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Some aspects about the legality of treaty-based interventions by regional organisations

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Some aspects about the legality of treaty-based interventions by regional organisations

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Abstract

The purpose of this article is to analyse the legality of the practice of treaty-based interventions by international organisations of regional character in their member states under international law. In particular, the objective is to analyse the legality of this practice in relation to the general rules of international responsibility and to the collective security system of the Charter of the United Nations. Regarding the rules of international responsibility treaty-based interventions are considered lawful provided there is valid consent from the affected state, since consent is considered as a circumstance precluding the wrongfulness of certain conducts. With respect to the United Nations Charter such practice can also be deemed lawful considering that it does not characterize as enforcement action requiring authorization by the Security Council, as provided for in Chapter VIII of the Charter. The article concludes that such interventions are generally lawful under international law but must comply with certain conditions to be carried out. As a recent practice, interventions by regional organisations in their member states do not have well-defined legal dimensions and have not been extensively analysed by doctrine.

Keywords: Regional Organisations, Use of Force, Collective Security, Treaty-Based Interventions.

Introduction

In recent years there has been an increasing in the practice of armed intervention by regional organisations in their member states, especially in the African continent[1]. Most of these interventions are treaty-based, that is, they are carried out in accordance with treaty provisions adopted in the internal legal

[1] Since 1989 there have been at least 15 significant treaty-based armed interventions using more than 500 military personnel carried out by regional organisations in the territory of their member states, totalling the employment of over 100,000 military personnel: interventions in Liberia (ECOWAS, 1990), Tajikistan (CIS, 1993), Sierra Leone (ECOWAS, 1997), Lesotho (SADC, 1998), Guinea-Bissau (ECOWAS, 1998 and 2012), Côte d'Ivoire (ECOWAS, 2002), Solomon Islands (Pacific Islands Forum, 2003), Burundi (AU, 2003), Somalia (AU, 2007), Comoros (AU, 2008), Mali (ECOWAS, 2012), Central African Republic (CEEAC, 2008 and AU, 2013) and The Gambia (ECOWAS, 2017).

framework of international organisations. Despite their impact, the use of force by regional organisations in the territory of their members is not studied extensively by doctrine and their legality is still unclear.

The practice of treaty-based interventions is not a recent phenomenon. Until the general prohibition of the use of force international law recognized that treaties could serve as a legal basis for armed interventions on the territory of states. The legality of these interventions was justified by the broad freedom of states to contract and to limit their freedom by conventional international obligations. The possibility of the use of force given by a treaty generally aimed at preserving a specific form of government or dynasty reigning in a given territory[2]. The existence of "treaties of guarantee" was generally associated with political claims by stronger states that acted as "guarantors" of a certain *status quo* of weaker states by maintaining the power to intervene unilaterally in their territories (Jennings & Watts 1992).

With the emergence of the UN Charter the practice of treaties of guarantee fell into disuse (Brownlie 1963). Especially from the 1980s onwards a new kind of treaty-based intervention emerged, which differs from the classic treaties of guarantee in that it is made within the institutionalized system of international organisations of regional character. Equipped with internal legal instruments that allow for the application of coercive measures employing the use of force in the territory of their member states, some regional organisations resemble somehow the Powers of the ancient treaties of guarantee in acting as "guarantors" of a certain *status quo*. In this new type of treaty, however, maintaining the *status quo* is justified by the protection of certain common values or principles shared by their States Parties, such as humanitarian purposes, the preservation of representative democracy, the guarantee of law and order and the preservation of regional peace and security.

Treaty-based interventions by regional organisations are a new phenomenon whose legality can be analysed on the basis of various legal criteria, such as the internal law of the organisations, the international humanitarian law and the law of treaties. The present study seeks to analyse the phenomenon through two prisms of international law: the general rules of international responsibility and the UN Charter.

1. Legality regarding the general rules of international responsibility

As subjects of international law, both states and international organisations are bound by the general set of rules that determine the consequences of the

[2] The main examples of classic treaties of guarantee are the London Treaty of 1864, in which the United Kingdom, France, and Russia guaranteed the independence and the constitutional monarchy in Greece, and the Havana Treaty of 1903, which admitted the possibility of the United States to intervene in Cuba to ensure the independence or maintenance of the local government.

violation of international obligations. In the present research it is necessary to analyse the legality of interventions made by regional organisations in relation to the rules of international responsibility, since such interventions are characterized by the use of armed force and the prohibition of the use of force is a consolidated principle of international law.

The main aspects to be analysed in relation to the norms of international responsibility are the characterization of the consent of the state as justification for the use of the armed force (2.1) and its condition of validity (2.2).

