FUNCTIONS AND POWERS OF THE U.N. SECURITY COUNCIL AND THE O.A.S. IN RELATION TO THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

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I. Introduction: The legal framework

In order to properly examine the relationship existing between the Security Council's Functions and Powers and those of the Organization of American States in respect to the maintenance of international peace and security, let us first of all recall that this concern is the fundamental purpose embodied in the Charter of the United Nations, Article 1, without prejudice to other important goals pursued by the Constitution of the World Organization.[1] As it has been said, "The United Nations was the result of the determination of the allied powers to establish an effective mechanism for preventing a repetition of the disastrous events which scourged the world from 1939 to 1945. The dominating idea in the mind of every one at the San Francisco conference was that such a catastrophe must never occur again and to convert this idea into a living reality, international peace and security should be maintained by stable and lasting means. At that time the premise was agreed upon that international peace is indivisible, and that to maintain it effectively there must exist some supreme authority."[2]

In order to achieve this fundamental purpose, it can be noted that two principal avenues were foreseen, and even enunciated in Conjunction with the proclamation of such purpose in article 1 (1) of the U.N. Charter "... and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts aggression or other breaches of the peace", and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a machinery able to provide for: a) Enforcement action, it is to say, ways devised for application of measures required for a "non-pacific" settlement of disputes or at least to obtain that such disputes remain in a state of "pacific non-settlement" and b) Peaceful Settlement of Disputes.[3]

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[1] Eduardo Jiménez de Aréchaga, *Derecho Constitucional de las Naciones Unidas*, Madrid, 1958, p.36.

[2] Manuel Canyes, "The Organization of American States and the United Nations", Washington, 1963, pp. 44/45.

[3] Two clarifications need to be made for proper understanding of our work. First that generally we will indistinctly be referring to disputes, situations and related terms, though the U.N. Charter do make sometimes the distinction, mainly as far as the jurisdiction of its organs and the procedure to be followed are concerned. This is because in any case the Charter is dealing with those disputes, situations, etc., only when they concern international peace and security. Furthermore the provisions contained in Chapter V of the O.A.S. Charter and in the Pact of Bogota only refer to the pacific settlement of "disputes", and the provisions of Chapter VI of this "acts", "facts" or "situations" that endanger peace. Second, that in relation to peaceful settlement of disputes, we will only deal with those which endanger or are likely to endanger international peace and security, though the Inter- American System provides for means of pacific settlement of all disputes, as we will see below. As may be understood we must confine our work, to those disputes which may affect international peace and security because only in respect to them relationship between the U.N. and the O.A.S. arises.

In this connection, it is to be recalled that the United Nations Charter deals with those functions mainly in Chapter VI "Pacific Settlement of Disputes" and in Chapter VII "Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression". Chapter VIII on its part deals with the role of Regional Arrangements in this field of maintenance of international peace and security[4] providing for the link between the U.N. and the regional agencies both in connection with peaceful settlement of disputes and enforcement action, and establishing the conditions under which those regional agencies are to perform their activities in this respect. In this brief revision of the relevant legal framework of the United Nations Charter, let us refer last but not least to Article 24 which heading the paragraph of Chapter V corresponding to "Functions and Powers of the Security Council", summarizes the role that this organ is to perform according to the above mentioned Chapters VI, VII and, VIII, stating that: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council **primary responsibility for the maintenance of international peace and security**..."(emphasis added). Since the scope of our study is confined to the relationship between functions and powers of this organ of the U.N. (though some reference may eventually be made to other bodies of the world organization) and those of the O.A.S. in the maintenance of international peace and security, we will now also briefly review the later legal framework, departing from the uncontested premise that this organization is a regional agency in the sense of Chapter VIII of the U.N. Charter.

We will call this framework the Inter-American System since it is composed by the following three interrelated treaties: the O.A.S. Charter, the American Treaty on Pacific Settlement (Pact of Bogota) and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).

Logically, the O.A.S. Charter constitutes the basic instrument of the system and besides declaring in Article 1 that "Within the United Nations, the Organization of American States, is a regional agency" provides – *inter alia* – for the necessary regional machinery regarding "Pacific Settlement of

[4] It is widely recognized that consistently with the U.N. Charter philosophy and letter (Art. 52) regional agencies envisaged in this Chapter must be capable to deal with matters "relating to international peace an security" and that this is one of the clear conditions of the Charter to consider them as such. Again, let us reiterate that this capability should be understood in connection with the two elements involved; machinery for: a) peaceful settlement of disputes, and b) enforcement action. Cf. José M. Ruda, "Relaciones de la O.E.A. y la U.N. en cuanto al mantenimiento de la paz y seguridad internacionales", Revista Jurídica de Buenos Aires, 1961, p.25; Antonio Gómez Robledo, "El Tratado Interamericano de Asistencia Recíproca", II Curso de Derecho Internacional, CJI, 1975, p. 365; Jorge Castañeda, "Conflictos de competencias entre las Naciones Unidas y la Organización de Estados Americanos", Foro Internacional, 1965, p. 547; Domingo Acevedo, "Las Naciones Unidas y el arreglo de controversias internacionales entre Estados miembros de la OEA", XIV Curso de Derecho Internacional, CJI, 1987, p. 174; N.D. White, *The Law of International Organisations*, Manchester, 1996, p. 203; J.C. Merrills, *International Dispute Settlement*, Cambridge, 1998, p. 281.

disputes"(Chapter V) and "Collective Security"(Chapter VI). It is to say, provides for means able to maintain international peace and security, of course from the regional perspective and under appropriate co-ordination with the United Nations. Procedures to achieve pacific settlement of Inter-American disputes are expanded in detail in the Pact of Bogota (concluded at the same Ninth Inter-American Conference that elaborated the Charter in 1948) which also restates the general principles set forth by the Charter in Chapter V saying that all international disputes that may arise between American States shall be submitted to the regional peaceful procedures, before being referred to the Security Council of the United Nations.[5] As may be recalled the Pact of Bogota was explicitly contemplated in Article 27 (formerly art. 26) of the O.A.S. Charter which stated that "A special treaty will establish adequate procedures for the pacific settlement of disputes..."after enumerating them in article 25 (formerly art. 24: direct negotiation, good offices, judicial settlement, etc.).

Chapter VI of the O.A.S. Charter referred to "Collective Security" gives to the Inter-American System the capabilities of meeting the requirements to apply enforcement measures in the sense of those referred to in Chapter VII of the U.N. Charter, and of exercising the right of collective self-defence provided for in Article 51 of the U.N. Charter.[6] It is known that this Chapter VI took into account the Rio Treaty which had been already signed in 1947 and that it is this instrument the one which in a similar way to the Pact of Bogota, expands the Charter provisions, in this respect concerning action to be taken by State Members for the maintenance of peace and security in the region in cases other than those in which a peaceful settlement of dispute procedure is applied.[7] This action can take the form of "recall of chiefs of diplomatic missions, breaking of diplomatic relations, breaking of consular relations, partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic and radiotelegraphic

[5] Former art. 23 of the O.A.S. Charter contained a similar provision until it was modified by the Cartagena Protocol of 1985. For an analysis of the impact of this reform on the issue we are studying, see infra III.2.

[6] We will not be dealing with the right of collective self-defense since this is not a question necessary related to the U.N.- Regional Organization Relationship. It happens to be that the Inter-American System includes a collective self- defense agreement, but this is not the feature that qualify the O.A.S. as a regional agency. Collective self-defense (as well as individual, of course) is governed by Article 51 of the U.N. Charter, as we know. Conditions for application of enforcement measures under Chapter VIII are a different question and it is in this respect that we will study the U.N. Security Council - O.A.S. relationship. Incidentally, let us anticipate that in this interplay related to action taken by the O.A.S., the regional organization never invoked article 51 of the U.N. Charter and resorted to other basis for struggling for its autonomy *vis-à-vis* the Security Council.

[7] It should be noted, however, that the Rio Treaty also provides in Article 2 for peaceful settlement of controversies among American States "by means of the procedures in force in the Inter-American System", and that the Pact of Bogota in Article VIII states that: "Neither the recourse to pacific means for the solution of controversies, nor the recommendation of their use, shall in the case of and armed attack be ground of delaying the exercise of the right of the individual or collective self-defense, as provided for in the Charter of the United Nations."

communications; and use of armed force", according to Article 8 of the Rio Treaty. As it has been said in respect to this instrument, "in a way, it can be regarded as the Inter-American equivalent to Chapter VII of the United Nations Charter."[8]

In short, we have tried to briefly refer to the legal framework concerning our study, making reference to relevant provisions or sections of the four instruments related to this relationship between the United Nations Security Council Functions and Powers and those of the O.A.S. in the field of maintenance of international peace and security. This reference presupposed the knowledge of the content of those treaties and its only purpose is to focus our attention within a particular frame of legal norms whose interplay, we will consider below. A descriptive relation of the U.N. Charter and the Inter-American Treaties in this Chapter would fall outside the scope of a work of this nature and even in some cases would overlap our further discussion. Be therefore sufficient, this summarized introduction to the role of the two organizations in relation to the maintenance of international peace and then after having also stressed the two elements which compose this concept, let us now consider in the following Chapters the issues which arise from the relationship between the role of the U.N. Security Council and those of the Organization of American States.

II. Issues arising from the relationship between the United Nations Security Council Functions and Powers and those of the O.A.S

As it has been expressed above, the maintenance of international peace and security involves two main functions. The existence of a system able to provide for peaceful settlement of disputes and the establishment of a machinery capable to apply enforcement action, it is to say for a non-peaceful settlement of disputes or at least capable, to ensure that disputes remain in a state of "pacific non-settlement".

Precisely in considering the interplay related to the respective functions in these two fields by the United Nations Security Council and by the O.A.S., is when the two central issues concerning such relationship arise. Let us therefore in turn to each of them and us try to find out how this relationship can work out.[9]

In our study of the topic we will first refer to the analysis of the relevant provisions embodied in the U.N. Charter and in the Inter-American instruments, and we will also refer immediately after each legal analysis of the questions, to cases constituting the U.N. Security Council - O.A.S. practice in this field. In

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[8] Aida Levin, "The O.A.S. and the U.N.: Relations in the Peace and Security Field", New York, 1974, p. 19.

[9] I.L. Claude in "The O.A.S., the U.N., and the United States", International Conciliation, 1964, p. 18 observes "the problem of working out an acceptable relationship between the U.N. and the O.A.S. in relation to these two issues were foreshadowed in the controversies that raged at the San Francisco conference of 1945".

marking this references, however and to limitations of a work of this type, we would have to omit a number of details especially those connected with factual elements and we will concentrate rather, in the legal consideration of those cases with due regard as well to political factors involved.

1. Competences related to the peaceful settlement of disputes

As we pointed out in our Introduction we will only be considering those disputes that in the language of article 33 of the U.N. Charter, "the continuance of which is likely to endanger the maintenance of international peace and security", since these are the only concerned with the U.N. system. On its part the Inter-American system is of course also concerned with such kind of disputes but it deals as well with others not related to international peace and security.[10] In respect to this latter category, consequently there is no problem of relationship and consequently they are not relevant to our work.

Let us then advance the central issue which poses the relationship under consideration, namely that which arises in considering if a member of the O.A.S. party to a dispute with another member of the regional agency (all of them happen to be members of the U.N., as well) a) can choose to refer such a dispute whether to the Security Council or the competent organ of the O.A.S., seeking a peaceful settlement, or b) has to resort first to the regional agency before referring it to the Security Council. In other words: Do members of the O.A.S. have a direct resort to the U.N. Security Council or do they have such resort only after having somewhat exhausted the regional instance? And, by the same token, a related question arises: is there an obligation for the U.N. organs to submit local questions to the regional systems?[11] These are the main questions that arise in this context and can be understood under the concept of priority of regional procedures, or "Try O.A.S. first", as some authors have called it.[12]

To deal with this matter we will summarize below legal arguments: 1) Favouring the resort to the O.A.S. as a first instance, and 2) Advocating for a direct resort to the Security Council if the O.A.S. member concerned wishes to omit the regional instance. For purposes of simplification we would refer to these two types of approaches as Regionalist and as Universalist respectively.

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[10] Article 24 of the O.A.S. Charter and art. II of Pact of Bogota refer to the peaceful settlement of disputes without qualifying them as art. of U.N. Charter , Article 2 of Rio Treaty makes similar reference to that O.A.S. charter and the Pact of Bogota and even says **all** disputes.

[11] Alberto Herrarte, "Solución pacífica de las controversias en el sistema interamericano", VI Curso de Derecho Internacional, CJI, 1979, p. 228.

[12] I.e. Claude, *op. cit.*: Gordon Connel- Smith, *The Inter-American System,* London, 1966.

1.1. The Regionalist approach[13]

Legal reasoning put forward by this theory can be condensed as follows:

a) Chapter VIII of the U.N. Charter and in particular Article 52 (1) were clearly designed to recognize the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action. It would be inconsistent to proclaim this recognition and at the same time that members States of the regional organization by virtue of the U.N. Charter can ignore the role conceived for the first and resort directly to the world organization. If that had been the case no Chapter VIII would have been required. In this case nothing would have precluded the existence of arrangements providing for residual competences for dealing with such cases which were not to be considered by the U.N.

b) More precisely Article 52 (2) imposes a clear-cut obligation upon members of regional organizations "to make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council", which is self-explanatory.

c) This obligation is concurrent with other regulating the Security Council functions. In effect Article 52 (3) supplementing the above mentioned provision indicates that "The Security Council **shall** (emphasis added) encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies" etc.

d) Article 33 of the U.N. Charter explicitly enumerates the resort to regional

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[13] For constructions following this approach see Felipe Paolillo "Regionalismo y Acción Coercitiva Regional en la Carta de las Naciones Unidas", Anuario Uruguayo de Derecho Internacional, 1962; J. J. Caicedo Castilla, *El Derecho Internacional en el Sistema Interamericano*, Madrid, 1960; José María Yepes, quoted in Herrarte, *op. cit*., p. 229; F.V. García Amador, cited in Acevedo, *op. cit*., p. 190; Waldemar Hummer - Michael Schweitzer, "Article 52", en Bruno Simma (ed.), *The Charter of the UN: A Commentary*, Oxford, 1994, p. 709. In this context it is relevant to recall that at the San Francisco Conference – Committee III (4) – the Peruvian representative articulated his concern that the compromise which had been reached did not clearly preclude the Security Council from asserting jurisdiction over intra-regional disputes at any stage, he was disappointed that the exclusiveness of regional responsibility for dealing initially with local disputes had not been safeguarded. The President of the Committee, speaking for Colombia, offered reassurance and expressed that he saw no problem of double jurisdiction, but he believed that the newly adopted provisions established the rule that the Security Council must leave initial efforts at peaceful settlement of local disputes to regional agencies. I. Claude (*op. cit*. p. 11) commented the interpretations saying: "The Peruvian comment was more accurate than the Colombian... An ambiguous compromise had been reached, allowing champions of regionalism to assert that they had won a clear victory for the autonomy primacy of regional agencies, and universalists to congratulate themselves that the supremacy of the Security Council in matters affecting peace and security had not been impaired".

agencies or arrangements when it says that members **shall** (emphasis added) seek solution of their disputes through procedures therein mentioned, and this provision read in conjunction with those previously quoted leads obviously to the thesis of regional priority in handling disputes among members of the agency.

e) Moreover that submission is confirmed by article 37 (1), since this provision indicates that members to a dispute of the nature referred to in Article 33 shall refer it to the Security Council, **should they fail to settle it by means indicated in that article** (emphasis added). Regional agencies, as indicated in (d) above is one of these means of article 33 and it is therefore clear that parties to a dispute are to refer it to the Security Council failing settlement through the regional arrangement because they had to deal first within the regional context.[14]

f) Coming to the reference made by Article 52 (4) to articles 34 and 35 it is true that article 34 of the U.N. Charter provides that the Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security and that Article 35 states that any member (and provided some conditions, oven non members) may bring any dispute or any situation of the nature referred to in article 34 to the attention of the Security Council. But these provisions should be construed as meaning that being the case that the regional agency is dealing with the local dispute, what the Security Council **can only do is to investigate** if such matter by its continuation can lead to a controversy likely to endanger the maintenance of international peace and security, and in doing so, will proceed whether on its own initiative (art. 34) or on the request made by any member country (art. 35). Precisely, what member countries can only ask in those cases, is that the Security Council exercises its investigation powers and not others. Now if the Security Council concludes after its investigation that there exists a danger to international peace and security which overflows the regional orbit, then in can fully assume its competences under Chapter V of the U.N. Charter. If this is not the case, the Council should refrain from any handling of the situation while regional procedures are dealing with it.[15]

g) It is also true that article 24 of the U.N. Charter provides that Members of the world organization confer on the Security Council primary responsibility for the maintenance of international peace and security, but it should be noted that primary does not mean that this responsibility rests **only** on the Security Council. In other words there is also responsibility to that effect which lies on regional organizations

[14] Hummer-Schweitzer, in their contribution to Simma's commentary on the U.N. Charter, affirm that the principle of subsidiarity of the resort to the Security Council as contained in article 34 is substantially reinforced by Chapter VIII; therefore, even a serious attempt would not be sufficient, and a matter devolves to the Council only in the event that regional dispute-settlement instruments do not produce success in mediation despite the parties' best possible efforts (op. cit., p. 710).

