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THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE CÔTE D'IVOIRE CRISIS: BACK TO BASICS?**

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1. *Introductory remarks.*

Over the last two decades we have witnessed a considerable proliferation in the regional organisations' activities in the field of maintenance of international peace and security[1]. The reasons behind this development are multifaceted. Admittedly, regional

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[1] The latest incident is the deployment of the Multinational Joint Task Force (MNJTF) by the member States of the Lake Chad Basin Commission and Benin, to combat the Boko Haram terrorist group, see for the press release http://www.peaceau.org/uploads/auc.com.boko-haram.25-05-2015.pdf (last visited 1.6.2015). It is important though to point out that, pursuant to International Court of Justice case-law, the Lake Chad Basin Commission "does not have as its purpose the settlement at a regional level of matters relating to the

organizations "are geographically and politically better positioned to understand the causes of armed conflicts owing to their knowledge of the region which can be a benefit for their efforts to influence the prevention or resolution of these conflicts", as has been stressed by the UN Security Council (hereinafter UNSC) in relevant resolutions[2]. From a practical point of view, the need to develop regional capacity responded to increasing shortfalls in the number of peacekeepers[3]. Also, within regional organisations, where member states presumably share common cultures and understandings, peaceful resolution of a dispute may be easier to achieve than within the framework of the UN. Moreover, it is a way to avoid imposed solutions by major powers like the five permanent states of the UNSC.

Especially in Africa, the general feeling was that the UNSC did not sufficiently attend to African needs and that "African solutions were needed for African problems"[4]. This was reflected in the "Ezulwini consensus", approved by member states of the African Union, underpinning the following: "Since the General Assembly and the Security Council are often far from the scenes of conflict and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that regional organizations, in areas of proximity to conflicts, are empowered to take actions in this regard"[5].

However, this proliferation is not without side effects. There have been instances where regional organisations have acted on their own or promoted their own agenda, especially in cases where the regional organisation has been dominated by a leading power which tried to further its own objectives by intervening in a conflict rather than securing regional stability. In spite of the tenuous efforts of the former UN Secretary General, B. Boutros-Ghali, to delineate regional organisations' actions in the aftermath of the end of the Cold-War era, in many cases this was not always feasible, due to the increasing number of crises that the UN had to deal with as well as the precipitated actions of regional organisations that were retrospectively approved or just tolerated by the UNSC.

In this framework, the case of Côte d'Ivoire is a particular one, since it can serve as a paradigm of smooth coordination between international and regional action. Throughout the two decades of unrest in the country, the UN and regional organisations have cooperated exemplarily in order to restore peace and stability in the country and the region, through preventive diplomacy, sanctions that do no imply the use of force and peace-keeping operations that have added positively to the legacy of peace-keeping both at the international and regional levels. Before proceeding to the analysis of the Côte d'Ivoire case-study, we will have a brief look at the regulation and coordination of international and regional (re)action in the field of maintenance of peace and security, as it has been already

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maintenance of international peace and security" and therefore cannot be considered a regional arrangement for the purposes of Chapter VIII UN Charter, see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria),* Preliminary Objections, Judgment of 11.6.1998, ICJ Reports 1998, p. 275, §67.

[2] See the latest one, S/RES/2033 (2012), 12.1.2012, 4th preambular paragraph.

[3] A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, 2004, §220, accessible at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (last visited 12.6.2015).

[4] B. MØLLER, *The African Union as security actor: African solutions to African problems?*, Working Paper no 57, Danish Institute for International Studies, August 2009.

[5] The common African position on the proposed reform of the UN: The Ezulwini consensus, 7th extraordinary session of the AU Executive Council, Addis Ababa, Ethiopia, 7-8.3.2005, available at http://www.responsibilitytoprotect.org/files/AU_Ezulwini%20Consensus.pdf (last accessed 12.6.2015).

laid out by the UN Charter with a particular emphasis to African regional organisations and more specifically the African Union and ECOWAS.