1.1. Consent as a circumstance precluding wrongfulness

It is a basic precept of international law and of various domestic legal orders that consent of the victim to the commitment of a wrongful act removes its illicit character. The *volenti non fit iniuria* principle was codified as a general rule of international law by the UN International Law Commission (ILC) in its Draft Articles of Responsibility of States for Internationally Wrongful Acts adopted in 2001 (ILC 2001). Article 20 therefore provides that "valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent". This rule, also valid for international organisations (ILC 2011), means that valid consent can rule out the unlawfulness of a conduct that would otherwise be considered unlawful under international law, such as violations of territorial integrity or the use of force.

It must pointed out that the *volenti non fit iniuria* principle can be combined with the freedom of contract of states in order to make armed intervention by a regional organisation as lawful. In this logic, by joining the organisation a state would have previously consented to any action taken by the organisation within the limits of its competences.

Currently, however, it is understood that the consent of states cannot be used as a justification for the violation of certain international obligations laid down by imperative rules of general international law (also known as rules of *jus cogens*), which by the most usual definition are those norms accepted and recognized by the international community of states as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character[3]. Because it preserves a higher interest and cannot be derogated from, like other rules of international law, the violation a rule of *jus cogens* cannot be justified on the basis of a treaty or any other form of consent of the affected state, what is stipulated both the Vienna Convention on the Law of Treaties and the Draft Articles of the ILC[4].

[3] Concept established by Article 53 of the Vienna Convention on the Law of Treaties (1969).

[4] See also the Conclusion 18 of the Draft Conclusions on Peremptory Norms of General

In practice, however, minor or ordinary acts involving the use of force are considered lawful when performed upon the acquiescence of the state (ILC 1979). The incompatibility between the impossibility of claiming consent as a circumstance precluding wrongfulness of a breach of a norm of *jus cogens* (such as the use of force) and the consolidated practice of states to admit such hypothesis is one of the greatest contemporary challenges of the law of international responsibility.

In the specific case of interventions by regional organisations the doctrine seems to accept the possibility of an exception to the rule, given the purpose of the action (Abass 2004). This opinion is also shared by Giorgio Gaja, Special Rapporteur of the ILC on the Responsibility of International Organisations:

> While a State may validly consent to a specific intervention by another State, a general consent given to another State that would allow the latter State to intervene militarily on its own initiative would have to be taken as inconsistent with the peremptory norm. (…) However, a different view could be held with regard to regional organisations which are given the power to use force if that power represents an element of political integration among the member States (ILC 2006).

The understanding that consent can be used to exclude the wrongfulness of the use of force aimed at the protection of common values of the international community is based on the very concept of peremptory rule. The protection of core values of the international community in theory could justify actions such as humanitarian interventions and other collective actions that involve armed force, since the scope of the rule considered as non-derogable is determined by the international community itself (Ronzitti 1986). However, the exception to an imperative norm must have the same character of it and is difficult to recognize. What is clear is that consent is widely recognized as capable of precluding the wrongfulness of the use of force, provided it is validly given.

1.2. Manifestation of the consent

One question that arises from the possibility that a state consents to an intervention in its territory by means of a treaty is whether the expression of the state's agreement to be bound by the treaty is sufficient to characterize it as a circumstance precluding the wrongfulness of the use of force, or whether the specific confirmation of such consent by a competent authority at the time of the intervention would be necessary. In other words, the question is whether the mere fact of having ratified the treaty that enables an intervention is sufficient to

International Law (Jus Cogens) adopted by the ILC in 2019: “No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (jus cogens)”.

characterize state authorization or whether *ad hoc* consent is required before the regional organisation uses armed force.

International law has no general rules on the conditions of validity of a state's consent. The ILC Draft Articles only provides that consent must be "valid" to preclude the wrongfulness of a conduct. The Commission understands that the characterization of consent as "valid" depends on factors linked to the specific obligation, but recognizes that consent must at least be freely given, clearly established and free of defects and may be given by the state in advance or even at the time of the occurrence of the act (ILC 2001).

Due to abuses in the implementation of treaties of guarantee, the modern doctrine tends to recognize the contemporary expression of consent as necessary to preserve the political independence of the affected state (Reisman 1980; Wippman 1995; Institut de droit international 2011). The justification for this requirement, however, seems to be based on political rather than legal criteria. The flexibility in requiring *ad hoc* consent is greater in the specific case of interventions by regional organisations because the action is carried out within an institutional framework and would be characterized as collective action for the purpose of protecting the common interests of states, and not individual interests of certain stakeholders (Jennings & Watts 1992).

Within the internal legal framework, few regional organisations require *ad hoc* consent as a condition for intervention. The Constitutive Act of the African Union recognizes in its article 4 the "the right of Member States to request intervention from the Union in order to restore peace and security" (j), but such consent is not considered a condition for interventions "in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity" (h). In 2003 the possibility of non-consenting intervention was expanded by a protocol of amendment of the Constitutive Act also to cases of "serious threat to legitimate order to restore peace and stability" (article 4).