[15] Paolillo, *op.. cit.* p.217/218; Yepes, *loc. cit.*; Hummer-Schweitzer, *op. cit.*, p. 709

as provided for by Chapter VIII, or which falls under the General Assembly as demonstrated by United for Peace Resolution[16] and even under individual States acting on their own or collectively in exercising the right of self -defense according to article 51.[17] Consequently, a restriction of Security Council jurisdiction which is contained in Chapter VIII cannot be invalidated by the mere reference to article 24.[18]

h) Article II of the Pact of Bogota and 2 of the Rio Treaty impose members of the O.A.S. the obligation to submit disputes among them to procedures conducted under the regional agency provided for by those instruments, **before referring such disputes to the United Nations Security Council.**

i) It is incorrect to assume that in case of aggression, Chapter VII comes into play rendering art. 52 inapplicable. This is so because jurisdiction depends not on the type of or reason of the conflict, but rather on the nature of the anticipated means of settlement.[19]

1.2. The Universalist approach

Legal arguments supporting this conception can be summarized as follows[20]:

a) Article 52 (4) of the U.N. Charter clearly states that regional procedures mentioned in its preceding paragraphs can in no way impair application of article 34 and 35. Functions and rights recognized by those two latter provisions are expressly safeguarded and therefore this implies to any interpreter their superiority in respect to the others.

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16 G.A. Resolution 377 (V) of 3 November 1950

17 Paolillo, *op. cit*., p. 213/214 . It should be clarified , however , that this argument is put forward by the author rather as an example of non absolute recognition of centralisation or universalism, than in the context of the problem related to the peaceful settlement of disputes . In any case however is intended to deny exclusive or excluding competence of the Security Council .

18 Hummer-Schweitzer, *op. cit*., p. 708.

19 *Id*., p. 713.

20 For constructions following this approach see Ruda, *op. cit*.; Claude, *op. cit*.; Connell Smith, *op. cit*., Jiménez de Aréchaga, "La coordination des systèmes de l´ONU et de l´Organisation des États Américains pour le règlement pacifique des différends et la sécurité collective", Recueil des Cours de la Académie de la Haie de Droit International 1964-III, p.419/456; Ronald St. J. McDonald, "Relaciones crecientes entre las Naciones Unidas y la Organización de Estados Americanos", Boletín Mexicano de Derecho Comparado, 1969; Sergio González Gálvez, "El caso de las Malvinas como un ejemplo de la validez de la tesis del regionalismo compatible", Anuario Jurídico Interamericano, 1982, p. 148; Antonio Remiro Brotóns, *Derecho Internacional*, Madrid, 1997, p. 967; Nguyen Quoc Dinh *et al*., *Droit International Public*, Paris, 1999, p. 819; Castañeda, *op. cit*., p. 549; Acevedo, *op. cit*., p. 205; Luis Marchand Stens, "La interrelación jurídica entre la ONU y la OEA", XXIV Curso de Derecho Internacional, CJI, 1997, p. 88; Merrills, *op. cit*., p. 283; Marco G. Monroy Cabra; "Solución de controversias en el sistema americano", en Manuel Rama-Montaldo (ed.), *Liber Amicorum Eduardo Jiménez de Aréchaga*, Montevideo, 1994, p. 1203.

b) Article 34 and 35 precisely consecrate the possibility of direct consideration by the security Council, whether acting on is own (Art. 34) or under the initiative of **any member of the United Nations** (Art. 35 1) which may bring to its attention **any disputes, or any situation** of the nature referred to in article 34 (emphasis added). Now, if any member of the United Nations enjoys this right, it is legally untenable that members of the U.N. which happen to be members of the O.A.S. can be denied of such a right. Furthermore how can the exercise of a direct resort be consistently ignored if proper consideration is given to right of non-members of the U.N. in this respect Art. 35. 2) and functions in the same field given to the general Assembly (Art. 11.2) and to the Secretary General (Art. 99).

c) In this connection, but also related to the whole interplay of U.N. Charter - Inter-American Instruments, it is to be recalled that Article 103 of the first mentioned Treaty provides that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreements, their obligations under the present Charter shall prevail." The O.A.S. Charter (Article 131; formerly 137), and the Rio Treaty (Article 10) go even beyond and not only safeguard obligations of American Sates under U.N. Charter but also their rights.

d) This subordination to the U.N. Charter given by the above mentioned provisions should also be taken into account when considering former article 23 of O.A.S. Charter and articles II of Pact of Bogota and 2 of Rio Treaty which prescribe that American States shall resort to the regional agency peaceful settlement of disputes procedures **before referring such disputes to the Security Council.** If this latter phrase is to be applied as preventing a direct resort to the Security Council, then that requirement of the inter-American treaties is in conflict with the U.N. Charter. For reasons which were explained in subparagraph c) above, it is needless to argue about the validity of such a requirement.

e) Direct authority of the Security Council cannot be contested if Article 24 of the U.N. Charter is to be rightly interpreted. It is true under article 52 (3) "The Security Council shall encourage the development of pacific settlement of local disputes through regional agencies..." etc. But the article goes on and says "either on the initiative of the States concerned or..."[21]

f) Now, having due regard to article 24, it cannot be claimed that the Security Council in the case of a regional dispute has to proceed necessarily in the way provided for in article 52 (3). Depending on its own judgement the Security Council may well decide to do so but regional arrangements are not the only way to handle the disputes. It is mentioned as one the possible means on equal footing with others in Article 33. Therefore the Security council, based on its primary responsibility can recommend to the parties other procedure drawn from article 33 (2). It can also decide to undertake an investigation according to article 34 and again

[21] Ruda, *op. cit.* p.40.

according to its own judgement in assessing the danger for the maintenance of international peace and security involved can decide to recommend to any other procedure for peaceful settlement, according to article 36 or even can decide to recommend the terms of settlement as provided for in Article 37 (2) *in fine*, **as it considers appropriate** (emphasis added). And it is also clear that if the parties so parties so request (regardless their membership to a regional agency) the Security Council can also make recommendations to them with the view to a pacific settlement of the dispute (article 38). All these functions and powers considered together with the premise set forth in article 24 and the legal subordination of the Inter-American Treaties to the U.N. Charter, to which we have referred before, leave no doubt about the lack of legal validity of the "Try O.A.S. First" principle.

g) Moreover, it should be kept in mind that chapter VII powers are by no means limited by the provisions contained in chapter VIII; in other words, whenever the Security Council considers that a situation involves a breach to the peace a threat to the peace or an act of aggression, the Security Council retains full powers regardless of the competence regional organizations may have on the affair.[22]

1.3. Cases before the Security Council

a) Guatemala 1954

On 19th June 1954 Guatemala simultaneously appealed to the Inter-American Peace Committee and to the U.N. Security Council requesting the necessary measures to halt the aggression which was taking place against this country, launched from neighbouring Honduras and Nicaragua through invader forces which were predominantly Guatemalan in composition and led by the Guatemalan exiled colonel Castillo Armas. The government of Guatemala in a more veiled manner also suggested that support to those irregular forces was also being given by the United States.[23] The following day Guatemala requested suspension of consideration of its complaint by that O.A.S. organ and on 21st June asked for a complete withdrawal of the case from it, in order to allow full U.N. Security Council handling of the case. This body held two meetings on the subject on 20th June and on 25th June 1954 in which the jurisdictional issue produced a full debate.[24]

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[22] This argument, which is the counterpart of argument i) of the Regionalist approach, has been proposed *inter alia* by Acevedo, op. cit., p. 205 and González Gálvez, loc. cit.; and was one of the views forwarded by Guatemala in 1954, as we shall see infra.

[23] After his retirement, President Eisenhower wrote that the anti-Arbenz force had invaded Guatemala from Honduras, and that he had supplied the force with aircraft during the invasion, trough a third country, thus co-operating "in providing indirect support to a strictly anti-Communist faction"; Mandate of change, 1953-56, Garden City, Doubleday 1963, pp. 425/426.

[24] SCOR 675th and 676 Mtgs. 9th Yr. Suppl for April, May and June, 1954.

At the 675th meeting of the Security Council held on 20th June 1954, the two Latin-American members of this organ (Brazil and Colombia) introduced a draft resolution which would have referred the case to the O.A.S., and asked for a report to the Council on the measures taken by the regional agency. Brazil noted that regional settlement of disputes was a ”tradition” in the Inter-American system, and remarked that Article 52 (3) of the U.N. Charter provided that the Security Council should encourage use of the regional forum. Colombia stressed that under Article 52 (2) and 33, members of the O.A.S. had “the duty to apply first to the regional organization, which is of necessity the court of first appeal”. The U.S. did not insist much on legal arguments but also mentioned Article 52 (2) in supporting the draft resolution. In doing so, this representative also resorted to practical grounds posing the question of “where the situation can be dealt with most expeditiously and most effectively” and saying that the “draft resolution does not seek to release the Security Council of responsibility; it just asks the O.A.S. to see what it can do to be helpful”. However, and despite these moderate remarks, the representative of the United States went a little further when he came to the political implications, and asserted that the anticipated Soviet veto of the Brazilian-Colombian draft would show “that the Soviet Union has designs on the American hemisphere” and addressing to the delegate of this country added “Stay out of this hemisphere and do not try to start your plans and your conspiracies over here”.

The representatives of Honduras and Nicaragua, who had been invited to participate in the debate as interested parties expressed their surprise for Guatemala’s contentions, took the legal position that the O.A.S. could properly assume jurisdiction over the case and that this should be referred to the regional agency. Consistently, they declined to enter into substantive discussion on the charges.

Opposition to this view was held of course by Guatemala, and by the Soviet Union, which supported its position in favour of asserting the Security Council jurisdiction. Arguments expressed by both delegations happen, logically, to coincide in general, but we will summarize them below separately in order to suggest the respective emphasis given to the respective contentions.

Guatemala pointed out that the case should be considered as arisen from an act of aggression, rather than as a controversy and therefore Articles 33 and 52 were not applicable. On the contrary, Articles 34, 35 and 39 clearly recognized Guatemala’s right to resort directly to the Security Council and by virtue of the function of this body in this respect. The Security Council should intervene directly and not through the regional agency.

The U.S.S.R. maintained that Article 52 (2) was not applicable to the case, since this was constituted by an act of aggression. The Security Council should immediately respond to it in accordance with Article 24 and consequently could not send the case to the O.A.S. and added to this argument a phrase that summarizes the Soviet understanding that the regional organization was dominated by the U.S.

which intended to use the inter-American machinery to cover and support its scheme to replace the Arbenz government: "Guatemala can expect nothing good from that body". Moreover, the representative of the U.S.S.R. expressed that since Guatemala had rejected the O.A.S. jurisdiction, the Brazilian-Colombian draft resolution proposing to send the case to the regional agency, was contrary to Article 36 (2) of the Charter.[25]

The draft resolution presented by Brazil and Colombia was rejected by 10 votes in favour (Brazil, China, Colombia, Denmark, France, New Zealand, Lebanon, Turkey, United Kingdom, and United States), 1 against (U.S.S.R.) and no abstentions.

Immediately afterwards the Council unanimously approved a resolution submitted by France, which called for "the immediate termination of any action likely to cause bloodshed and (requested) all members of the United Nations to abstain, in the spirit of the Charter, from giving assistance to any such action".

The intention of this resolution was far from being achieved and the situation continued deteriorating. Honduras and Nicaragua requested the Inter-American Peace Committee to designate a special subcommittee to visit them and Guatemala to investigate the situation. Guatemala rejected this move on the ground that she could not consent to having this matter brought before that body before the decision of the Security Council was fully carried out. Guatemala asserted the competence of the Security Council once again and finally along with the Soviet Union urged the Council to meet again to consider alleged violations of its resolution of 20th June. The body failed to adopt the agenda but some important discussion relevant to our work took place.[26]

Brazil and Colombia restated their positions both on legal and pragmatic grounds and expressed that the agenda item should be postponed since the O.A.S. was dealing with the matter and it was logical to wait for the report of the Inter-American Peace Committee. The U.S. joined this view and more strongly than in the previous meeting asserted the competence of the regional agency. He alleged that Guatemala's "effort to bypass the O.A.S. is, in substance, a violation of Article 52 (2) and that the U.S. had the legal duty to oppose Security Council consideration of the case until the O.A.S. had first dealt with it". The U.S.S.R. also restated its position affirming the jurisdiction of the Security Council. It said that the case was already under the consideration of this body which had even approved a resolution on it, and expressed that peaceful settlement procedures outside the Security Council cannot be imposed to a Member State of the United

[25] Article 36: 1. The Security Council may at any stage of a dispute of the nature referred to in Art. 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. 2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. 3...

[26] Guatemala could not participate in the debate since she was not a member of the Security Council and the agenda had not been adopted.

Nations.

Denmark, Lebanon and New Zealand supported the inclusion of the item in the agenda and expressed that the right to resort to the Security Council should be preserved, and that Guatemala should consequently be heard. France and the United Kingdom adopted an intermediate approach, stating the ultimate responsibility of the Security Council but refraining from supporting the discussion of the case. The matter, as mentioned above, failed to be included in the agenda by 4 votes in favour (Denmark, Lebanon, New Zealand, and the U.S.S.R.) and 5 against (Brazil, China, Colombia, Turkey and the U.S.) and two abstentions (France and the U.K.).

The Inter-American Peace Committee renewed its efforts to arrange an enquiry mission, and this time, probably as a result of the Security Council's inability to consider the case, Guatemala agreed to co-operate. Additionally the O.A.S. Council decided to call a meeting of Ministers of Foreign Affairs of the American States (the O.A.S. Organ of Consultation) for the 7th July to consider all aspects of the danger which implied for the peace and security of the continent, the intervention of the international Communist movement in the political institutions of Guatemala.[27]

However, before that date President Arbenz was ousted and Castillo Armas took office. The Subcommittee of the Inter-American Peace Committee which was supposed to visit Guatemala, Honduras and Nicaragua had only reached Mexico City and turned back. The O.A.S. cancelled the projected meeting of Foreign Ministers and the new government of Guatemala, informed the U.N. Security Council that the case was closed.

b) Cuba 1960

On July 1960 the Security Council met to consider Cuba's charges of interventionist policy and conspiracy to commit aggression which it lodged against the United States.[28]

Cuba cited Article 52 (4) as legal basis to directly resort to the U.N. Security Council and to request from it, appropriate measures in respect to the situation referred to above. Regional procedures, Cuba added, were not exclusive but permissive since Article 52 (2) was qualified by Article 52 (4). In case of any

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[27] The meeting was convoked under Article 6 and 11 of the Rio Treaty. See Tratado Interamericano de Asistencia Recíproca. Aplicaciones Vol. I, 1948-1959, Secretaría General, Organización de los Estados Americanos, Washington D.C. 1973, pp.154/155

[28] SCOR:15th Yr. Supp. for July, August and September 1960, Doc. s/4378. See also Ibid. 874th, 875th Meetings, 18 July 1960 and 876 Mtg., 19 July 1960. Claude observes that "the situation was similar to the Guatemalan case, in that it involved friction between the United States and a regime which it regarded as giving Communism a foothold in the Caribbean area", *op. cit.* p.34.

doubt, Cuba affirmed, Article 103 of the U.N. Charter and 102 of the O.A.S. Charter (at present Article 131) recognized U.N. Charter supremacy and therefore, no obligation to resort first to the regional agency was possible to maintain, despite Article 20 of the O.A.S. Charter (at present Article 24). Thus Cuba asserted its right to choose the Council in preference to the regional forum. With respect to the political arguments, let us recall that the Cuban spokesman said that the United States was intent upon repeating its Guatemalan tactic, covering its projecting action against the Castro regime with the mantle to be provided by the O.A.S. and that, more strongly this representative concluded, that Cuba was being asked "to allow ourselves meekly to be led away, like a docile beast, to the slaughterhouse".[29]

Poland and the Soviet Union supported Cuba's views affirming the right of the latter to directly resort to the Security Council and asserting the responsibility of this body to deal with the case. They cited Article 52 (4) in conjunction with Article 34 of the U.N. Charter, stressing that the latter referred to any dispute **or situation**, and expressing that this was a situation which was a threat to the peace, which according to Article 34 the Security Council could not neglect to consider.

