECS and U.S. use of force as being justified on the interrelated grounds, of peacekeeping, self-defense, and humanitarian intervention).

on the *words* of the Charter alone for the meaning of Article 53 induces alternative justifications and increasingly, and unfortunately, blurs the line between enforcement actions on the one hand and peacekeeping and self-defense on the other hand.

4. Liberia (1992).

In 1990, The Economic Community of West African States, (ECOWAS), became involved in a peacekeeping effort to implement a cease-fire between government and rebel forces in Liberia. Since this was a peacekeeping operation, no Security Council authorization was obtained and none was needed. However, during 1992, the ECOWAS peace-keeping forces, (ECOMOG (ECOWAS Monitoring Group)), became engaged in enforcement actions against the rebels. At the time that the peace-keeping effort was converted to an enforcement action, ECOWAS was operating without prior explicit Security Council authorization, arguably in violation of the plain words of Article 53.

On November 19, 1992, after the ECOWAS enforcement action began, the Security Council adopted a resolution which recalled "the provisions of Chapter VIII" and commended "ECOWAS for its efforts to

restore peace, security and stability in Liberia."[65] The Security Council resolution seems to implicitly, and *ex post facto*, authorize the ECOWAS enforcement action. If so, this contravenes the plain words of Article 53 requiring prior explicit Security Council authorization.[66] As a practical matter, however, prior explicit authorization, in circumstances where peacekeeping is converted to enforcement action, may not always be possible. Nevertheless, the Liberia episode represents a further weakening of the primacy of the Security Council over regional organization enforcement actions.

This episode also illustrates the flexible attitude of the Security Council about the kinds of organizations that may take enforcement actions. ECOWAS is primarily an economic development and relations organization and was not authorized by its constitutional documents to use or threaten force in internal civil wars.

5. Bosnia (1992-93).

In the early 1990s, NATO conducted various military operations in Bosnia at the behest of the Security Council under Chapter VII - enforcing arms embargoes, implementing sanctions, enforcing "no-fly"

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[65] U.N. SCOR Res. 788, U.N. Doc S/RES/788 (1992).

[66] *See*, MALCOLM N. SHAW, INTERNATIONAL LAW 886 (4th ed. 1997) ("While it is clear that the Security Council ultimately supported the action taken by ECOWAS, it is questionable whether the spirit and terms of Chapter VIII were fully complied with.").

zones, providing close air support for the UN force (UNPROFOR), and delivering humanitarian assistance.[67] The Bosnia episode underscores that the Security Council was prepared to use NATO in enforcement actions even though NATO (as a defense organization) was "not acting within the powers of its own constituent treaty."[68] It also illustrates that the technical status of the regional organization may not bar regional organizations from engaging in enforcement actions under Chapter VIII as long as the organization's members are willing.

6. Kosovo (1999).

In 1999, NATO conducted a bombing air campaign and expelled Serbian forces from Kosovo. At the time, the Security Council was seized of the Kosovo matter by resolution under Chapter VII of the UN Charter.[69] However, the Security Council did not explicitly authorize the use or threat of force by NATO. After the bombing and expulsions, the Security Council authorized by resolution substantial partici-

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[67] *See* U.N. SCOR Res. 770, UN Doc S/RES/770 (1992); 781,UN Doc S/RES/781 (1992); 816, UN Doc S/RES/816 (1993); 819, UN Doc S/RES/819 (1993);824, S/RES/824 (1993); 836, S/RES/836 (1993); 844, S/RES/844 (1993).

[68] WHITE, *supra* note 10, at 219. This tends to confirm the view that function trumps form in defining "regional agency or arrangements" for Chapter VIII purposes.

[69] U.N. SCOR Res. 1160, U.N. Doc. S/RES/1160 (1998) ("The Security Council . . . Acting Under Chapter VII of the Charter of the United Nations . . . Decides to remain seized of the matter."); *See also* U.N. SCOR Res. 1199, U.N. Doc. S/RES/1199 (1998); U.N. SCOR Res.1203, U.N. Doc S/RES/1203 (1998).

pation by NATO in *future* international security matters in Kosovo under Chapter VII.[70] However, the Security Council again did not address the prior bombing campaign and expulsion of Serbs.