The only instance in which article 4 (h) was used occurred in 2015, when the Peace and Security Council of the AU recommended to the Assembly of Heads of State and Government the implementation of the African Prevention and Protection Mission in Burundi (MAPROBU). At the time the Council stressed that the mission should be approved even without the consent of the state, but the reduction of tensions in the country led to the non-implementation of the action.

The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security of the Economic Community of West African States (ECOWAS) identifies the request for intervention by the state concerned as a condition for intervention, but this may be also done by other member states, its organs, and even by the African Union or the United Nations (articles 25 and 26). On the other hand, organisations such as the Southern

Africa Development Community (SADC) and the Collective Security Treaty Organisation require prior state consent as a necessary prerequisite for intervention. According to article 11 of its Agreement Amending the Protocol on Politics, Defence and Security of 2001, the SADC "shall seek to obtain the consent of the disputant parties to its peace-making efforts": this provision sought to meet the criticism of the lack of consent of all parties of the conflict in the intervention in Lesotho in 1998.

The normative change made within the scope of SADC is a manifestation of a tendency to demand, in practice, some form of prior consent from the national authorities of their member states by regional organisations prior to an intervention, in order to be used as a legal basis to justify the operation (albeit not exclusively). Such practice can be observed in relation to ECOWAS, which in January 2017 requested the consent of President-elect of The Gambia Adama Barrow to intervene in the country following the refusal of the former President Yahya Jammeh to accept the outcome of the 2016 elections. The same practice had been done in relation to the ECOWAS' intervention in the constitutional crisis of Côte d'Ivoire in 2010, but in the specific case of The Gambia the President-elect did not exercise effective control over the territory, which makes his competence to request ECOWAS intervention questionable, but confirms the understanding that some form of consent is required.

It may be too early to state that *ad hoc* consent is considered a necessary requirement for treaty-based intervention by regional organisations, but the practice of requiring it is becoming constantly uniform even within organisations that do not set it formally as a condition for action, such as the ECOWAS or the African Union. At the same time this practice has not been uniform with regard to the requirements that must be taken into account to determine the validity of contemporary consent.

2. Legality regarding the Charter of the United Nations

The practice of interventions by regional organisations can also be analysed in relation to the UN Charter, in respect to which the rules of international responsibility are subsidiary (Arcari 2013). The use of the UN Charter as a legal parameter in this case is explained by the collective security system established by it. While the role of regional organisations in maintaining international peace and security was provided for in the Charter (2.1), the lack of specific provisions in it about armed interventions carried out by regional organisations raises doubts about the legality of such practice (2.2).

2.1. Action under Chapter VIII of the Charter of the United Nations

The UN Charter has reserved to international organisations of regional

character an important role in the post-war collective security system by dedicating a chapter of its own to them. Chapter VIII provides for the possibility of establishment of "regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies", provided that they are compatible with the purposes and principles of the United Nations.

The vague terms employed show that Chapter VIII did not seek to regulate the establishment or operation of such entities, but to establish a model of relationship between the Security Council, which have primary responsibility for maintaining international peace and security, and regional organisations, which would act as local instruments of the collective security system by addressing threats to international peace and security more effectively (Orakhelashvili 2011).

Chapter VIII assigns two distinct roles to regional organisations in the collective security system. The first function concerns the peaceful settlement of disputes, by stating in paragraphs 2 and 3 of Article 52 that UN member States that are parties to these regional agreements or entities "shall 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" and the Council itself may encourage the peaceful settlement of disputes under these agreements. Under article 52 regional organisations enjoy great autonomy and flexibility in intervening for the purpose of maintaining international peace by peaceful and non-forcible means: this reflects a regionalist approach advocated by Latin American and Arab states at the San Francisco Conference (Boisson de Chazournes 2011).

The second role assigned to regional organisations relates to enforcement through coercive measures. Article 53 states that the Security Council "shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority", which makes them an instrument of the Security Council. Article 53 also implicitly enables the Security Council to delegate powers and authorize regional action by providing that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". Finally, Article 54 reinforces the hierarchical submission of regional organisations by establishing their duty to inform the Council of the "activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security".

2.2. Action without the authorization of the Security Council

Since the hypothesis of intervention by a regional organisation in its member states is not foreseen in Chapter VIII and was not discussed in the preparatory

works of the Charter, the key element in determining whether an armed intervention by a regional organisation requires the prior authorization of the Security Council is its configuration as an "enforcement action" under Article 53. The term is used by the UN Charter to refer broadly to the powers of the Security Council provided for in Chapter VII of the Charter, but the coercive measures that involve the use of armed force provided for in Article 41, such as economic sanctions, do not seem to be understood as falling under the scope of article 53.