The United States rejected that it had aggressive designs against Cuba, and argued for O.A.S. jurisdiction over the case both on legal grounds (Articles 33 and 52 (2) of the U.N. Charter and 20 of the O.A.S. Charter - at present Article 24-) and on the ground that the O.A.S. was already planning a foreign ministers' meeting to deal with it.

Britain and France joined the United States in asserting that Cuba had a legal obligation to "Try O.A.S. First". Italy leaned to this position through it did not expressly support the "Try O.A.S. First" doctrine. It noted that the O.A.S. was considering the case and therefore the Security Council should at that stage postpone its intervention but at the same time this body should reserve its final decision on the matter. China supported reference of the case to the O.A.S. but offered no comment on the jurisdictional issue.

Sri Lanka (Ceylon at that time) and Tunisia endorsed Cuba's right to have recourse to the Security Council, affirmed the competence of this body to deal with the matter but judged it expedient for that organ to make use of the O.A.S.

Argentina and Ecuador introduced a draft resolution which asked the Council to state its concern about the situation, take note of the fact that it was being considered by the O.A.S., adjourn consideration of the matter pending receipt of a report from the O.A.S., invite members of the O.A.S. to assist in promoting peaceful settlement and urge other states to avoid exacerbation of tensions between Cuba and the United States. It is to be noted that both Latin-American

[29] SCOR 15th Yr. 874th Mtg. 18 July 1960.

members of the Security Council refrained from giving support to the "Try O.A.S. first" doctrine, tried to avoid entering into legalistic discussion and rather based their proposal on pragmatic grounds. Argentina held that the adoption of the draft would not imply renunciation of jurisdiction by the Security Council and that it would simply recognize that the O.A.S. was dealing with the case, and that the Council should await the result. Ecuador espoused the doctrine that members of the O.A.S. could resort either to the regional organization or to the Security Council, as they may deem appropriate, but expressed that as a practical matter the Council should make use of the O.A.S.

The Soviet Union proposed amendments to the draft resolution to delete all reference to the O.A.S. They were rejected by 8 votes against (Argentina, Ecuador, Britain, France, Italy, China, U.S. and Sri Lanka), 2 in favour (Poland and the U.S.S.R.) and one abstention (Tunisia). Then the Council voted 9 to 0, with Poland and the Soviet Union abstaining, in favour of the original draft resolution, which consequently was approved.

c) Haiti 1963

The Security Council devoted two meetings to consider a dispute between Haiti and the Dominican Republic on May 1963, at the request of the former.[30] No serious controversial discussion took place,[31] since Haiti itself avoided it by agreeing that the Council should defer the case to the O.A.S., which had already begun efforts to promote a settlement. The Council by consensus dropped the matter, **while retaining it on the agenda.**

d) Panama 1964

On January 1964, Panama charged the United States, both in the Security Council and the O.A.S. with aggression.[32] This body met on January 10th to consider the matter.

Panama expressed its charges at the session, emphasized the need to revise the Treaty on the Panama Canal which it had agreed to with the United States in 1903, but it did not request any specific action to be taken by the Security Council, apparently leaving to the latter the initiative to be pursued in this respect. The Soviet Union supported Panama, and restated its views about the responsibility of the Council which it could not ignore this serious case.

The United States denied Panamanian charges, mentioned that the Inter-

[30] SCOR: 1035th and 1036th Mtgs., 8th and 9th May 1963.

[31] It should be noted, however, that Venezuela, a Latin-American member of the Security Council, supported the right to resort to this body vested on members of the O.A.S., under Articles 52 (4) of the U.N. Charter and 102 (at present 131) of the O.A.S. Charter.

[32] These charges were originated by an incident which took place in the Panama Canal zone between a group of Panamanians and U.S. military personnel assigned to that area.

American Peace Committee was dealing with the matter and was about to visit the area in which the incident had taken place to investigate the case properly. It affirmed the O.A.S. competence under U.N. Charter Articles 33 and 52 (2) and O.A.S. Charter Article 20 (now Article 24) and added that the Security Council would not relinquish its responsibility if it left the case to be dealt with by the regional agency. The Brazilian delegate suggested an appeal to the parties by the President of the Security Council as a means of asserting the legitimate concern of this body, which would strengthen O.A.S. efforts to settle the dispute.[33] Panama agreed to the suggestion, the Council dropped the matter and as in the Haiti case of 1963, it was clear the understanding that **the Council had to remain seized of the case.**

e) Panama 1973

On the 9th January 1973 the Minister of Foreign Affairs of Panama addressed a letter to the President of the Security Council inviting that body to meet in Panama City from the 15th to the 21st March to consider an agenda which would have as its general theme the "consideration of measures for the strengthening of international peace and security and the promotion of international co-operation in Latin America, in accordance with the provision of the Charter and the resolutions relating to the right of self-determination of peoples and strict respect for the sovereignty and independence of States". The Security Council met three times during January on the agenda "Request of Panama concerning the holding of meetings of the Security Council in Panama City". The President of the Security Council received a letter from the Chairman of the Latin-American group in which the support of the group for the Panamanian initiative was made known. In the Security Council discussions, Panama made explicit that the Panama Canal question was one of those important matters that the body should consider in Panama. Moreover the representative of this country stressed that Panama wished the Council, following the new policy of preventive diplomacy, to be able during its stay in Panama to realize *inter alia* the following: that in the so-called Panama Canal Zone there was a colonial situation, because that zone was a real enclave which was foreign to Panama's national jurisdiction, and which divided Panama into two parts and prevented the political, economic and social integration of the Republic, thus running counter of international tension where a dangerous and potentially explosive situation existed. Panama claimed effective sovereignty and complete jurisdiction over its entire territory as basic points for a new treaty for the Canal".[34] In the same meeting the United Kingdom said that if it was the wish of the majority of the Council members to accept the invitation of Panama, the U.K. would be prepared to join in doing so; but at the same time expressed some concern about it, on grounds of relevancy and convenience, questioning also the appropriateness of holding such a meeting away from New York and precisely closer to the scene of a particular controversy. The United States also mentioned similar arguments in its intervention, but clearly expressed serious reservations

[33] United Nations Doc. S/PV.1086, 10th Jan. 1964

[34] SCOR; 16th January 1973, A.M.

about accepting the invitation of Panama.

To counter-argue about the possibility of discussing the question of the Canal and some others related to Latin-American relations with the U.S., it said that for proper functioning of the Council, it was essential that the meeting not be conceived as a means for bringing pressure on **bilateral issues** not currently before the Council; **If it were bilateral problems the best and traditional way to proceed would be through bilateral negotiations and thereafter, should the need arise, utilising the instrumentalities of the system, as provided under Chapter VIII and other relevant articles of the Charter.**[35]

All other members of the Council expressed their readiness to hold the special session in Panama, supported its initiative and most of them showed that they shared the concern of Panama on the question of the Canal.

On the 26th of January the Council approved with no objections resolution 325 (1973) deciding to hold meetings in Panama City, beginning March 15th and ending March 21st 1973 and stating that the agenda for these meetings should be "Consideration of measures for maintenance and strengthening of international peace and security in Latin-America in conformity with the provisions and principles of the Charter."

This decision was expressly supported by the African and Arab groups, which addressed their respective communications to that end to the Chairman of the Latin-American Group and these letters were transmitted to the Council.

The session in Panama gave opportunity for lengthy discussions related to the agenda *inter alia* on the question of the Panama Canal in which, as it can be realized, great attention was going to be devoted.[36]

On the jurisdictional problem only the U.S. made with some precision the point expressing certain reservation on possible action by the Council, though it was far from stating the "Try O.A.S. First" doctrine. The representative of that country said that while the Charter conferred the responsibility for maintaining international peace and security on the Security Council, it also provided - in Article 33, it specifically enumerated - many ways to resolve international issues before such matters were brought before the Council. And referring to the Panama Canal question added, that **if that organ were to take a partisan stand or to reflect only a parochial viewpoint, it would risk undermining the processes of bilateral and regional diplomacy which had served the hemisphere so well.** Panama rejected this view and asserted the competence of the United Nations, saying that its jurisdiction could not be diminished or limited by that of the O.A.S.

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[35] SCOR; 16 Jan. 1973, P.M.

[36] As planned the session took place from 15 to 21 March. The Council held 10 meetings during that period.

and expressing that the supremacy of the U.N. Charter provided by Article 103 was expressly recognized by (then) Article 137 of the O.A.S. Charter (at present article 131).

On the 21st of March the Council failed to adopt a draft resolution sponsored by Guinea, India, Indonesia, Kenya, Panama, Peru, the Sudan and Yugoslavia. The vote was 13 in favour (the co-sponsors plus Australia, Austria, China, France and the U.S.S.R.), to 1 against (United States), with 1 abstention (U.K.). That resolution would have had the Council take note that the Government of Panama and the United States in the Joint Declaration signed before the Council of the O.A.S. on 3 April 1964, had agreed to reach a just and fair agreement for the prompt elimination of the causes of conflict between them. The Council would have also taken note of the willingness shown by the Governments of Panama and the United States to establish, in a formal instrument, agreements on the abrogation of the 1903 Convention of the Isthmian Canal and its amendments, and to conclude a new, just and fair treaty concerning the Panama Canal, which would fulfill Panama's legitimate aspirations and guarantee full respect for Panama's effective sovereignty over all of its territory. And finally the resolution would have had the Council urge the United States and Panama to continue negotiations in a high spirit of friendship, mutual respect and co-operation and to conclude without delay a new treaty for prompt elimination of the causes of conflict between them.

The United States explained its veto saying that it was not appropriate for the Council to adopt a resolution dealing with matters of substance in a continuing bilateral negotiation. Furthermore, the representative of this country added that the draft resolution was unbalanced, incomplete and therefore subject to misinterpretation.

On the same day the Security Council approved resolution 330 (1973). The vote was 12 in favour to none against and three abstentions (France, United Kingdom and United States). Through this decision the Council urged States to adopt appropriate measures to impede the activities of enterprises which deliberately attempted to coerce Latin-American countries, and requested States, with a view to maintaining and strengthening peace and security in Latin America, to refrain from using or encouraging the use of any type of coercive measure against the States of the region.

France, the United Kingdom and the United States explained their abstentions saying that matters being dealt with by the resolution fell outside the competence of the Council and suggested that the proper forum would be the General Assembly and/or the Economic and Social Council. The United States added that it would not and did not condone the use of coercive measures by one State to secure advantages from another in violation of international law and that also wanted to clarify that it did not accept the premises of the resolution that any such coercive measures were being used.

f) Malvinas 1982[37]

The question of the interrelationship between U.N. and O.A.S. showed a different dimension during the Malvinas conflict. This case was unlike the ones we have considered so far in two main aspects: a) the case involved a non-O.A.S. State, the United Kingdom; and b) the Security Council had already intervened in the matter when the question was presented to the O.A.S.[38]

Immediately after the Argentine take-over on April 2nd the Security Council held a meeting and approved Resolution 502 (1982), demanding the immediate withdrawal of Argentine troops and urging the parties to reach a diplomatic arrangement.

On April 19, when the British troops were about to invade the islands, Argentina convoked the Consultation Organ of the O.A.S., in pursuance of arts 6 and 13 of the Rio Treaty.[39] Two days later, the Permanent Council convoked the Consultation Organ to "consider the grave situation presented in the South Atlantic" and decided to convene a meeting on 26 April 1982.[40]

Two meetings where held by the XX Meeting of Consultation on this matter. The first one (26/28th April) adopted Resolution I, in which the U.K. Government was urged to the "immediate cease of hostilities ... and to abstain from any act which may affect the Inter-American peace and security". The Argentine Government was also urged to "abstain from taking any action, which may aggravate the situation". Finally, the resolution encouraged both Governments to establish an immediate truce and to start negotiations leading to the pacific settlement of the conflict.[41]

While Colombia adopted an isolated stance denying O.A.S. jurisdiction on the matter, most of delegations held either the existence of concurrent jurisdiction between the O.A.S. and the U.N., or the right of member state to opt between both systems (Chile, Trinidad & Tobago, U.S., Ecuador, Mexico, Nicaragua, and

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[37] This conflict involved a number of very complex legal and political issues that will not be dealt with here; we will limit ourselves to point out some aspects of the question that have some bearing on our subject.

[38] While some authors consider that there is no per se contradiction nor incompatibility in the decision of a O.A.S. organ to intervene after the Security Council had been seized on the matter (Acevedo, op. cit., p. 192), others find that in this case O.A.S. lacked jurisdiction under chapter VIII since when third states are involved there would be no "local dispute", and thus art. 52 would not be applicable (Hummer-Schweitzer, op. cit, p. 696)

[39] OAS Doc. CP/Doc.1253/82, April 19th, 1982

[40] Eighteen member States voted in favour of the meeting and three (Colombia, Trinidad Tobago and U.S.) abstained. Acta de la Sesión Extraordinaria del Consejo Permanente, 21st April 1982, Doc. CP/ACTA 493/82

[41] This resolution was adopted by 17 votes in favour and four abstentions (Colombia, Chile, U.S. and Trinidad Tobago). Doc. OEA/Ser.F.II.20, docs. 33/82 and 28/82 rev. 3, corr. 1.

others).[42] Therefore, even if the priority of the O.A.S. was not at stake and thus was not discussed in the Meeting, the debates confirmed the growing tendency among O.A.S. members towards the acceptance of the "concurrent jurisdiction" theory.[43]

g) Nicaragua 1983

This case is similar to the previous one in that it involved an attempt by the O.A.S. to intervene in a question already under consideration by the Security Council.

On March 23 1983 the Council held a meeting to consider a complaint of Nicaragua regarding acts of aggression against that country.[44] After eight sessions the Security Council did not resolve the question of jurisdiction or adopt any decision, but continued to be seized on the matter.

On March 30, Honduras asked for a session of the O.A.S. Permanent Council to urge Central American countries to initiate negotiations in order to achieve lasting agreements to restore peace and security in the region.[45] The Nicaraguan representative, while not rejecting the possibility of a "dialogue" within the O.A.S., indicated that Nicaragua had already presented a claim before the Security Council and that therefore the issue was under the jurisdiction of the U.N. He also upheld the right of O.A.S. members to choose between the U.N. and the O.A.S.[46]

During the debates some representatives expressed their concern about the jurisdictional issue, but the Permanent Council did not decide upon it and finally the question was postponed indefinitely.[47]

Meanwhile, the U.S. representative to the U.N. expressed in the Security Council that the O.A.S. was dealing with the problem, stating that under article 52 of the Charter, regional problems are better resolved on the regional level.[48] The Salvadoran and Honduran representatives also forwarded similar views, stressing that the O.A.S. was the appropriate forum to deal with the situation,[49] and that O.A.S. members had the duty under the O.A.S. Charter to submit their controversies to the O.A.S. before turning to the Security Council.[50]

It should be noted, however, that these opinions presupposed that the O.A.S.

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42 *Id*., docs. 24/82, 27/82, 28/82, 33/82 , 67/82.
43 Acevedo, *op. cit*., p. 193
44 Security Council, doc. S/15651 (March 22, 1983)
45 OEA, doc. CP/doc.1354/83, p. 1
46 OEA, doc. CP/ACTA 520/83 (April 5, 1983)
47 Acevedo, *op. cit*., p. 202
48 Security Council, doc. S/15689 (April 8, 1983)
49 *Id*., doc. S/15694
50 *Id*., doc. S/15691

had already decided to consider the Honduran proposal, when in fact such decision had not been taken, other than expressing support for the so-called "Contadora Group".[51] So even if no actual conflict between the U.N. Security Council and the O.A.S. has arisen, this case is important because it showed that the Security Council did not consider itself to be bound to refer the issue to the regional system, which, unlike the Malvinas case, fell more or less easily on the "local dispute" category.

The issue was addressed, albeit indirectly, by the International Court of Justice in the Nicaragua case (1984). The Court held that "the existence of negotiations should not prevent the Security Council and the Court from exercising their functions according to the Charter (emphasis added)."[52]

2. Competences in respect to enforcement measures

The relationship between the O.A.S. and the United Nations Security Council in this field poses the other central issue, which we mentioned at the beginning of this Chapter II, namely the issue of the O.A.S. autonomy.[53] The question leads to the discussion to establish how enforcement action or measures[54] can be applied by a regional agency, in our case the O.A.S.; and more precisely under which conditions these measures can be applied by such agency.

Perusal of the Charter provisions leads to the conclusion that the Security Council is the sole judge of the measures to adopt in this field, while regional organization are only enforcing agents of those measures, in a framework of total subordination.[55] Practice, however, has shown that such subordination is not that strict, whereas the O.A.S. and other regional organizations have managed to acquire some degree of autonomy in this domain.