2. *Regional and subregional organizations in the African continent and their cooperation with the United Nations in matters of maintenance of international peace and security*[6].

2.1. *The UN Charter and maintenance of international peace and security: where do regional organizations fit?*

Since the inception of the UN Charter in 1945 and the establishment of the United Nations – the sole international organisation of universal and general competence – issues relating to the maintenance of international peace and security were entrusted primarily to the Security Council. Thus, according to article 24 §1 UN Charter, the member states of the UN conferred on the Security Council, acting on their behalf, the primary responsibility for the maintenance of international peace and security, in order to ensure prompt and effective action by the United Nations. Be that as it may, the International Court of Justice has already clarified in 1962 in its advisory opinion *"Certain expenses of the United Nations"* that within the UN, although the competence of the UNSC is primary, it is by no means exclusive, since the General Assembly may be also involved in matters of international peace and security, even if it cannot order coercive action, a power that is vested exclusively in the Security Council in the framework of Chapter VII UN Charter[7].

Regional organizations on the other hand have a central role to play in relation to the pacific settlement of disputes, as they remain of foremost importance as the proper forum to address local disputes, through preventive diplomacy, confidence-building and mediation efforts. The creation of an hierarchy between the UN and in particular the Security Council and regional organisations in matters of maintenance of international peace and security was made clear during the Dumbarton Oaks conversations. Section C of the said document elaborates on the relationship by recognising that local disputes should be dealt with by such regional organisations through peaceful means of settlement. If enforcement measures were to be taken, these should be authorized by the UN Security Council. The text has been almost *verbatim* incorporated into the UN Charter[8]. Thus, according to article 33 §1 UN Charter, which enumerates the means of peaceful resolution of disputes, resort to regional agencies or arrangements is one of the means proposed to the opposing parties in order to settle peacefully their dispute, the continuance of which is likely to endanger the maintenance of international peace and security[9]. The UN

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[6] For a detailed analysis of the subject-matter see, A. ABASS, *Regional organizations and the development of collective security. Beyond Chapter VIII of the UN Charter*, Hart Publishing, 2004.

[7] *Certain expenses of the United Nations (article 17, paragraph 2, of the Charter),* advisory opinion of 20 July 1962: ICJ reports 1962, p. 163-4. See, also, resolution 377 A of the UN General Assembly "Uniting for peace" (A/RES/377(V), 3.11.1950) adopted to overcome lack of unanimity among the five permanent members of the UNSC, recognising certain powers to the UNGA in order to restore international peace and security.

[8] See, Proposals for the Establishment of a General International Organization, 1 August - 7 October 1944 - Dumbarton Oaks Conversations, available at http://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf (last visited 15.5.2015).

[9] See also, UN Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security, A/RES/49/57, 9.12.1994. In the Grenada crisis (1983) one of the critical approaches concerned the Organization of Eastern Caribbean States stance towards the US invasion. According to this approach: "if the OECS truly believed the new

Declaration on the friendly settlement of disputes also gives priority to regional organizations before submitting local disputes to the UNSC[10]. According to the theory, traditional peace-keeping, i.e. the one enjoying consent by all the parties involved and permitting the use of force only in personal self-defence, is not considered enforcement action that requires UNSC approval. The basis of this assumption is that such activities constitute a means of peacefully settling a conflict (as Chapter VI ½ UN Charter). We will return to this matter in the following sections.

Although resort to regional organizations is proposed as one of the fundamental means of settling peacefully a conflict, when it comes to the imposition of coercive measures and the use of force, regional arrangements have a secondary role to play and definitely they cannot act without a prior authorization of the UNSC. This is explicitly spelled out in Chapter VIII of the UN Charter, which will be analyzed in the following paragraphs, while it is further corroborated by article 103 UN Charter, according to which in the event of a conflict between the obligations of the members of the United Nations under the UN Charter and their obligations under any other international agreement – including regional integration treaties – their obligations under the UN Charter shall prevail.