The NATO use of force in Kosovo and the Security Council's failure to explicitly exercise its authorization functions under either Chapter VII or Chapter VIII of the Charter calls into question the need for Security Council authorization for regional organizations to engage in enforcement actions. The Security Council failed to directly react, before or after the fact, to the use of force by NATO. The Security Council's inaction might mean that Article 53 requirements will not be applied in all cases. It might also infer that the Security Council is prepared to accept that enforcement actions authorization may be implied and *ex post facto*.[71]

The Kosovo episode also seems to resurrect the arguments made by the U.S. lawyers during the Cuban missile crisis that Article 53 authorization can be implied. However, at the time of the Cuban missile crisis, the Security Council was paralyzed by the cold war threat of veto in a way that guaranteed inaction.

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[70] U.N. SCOR Res. 1244, U.N. Doc. S/RES/1244 (1999) (stating that the Resolution "[a]uthorizes . . . relevant international organizations to establish the international security presence in Kosovo," including "substantial . . . [NATO] participation"). ANNEX II avers that "the Deployment in Kosovo" of NATO was "decided under Chapter VII of the Charter."

[71] *See supra* p. 93 for discussion of changes in Charter meaning under the doctrine of implied powers.

The absence of state practice to the contrary and the cold war guaranteed veto made it arguably less inappropriate to imply authorization. This sort of argument lay dormant until the Kosovo episode. In Kosovo, the threat of veto by China or Russia prevented the introduction of a Security Council resolution to authorize the NATO bombing and expulsions ahead of time. However, there was no veto in the later resolutions embracing future NATO participation. In addition, the Security Council was already seized of the Kosovo matter under Chapter VII. Chapter VII, unlike Article 53 of Chapter VIII, does not explicitly require prior explicit Security Council authorization for regional organizations and their members to use force to carry out Security Council resolutions to maintain or restore international peace and security. Here, finding an implied or *ex post facto* authorization of the prior bombings seems less disturbing to the words of the Charter and to the paper primacy of the Security Council in collective security matters than perhaps implying authorization from Charter words alone under Chapter VIII.

7. Iraq 2003.

The use of force by the "Coalition of the Willing" in Iraq in 2003 fell under Chapter VII of the U.N. Charter, rather than Chapter VIII, because the Security Council was seized of the matter by Security

Council resolutions.[72]

Under Chapter VII, the U.N. originally was supposed to have a standing "army" contributed by member states under special agreement.[73] However, this arrangement never came into being. Alternatively, the Security Council has relied instead on voluntary forces supplied on an *ad hoc* case by case basis. Thus, the Security Council regularly has relied on willing states to maintain and restore international peace and security. Here, the Security Council found Iraq to be a threat to international peace and security and indicated that it would enforce the obligatory controls that had been imposed on Iraq.[74] However, neither the U.N. Charter itself nor the relevant Security Council resolutions indicated who would deter-

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[72] *See* Security Council Resolutions 678 and 687.

[73] Article 43 of the U.N. Charter provides:

> 1. All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general locations, and the nature of the facilities and assistance to be provided.
> 3. The agreement shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

[74] *Id.*

mine (The Security Council or the Coalition of the Willing) when Iraq materially breached the resolutions or when members could use force to enforce those resolutions. Although not directly addressed by this article, it would appear that the uncertainty about enforcement of matters under Chapter VII would benefit from being remedied[75] as much as the uncertainty over authority over Chapter VIII has arguably been remedied by subsequent practice.

IV. IMPLICATIONS OF A CHANGE IN CHARTER MEANING.

A change in Charter meaning that allows regional organizations to take enforcement action without authorization of the Security Council has certain implications which need to be addressed. First, such a change accommodates the reality that there is a far different collective security world today than existed in 1945. Second, a change in Charter meaning creates less pressure to unacceptably stretch other legal predicates for use of force to sidestep or avoid lack of Security Council authorization. And, third, a change in Charter meaning creates a gap in accountability to the global collective which needs to be dealt with.