This discussion has its main point in the definition of the term enforcement measures, as we will see below, since such definition is given nor by the U.N. Charter neither by the Inter-American Treaties. Moreover to advance the issue and put it in simple terms, let us say that the point arises when asking if enforcement measures are those contemplated in article 41 and 42 of the U.N.

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[51] Acevedo, *op. cit*., p. 203

[52] Case Concernig Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), I.C.J. 1984, p. 440

[53] This terminology is used *inter alia* by Claude, *op. cit*. pp. 18 and 47.

[54] We will be using the word "measures" or "actions" indistinctively as many writers do. However, some very interesting distinction has been made in this respect: see R.-J. Dupuy, "Organisation internationale et unité politique: la crise de l'Organisation des États Américains", Annuaire Français de Droit International (1960) pp. 185, 212. We will also be using in the same manner the word "sanctions". Edem Kodjo "Accords régionaux" en Cot Pellet (eds) La Charte des Nations Unies, Paris, 1991, P.823.

[55] Marc Perrin de Brichambaut, "Les relations entre les Nations Unies et les systèmes régionaux", in Société Française pour le Droit International (ed.), *Le Chapitre VII de la Charte des Nations Unies*, Paris, 1995, p. 98; Remiro Brotóns, *loc. cit*.

Charter (which have their parallel in the Inter-American System) or if they are only of the kind provided for in article 42, namely when they imply the use of force. This definition is of paramount importance since according to article 53 of the U.N. Charter enforcement action can be applied by regional agencies, only in two cases:[56] a) under the Authority of the Security Council, or b) with the authorization of this organ.

It is obvious that depending on the answer that is given to the question of definition of enforcement measures the degree of autonomy of the regional agency will vary, since authorization by the Security Council may or may not be required for measures of the type of article 41.

There are other related questions i.e. the time in which the authorization is to be given, the formalities which requires, the differentiation of enforcement from provisional measures, to which we will refer in turn.

2.1. The term enforcement measures

As pointed out by F. Paolillo,[57] the majority of legal doctrine (and also himself) considers enforcement measures those of the two types included in articles 41 and 42 of the U.N. Charter, it is to say regardless they imply or not the actual use of force. Consequently application of any of these measures has to meet one of the two requirements of article 53 if they are to be applied by regional agencies, whether these agencies act under the authority of the Security Council or they act under its authorization.

Legal arguments supporting this trend can be summarized as follows:

a) the *travaux préparatoires* indicate so, though it can also be said at that time little attention was paid to defining enforcement action and that delegates to the San Francisco Conference spent most of their tine trying to define exceptional circumstances in which action could be taken without Security Council authorization (self-defense and action against enemy states).[58]

It can be recalled that two Latin-American countries (Brazil and Venezuela)

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[56] For reasons which need little explanation in a work of this kind, we will omit consideration of the question related to enemy states.

[57] Paolillo, *op. cit.*, p.224, along with others quoted below. See also among supporters of this trend Hans Kelsen "Collective security and collective self- defense under the Charter of the U.N." in American Journal of International Law, October 1948, p.786, and also "The Law of the United Nations", London, 1950, p. 724/25; Gómez Robledo; *op. cit.*, p. 372; Castañeda, *op. cit.*, p. 558; González Gálvez, *op. cit.*, p. 154.

[58] Michael Akehurst, "Enforcement Action by Regional Agencies, with special Reference to the Organization of American States", British Yearbook of international Law, 1967. See also U.N.C.I.O. Vol. II, pp. 20/24; note as well that Committee IV. 3's report on what subsequently became Articles 41-50 was entitled "Mechanism of Enforcement measures" (*ibid.*, vol. 12, p.508).

seemed to have understood at San Francisco that enforcement action included both types of measures[59]. Even the United States had regarded them accordingly[60].

b) As we know the only exception to the principle of non-intervention in matters of domestic jurisdiction is, according to article 2 (7), that it "shall not prejudice the application of enforcement measures under Chapter VII". Now if we consider that enforcement action is only that which imply the use of force, in the case that the Security Council is confronted with a threat to the peace arising from matters within the domestic jurisdiction of a State, it would only be able to take military action and it could not apply measures provided for in Article 41. This reasoning clearly leads to an absurd and contradictory result. Absurd because it requires the application of the most radical measures when it may be not necessary such action and it would even be unwise to resort to them. Contradictory because article 42 treats military action as something more drastic than the other type of sanctions something which is only to be applied" should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate".[61]

c) Article 50 provides that a State, facing economic problems as a result of enforcement action against another State, shall have the right to consult the Security Council with regard to a solution of those problems. It would be inconsistent that such a right could only be claimed when it is the case of the use of force (if enforcement action is interpreted in that restrictive manner). Precisely the need of exercising such a right and its justification is equally found when problems, which that State is facing are caused by economic sanctions to a third State. To state the opposite would imply that the right to consult about economic problems by the State concerned is not applicable in the case of economic sanctions[62]. It seems not necessary to qualify this conclusion nor to argue about techniques of interpretation of law in order to restate the invalidity of the premise on which it is based.

d) It would also be absurd for members of the U.N. to be allowed to aid States against whom the Organization was taking non-military sanctions, while being forbidden by article l2 (5) to aid States subject to provisional measures or military sanctions, and that would be the case if we understand enforcement action mentioned in this article as meaning the use of force only.[63]

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[59] See Venezuela statement in U.N.C.I.O., vol. 4, pp. 265/6 and the Brazilian draft amendment in vol. 4 p.829. This draft was not put to the vote.

[60] In two draft plans for the Charter including one used as a working paper at Dumbarton Oaks, the United States had included commercial financial and economic measures within the framework of enforcement action. "Post War Foreign Policy Preparation 1939-1945", "U.S. Dept. of State, Pub. 3580 Washington: GPO", 1949, pp. 583, 596. Claude, *op. cit.* p.50.

[61] Ruda, *op. cit.*, p.60; Paolillo, *op. cit.* p.236; González Gálvez, *op. cit.*, p. 156.

[62] Ruda, *op. cit.*, p.61.

[63] Manuel Rama Montaldo. Anuario Uruguayo de Derecho Internacional; Montevideo 1962, p.386.

e) Article 20 (formerly 19) of the O.A.S. Charter provides that no state can apply or encourage enforcement measures of economic and political character to compel the sovereign will of another State and to obtain from this any kind of advantage. It is therefore clear that the use of force is not an essential element to the concept of enforcement measures, even within the inter-American legal framework.

The view supporting the restrictive interpretation of the term enforcement measures, it is to say requiring the use of force to qualify them as such can be summarized by the quoting of the following passage of a well known report by Dr. Alberto Lleras Camargo, then Director General of the Pan American Union:[64]

> "In the Charter of the United Nations there are two types of measures closely co-ordinated with the procedure to be followed in the Security Council when faced with threats of aggression, with the refusal of the States to comply with the recommendations of the Council, or with the breach of the peace. The first type is that of article 41, according to which the Security Council is empowered to decide what measures **not involving the use of armed force** are to be employed to give effect to its decisions, and it is empowered to call upon the Members of the United nations to apply such measures. But if these measures are or have proved, to be inadequate, coercive measures will next be applied, with the use of air, sea, or land forces. There is a clear distinction for the reader of the Charter between the measures of Article 41 (enforcement action) which are not coercive, in the sense that they lack the element of physical violence that is closely identified with military action, and those of article 42. Enforcement action, with the use of physical force, is obviously the prerogative of the Security Council, with a single exception: individual or collective self-defense. But the other measures, those of Article 41, are not; it may even be said that it is within the power of any State – without necessarily violating the purposes, principles or provisions of the Charter – to break diplomatic, consular, and economic relations or to interrupt its communications with another State."

In commenting this passage Ruda[65] observes, and we share his view, that Lleras Camargo's Report involves a fundamental misconception. One thing is that a State can individually decide to take any measure of Article 41 and another thing is that those measures be taken as enforcement measures by the organization.

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[64] Inter-American Conference for the maintenance of continental Peace and Security, Report on the Result of the Conference Series Nº 53, Washington D.C., Pan American Union, 1947, pp. 41-42. It is interesting to recall that Lleras Camargo, precisely, had been the Chairman of Committee 4 of Commission III, which dealt with "Regional Arrangements" at the San Francisco Conference of 1945. This approach is also followed by Caicedo Castilla, *op. cit*., p. 335; Jiménez de Aréchaga; *El derecho internacional contemporáneo*, Madrid, 1980, p. 168; Marchand Stens, *op. cit*., p. 80; Remiro Brotóns, *op. cit*., p. 968; Merrills, *op. cit*., p. 282..

[65] Ruda, *loc. cit.*; cf. González Gálvez, *op. cit*., p. 155.

From the individual point of view, it is correct that the Charter has not forbidden States to break diplomatic relations, etc.; but what it is not allowed is to resort to the threat or use of force, according to Article 2 (4). If the Security Council decides to take one of those measures, because of the existence of threats to the peace, breaches of the peace or acts of aggression, it is taking an "effective collective measure" in the sense of Article 1 (1). And this decision is binding upon all Members, being in agreement or not, since they had agreed to accept and carry out such decisions by virtue of Article 25. To summarize, once thing is a measure of individual character and another is a collective one as qualified by the U.N. Charter.

2.2. Opportunity in which the authorization is to be given

It can be said that there is no question that the authorization by the Security Council is needed only for the **application** of enforcement measures and it is not required for the adoption of them by the regional agency.[66] Furthermore, it is added that the Security Council's authorization is not needed until it is a question of actually putting the previously agreed plans into effect. This permits contingency planning in advance.[67]

Now, can the authorization be postponed until after the enforcement action has started? The Soviet Union seemed to think so in 1960, when suggested that the Security Council should approve sanctions which the O.A.S. had imposed, with immediate effect, upon the Dominican Republic sixteen days earlier. However the delegation of France opposed to this suggestion saying that "to attempt to apply Article 53, to this case (as the Soviet Union sought to do) would be self-contradictory, since the provision invoked involves the authorization by the Security Council and it is clear that this authorization must be given in advance."[68]

It is submitted that the authorization should be previous to the application of enforcement measures by the regional agency as the majority of the doctrine affirms. To hold otherwise might lead to encourage illegal acts, because regional agencies would be tempted to initiate enforcement action in the hope that the Security Council would give its authorization, but this hope might not always be fulfilled. In other cases the Security Council might feel that it would be politically awkward to withhold authorization for what had already been done; confronting the Security Council with *faits accomplis* would therefore fetter the discretion which Article 53 intended it to enjoy. Even more *post facto* denial by the Security Council could lack of practical effect since detrimental consequences of enforcement measures, which had been applied by the regional agency, may prove to be difficult or impossible to reverse.[69]

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[66] Paolillo, *op. cit.* p.222; Ruda, *op. cit.* p.59; Gómez Robledo, *loc. cit.*; Jiménez de Aréchaga, *op. cit.*, p. 170.

[67] Akehurst, *op. cit.* p.214; Jiménez de Aréchaga, "La coordination ...", p. 497.

[68] SCOR; 15th Year, 83rd Mtg., 8 September 1960.

[69] *Inter alia* see: Akehurst, *loc. cit.*, Paolillo, *op. cit.* pp. 237/38; Ruda, *loc. cit.*; Remiro

2.3. Formalities required for the authorization

The question here consist on determining whether authorization means an express decision by the Security Council or it can be drawn as implicitly conceded. Though we will refer to specific cases below, it is necessary to consider some relevant aspects of two of them, to point out the controversy regarding this issue. In the case of the O.A.S. sanctions against the Dominican Republic in 1960 the Security Council could not **approve** them as suggested by the Soviet Union, but took note of those sanctions in a decision.[70] Afterwards this resolution was going to be interpreted in two different ways: 1) The United States would maintain that no authorization by the Security Council was needed for those measures applied by the O.A.S. (It should be recalled that in the Dominican Case of 1960 only non-military measures were applied), 2) The Soviet Union would read the resolution saying that in "taking note" of the O.A.S. action without expressing disapproval, the Council had implicitly approved the action and thus establish its competence to give or withhold approval. I. Claude observes[71] in this respect, that "for this reason the Soviet Union had refrained from exercising its veto power. Moreover, it interpreted the views of members who had advocated evasion of the legal issue (this was in fact the one related to the definition of enforcement measures), as indicating that they had not intended to set a precedent, but that they wished instead to leave the door open for future determination of the meaning of Article 53."

This question of implicit authorization paradoxically was later put forward by U.S. legal advisers to the Department of State when arguing that the imposition of the quarantine against Cuba during the missile crisis in 1962 was done under an O.A.S. resolution and that resolution was not contrary to article 53 of the U.N. Charter. Though, as we will see when referring to this case, this was not the main argument, directed to evade Security Council control, it is precisely the one relevant to this point and we prefer to make reference to it here rather than below when dealing with the case. Such type of extensive interpretation of authorization, as derived from a kind of acquiescence was put in by L.C. Meeker[72] in the following way: "The Security Council did not see fit to take any action in derogation of the quarantine. Although a (draft) resolution condemning the quarantine was laid before the Council by the Soviet Union, the Council subsequently, by general consent, refrained from setting upon it, and instead chose to promote the course of a negotiated settlement... Authorization may be said to have been granted by the course which the Council adopted."

To the same direction, but trying to avoid inconsistency with the U.S.

Brotóns, *loc. cit.*; Jiménez de Aréchaga, *El Derecho .... loc. cit.*; Gómez Robledo, *op. cit.* p. 373; Georg Ress, "Article 53", in Simma, *op. cit.* p. 733.

70 SCOR; 15th Year, 895 Mtg., 9 September 1960, p.5.

71 *Op. cit.* pp. 52/53.

72 L.C. Meeker, "Defensive quarantine and the Law", American journal of International Law,57, 1963, p.515.

interpretation of the resolution of the Security Council related to sanctions imposed by the O.A.S. upon the Dominican Republic in 1960[73] other principal legal adviser, Chayes, said:[74] "The debates in the Security Council in the case of the Dominican Republic revealed a widespread readiness to coincide that the requirement of 'authorization' does not import prior approval, but would be satisfied by subsequent action of the Council, or even a mere 'taking note' of the acts of the regional organization."

Summing up, these arguments try to states that authorization can be inferred from the Security Council's failure to pass a resolution condemning the enforcement action and that an analogy can even be drawn from the customary rule developed in the practice of the Security Council concerning abstentions of Permanent Members.

Notwithstanding, we share the view[75] that this customary rule is based on the *travaux préparatoires* and on a continuous practice, and acceptance by all states concerned. Consequently such analogy might be difficult to be allowed since none of these elements are present here.[76]

Precisely *travaux préparatoires* related to the issue of regional autonomy, as it may be recalled, clearly show that States represented in San Francisco and particularly American States were aware that authorization by the Security Council required an express consent and that the veto power could preclude the achievement of this requirement. And it is also known that the compromise reached at that time regarding regional autonomy, especially advocated by Latin-American countries, was the inclusion of Article 51 and not the deletion of authorization prescribed by Article 53.[77] The whole lengthy discussion held at San Francisco would be otherwise meaningless. As M. Akehurst[78] says "if authorization had merely meant acquiescence the bitter dispute would have been pointless"; besides a distinction is to be made between acquiescence by a permanent member and acquiescence by the Security Council as a body; a permanent member which abstains, is probably not unwilling to see the resolution

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[73] It should be noted however that in this case the issue was regarding interpretation of the term enforcement measures.

[74] A. Chayes, "Law and the Quarantine of Cuba", Foreign Affairs, 41, 1962-63, pp. 552-556.

[75] McDougal and Gardner, "The Veto and the Charter", Yale Law Journal 60, 1951, pp. 258, 277/278.

[76] Moreover, and with regards to the argument put forward by the US that art 53 had lost its efficacy owing to the rebus sic stantibus clause given the impotence of the Security Council at that time, Prof. Conforti affirms that whoever holds such view must coherently conclude that the whole Charter and not only its individual provisions have terminated; The Law and Practice of the United Nations, Den Haag, 1997, p. 223

[77] For reference to this discussion see U.N.C.I.O. Vol. XII, and also comments made by Claude, *op. cit.* pp. 7/9.

[78] Akehurst, *op. cit.* pp. 217/218; White, *op. cit.*, p. 215; Remiro Brotóns, *loc. cit.*; Jiménez de Aréchaga, *loc. cit*; Ress, *loc. cit.*

passed, but failure by the Security Council to condemn a regional action (as the U.S.S.R. had proposed in the Cuban case) it is caused most possibly by an actual or prospective veto, even though other members (or even all the others) wished to condemn the action in question. To say in these circumstances that there is acquiescence by the Security Council does not seem to be legally based.

2.4. Enforcement measures and provisional measures

It can be said that little controversy has arisen in respect to the differentiation between enforcement measures and provisional ones, namely between measures contemplated in Article 41 and 42 of the U.N. Charter and those embodied in Article 40.