The Charter's preparatory works points out that the term originally also included economic sanctions, but in practice the Security Council takes a restrictive view and considers that only coercive measures involving use of force under Article 42 would be considered “enforcement actions” for the purposes of Chapter VIII (Boisson de Chazournes 2011). Such an understanding is consistent with the fact that the Charter allows states to apply economic sanctions individually without the consent or authorization of the Security Council, and therefore there would be no reason to prevent a regional organisation from doing the same collectively.

Intuitively one can imagine that treaty-based interventions would only be allowed when authorized by the Security Council, because they clearly involve measures considered to be “repressive”, employing armed forces and conducting military operations. However, not all actions involving the use of force for the purpose of maintaining international peace and security are considered enforcement actions. This is the case of peacekeeping operations, whose characterization as actions under Chapter VII of the Charter was rejected by the International Court of Justice in its advisory opinion on *Certain Expenses of the United Nations* of 1962.

The existence of peacekeeping missions operated exclusively by regional organisations or in partnership with the United Nations is an established practice that should not be confused with treaty-based interventions by regional organisations. The concept of peacekeeping operations is quite specific, always involving the elements of consent, impartiality and limited use of force (Corten 2010). While both types of operations require the consent of the state in which they are carried out for peace and security purposes, peacekeeping operations generally make tactical use of the armed force limited to the defence of the mission or its personnel, while in treaty-based interventions the use of armed force is strategic and an essential element for the achievement of objectives.

The autonomous action of the regional organisations in relation to the Security Council is a practice that was accentuated since the end of the Cold War and created “pockets of institutional autonomy” (Boisson de Chazournes 2011), in practice derogating from the rigid structure of subordination provided for in the UN Charter. Among the many causes of the process of decentralization of the collective security system is the prolonged paralysis of the Security Council

during the Cold War and the creation of a model of force authorization that has been in force since then (Boisson de Chazournes 2011).

Treaty-based interventions within regional organisations clearly concern the maintenance of regional peace and security but they may fall in a legal limbo of activities that does not require Security Council authorization, such as peacekeeping operations. The determining factor that makes treaty-based interventions not considered as enforcement actions is the consent of the affected state, as the International Court of Justice had already considered in the *Certain Expenses* advisory opinion.

Even if the authorization of the Security Council prior to interventions made by regional organisations in their member states is not expressly required by the UN Charter, there is a tendency in the practice of the organisations to seek cooperation from the Security Council prior to any action[5]. All the last five large interventions carried out by regional organisations met either with an express permission by or acquiescence from the Security Council. All of them were carried out by ECOWAS and the African Union, whose internal legal frameworks do not require the prior authorization of the Security Council to military intervention.

The intervention carried out by ECOWAS in The Gambia in 2017, for example, only started after the Security Council meeting of 19 January, which was held few hours before the deployment of the troops. Similarly, the African Union only deployed troops to the Central African Republic in 2013 after express authorization by the Security Council in December of that year, five months after its internal decision to approve the operation.

This is not surprising, given that regional organisations tend to seek United Nations support to legitimize their regional actions. As originally foreseen by Chapter VIII of the UN Charter, cooperation between regional bodies and the Security Council shows that regionalism is a necessary component of multilateralism in maintaining international peace and security (Pasquali 2012).

Conclusion

Treaty-based interventions within regional organisations is a phenomenon that has intensified in recent decades, spontaneously emerged and was later institutionalized to deal with some regional problems more effectively than the global collective security system would be able to do. Other factors contributing to the frequency of this practice include the greater legitimacy of local entities in dealing with local problems, the restriction on the principle of non-interference in

[5] Interventions in The Gambia by ECOWAS in 2017, Central African Republic by AU in 2013, Guinea-Bissau by ECOWAS in 2012, Mali by ECOWAS in 2012 and Comoros by AU in 2008.

the internal domain of states and even the encouraging action of the Security Council.

Some conclusions can be made based on the questions presented here. Interventions by regional organisations in their member states are not precluded by international law but must follow certain requirements in their application. The legal basis of their legality is grounded on the competence of the regional organisation and the consent of the affected state, which is the reason why an intervention must be provided for in the internal legal system of the regional organisation and must have the valid consent of the state in order to be considered lawful. Consent from the affected state is the key element that makes United Nations Security Council authorization not required for the use of force by a regional organisation in this specific case. The authorization of this Security Council, however, is desirable to ensure the legitimacy of the operation under the UN Charter.

Consent is also the element that allows intervening action not to be considered an unlawful violation of the prohibition on the use of force, although it cannot be used to justify serious violations such as acts of aggression. To be considered valid, consent is usually provided by internationally recognized governmental authorities expressing the will of the state and there are uncertainties as to the existence of rules applicable to such cases.

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