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[75] Franck, *supra* note 13 at 900, suggests a change in Security Council voting that would have the Security Council determine whether Chapter VII resolutions have been materially breached, but "to do so by a majority of nine of the fifteen, without a veto."

Challenges to Security Council Power

A. The Collective Security World has Changed since 1945

In several significant respects, the world has changed since the U. N. Charter was adapted in 1945, all of which make a change in Charter meaning with regard to lawful enforcement actions taken by regional organizations more appropriate.

1. The End of the Cold War.

The end of the cold war and the dissolution of the Soviet Union brought an end to the paralysis of the Security Council that existed during the crisis. From 1945 to 1990 the veto was used well over 200 times. However, it has been used less than ten times since then.[76] It is more likely today that negotiated abstentions, rather than vetoes, will be used to express disapproval of Security Council actions. Thus, the Security Council is in a much better position than it was during the crisis to properly exercise its authorization function under Article 53 and under a changed Charter meaning.[77] The dissolution of the Soviet Union signaled the end of both the "empire" system of international governance and communism. It also heralded the movements toward democracy and market economies. Those developments have altered the fo-

[76] *See* Richard Butler, *United Nations: The Security Council Isn't Performing*, INT'L HERALD TRIBUNE, Aug. 5, 1999, at 8.

[77] The "guarantee" of a veto by Russia, Germany and France in the Iraq situation harkens back to cold war days.

cus of use-of-force concerns from conflicts between hemispheric military alliances (like in the Cuban missile crisis) to geographic regional strife, to internal unrest, civil wars, and humanitarian concerns. With that shift in focus, the demarcation line between Article 53 regional enforcement actions for which Security Council authorization is needed and other uses or threats of force has become blurred, and the appropriateness of continued monopoly power of the Security Council is questionable.

2. Increased Demands on the U.N. Organization.

One result of a functioning Security Council has been a marked increase in the demands placed upon the UN Organization in collective security matters to provide forces to engage in enforcement actions, peacekeeping actions, and actions involving humanitarian concerns. In the area of peacekeeping alone, the UN has approved budgets for operations and observer missions in Angola, Iraq-Kuwait, Western Sahara, Cambodia, Guatemala, Croatia, Cyprus, Georgia, Tajikistan, Bosnia and Herzegovina, Haiti, Central African Republic, Sierra Leone, Kosovo, and East Timor.[78]

Those demands and other requirements strain the budget of the UN Organization and severely test the

[78] *See* U.N. Press Release, U.N. Doc. GA/9726 (June 15, 2000).

collective political will of UN members, which must supply the military forces and materiel, in circumstances where collective enforcement action may be needed to maintain or restore international peace and security. UN budgets in the 1990s for peacekeeping and peace-building activities around the world have ranged between 1.5 and almost 4 billion dollars.[79] As of May 1999, member states owed the UN as much as $2.6 billion. Over 30 members have been in arrears in their payment of UN dues, and the UN at times has even been forced to borrow from peacekeeping funds to cover overall budget shortfalls.[80] The twin impediments of lack of money and lack of collective political resolve increase the likelihood that, in future circumstances where use of force is needed to maintain or restore international peace and security, the Security Council may not be able to seize a matter under Chapter VII, or, if seized, it may not have the resources to act. Here, regional organizations in appropriate circumstances ought to be asked, or ought to be allowed under the Charter, to take action under either Chapter VII or Chapter VIII without explicit Security Council authorization.

3. The Number and Nature of Regional Organizations has Changed.

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[79] *See U.N. Peacekeeping*, U.N. Dep't of Public Information, U.N. Doc.DP/1851/Rev.9 (June 1999).

[80] *See The Financial Crisis*, U.N. Dep't of Public Information, U.N. Doc. DP/1815/Rev. 16 (June 1999).