To differentiate one type of measure from the other is obviously important since this differentiation permits regional agencies to apply provisional measures autonomously, it is to say without Security Council's authorization.

It appears almost evident that this differentiation must be made and that consequently this is not the case of requiring authorization by the regional agency.[79] If provisional measures did constitute enforcement action - on the other hand -, a State which had been called upon to comply with provisional measures could be suspended from exercising the rights and privileges of membership under Article 5, and this would be incompatible with the principle laid down in article 40, that "such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned."

As Paolillo observes,[80] there is no provision in the U.N. Charter which forbids regional agencies to apply such provisional measures, provided that they are contemplated in their respective legal framework. Moreover, it can be worthy to preserve for regional agencies, this right of application of non-coercive measures, since through them in many cases it could also be possible to avoid having to resort to more radical measures.

2.5. Cases before the Security Council

a) Dominican Republic (1960)

This is the first case, which the O.A.S. autonomy in imposing sanctions issue was brought to the attention of the U.N. Security Council. As we know those sanctions were imposed upon the Dominican Republic by the Sixth Meeting of Consultation of Foreign Ministers of the American States, held at the request of Venezuela, at San Jose de Costa Rica. The resolution of the O.A.S. Organ of

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[79] Jiménez de Aréchaga, "La coordination...", pp. 465/466, Paolillo, *op. cit.* p.223; Ruda, *op. cit.* p.63; Gómez Robledo, *op. cit.*, p. 371.

[80] Paolillo, *loc. cit.*.

Consultation was approved on 20 August 1960[81] and it resolved that members of the regional organization apply sanctions, which consisted in the severance of diplomatic relations and partial economic embargo beginning with military equipment. In accordance with the resolution, the O.A.S. Secretary General reported to the U.N. on the matter[82]. Four days later the Soviet Union requested a meeting of the Security Council to deal with the subject "according to Article 53 of the Charter" and submitted a draft resolution for approving "the enforcement measures" taken against the Dominican Republic by the O.A.S.[83] Afterwards the U.S.S.R. revised its draft deleting the qualifications of those measures as sanctions and leaving the proposal for approval of the O.A.S. resolution.[84]

The Security Council devoted three meetings to the question of the Dominican Republic.[85] We will summarize the more important developments that took place in those meetings.

The U.S.S.R., backed by Poland, invoked the rule of Article 53 as unquestionably applying to the case. It had no doubt that the O.A.S. resolution had imposed enforcement measures and therefore authorization from the Security Council was required, since without such authorization, application of enforcement action by the regional agency would be contrary to the U.N. Charter.

The United States took an equally firm and dogmatic position counter-arguing that the Security Council authorization applies only to forcible measures, not to such diplomatic and economic sanctions as the O.A.S. was putting into effect against the Dominican Republic. Actions of the latter kind, it added, could legitimately be taken by any State in exercise of its sovereignty; hence it was inconceivable that Article 53 could be taken to restrict the right of a group of states to apply such measures. Additionally the U.S. declared that the O.A.S. foreign ministers had considered that the Charter only required them to inform the Security Council of their action, not to seek its approval. The United Kingdom, China, France, Italy, Tunisia and Venezuela (which was participating in the debate by invitation as an interested party) leaned towards the United States' view, but only the U.K. and Venezuela seemed absolutely confident of its interpretation of Article 53 and the related question of definition of enforcement measures. Argentina and Ecuador cosponsored a draft resolution jointly with the U.S. through which the Security Council would take note of the O.A.S. decision[86] but the two

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81 O.E.A. Sexta Reunión de Consulta, Doc. 25, Rev., p.4.

82 U.N. S/4476, 1 September 1960.

83 SCOR 15th Year, Supplement for July, August and September, 1960 doc. S/4477 and S/4481 and Rev. 1.

84 Claude, *op. cit.* p.49 observes that the political meaning of the Soviet move was clear. Promotion of Council approval of O.A.S. sanctions in the Dominican case was designed to lay groundwork for Soviet opposition to Council approval - that is for Council disapproval - of eventual O.A.S. measures against Cuba. These measures were actually taking later by the O.A.S. as we will see below.

85 SCOR; 15th Year, 893rd to 895th Mtg. 8/9 Sept. 1960.

86 S/4484, 8 September 1960.

Latin-American countries regarded the legal issue as more or less open and based their view on practical grounds. Sri Lanka (then Ceylon) thought that the Soviet interpretation was probably correct, but in view of the uncertainty of the legal position, said that was prepared to vote for the draft resolution introduced by the three American countries, and that the words "takes note of" meant "concurs with".

In the end the Security Council passed the draft resolution tabled by Argentina, Ecuador and the United States by 9 votes, to none against and two abstentions (U.S.S.R. and Poland). The Soviet draft was subsequently withdrawn.

As M. Akehurst observed[87] this case revealed an important uncertainty about the legal issues involved.

In paragraph 2.3., Chapter II, of this work we pointed out that after the resolution was passed, the Soviet Union seized upon these expression of uncertainties to argue that the Security Council by taking note of the O.A.S. action without expressing disapproval, had implicitly approved it and thereby established its competence to give or withhold approval.[88]

The U.S., on the other hand took his vote as a clear vindication of its legal position,[89] as we have also seen above.

We regard the legal question as an open one and let us express that legal interpretation from a strictly logic point of view can lead to more than one valid juridical conclusion.

Let us come back to the case only to say that the majority voted for the resolution co-sponsored by the U.S. but the minority clearly supported the legal basis of its position. And now let us proceed to examine how the uncertainties we had referred to above, were developed in future cases.

b) Cuba 1962

As may be recalled the Eighth Meeting of Consultation of Ministers of Foreign Affairs of the American States held at Punta del Este (Uruguay) in January 1962 proclaimed that Cuba's Marxist-Leninist allegiances was incompatible with the aims and principles of the Inter-American System, suspended the Cuban Government from participation in O.A.S. and also placed an embargo on exports of arms to Cuba, as a sanction against this country for having fomented subversive activities in other Latin-American countries, particularly Venezuela.[90]

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87 *Op. cit.* p.190.

88 SCOR; 15th Yr. 895th Mtg. 9 Sept. 1960.

89 Claude, *op. cit.* p.52.

90 For text of the Final Act see SCOR: 17th Yr., -Supp. for January February and March 1962 (S/5976, 3 Feb., 1962).

Though Cuba complained against the U.S. and the O.A.S. sanctions, as well as other delegations attending the 16th session of the U.N. General Assembly did, little was said about the legal issue posed by the interpretation of Article 53. Draft resolutions introduced by Czechoslovakia, Romania and Mongolia, which were either expressly or by implication critical of the United States, were rejected.[91]

On the 27th February 1962 the Security Council met to consider a Cuban complaint against the O.A.S. sanctions taken at Punta del Este and against the U.S. Cuba qualified those measures as illegal and stated that the United States had "converted the O.A.S. into an instrument of aggression."[92] The agenda item failed of adoption since only four members favoured its inclusion Ghana, Romania, Soviet Union and the then United Arab Republic - Egypt -). The other seven members abstained. However some reference to relevant discussion can be made. The Soviet Union and the United States restated their respective positions, which they had expressed during the Dominican Republic case, except that this time the U.S.S.R. argued that the O.A.S. sanctions were contrary to the United Nations and O.A.S. Charters[93] and should not be approved. In any case, it insisted that O.A.S. sanctions without the authorization called for in Article 53 were invalid. The United States, together with Chile, the United Kingdom and Venezuela, argued that the precedent established in 1960 (Dominican Republic case) made it clear that the O.A.S. sanctions did not require authorization.

These arguments were further elaborated at a series of Meetings that the Security Council held from the 14th to 23rd March 1962 to deal with a request of Cuba which had asked the Security Council to seek an advisory opinion from the International Court of Justice on seven questions concerning the legality of the O.A.S. sanctions, including the question whether the sanctions were enforcement action and subject to Security Council authorization within the meaning of Article 53. Cuba also asked the Council to call for suspension of the sanctions pending receipt of the Court's opinion.[94] This time the council adopted the agenda without objections and invited Cuba to participate in its proceedings. Let us advance that the Cuban request was rejected by 7 votes (Chile, China, France, Ireland, United Kingdom, United States and Venezuela) to two against (Romania and the Soviet Union) with one abstention (Egypt); Ghana did not participate in the voting.

It can be noticed that this case involved several questions; whether the O.A.S. sanctions were subject to Council action, whether they were worthy of approval and the request to the Court itself. The questions were combined in Cuba's

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[91] G.A.O.R. 16th Sess., 1st Cmttee., 1231st to 1243rd Mtgs., 5 to 15 Feb. 1962; Plenary Mtgs. 1104th and 1105th, 19/20 Feb. 1962.

[92] SCOR, 17th Yr. Suppl. for Jan. Feb. and March 1962 (S/5080); see also SCOR 17th Yr. 991st Mtg. 27th Feb., 1962.

[93] It may be noted that neither the O.A.S. Charter nor the Rio Treaty did contemplate exclusion or suspension of a Member as was decided by the Punta del Este Meeting.

[94] SCOR, 17th Yr. Supp. for Jan. Feb. and March 1962 (S/5080, S/5986 and S/5095); 992nd to 998th Mtgs., 14 to 23 March 1962.

presentations and in the Council's debate. Let us briefly review relevant elements of the discussion.

Arguments against validity of measures applied by the O.A.S. and therefore maintaining the necessary authorization (or rather disapproval by the Security Council) since they were enforcement action in the sense of article 53 were put forward mainly by Cuba, Romania and the Soviet Union. These countries also challenged their opponents to let the Court decide on the correctness of the above mentioned assertions. This trend advanced arguments which we will try to summarize as follows:

i. Measures taken by the O.A.S. were enforcement action and consequently subject to control by the Security Council as provided for in article 53, and in conformity with the precedent established in the case of the Dominican Republic in 1960.

ii. Suspension from the O.A.S. was as the other measures an enforcement action illegally applied. Neither the O.A.S. Charter nor the Rio Treaty provided for such action but even if by implications that conclusion was going to be drawn, it is to say that the measures fell into the competence of the regional organization, it was clear that the measure constituted enforcement action since enumeration of article 41 of the U.N. Charter is not exhaustive. And of course these measures of Article 41 enforcement action even if they did not imply the use of force. Regarding this issue of the suspension, Cuba particularly, said that it was illegal because its choice of government was a matter solely within domestic jurisdiction.

iii. Sanctions might only be imposed in order to deal with a threat to the peace, a breach of the peace or an act of aggression and not in order to bring about the downfall of a Communist government in Cuba.

iv. In any case the validity of the O.A.S. action was also to be considered with due regard to Articles 103 of the U.N., Articles 102 (137 at present) of the O.A.S. Charter and 10 of the Rio Treaty, which clearly recognized the subordination of the regional system to the Charter of the word organization.

v. Finally, it is to be differentiated action which a State might individually legally take from a similar action, when it is taken by a group of States since the meaning and the consequences of the two cases are different.

The other main trend was led by the United States and it was also represented by Chile, China, France, Ireland, the United Kingdom and Venezuela. Its views favouring autonomy of the O.A.S. and legality of measures taken by it, as well as opposition to request an advisory opinion from the International Court of Justice can be condensed as follows:

i. Measures did not constitute enforcement action since they did not imply

the use of force. Enforcement action necessitating Security Council authorization referred only to military action. The precedent established by the Security Council in dealing with the Dominican Republic case in 1960, confirmed this assertion.

ii. Any State is free to break diplomatic or economic relations with another and therefore groups of states are entitled to do the same on a concerted basis, whether groups are regional or not.

iii. Decisions by regional agencies regarding membership and their constituent instruments were final and not subject to review by the Security Council. The representative of Ireland further elaborated this idea and recalled the political factors involved, eloquently: He said "To be effective, regional organizations must have a minimal degree of internal cohesion, a basic sense of common purpose. To deny regional organizations the freedom to exclude from the privilege of membership, Governments or States which, for one reason or other, seem to the other members to have ceased to subscribe to the aims and ideals shared by the membership as a whole would be to deprive regional organizations of the sense of community of interest and purpose which is the main reason for their existence, and by doing so, to reduce the whole concept of regional organization to a nullity."[95]

iv. Questions discussed should not be put to the Court, since they raised political and not legal issues. Besides the legal rule of Article 53 was so clear, especially after the Dominican Republic case of 1960, that it did not need interpretation by the principal judicial organ of the United Nations.[96]

We have tried to concentrate as much as we could in the legal arguments expressed before the Security Council but let us point out as well that the debate was as much political as legal. The ideological confrontation between the U.S. and the U.S.S.R. had found a new and important field within the issue of regional autonomy and within the American continent. I. Claude observes: "The United States was unwilling to tolerate the use of an instrument (the Soviet veto power in the Security Council) to embarrass or inhibit the anti-Communist activities, of the O.A.S. or its own anti-Communist activities..."[97] The issue of the suspension of membership reveals precisely that while socialist countries deemed possible to transpolate pluralist composition as the one of the U.N. to the O.A.S., their opponents were not ready to allow communist participation in the latter,[98] and for

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[95] SCOR; 17th Yr. 996th Mts. 21 March 1962.

[96] It should be noted that Egypt (then United Arab Republic) said nothing about the correct interpretation of article 53. Ghana on its part said that the Dominican Republic affair had left the correct interpretation of article 53 unsettled, and that it was therefore inclined to support reference of the question to the International Court of Justice.

[97] Claude, *op. cit.* p.57.

[98] France went so far as to characterise the O.A.S. sanctions as "a matter of collective protection which is justified under Article 51 of the Charter" S.C.O.R. 995th Mtg. 20 March 1962. It should be noted however that in none of the cases which involved O.A.S. sanctions, nor the regional organisation neither its members including the U.S. invoked this

that purpose regional autonomy had to be reaffirmed. Moreover, if a Security Council decision (or rather an absence of it) was able to produce this result, there was no reason for submitting the question to the Court, from the political perspective. It is true that legal (as well as political) issues were involved, but why to refer them to the International Court of Justice when diplomacy (though no consensus) could secure the goals pursued, even at the expense of leaving the legal issues unsettled.

A new legal question regarding enforcement measures and consequently related to the Security Council authorization was going to arise during the same year in respect to Cuba. On the 22nd October 1962 President Kennedy announced that the Soviet Union was installing missiles in Cuba for offensive purposes and demanded the immediate withdrawal. The U.S. simultaneously requested meeting of the O.A.S. Council and the U.N. Security Council. On the 23rd October that O.A.S. body acting provisionally as organ of Consultation decided to call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability; to recommend that member states, in accordance with Article 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures individually and collectively, **including the use of force** (emphasis added), which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet Powers military material and related supplies which may threaten the peace and security of the Continent; to inform the Security Council of the U.N. of this resolution in accordance with article 54 of the Charter of the U.N. and to express the hope that the Security Council will. . . dispatch United Nations observers to Cuba. . .etc.[99]

Immediately after this resolution had been passed President Kennedy issued a proclamation in which, relying on the O.A.S. decision he announced that the U.S. was imposing a quarantine on Cuba. Other Latin-American countries joined the U.S. co-operating, of course in a relatively modest manner if compared with the actions undertaken by the former, with the enforcement of that quarantine.

The issue of autonomy now involved the actual application of force.

The Security Council considered the crisis, following the request of the U.S. (to which we have referred to above) and those of Cuba and U.S.S.R., at its 1022nd to 1025th Mtgs., held between the 23rd and 25th October 1962.

The U.S. tabled a draft resolution calling for (i) the withdraw from Cuba of all missiles and offensive weapons, as a provisional measure under Article 40 of the U.N. Charter; (ii) the dispatch of U.N. observers to Cuba to report on compliance with the resolution; (iii) termination of the quarantine after the missiles had been withdrawn; and (iv) negotiation between the U.S. and the U.S.S.R..

Article.

[99] Text in S.C.O.R., 17Th Yr. l022 Mtg. 23 October l962, paragraph 81

The discussion in the Security Council contained few arguments of legal nature, especially in relation to the issue of regional autonomy.

The Soviet Union and Cuba argued that the missiles were intended for defensive purposes (e.g. deterring a United State invasion to Cuba); the United States action, they alleged, infringed the freedom of the seas, was an act of war contrary to Article 2 (4) of the Charter and increased the risk of thermonuclear war. In reply the U.S. said that the aggressive purpose of the missiles was proved by the secrecy and deceit with which the Soviet Union had tried to upset nuclear balance of power.

China argued that the quarantine entailed the use of force and therefore constituted action which could not be taken without Security Council approval and Egypt also expressed similar views.[100]

The solution was not going to be reached within the U.N. framework and the crisis was superseded by an agreement achieved between the two superpowers on the 28th of October 1962. The Soviet Union withdrew the missiles and the quarantine was lifted.

Afterwards certain legal justifications of the quarantine were published by U.S. Department of State legal advisers. We have referred above, in paragraph 2.3. of this Chapter, to some of them when we recalled opinions of Meeker and Chayes regarding the need of authorization by the Security Council and the acquiescence theory.

The other main argument used by the U.S. Department of State advisers was that enforcement action meant action taken under a binding decision, not under a recommendation; and the O.A.S. resolution of 22nd of October 1962 has only been a recommendation. In support of this view Meeker[101] cites the advisory opinion given by the International Court of Justice in the Expenses case. However, as M. Akehurst[102] points out, "in that opinion the Court treated U.N.E.F. and O.N.U.C. as not constituting enforcement action because they operated with the consent of the State concerned; the Court's distinction between enforcement action and peacekeeping action was not based on the distinction between a decision and a recommendation, but on the presence or absence of consent by the State concerned and Cuba and the Soviet Union did not consent to the quarantine". Furthermore, this author adds, "under Article 20 of the Rio Treaty, O.A.S. resolutions can never be more than recommendations, which, on Meeker's argument would mean that they were never subject to Security Council authorization." By the same token "application of this definition to the functions of the Security Council under Article 42 could not constitute enforcement action, since it is generally agreed that no State is under a duty to provide troops for the

[100] 1024th Mtg.; 24th October 1962
[101] *Op. cit.*, pp 521/522.
[102] Akehurst, *op. cit.*, pp 202/203.

Security Council unless it has agreed to do so, either under article 43 or under *ad hoc* agreements of the type used to constitute O.N.U.C. and yet military sanctions by the Security Council are surely enforcement action *par excellence*". What is most significant, as Akehurst stresses is that Meeker's arguments had never been invoked before[103] and have never been invoked since.[104]

c) Cuba 1964

Upon the request of Venezuela, the O.A.S. Council considered in November 1963, accusations of that country against Cuba. Venezuela affirmed that it had been the target of a series of actions sponsored and directed by the Government of Cuba, which had being trying to subvert Venezuelan institutions and to overthrow its government through terrorist, sabotage and guerrilla warfare. The Council convoked at that time the Organ of Consultation of the O.A.S. and constituted itself, provisionally, to act as such, following the regular procedures of the regional organization. Immediately afterward it appointed a committee to investigate charges denounced by Venezuela. The committee found Venezuelan charges justified[105]. In the course of its activities the Investigating Committee had asked the Cuban Government to submit, in writing, if so desired, the information and comments, so as to determine its responsibility in connection with points in the Venezuelan complaint. The Cuban Government cabled on February 3 that[106] it "neither recognizes, admits, nor accepts the jurisdiction of the O.A.S."

The Organ of Consultation which had been convoked by the O.A.S. Council, met at the O.A.S. headquarters in Washington from July 21 to 26, 1964. This Ninth Meeting of Consultation of Ministers of Foreign Affairs of the American States resolved, *inter alia*,[107] "...That the governments of the American States not maintain diplomatic or consular relations with the Government of Cuba; that the governments of the American States suspend all their trade, whether direct of indirect, with Cuba, except in foodstuffs, medicines, and medical equipment that

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[103] It may be noted in this respect that, under Articles 6 and 7 of the Pact of the League of Arab States, military action is voluntary, but in 1948 the United States argued that the Arab's States military operations in Palestine could not bed legal as enforcement action because they had not been authorised by the Security Council; S.C.O.R., 307th Mtg. 28th May 1948.

[104] G.I.A. Draper in "Regional Arrangements and Enforcement Action" Revue Égyptienne de droit international, 20 (1964) , pp. 1/24, says that the U.S. argument consisted in affirming that what is illegal if it be done under obligation became lawful if it be done voluntarily.

[105] See report in, Tratado Interamericano de Asistencia Recíproca, Aplicaciones, Vol. II, p. 224, Secretaría General, Organización de los Estados Americanos, Washington 1973.

[106] The Inter-American System, Inter-American Institute of Legal Studies New York, 1966, p.167

[107] Sanctions imposed to Cuba were based on Article 6 and 8 of the Treaty according to the Resolution, which also declared that acts verified by the investigating Committee constituted an aggression and an intervention on the part of the Government of Cuba in the internal affairs of Venezuela.

may be sent to Cuba for humanitarian reasons; and that the governments of the American States suspend all sea transportation between their countries and Cuba, except such transportation as may be necessary for reasons of humanitarian nature."[108] The Secretary General of the O.A.S. was instructed through the same resolution to transmit its full text to the U.N. Security Council, in accordance with the provisions of Article 54 of the U.N. Charter.[109] In compliance with these instructions the Secretary General transmitted the resolution to the World Organization by letter dated 27th of July of 1964.[110]

On the 9th of August 1964, the representative of the U.S.S.R. transmitted to the President of the Security Council a letter[111] containing a statement by his government which declared, among other things, that the resolution of the Ninth Meeting of Consultation has arbitrarily and groundlessly condemned Cuba for aggression and intervention. Decision of the O.A.S. meeting, the U.S.S.R. statement said, was legally untenable and in contradiction of the U.N. Charter and the principles of international law; "no enforcement action shall be taken under regional arrangement or by regional agencies without the authorization of the Security Council". The U.S.S.R. further expressed that according to Article 39, the Security Council is the sole organ which "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and the Security Council alone shall decide "what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security", and no regional organization is endowed with these rights. The Soviet Union also pointed out that the Charter of the U.N. in Article 2 forbids the threat or use of force in international relations, and also expressed that the O.A.S. decision could not be justified by reference to the Rio Treaty, since Article 103 of the United Nations Charter stipulated that, in the event of a conflict between the obligations of the members of the U.N. under the Charter and the obligations under any other international agreement, their obligations under the Charter prevailed.

In a letter by the representative of Czechoslovakia to the President of the Security Council, dated August 17, 1964 which it was attached a statement by the Czechoslovak Government, same contentions and legal arguments put forward by the U.S.S.R. were made. [112]

The Security Council, however, held no meeting to consider this case, since no request to that effect was made.

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[108] Resolution I of the Ninth Mtg. Of Consultation; see full text in Tratado Interamericano de Asistencia Recíproca..."Loc. Cit. p. 219.
[109] Paragraph 7 of Resolution I mentioned above
[110] U.N. Document S/5845
[111] U.N. Document S/5867
[112] U.N. Doc. S/5901

d) Dominican Republic 1965

The President of the Dominican Republic, Juan Bosch, was ousted by a military coup in June 1963. The military government which succeeded Bosch, collapsed in April 1965 in the face of coups launched by right wing military leaders, who then proceeded to fight each other. On April 28, President Johnson announced that he was sending United States' marines to the Dominican Republic in order to evacuate United States citizens whose lives were endangered by the fighting,[113] though it was extremely doubtful whether a State is entitled to use force in order to protect its nationals.[114] Within a matter of few days the United States provided for citizen evacuation and remained probably more than the necessary for that operation. It put forward other two arguments to justify its intervention. First the necessity of saving the Dominican Republic from the Communist, who had allegedly replaced the democratic elements as leaders of the left-wing forces, and second that the continuance of the U.S. military presence had the purpose of preserving the capacity of the O.A.S. to function in the manner indicated by its Charter; in other words that this presence gave the O.A.S. the essential time in which to consider the Dominican situation and to determine means of preserving the rights of that country under the Inter-American system.[115]

On April 29, 1965, the U.S. informed both the U.N. Security Council and the O.A.S. that it was sending troops to Santo Domingo as announced by President Johnson the day before. The O.A.S. Council, which had been informed by the representative of the Dominican Republic on April 28 about the events in his country, decided on the following day to appeal for a cease-fire in the Dominican Republic. On April 30, the Council approved another resolution calling again all parties involved to pursue immediately all possible means by which a cease fire might be established and all hostilities and military operations suspended, and urging them to permit the establishment of an "International neutral zone of refuge" encompassing the area immediately surrounding the embassies of foreign governments, the inviolability of which would be respected by all opposing forces.

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[113] President Johnson's statement may be found in SCOR, 20th yr. Suppl. for April May, June 1965, p 65 (S/6310).

[114] R.J. Dupuy observes "À supposer que l'intervention d'humanité soit toujours admissible en droit international, il ne saurait s'agir que d'une faculté tout à fait exceptionnelle, fondée sur un principe très général de légitime défense exercée au profit non de l'État, comme dans le système de 1'article 51 de la Charte, mais des individus. Dès lors, elle devrait observer deux exigences logiques: la proportionnalité entre les moyens utilisés et la missions à remplir le caractère temporaire d'une opération exorbitante du droit commun" ("Les États-Unis, l'OEA et l'ONU à Saint Domingue", Annuaire Français de Droit International, 1965, p. 77.). Of course those two requisites were not present and the US resorted later to other justifications. See also Akehurst, *op. cit*., pp. 204/205.

[115] Akehurst, *op. cit*. pp. 205/206 ; Dupuy, *loc. cit*. See also the Department of State Bulletin, Vol LII N^{o} 1351 , May -1965- ; U. S. statements in S.C.O.R., 20 th. Yr., Mgt. 5 May 1965 and 1212 Mgt. I9 May 1965. Documents, decisions and quotations related to OAS and to Security Council actions regarding this case may be found in S.C.O.R., 20th Yr Supp. For April, May and June 1965.

It was also decided to convene a meeting of the Organ of Consultation. On May 1 the tenth Meeting of Consultation set up a Committee of 5 representatives of member countries (Argentina, Brazil, Colombia, Guatemala, and Panama) to investigate the situation and to use its good offices to secure a cease fire and the orderly evacuation of the persons who desired to leave the Dominican Republic. In the meantime the U.S. troops had established an "international neutral zone" and the Papal Nuncio had persuaded leaders of the two factions to agree to a cease fire.

The O.A.S. Committee, on May 5 1965, persuaded the two parties to sign the Act of Santo Domingo which after reaffirming the cease-fire, agreed upon on April 30, provided, *inter alia*, that "The parties accept the establishment of safety zone in the city of Santo Domingo..." and that "The parties bind themselves especially to respect this safety zone, within which there is guaranteed, in the manner that the O.A.S. may deem appropriate, adequate protection for all persons found within that zone of refuge-. . ".

On May 6 the Organ of Consultation, decided to create an Inter-American Force. The resolution, among other things, decided: "1. To request Governments of member States that are willing and capable of doing so to make contingents of their forces available to the O.A.S., ... to form an Inter-American Force that will operate under the authority of this Tenth Meeting of Consultation; 2. That this Force will have as its **sole purpose in a spirit of democratic impartiality**, that of co-operating in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishment of an atmosphere of **peace and conciliation which will permit functioning of democratic institutions**"(Emphasis added). It is important also to recall the preamble of this resolution, *inter alia*, stated that "The formation of an Inter-American Force will signify the transformation of forces presently in Dominican territory into another force that will not be that of one State but of the O.A.S...". Brazil, Costa Rica, Honduras, Nicaragua and (of course) U.S. contingents composed the Force, which were placed under the exclusive authority of the Brazilian General Alvim. U.S. forces, however, far outnumbered the others.[116]

The Security Council discussed the case during three series of meetings held from the 3rd to the 25th of May, from the 3rd to the 21st June, and from the 21st to the 26th of July. The Soviet Union, who had requested an urgent meeting of the Council on the 1st of May, asked this body to condemn the United States, and to demand the immediate withdrawal of United States forces from the Dominican Republic. On the 14th of May the Council unanimously approved a resolution calling for a cease fire and inviting the Secretary General to send a representative to the Dominican Republic for the purpose of reporting to the Security Council on

[116] See Dupuy, *op. cit*., p.94.

the situation.[117] On May 22 the Security Council passed a resolution requesting that suspension of hostilities in the Dominican Republic should be converted into a permanent cease-fire. All members voted in favour but the United States, which expressed that it had abstained because the resolution did not acknowledge the work of the O.A.S.

Before entering into the relevant discussion held at the Security Council in respect to our study, let us only recall that the Dominican Republic situation gradually became more peaceful. Due to the mediation of the O.A.S. and the U.S. the rival factions signed the Act of Reconciliation on August 31, 1965,[118] which led to the formation of a Provisional Government, who was accepted by both parties. Elections were afterwards held and Mr. Balaguer won over ex-President Bosch. President Balaguer took office on July 1 1966. The O.A.S. had previously decided to withdraw its Force and this action was completed by September 1966.[119] The United Nations observers were withdrawn in October.[120]

The most relevant discussion about the case held in the Security Council as far as our work is concerned, is that referred to the new element introduced in the history of the U.N. Security Council - O.A.S. relationship, that is the creation of the regional force. Naturally this debate had its main characters in the Soviet Union and the U.S.

The first mentioned country condemned the creation of the Inter-American Force and qualified it as "a smoke-screen for aggressive acts" by the United States and as a violation of Article 15 of the O.A.S. (at present article 16) Charter. In respect to the latter provision the Soviet Union expressed that the creation of any type of armed force, regardless of its purpose by a regional agency constituted enforcement action and was invalid unless authorized by the Security Council. These views were shared by Cuba and by Jordan.[121] The U.S. explained

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[117] The Secretary General appointed Mr. José A. Mayobre, Executive Secretary of ECLA who investigated the situation, mediated in order to secure a cease fire and maintained the Security Council informed about the case through his reports to the Secretary General. Dupuy, *op. cit.* p.101 observes: "Ainsi les Nations Unies, trop divisées pour exiger le retrait des forces d'intervention, n'en affirmait pas moins très nettement leur compétence. Pour la première fois, elles sortaient de leur réserve prudente et, en envoyant sur place un observateur, intervenaient activement dans une affaire dont s'occupait déjà l´Organisation des États Américains, portant ainsi, dans l'opinion publique un. coup assez sévère au prestige de celle-ci".

[118] Text in OEA/Ser.F./II.10, Doc. 363, 7 September 1965.

[119] Chronique des faits internationaux. Revue Générale de droit international public, 37 (1966) p.1028.

[120] SCOR 21st Yr., Supplement for October, September and December 1966.

[121] SCOR 20th Yr., Supplement for April, May and June 1965, pp. 225-7 Id. 1221st Mtg., 7 June 1965, paragraph 22. Article 15 of the O.A.S. Charter at present Article 18) says "No State or group of States has the right to intervene, directly, or indirectly, for any reason whatsoever, in the internal affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements".

that "the Inter-American Force is not designed to act, and is not acting against the Dominican Republic of the Dominican people" and concluded that the Force did not constitute enforcement action under Article 53 of the U.N. Charter and that was rather governed by Articles 52 and 54. Malaysia supported this view, and later, in the discussion the U.S. compared the Force with peace-keeping forces in Cyprus, the Congo and the Middle East.[122]

Uruguay affirmed that the role of the Force could not be considered as a peace keeping action, since what it was regarded as an essential prerequisite to that effect was lacking, namely the consent of the State concerned; France shared this view, pointing out that the Dominican Government had not consented to the presence of the Force, since there was no government, but only factions and consent by factions could not bind the State.[123]

Once again the U.N. - O.A.S. relationship could not be agreed upon in this respect, but no doubt that this case brought the world organization to perform a role which, in a way forced regionalists as well as Globalists to make efforts towards a harmonization despite the mutual criticism, they addressed to each other.

e) Grenada 1983

This case is not directly relevant to our study since the measures taken by the U.S. (whether legally or not) were made in pursuance of a decision not of the O.A.S. but of a different regional organization - the Organization of Eastern Caribbean States -, even if the case was clearly a "local dispute" over which the O.A.S. could have exercised its jurisdiction. The O.A.S. did take notice of the situation at an extraordinary meeting of the Permanent Council on October 26, but no explicit mention on the question of O.A.S. jurisdiction on the matter was made[124]. Neither was any action taken in the framework of the Rio Treaty, even if a convening of a Meeting of Consultation would have been appropriate according to articles 3 or 6 of that Treaty. On the other hand, the U.N. General Assembly approved Resolution 38/7 which condemned the measures taken in Grenada.

f) Haiti 1991-94

Initial response to the coup in Haiti came from the O.A.S. Immediately after the ousting of President Jean-Bertrand Aristide the Permanent Council, pursuant

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[122] SCOR, 20th Yr., Supplement for April, May and June 1965, pp. 225 Id. 1221st Mtg., 7 June 1965, and 1222nd Mtg., 9 June 1965.

[123] SCOR, 20th Yr., 1221st Mtg., 7 June 1965, Paragraph 44 and 60/1. Akehurst, *op. cit.* p.212 suggests that this argument was perhaps unduly formalistic, basing his suggestion on the prove that the consent given by both sides in a civil war represent the national will as effectively as consent given by a government in normal conditions.