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The number of regional organizations has increased substantially in the decades since the Cuban missile crisis. In addition, the nature of regional organizations has changed.[81] Except for NATO, the old collective defense pacts that engendered much of the concern about regional organizations and the primacy of the Security Council in the early days of the UN are gone: the Warsaw Pact, ANZUS, SEATO, and CENTO.[82] Even NATO is now searching for its new role in the post-cold war world. Its membership is expanding to include former adversaries in central and Eastern Europe and the states of the former USSR. NATO is also beginning to use or threaten force in non-self-defense situations, for example, in its activities in Bosnia and in its more recent bombing campaign in Kosovo. Other regional organizations, which have not had a use-of-force function, are becoming engaged in use-of-force activities. For example, the EU, at the 1999 Helsinki Summit, approved a European Security and Defense Initiative to field a European rapid-reaction force, and the OSCE (Or-

[81] *See* TOM NIEROP, SYSTEMS & REGIONS IN GLOBAL POLITICS: AN EMPIRICAL STUDY OF DIPLOMACY, INTERNATIONAL ORGANIZATION & TRADE, 1950-1991, 95-9 (1994); Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 1997 A.F. L. REV. 235, 235-36. 1997.

[82] The Warsaw Pact (Bulgaria, Czechoslovakia, the GDR, Hungary, Poland, Romania and the USSR) ended in 1991. The Security Treaty between Australia, New Zealand, and the United States is no longer in full operation due to the U.S. suspension of its security commitment to New Zealand and the establishment of a South Pacific Nuclear-Free Zone. The South East Asian Treaty Organization was dissolved in 1977. The Central Treaty Organization (Turkey, Iraq, Pakistan, Iran, and Great Britain) ceased operation in 1979.

ganization for Security and Cooperation in Europe) has become a Chapter VIII regional agency or arrangement and has agreed to become involved in non-use-of-force peacekeeping. And in 1990, ECOWAS (Economic Community of West Africa States) became involved in the use of force in Liberia.

In addition, the Security Council itself seems to find irrelevant a sharp distinction between Chapter VII regional organizations (like the OAS, the OAU and The Arab League) capable of taking enforcement actions against their own members, and other regional organizations(like NATO) which may be obligated under Article 48 (2) of the U. N. Charter to take enforcement actions to maintain or restore international peace and security as noted above regarding enforcement actions in Somalia and the former Yugoslavia.

With the increasingly pivotal role regional organizations are beginning to play in trade, human rights, development, finance, and the environment, it is likely that their role in situations involving the use or threat of force properly will continue to increase and may become more autonomous.

4. The Change in the Nuclear Threat.

Over the past half century there has been a fundamental change in the nature and scope of the threat posed by nuclear weapons. In 1962, in the Cuban missile crisis, the threat posed to international peace

and security was global nuclear war conducted by the opposing military alliances of the East and West, led respectively by the Soviet Union and the United States. Such threats gave considerable weight to arguments that the OAS quarantine could have been justified as a legitimate act of anticipatory self-defense. Today, however, the threat of mutually destructive global nuclear war that prompted the OAS quarantine has all but disappeared. Global nuclear warfare threats fueled by global political polarization have been replaced by threats of regional nuclear conflicts, for example, in the Indian subcontinent (India-Pakistan), the Middle East (Israel-Iraq), the Korean peninsula, and Eastern Europe and the states of the former Soviet Union. Even here, however, the direction is toward reduction and containment of the nuclear threat.

The signposts of the diminishing nuclear threat are apparent on many fronts. Nuclear arms reduction efforts are reflected in the SALT I and II (strategic arms limitation) agreements of the 1970s and the START I, II, and III (reduction and limitation of strategic offensive weapons) agreements of the 1990s. The 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force in 1970.[83] Today 187 states are party to the Treaty (only Cuba, India,

[83] "The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) *available at* http://disarmament.un.org/wmd/npt/npttext.html, *last visited,* April 29, 2004.

Israel, and Pakistan are not). This treaty and other non-proliferation efforts have resulted in a continuing drop in the total number of nuclear weapons, in reductions in fissionable material for weapons, and in a shift to "tactical" nuclear weapons.

Efforts at nuclear weapons elimination are also reflected in the regional actions to eliminate nuclear weapons by declaring nuclear free zones. Latin American States did this in 1967.[84] Other nuclear free zones have been established in Antarctica, the South Pacific, Africa, and Southeast Asia.

Other efforts have been directed at stopping nuclear weapons tests. In 1973, Australia and New Zealand brought proceedings against France claiming violations of territorial sovereignty and violations of high seas rights caused by French nuclear tests on the South Pacific island of Muruoa.[85] In 1996, the I.C.J. ruled that it had jurisdiction but it declared the nuclear tests dispute moot in the light of France's unilateral suspension of nuclear tests. The I.C.J also has advised the General Assembly that international law neither authorized nor prohibited the threat or use of nuclear weapons and that, while generally contrary to the law of armed conflict and humanitarian law, it could not conclude whether the use or threat of nu-

[84] *See* Treaty for the Prohibition of Nuclear Weapons in Latin America, February 14, 1967, 6 I.L.M. 521 (1967).

[85] The Nuclear Tests Case (Australia v. France) (Judgment), 1974 I.C.J. 253.

clear weapons in an extreme case of self-defense to protect the very survival of a state was lawful or unlawful.[86] In 1996, the comprehensive Nuclear-Test-Ban Treaty opened for signature but China, India, Pakistan, North Korea, Russia, and the United States are not parties.

Despite the progress at nuclear disarmament over the past half century, the nuclear threat remains. There still exist some 35,000 nuclear weapons and many of those weapons are deployed. None of the known nuclear powers have dispensed with all their nuclear weapons. Clandestine nuclear weapons programs still exist and the threat of nuclear terrorism remains a possibility. Peaceful nuclear power generation and nuclear fuel reprocessing produce fissionable material that poses serious security threats. Those threats could require that regional organizations be able to legitimately act swiftly and decisively to use or threaten force in enforcement actions to maintain international peace and security.

B. Acceptance of a Change in Charter Meaning Creates less Incentive to Unacceptably Stretch Other Legal Predicates for Use of force.

Lack of acceptance of a measure of regional organization independent power to take enforcement

[86] 35 I.L.M. 809 (1996).

action without Security Council authorization creates an incentive for regional organizations to stretch such use-of-force doctrines as anticipatory self defense, robust peacekeeping and humanitarian intervention beyond limits of acceptability.

1. Anticipatory Self-Defense.

Anticipatory self-defense is an international law doctrine that allows a state or regional organization to use force without Security Council authorization in circumstances where there is no actual armed attack but where an attack is imminent and an immediate response is necessary. As with self-defense, any force used must be proportional to the threat posed.[87] If the Security Council refused or could not (because of a guaranteed veto) authorize an enforcement action in circumstances where a regional organization felt strongly that use of force was needed, it might seek legal justification by invoking a right of anticipatory self-defense. In turn, such reliance could potentially contort the doctrine to an unacceptable degree, thereby undermining international peace and security. The doctrine of anticipatory self-defense is controversial enough and is already being tested enough without it also being employed as a surrogate for Security Council authorization of an enforcement action by regional organizations. The latest iteration of anticipatory self defense offered as a justification

[87] *See* BOWETT *supra* note 9 at 118.

for the use of force without Security Council authorization is the doctrine of preemption which would unacceptably dispense even with the immediacy requirement. An acceptance that regional organizations may take enforcement actions unless the Security Council denies authorization would reduce the incentive to abuse an otherwise legitimate doctrine of anticipatory self-defense.