[124] Doc. OEA/Ser.G/CP/ACTA 543/83

to resolution 1080 of 1991 the O.A.S. General Assembly,[125] convened an ad hoc Meeting of Ministers of Foreign Affairs, which took place on the 3rd October 1991. It recommended O.A.S. member States to take measures in order to seek the diplomatic isolation of the de facto regime in Haiti, including the suspension of their economic, financial and commercial ties with Haiti, with the exception of strictly humanitarian aspects.[126] A few days later another resolution was adopted which encouraged States to immediately freeze Haitian assets and enforce a commercial embargo on Haiti.[127]

Although the Security Council did not at first comment the legality of O.A.S. actions, the General Assembly approved of the O.A.S. resolution on October 11th,[128] calling U.N. member States to support the measures taken within the O.A.S.

An interesting exchange of letters between the Secretary-Generals of the O.A.S. and the U.N. ensued.[129] On a letter dated June 19 1992, the U.N. Secretary-General attached a letter from President Aristide to the former, in which assistance was asked from the U.N. to achieve the effective application of the resolutions adopted by the O.A.S. It is worth noticing that President Aristide made express reference to Chapter VIII of the U.N. Charter saying that the actions undertaken by the O.A.S. had been done in its framework. In his reply – dated July 10th 1992 – the O.A.S. Secretary-General pointed out that he did not consider Chapter VIII as the basis of the action undertaken by the O.A.S., but rather its own Charter and the mechanism provided by Res. 1080 and others.[130]

On December 13th 1992, the Ad Hoc Meeting adopted a new resolution, whose paragraph 8 mandated the Secretary-General to explore the possibility and convenience of taking the Haitian question to the Security Council in order to ensure universal application of the embargo recommended by the O.A.S.[131]

Consequently the Secretary-General addressed another letter to his U.N.

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[125] This resolution, adopted during the twentieth session of the O.A.S. General Assembly in June 1991, sets forth a mechanism in case of irregular interruption of the functioning of democratic institutions of member States. AG/RES. 1080 (XXI-O/91)

[126] Doc. OEA/Ser.F/V.1-MRE/RES. 1/91.

[127] Doc. OEA/Ser.F/V.1 MRE/RES. 2/91. The embargo was not of a mandatory character since it was adopted outside the framework of the Rio Treaty, which constitutes the only way the O.A.S. can adopt compulsory measures (Marchand Stens, op. cit., p. 83; contra White, op. cit.). In so far as the embargo was of a recommendatory character, this case can be parallelled to that of Cuba 1962. See also Danesh Sarooshi "The United Nations and the Development of Collective Security, Oxford, 1999, p234.

[128] Doc. UN A/Res./46/7.

[129] These letters are reproduced in doc. OEA/Ser.F/V.1-MRE/INF.15.92

[130] Needless to say, there appears to be no contradiction between the statement made by President Aristide and that made by the O.A.S. Secretary-General. But the answer provided by the latter is a clear illustration of the uneasiness of the O.A.S. vis-à-vis Chapter VIII.

[131] Doc. OEA/Ser.F/V.1-MRE/RES.4/92.

counterpart, in which he intended to study the legal grounds and consequences of Security Council intervention on the matter. He found, *inter alia*, that the universal application of the embargo presupposed the adoption of a mandatory decision under Chapter VII, which would therefore require the determination of a threat to the peace. He went on to say that the efforts to solve the issue within the O.A.S. had not been deemed exhausted by the Ad Hoc Meeting of Ministers. He believed article 52 (2) was not applicable since the O.A.S. could continue to make all efforts in the regional level without prejudice to the co-ordination of actions with the U.N.[132]

Only when the Security Council intervened in the matter did the measures adopted by the O.A.S. acquire binding effect. On June 16 1993, the Security Council held a meeting to deal with the situation in Haiti, unanimously adopting Resolution 841, co-sponsored by U.S., France and Venezuela. This resolution, taken under Chapter VII, imposed an oil and arms embargo on Haiti which complemented the one recommended by the O.A.S. Hence, the Council endorsed the actions taken by the O.A.S., and actually provided for the continuation of the mediation efforts of both Secretaries-General.[133]

During the debate, the delegates from Canada, Venezuela, Pakistan and Brazil expressed the view that the resolution was adopted in a spirit of shared responsibility and co-operation between both organizations. China, however, declared –somewhat surprisingly– that the resolution had made clear that the Council had to take into account and respect the opinions of regional organizations and that all measures adopted by the Council should be complementary and supportive of measures already taken by those regional organizations.[134]

In face of the failure of the process tending to the restoration of the legitimate Haitian authorities, the Security Council reinstated coercive measures by virtue of Resolutions 873 and 875 (1993), of October 13th and 16th. The preamble of the latter made express reference to Chapter VII and VIII, and exhorted member States to adopt, either individually or by conduct of regional mechanisms, all measures necessary to assure the strict compliance with Resolutions 841 and 873 (1993).

But it required the threat in July 1994 of a UN-authorized U.S. military operation for the de facto authorities in Haiti to step down in October 1994. Before that, the O.A.S. did discuss the use of military force under the auspices of the Organization in May 1994 but only three States were in favour of it.[135]

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[132] Doc. OEA/Ser.G-CP/INF.3388/93.

[133] Hugo Caminos; "La legitimidad democrática en el sistema interamericano: un nuevo marco jurídico para la cooperación entre los organismos regionales y las Naciones Unidas", in Rama Montaldo, *op. cit.*, p. 1055.

[134] Doc. UN S/PV.3238.

[135] White, *op. cit.*, p. 214. See statements by representatives of Brazil, Mexico and Uruguay (S/PV. 3413, p.4 -10).

Consequently the Security Council adopted Resolution 940 (1994), on July 31st, which authorized the above-mentioned military operation. This Resolution was adopted in the face of the opposition of most countries of the region. It is interesting to note that Brazil, who abstained, expressed the view that democracy could not be defended by the use of force; and that many other Latin-American States who presented their view to the Security Council thought that the Haitian situation did not constitute a threat to the peace. The Security Council did not therefore act in the name of the States of the region.[136]

III. Conclusions

1. General Observations

The analysis of this subject shows a clear pattern determined by a constant interplay between international law and politics rather than by a stable legal framework (composed by the U.N. and the O.A.S. systems) on which the interpreter could work. Moreover, it can be anticipated that in our view the political elements are those which prevailed in this matter and are those which are likely to continue performing such a role. It is consequently submitted that our conclusions would fall more properly under the province of an international political analyst than that of the international lawyer.

As many others, U.N. Charter provisions regarding regional organizations, were obviously the result of a compromise mainly among the trends represented by those advocating the Universalist approach and those in favour of the Regional one[137]. As often it happens such results are translated into language ambiguous enough to permit conflicting interpretations. Though we share the view that considers any legal rule as subject to more than one equally valid interpretation, it seems to us that in this case many crucial questions concerning the relationship U.N.- Regional Organizations, were left unanswered, as it is hoped we have demonstrated in previous chapters of this work. It is in that context that the malleability of the Charter becomes under the impact of political considerations and political forces. As M. Akehurst put it[138], practicing lawyers know that the law often has to be stated in terms of probabilities, not certainties and international law, where adjudication is rare, the distinction between legality and illegality is even more blurred; in diplomatic negotiations and United Nations debates it is often sufficient simply to convince the other side and third parties that one's claim is reasonable, without necessarily being absolutely correct. There is not a conspicuous line between legality and illegality, but a spectrum of varying degrees of legal soundness and unsoundness.

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[136] María del Carmen Márquez Carrasco, *Problemas actuales sobre la prohibición del recurso a la fuerza en derecho internacional*, Madrid, 1998, p. 244 Kodjo, op.cit, p.801.

[137] Perrin de Brichambaut, *op. cit*., p. 97; Oscar Schachter, *International Law in Theory and Practice*, Den Haag, 1995, p. 410; Hummer-Schweitzer; *op. cit*., p. 686; González Gálvez, *op. cit*., p. 145.

[138] Akehurst, *loc. cit*. p.220.

The beginning of deterioration of Soviet-American relations shortly after the San Francisco Conference was, no doubt, an outstanding element to be considered in this respect. And the struggle between the U.N. and the O.A.S. over the maintenance of peace and security in the Americas can be inscribed as a chapter in the larger volume of the Cold War.[139]

In this context, the political-ideological contest between the United States and the Soviet Union had its first challenge in 1954 when the Guatemala case arose, but in the 1960's the U.N.- O.A.S. relationship concerning the maintenance of peace and security was tested once and again, and developments created complex and delicate problems concerning the proper balance between the authority and functions of both organizations. Such developments showed a mixed pattern of victories and defeats for the United States in the pro-O.A.S. campaign, which obviously persisted in its effort to deprive the Soviet Union from intervention in Inter-American affairs and more precisely from the exercise of an effective veto power in the Security Council regarding those matters. On the other hand, the latter appeared in the unusual role of champion of the rights and competence of the U.N.[140] and the results which achieved to this end also demonstrate, logically, the equivalent counterpart of such mixed pattern.

With the end of the Cold War and the collapse of the Soviet block the debate about chapter VIII has taken a more constructive turn and attention has been given to how regional organizations and the U.N. can work together.[141] In this context, the experience of Haiti may open the door for further co-operation and division of labour between the U.N. and the O.A.S.

2. Evolution registered in respect to the central issues of the relationship

To follow the scheme we have proposed in dealing with the subject, let us consider in these conclusions the evolution registered in relation to the "Try O.A.S. First" issue on the one part, and that related to the application of enforcement measures, on the other.

As to the problem of peaceful settlement of disputes, namely the one involving the first question, we propose that the principle requiring prior submission and treatment of a dispute by O.A.S. as a prerequisite to open the resort to the Security Council if not superseded was put (perhaps indefinitely) in abeyance.[142] As such it was never recognized by the Security Council and its implicit application

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139 Claude, *op. cit*. p.62.

140 *Id*., p.61.

141 Merrills, *op. cit*. p. 281; White, *op. cit*., p. 211.

142 Ernesto Rey Caro, "La solución pacífica de controversias en la OEA y el Pacto de Bogotá", en *id*., *Estudios de derecho internacional*, Córdoba, 1982 p. 224; Gómez Robledo, *op. cit*., p. 366; Schachter, *op. cit*., p. 411; Nguyen, *loc.. cit*.; White, *op. cit*., p. 220; Merrills, *loc. cit*.

experimented such a decrease which leads us to the above stated conclusion.

It is important to mention here two legal opinions rendered on this issue within the framework of the O.A.S. On occasion of the Honduran proposal of March 30th 1983 regarding the situation in Central America, an advisory opinion was requested from the legal department of the Secretary-General on the possibility of O.A.S. intervention in a matter that had already been brought to the attention of the Security Council. The opinion reached the conclusion that the previously prevailing opinion of the precedence of regional dispute settlement had lost most of its vigour. That theory had given way to the recognition of the sovereign right of each State to freely choose the forum it considers appropriate. Therefore, article 35 of the U.N. Charter had been given primacy in order not to force States to a certain procedure. The opinion concluded by stating the existence of concurrent jurisdiction between the Security Council and the O.A.S., while recognizing that all decisions taken by the latter must conform to the ones decided by the Council.[143]

The second opinion was produced by the Inter-American Juridical Committee.[144] It states that under article 52 of the U.N. Charter the Security Council is the only competent authority to decide in each case the application of article 34 - investigating the existence of a menace to international peace and security -, or the promotion of peaceful settlement by means of a regional organization. On the other hand, the U.N. member which is at the same time member of a regional organization is the only one -other than the Council- legally able to decide the use of article 35 (1) or the resort to article 52 (2).[145]

The culmination of this regional trend towards the rejection of the "Try O.A.S. first" came along with a series of amendments to the O.A.S. Charter and the Rio Treaty. Articles 23 of the 1967 Charter and Art. 2 of the Rio Treaty, as we mentioned before, mandate member States to solve their disputes by regional measures before calling upon U.N. organs. The San José Protocol to the Rio Treaty (July 25th 1975) added to article 2 the following paragraph: "This provision shall not be interpreted as an impairment of he rights and obligations of the States Parties under Articles 34 and 35 of the Charter of the United Nations". The Cartagena Protocol to the O.A.S. Charter (December 5th 1985), while adding a similar paragraph to the new Article 24, went so far as to eliminate all reference to

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[143] Opinión emitida por el Subsecretario de Asuntos Jurídicos de la Secretaría General en relación con la competencia de la OEA para conocer del asunto tratado en la sesión extraordinaria del Consejo Permanente de la OEA de fecha 5 de abril de 1983, OEA/Ser.G CP/doc.1354/83, 11 abril 1983, p. 1-8.

[144] Resolución acerca de estudios sobre los procedimientos de solución pacífica de controversias previstos en la carta de la OEA, Comité Jurídico Interamericano; *Informes y recomendaciones*, Vol. XVI, 1984, p. 51

[145] *Id*. p. 56. In support of this conclusion the Committee espouses *inter alia* argument b) of the Universalist approach. Neverhteless, it should be noted that two members of the Committee (MacLean Ugarteche and Herrera Marcano) found that O.A.S. member states should seek first a solution in the O.A.S. before referral to the UN. *Id*., pp. 57 and 63.

priority of O.A.S. resort.[146]

Some authors have concluded that these reforms have reduced or even eliminated any conflicts between the O.A.S. and the U.N., enshrining the principle of freedom of choice of forum.[147] It must be borne in mind, however, that whereas the Cartagena Protocol is in force since November 16th 1988, the San José Protocol is yet to receive the necessary ratifications for its entry into force. Moreover, the Cartagena Protocol has not been ratified by all O.A.S. members, while Article II of the Pact of Bogota has not been modified. So it will depend on the given case whether a particular O.A.S. member State is still bound under the Inter-American system to give priority to regional procedures.

In any case, these amendments have no bearing upon the question from the point of view of the interpretation of the U.N. Charter itself.[148] From a purely logical-theoretical perspective, argument f) of the Universalist approach may appear as the most solid interpretation of all the Charter provisions. In the words of Hummer-Schweitzer: "Concurrent subject-matter jurisdiction between the Security Council and a regional agency does not exist, but the Council, in spite of a regional agency being seized of a matter, can be seized of it at the same time. The Council is thereby barred from taking definitive, meritorial measures as long as the mechanisms adopted by the regional agency have not proved to be overtly ineffective."[149]

But the practice both of the Security Council and the O.A.S. - a practice which has had in general political and pragmatic grounds, and which rarely presented statements on legal doctrine -[150] has clearly tended to the dismissal of the "Try O.A.S. first" posture.

Though the Security Council did no refer expressly the Guatemala case to the O.A.S., it is evident that implicitly left the handling of the situation to the latter and this one was shortly afterwards facing the overthrown of the constitutional government which had demanded Security Council intervention and consequently cancelled the meeting of the Minister of Foreign Affairs of the American States which had scheduled for July 7 1954. It is not discussed here that the O.A.S. did not make in the meantime necessary efforts to cope with the situation but it is true that the facts precluded its final action for a peaceful settlement of the dispute. Whichever is the reason, the Guatemala case instead of establishing a precedent

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146 It may be mentioned that, when signing this Protocol on November 7th 1986, the U.S. declared they continued to adhere to jurisdictional priority of the regional O.A.S. organs (Hummer-Schweitzer; *op. cit*., p. 718).

147 *Id*., p. 710; Monroy Cabra; *op. cit*. pp. 1204/1205.

148 Nguyen, *loc. cit*.

149 Hummer-Schweitzer, *op. cit*., p. 709. It is true, as these authors point out, that some of the proponents of the "concurrent jurisdiction" theory end up with a similar conclusion.; Nguyen; *loc. cit*.