2. Robust Peacekeeping.

In the area of peace-keeping, the concept of robust or muscular peace-keeping has evolved, which often is difficult to distinguish from enforcement actions. Under traditional notions of peacekeeping, the range of allowable use or threat of force by states or regional organizations was, at one end of the spectrum, limited to the right of self-defense under Article 51. At the other end, a use or threat of force could be used more generally to maintain law and order. In either case, forces could not be introduced without the consent of the host state or of the viable contending actors. The use of force in traditional peacekeeping efforts also had to be non-coercive and politically neutral.[88] Robust or muscular peace-keeping opens the door for regional organizations to avoid or bypass

[88] *See also* Certain Expenses Case, *supra* note 16, at 177; *See generally* Kourula, *supra* note 29, at 95; D.W. BOWETT, UNITED NATIONS FORCES 202 (1964) ("What . . . [is] really required . . . [is] the assertion of a right (which is not the right of self-defense but a more general right to maintain peace between rival factions) to act against any unit which . . . [begins] military action in defiance of . . . Security Council Resolutions.").

the Security Council authorization requirements of Article 53 by justifying their use of force as regional robust peace-keeping for which no Security Council authorization is needed.

In 1992, UN Secretary-General Boutros-Ghali's *Agenda for Peace* urged the greater involvement of regional organizations in intra-regional conflicts to help ease the financial and logistical burdens on the UN.[89] In addition, that increased role for regional organizations was urged to include not only military support for traditional peace-keeping, but also for peace-building, peace-enforcement, and humanitarian assistance. This expansion of peace-keeping functions crosses the traditional bright line between coercive enforcement actions and non-coercive peace-keeping.

3. Humanitarian Intervention.

Another area where use of force law may be unacceptably stretched concerns the doctrine of humanitarian intervention.[90] The doctrine of humanitarian

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[89] Boutros Boutros-Ghali, *Agenda for Peace*, U.N. Doc. A/47/227, S/2411 (June 17, 1992), *reprinted in* 31 I.L.M. 953 (1992). *See also* Rosalyn Higgins, *United Nations Role in Maintaining International Peace: The Lessons of the First Fifty Years*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 135, 141-42 (1996).

[90] *See*, Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'LL. 23 (1999) Humanitarian intervention is difficult to define. For purposes of this chapter it is the coercive use or threat of force unilaterally by states or by a regional organization to

intervention has a long and checkered past and remains controversial today.[91] It has been wrongly used throughout history, especially during the colonial era, as an excuse for stronger states to invade weaker states.

The principle concern, and danger, with an expanded embrace of humanitarian intervention as a predicate for the use or threat of force in absence of Security Council authorization is the very real risk of abuse by an intervening regional organization or one of its members. Those risks are accurately reflected in the following series of blunt questions, which sensibly call for caution in accepting humanitarian intervention as a stand alone exception to the prohibition

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halt the mistreatment by a state of that state's nationals in a way that shocks the conscience of the global community. Humanitarian intervention does not include a use of force in a state by a member of a regional organization to protect citizens of that member state because this right is an aspect of self-defense. *See* E.C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921).

[91] *See* Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231 (1999); Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J.TRANSNAT'L L & POL'Y 153 (1999); Derek W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 38, 44-46 (John Norton Moore ed., 1974); Ian Brownlie, *Humanitarian Intervention*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD, 217; Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD *at* 229.

of the use or threat of force against the territorial integrity or political independence of a state in Article 2(4) of the UN Charter[92]:

> . . . if NATO can decide on its own that Yugoslavia's treatment of its Kosovar Albanians warrants NATO's bombing, occupation, and de facto severance of Kosovo from Yugoslavia, why cannot every powerful nation or regional group, on the "mirror image" principle, do the same? Would the United States and NATO concede the Arab League's legal right to decide for itself that Israel's treatment of its Palestinian minority warranted the League's bombing of Israel? Can China decide that Indonesia's mistreatment of ethnic Chinese allows it to bomb Djakarta? Can Russia bomb Istanbul to make the Turks stop their effort to suppress the Kurdish separatist movement – hard to distinguish, incidentally, from Yugoslavia's efforts to suppress Kosovar Albanian separatism? And so on! Do we really want to say that the Charter and international law permit that kind of world?

[92] Bilder, *supra* note 91, at 162-63.

> And if NATO flouts and bypasses the Charter's basic and most significant principles, how can it hope to later invoke those principles against other states? Or, if the United States and NATO do claim those Charter principles still apply, will there be, as cynics claim, one Charter and one international law for the weak and one very different and less demanding one for the strong?

Again, acceptance of a presumption that regional organizations may undertake enforcement actions unless the Security Council denies authorization reduces the incentive for regional organizations to invoke and unacceptably stretch the doctrine of humanitarian intervention at least where humanitarian concerns are part of the international peace and security equation.

C. A Change in Charter Meaning Leaves a Gap in Accountability to the Global Collective.

If regional organizations, as asserted in this article, may now take enforcement actions unless the Security Council explicitly denies authorization to do so, there is a vacuum in the collective security system. That is, regional organizations are primarily accountable to their member states and not to the global community as a whole. Thus, what is needed is some

way to provide the requisite global accountability. One way to achieve this is through the General Assembly. For example, when the U.S.S.R. intervened in Hungary in 1956, the Security Council was, of course, paralyzed by the prospect of a Soviet veto to any condemnation of the Soviet action. However, the General Assembly filled the accountability void by declaring that "armed force against the Hungarian people" by the U.S.S.R. violated the U.N. Charter and "the political independence of Hungary."[93] In addition, the emergence of the information age makes it virtually impossible for a regional organization to hide or effectively misrepresent a use-of-force action.

Reliance on the General Assembly alone to fill the accountability gap on a case by case basis may not be satisfying both because General Assembly resolutions are not binding and they tend to come after the fact or not at all in some individual cases. On the other hand, it has also been determined in *Expenses* case that the General Assembly shares collective security responsibilities, especially when the Security Council is unable to function because of the threat or promise of veto by a permanent member. Thus, the General Assembly could appropriately recommend some sort of standing criteria, guidelines, or assessment framework for regional organization enforcement actions. This would help to ensure a measure of predictable

[93] G.A. Res. 1131, 11 U.N. G.A.O.R. Supp. No 17, (Dec. 12, 1956) *See* WHITE *supra* note 18, at 100-01.

and significant accountability to the global community. Such criteria could identify the sorts of regional organizations that might be able to take enforcement actions, state the general circumstances under which enforcement actions might be undertaken, require a level of evidentiary factual support for an enforcement action, and articulate the conditions under which enforcement actions should end. Importantly, they could also address the post enforcement obligation of the regional organization to ameliorate the consequences of the use of force.[94] Such criteria would also provide a standard by which regional organizations could decide whether they should take enforcement action.

In addition, of course, any State, NGO, or other international party could opine on the compliance of any regional organization with those criteria.

IV. CONCLUSION.

In the decades following adoption of the U.N. Charter, regional organizations have used force in a variety of circumstances without authorization of the Security Council. However, it is by no means clear that Security Council authorization is any longer a

[94]The Dutch Advisory Council on International Affairs (AIV) and the Dutch Advisory Committee on Issues of Public International Law at the request of the Dutch Government issued a report entitled *Humanitarian Intervention* which made similar recommendations when states unilaterally engage in humanitarian intervention.

sine qua non to a legitimate use of force by a regional organization.

The U.N. Charter and the subsequent practice of states call into question whether specific Security Council authorization is any longer required under Chapter VIII. That is, as to Chapter VIII, the meaning of the U.N. Charter may be changed to embrace a presumption that would allow a regional organization to take otherwise appropriate enforcement action unless the Security explicitly votes to deny authorization. Such a presumption admittedly may complicate global accountability. However, any resulting vacuum in the accountability to the global collective could be filled by the General Assembly recommending criteria for enforcement actions. In this way, force will be more likely to be used and used in a timely manner to maintain and restore international peace and security.

The old meaning of the U.N. Charter meant that, more often than not, either no enforcement action was taken when needed or enforcement action was unduly delayed. Accepting a changed new meaning in the Charter should help assure that enforcement actions will be undertaken when needed and in a timely manner. Such a result cannot help but strengthen, rather than weaken, the maintenance and restoration of international peace and security.