150 *Id*., p. 709.

for The "Try O.A.S. First" principle stimulated rather a persistent wariness against allowing the recurrence of such type of episodes. Not only members of the Security Council which in one way or another had affirmed the competence of this organ to deal with the case, but even others as Brazil, which co-sponsored the draft resolution which would have referred the case to the O.A.S. (it had not been vetoed by the U.S.S.R.) denied that it intended that the Security Council "could not have dealt with the matter", at the following session of the General Assembly. Moreover, several Latin-American countries in that IX session, as Argentina, Ecuador and Uruguay went further and clearly affirmed that access to the Security Council could not be deprived to members of the O.A.S. by invoking the regional system and that it may well exist cases of concurrent jurisdiction. They also added that affirmation of exclusive jurisdiction of the O.A.S. as a first instance would place members of such regional organization in a disadvantaged situation if compared with that of other members of the United Nations in what concerns their respective rights.[151] The Secretary General of the World Organization made what can be regarded as a veiled criticism of the handling of the case, when expressed: "The importance of regional arrangements in the maintenance of peace is fully recognized in the Charter and the appropriate use of such arrangements is encouraged. But in those cases where resort to such arrangements is chosen in the first instance, that choice should not be permitted to cast any doubt policy giving full scope to the proper role of regional agencies can and should at the same time fully preserve the right of a Member Nation to hearing under the Charter".[152]

The "Try O.A.S. First" doctrine continued to loose ground during the Case of Cuba of 1960. Though the resolution approved by the Security Council decided to suspend consideration of the question pending receipt of a report from the O.A.S. it is significant that the two Latin-American members of the Security Council which happened to co-sponsor the resolution refrained from support the O.A.S. priority as a legal doctrine, marking a difference of approach in their behaviour if compared with the one performed by Brazil and Colombia during the Guatemala case, in which they did espouse such a doctrine in the Council. In this opportunity Argentina declared in the Council that it did not deem appropriate to enter into a legal and doctrinary discussion of the matter, but conceded that "no country can be denied access to organizations of which it is a member". On this issue, Ecuador affirmed that members of the O.A.S. had not obligations restricting their right to resort to the Security Council and expressed that as a practical matter the Council should make use of the O.A.S., and in doing so, by approving the draft resolution the Council would be exercising and not relinquishing its competence. We noted the significance of these positions before and we think that their contrast with the one of the United States, which restated the O.A.S. priority doctrine, was remarkable. Furthermore if we take account the opposition expressed to the American contention by the U.S.S.R., Poland, Sri Lanka (Ceylon at that time) and

[151] See G.A.O.R. 9th session, 1954, 481st, 485th, 486th and 486th Plenary Meetings.

[152] Introduction of the Annual Report of the Secretary General on the work of the Organization, 1 July 1953 to 30 July 1954, G.A.O.R. 9th Session, Supp. Nº 1 (A/2663).

Tunisia we come to the conclusion that out of the eleven members of the Security Council, six were not sharing the United States legal arguments. It is also to be noted that when the Security Council took up the case in January 1961, the Latin-American members at that time, Chile and Ecuador, advanced a proposal (though dropped afterwards without having taken formal action) which would have that body urge peaceful settlement without making the slightest reference to the O.A.S.[153]

The trend against resorting to the O.A.S. as a prerequisite to access to the Security Council was again confirmed by the Haitian (1963) and Panamanian (1964) cases in which the matters were dropped of consideration leaving the cases to the O.A.S., **but provided the previous agreement by the complainants had been given to this effect and that the cases would remain seized by the Security Council and retained in its agenda**. Again the Latin-American members of this organ refrained from supporting the O.A.S. priority doctrine. More explicitly, in the Haitian Case, Venezuela declared the necessity for recognizing the unrestricted right of members of the O.A.S., mentioning article 103 of the U. N. Charter and 102 of the O.A.S. Charter (present Art. 131) as against the "Try O.A.S. First" theory[154] whose validity and application suffered the last and perhaps more important rejection when the Security Council dealt with the Panama Canal case in 1973. Though the agenda title was not explicit of that and the resolution adopted did not expressly referred to it (though the draft vetoed by the U.S. did)[155] it was crystal clear that was the central issue to be discussed in Panama City, since the invitation from that government had been accepted. The overwhelming support to the Panamanian initiative both for the convening of the meeting and for the substantial claim compared to the reservation only made to this respect by the United States, arguing that the question was being considered bilaterally and in case of failure there were always open solutions provided for in Chapter VIII of the U.N. Chapter, have proved our submission that the direct resort to the Security Council by members of the O.A.S. can now be clearly recognized, in practice. Not only the U.S. did not intend to prevent the convening of the meeting in Panama but also was embarked effectively in the Panama Canal question and apart from the reservation mentioned above no contention in favour of the priority of the O.A.S. was made. The old days in which this doctrine was firmly maintained by that country were passed and such doctrine was superseded.

In contrast to the trend regarding the O.A.S. priority in the peaceful settlement of disputes that we have tried to describe above, in respect to the application of enforcement measures the consideration of cases referred to in preceding Chapter II section 2 leads us to the conclusion that the regional organization has exercised so far, an important degree of autonomy which therefore reflects a trend in favour

153 SCOR, 16th Yr., Suppl. for January, February and March

154 SCOR, 18th Yr, 1035th and 1036th Mtgs. 8/9 May 1963.

155 It should be noted that this draft was co-sponsored by the two Latin-American members of the Council and all other of the third world.

of regionalism as competing against U.N. authority in this field.[156] The term "enforcement measures" has been defined and redefined and along with other arguments posed before the Security Council was used so as to exempt from the requirement of its authorization the imposition of economic and diplomatic sanctions (Dominican Republic 1960, Cuba 1962 and 1964, Haiti 1991), the use of force (missile crisis in Cuba 1962) and the establishment of a regional force (Dominican Republic 1965). Though no principle supporting this autonomy was ever recognized by the Security Council the practice demonstrates that it was exercised despite a considerable degree of criticism in the U.N. which included in certain cases that of several Latin-American countries. However, it can be assumed that after the Dominican case of 1960 the United States found an increasing number of these countries joining other members of the U.N. willing to endorse the view that Article 53 of the Charter should not be construed as to inhibit O.A.S. activities against Communism in the region, and consequently rallied to support the expansion of their rights as a regional group. As I. Claude observed, it may well be that the United States was able to attract greater support for expanding its jurisdictional rights under Article 52, because the former did, and the latter did not, involve an attack upon the Soviet Union veto power.[157]

However from 1960 to 1965 some important developments took place which have to be considered in conjunction with this pattern of autonomy of the O.A.S. In the Dominican Republic case of 1965 the Security Council could play certain relevant role and to some extent this was due to the growing criticism against the United States intervention including that of several Latin-American countries which, like Uruguay, in previous cases had shared its view. The O.A.S. as well was subject to criticism based on the feeling that it was manipulated by the United States in this case, but regarding this point, we think that some clarification should be made. The O.A.S. resolution creating the Inter-American peace force did not approve the action the U.S. had taken and said nothing about the dangers of Communism (the contrast with the Cuba case is significant) and very little about evacuation of foreigners. The objectives of the Force – impartial co-operation in the restoration of peace and democracy – are rather different from the reason given by the U.S. for its original intervention. Furthermore the emphasis of the resolution or impartiality was inconsistent with the United States previous policy of intervening against the allegedly Communist leadership of the constitutionals faction and this can prove that that country was becoming sensitive to criticism precisely from Latin-Americans and because of its action in the region. The pattern of O.A.S. autonomy was present but the political elements behind it were changing.

On the whole, it can be said that, it appears clear that the United States performed great influence in the O.A.S. when it dealt with these cases involving sanctions but the fact that many Latin-American countries pursued similar policies should not be regarded as a consequence arising from some kind of control of the

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156 White, *loc. cit.*; Gómez Robledo, *op. cit*, p. 370.

157 Claude, *loc. cit*.

former over the others. Not only the Cold War situation is relevant, but genuine orientation against communism of these many Latin-American countries should be considered so as to have a clearer picture. Besides, during the early 1960's the O.A.S. was more active against Trujillo regime in the Dominican Republic, and less active against the Castro regime in Cuba than the United States would have liked[158]. Once and again the U.S. had to soften or refrain from pressing anti-Communist draft resolutions in order to be sure of getting a sufficient majority and even so there have been dissenting votes, reservations and abstentions.[159] As M. Akehurst put it,[160] the intervention of the United States in the Dominican Republic in 1965 **had** to be unilateral because the United States probably had assessed that it would not have authorization from the O.A.S. and when the latter began dealing with the situation as we observed above, it pursued aims and proceeded according to reasons which were not compatible with those upon which the U.S. **had** unilaterally acted. We maintain that the O.A.S., on those basis, **had** to get involved and on similar grounds we submit that, also the Security Council **had** to intervene. As it cannot be criticized the limited role of the latter due to the political constrains which it faced, we cannot say that the O.A.S. was glossing over the U.S. action. It is of course largely contested both the legality of the O.A.S. action under the U.N. Charter and the political achievements which it reached, but it cannot be denied some influence from its part to balance the situation, as it cannot be denied that the modest role performed by the Security Council and the activities of the representative of the Secretary General contributed also to this end.[161] To us, because of the O.A.S. and the U.N. actions, in this case, it was obtained a diversion from exercise of power by a State upon other to a less anti-social course of action. A less anti-social result is not an ideal one, but is idealism a province of politics?

With the end of the Communist block, emphasis has shifted to the promotion of democracy in the region. Moreover, the imposition of sanctions against Haiti in 1991 suggests that with the demise of the U.S.S.R. opposition to the imposition of economic sanctions without the prior authorization of the Security Council seems to have disappeared, or at least no State has overtly objected to it.[162] In fact it is remarkable that no voice was heard, either on the regional level or at the universal one, condemning the O.A.S. for having decided economic sanctions on Haiti without previous authorization from the Security Council. So the once-controversial

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158 John Dreier, The Organization of American States and the Hemisphere in Crisis, New York, 1967.

159 Connell-Smith, *op. cit.* pp. 230 and 248 *et seq*.

160 Akehurst, *op. cit.* p.226.

161 Dupuy, *op. cit.* pp. 109/110 observes: "L'ONU surmontant la faiblesse de ses moyens, est parvenue à apporter des thérapeutiques, modestes certes mais précieuses, au plus fort de la crise, à suivre de près une situation typique des guerres subversives de la seconde moitié du XX siècle, à dégager les voies formalisées, qui s'ouvrent à elle et qui tendent à la conduire à U.N. contrôle réel des systèmes régionaux, à une époque où la tension du mondial et du local atteint une singulière intensité, du fait de l'univers politique et des brèches qui s'ouvrent dans des mondes naguère encore protégés par solides clôtures."

162 White, *op. cit.*, p. 211.

issue of whether regional organizations can impose article 41 sanctions without authorization of the Council has lost considerable ground.[163]

The Haitian case is an example of co-operation and co-ordination between the universal and the regional organization in an unprecedented scale. This case, at the same time, has highlighted a curious phenomenon: given the ineffectiveness of the Rio Treaty, at least since its shortcoming during the Malvinas crisis, the O.A.S. lacks the capability to enforce its measures – if not in theory, at least in practice–. Nowadays the Inter-American System is therefore dependent on the U.N. in order to apply measures of a coercive nature, in the strict sense.[164]

Let us finally recall along with Akehurst,[165] that the Latin-American support for regionalism at the U.N.C.I.O. in 1945 (at a time when unilateral U.S. interventions were more recent if not more frequent) and the mixed feelings of this country (after its clear favouring of a Globalist approach in Dumbarton Oaks) at this respect, show that Latin-American States were not seeking an Inter-American system dominated by the U.S. in which they would docilely follow the latter. They rather considered that a strong Inter-American system was a way to persuade the U.S. to accept the principles of the equality of States in practice. We submit that if the deterioration of the U.S. - U.S.S.R. relation to which we referred at the beginning of this conclusion as of a paramount importance, would not have occurred, the existence of such Inter-American System in which the Latin-American countries were the vast majority, had had, possibly in many cases, the virtue of ensuring such equality *vis-à-vis* a great power *entente* in the Security Council.

This last observation leads us to consider the prospect we could envisage from the present as a supplement to the conclusions we have drawn from the past.

3. Prospects

International political relations, including of course political elements relevant to our subject, have undergone a number of transformations and these changes are also registered within internal politics of countries, including those of the Latin-American countries, being this latter factor not an infrequent occurrence in the region. It is to be expected that processes of change referred to, will be reflected in future interplay between the O.A.S. and the U.N., but is to be recognized the difficulty to predict with some accuracy future institutional responses.

With the end of the Cold War it is right to assume that the relaxation of international relations will preclude, in general, entanglement of regional disputes with great powers rivalries and having regard to the Latin-American picture it is also to the be assumed that difference of ideologies should not even generate

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163 *Id*., p. 214
164 Marchand Stens, *loc. cit*.; Merrils, *op. cit*., p. 284
165 Akehurst, *loc. cit*.

disputes.

Two models could be considered, both based on the agreement of the great powers. A) One leading to a centralization for the settlement of disputes whether in the Security Council or outside it, but of course with their intervention in the handling of the matter and B) Another leading to a de-centralization by which the great powers, again through decision by the Security council (not necessarily explicit) or by agreement taken outside it, they leave the settlement of disputes to the regional agency and even "allow" (more likely implicitly), if necessary, the application by such agency of enforcement measures on the basis of reciprocity. A behaviour which would be inscribed in a pure exercise of power politics within the framework of spheres of influence.

However, we think that some other political elements are involved in present international relations, such as a trend to multipolarity and the role of the vast majority of States grouped for reasons of solidarity based on economic factors, political ones, etc. It is a fact that small powers are constantly making necessary efforts to counterbalance with their common action the influence which in some cases big powers would like to exercise in pursuing their own interests. This strengthening by means of grouping is also to be considered along with the importance of such medium or even small powers, bilateral relations *vis-à-vis* with the great powers, because of economic reasons (i.e. dependence of the latter on natural resources of the former) or others like strategic factors (i.e. due to geographical position of a given country), etc. Both the grouping, needless to say a key element in international fore, and that individual elements in relevant cases, would also have to be taken into account, as we said above, when considering those two possible models.

Having due regard to the previous considerations we would finally like to refer to the prospects regarding the handling of those two matters which we have pointed out as the central issues of our work. Namely the one related to peaceful settlement of disputes and the one concerning the application of enforcement measures.

As to the first we find easier to say or rather to emphasize our previous assumption. The "Try O.A.S. First" doctrine has been superseded and consequently it is expected that free choice of forum to bring their problems be exercised by the American countries, though no explicit recognition of the principle would be possibly to agree, like it was not possible to agree upon recognizing "Try O.A.S. First" as a principle. Panama in 1973 deemed more appropriate to refer the issue of the Panama Canal to the Security Council, but that does not mean that direct resort to that organ will always be sought. We think that depending on the matter, the States involved, etc., Latin-American countries will make the choice accordingly. For instance in question related to the exercise of maritime jurisdiction by a Latin-American country over a relatively broad area of sea adjacent to its coast, which caused a dispute with the U.S., it is more likely that if the matter is to

be referred to one of the two international organizations, the Latin-American country might well prefer the O.A.S. where a vast majority can rally its support for him. The U.S., on the contrary, would rather have the Security Council involved since there will count not only on its veto but also on the co-operation of the rest of the Permanent members (with the exception of China) and other States which because of their particular position on this subject despite their political or economic alignment would also support the U.S. or at least would refrain from supporting the Latin-American country. As an opposite case it may also be preferable for a Latin-American country (as it was for Panama in 1973) to take its dispute to the Security Council because, being this a world-wide forum offers greater propaganda possibilities as well as abilities to form greater coalitions with countries of the third world, of far more significance than a Latin-American one. The U.S., in turn may will in some cases (if not in many) prefer to keep disputes with Latin-American countries both out of the O.A.S. and out of the U.N., since in both organizations may have to face vast opposing majorities. Summing up, depending on the matter, the States involved, the opportunity and other relevant factual elements, the dispute will be referred indistinctly to the O.A.S. or to the U.S. Security Council by the party or parties willing to seek multilateral involvement.

In respect to enforcement measures, the picture is not so clear. Let us say that we can only predict a handling based on pragmatic basis, depending on the elements involved (both from regional and a global perspective), to which we have referred previously. It seems to us that it is not likely that the O.A.S. will renounce to the possibility of exercising autonomy in this field as a principle, but it may do so depending on the case by simply taking no action and leaving the case to the Security Council or to the exercise of individual or collective self-defense.[166]

It also seems to us that in the same manner the Security Council will not renounce expressly to the principle of requiring authorization by the regional agency to apply enforcement measures by distorting it, but also it is to be expected that it will not be able to agree on a definition of such measures and other related questions. Again pragmatic grounds will be the indicators within the global and regional political spectrum that we have tried to describe.

Let us finally point out that, according to some authors, "delegation of Chapter VII powers to regional arrangements is a desirable process, since it can lead to military enforcement action being taken on behalf of the Security Council to achieve the Council's stated objectives".[167] In fact, according to former Secretary-General Boutros-Ghali in his well-known *Agenda for Peace*, an important reason for the use of regional arrangements in such a role is that the process contributes to "a deeper sense of participation, consensus and

[166] It is to recall that the O.A.S. has never invoked this right provided in Article 51 of the U.N. Charter as basis for its action.

[167] Sarooshi, op. Cit., p.282.

democratization in international affaires.[168] However, it may very well be doubted to which extent regional arrangements have the capability or international legitimacy to carry out such military enforcement action. Indeed, as it has already been mentioned, the OAS is in practice unable to actually apply enforcement action. In consequence, any enforcement action taken at the Inter-American level seems to be unavoidably dependent both on the UN and the US, as the Haiti example has clearly shown. In any case, it seems to us that to state a general rule in this respect would rather signify to adventure an opinion than to state a prospect.

[168] Boutros Boutros-Ghali, *An agenda for Peace*, UN Publications, 1992. Para.64.

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