2.2. *Chapter VIII UN Charter: content and current relevance*

Therefore, the relationship between the United Nations and regional organisations has been meticulously delineated in Chapter VIII of the UN Charter, a real innovation at that time, bearing in mind that the UN Charter's predecessor, the Covenant of the League of Nations, was extremely centralised and did not recognize other arrangements between member states[11]. Article 52 UN Charter recognizes the existence of regional arrangements or agencies and their capacity of dealing with matters relating to the maintenance of international peace and security that are appropriate for regional action and provided that such activities and initiatives are consistent with the purposes and principles of the United Nations. Besides, the UN Charter gives precedence to the pacific settlement of local disputes in the framework of such regional arrangements (already stipulated in article 33 §1 UN Charter), either on the initiative of the states concerned or by reference from the Security Council. Thus, it is inferred from the above that recourse to the use of force is not allowed without a UNSC authorization, a prohibition that is further elaborated in the following article.

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regime in Grenada created a serious threat to the future peace and stability of the region, the appropriate remedy would have been to bring the matter to the attention of the OAS", see F. BOYLE *et al.*, *International Lawlessness in Grenada*, in 78 *AJIL*, 1984, p. 172-175 (173). Thus, whenever the democratic institutions are threatened or destabilised in a state, the competent regional organization can contribute decisively to the resolution of the crisis, through mediation and other initiatives that do not involve the use of force.

[10] Manila Declaration on the peaceful settlement of international disputes, UN doc. A/RES/37/10, 15.11.1982, §6.

[11] See in particular article 11 thereof: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations". However, according to article 21 of the same instrument: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace", destined to alleviate mainly the worries of the USA Congress, see U. VILLANI, *Les rapports entre l' ONU et les organisations régionales dans le domaine du maintien de la paix*, in 290 *RCADI*, 2001, p. 225-436 (239).

Indeed, article 53 recognizes to the UNSC the primary role in the implementation of enforcement measures, since it stipulates that: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council" [12]. Finally: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security" (article 54 UN Charter). The UNSC's primacy is highlighted in all relevant UN Documents[13]. Even in the World Summit Outcome Document, which establishes the Responsibility to Protect doctrine, it is stated that collective action to protect populations from war crimes, crimes against humanity, ethnic cleansing and genocide will be undertaken though the Security Council, with or without the use of force, and "in cooperation with relevant regional organisations as appropriate"[14].

It should be pointed out that collective or individual self-defence in accordance with article 51 UN Charter is not enforcement action that requires the authorisation of the UNSC[15]. Likewise, intervention by invitation is also outside the scope of articles 52-54 UN Charter[16]. This is of major importance, since, as we shall see, some of ECOWAS' interventions (like ECOMOG's presence in Liberia in the early 90s and Sierra Leone in the late 90s)[17] have been characterised as interventions by invitation and not as regional actions requiring UNSC endorsement. Finally, traditional peace-keeping activities (i.e. without an enforcement element and deployed with the consent of all the parties to the conflict) by regional organisations do not require authorisation by the UNSC, since they are not considered enforcement action[18]. This may explain in part the establishment of ECOMOG, which was destined to monitor cease-fire lines, although its involvement in active combat demonstrates that it transgressed the boundaries of traditional peace-keeping.

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[12] Article 53 provides for an exception on the obligation to inform the UNSC. This concerns coercive measures that are adopted against an "enemy state", namely a state that was an enemy of any signatory of the UN Charter during the Second World War. It is evident that this provision has long ago lost any practical importance.

[13] See the following, very typical, abstract from the Agenda for Peace: "While democratization is encouraged at all levels in the task of maintaining international peace and security, it is essential to continue to recognize that the primary responsibility will continue to reside in the Security Council", Report of the former UN Secretary-General, Boutros Boutros-Ghali, An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping, UN Doc. A/47/277-S/24111, 17 June 1992, §65. The primacy of the UNSC and the continued relevance of Chapter VIII UN Charter is stressed in all relevant UNSC resolutions, see S/RES/1631 (2005), 17.10.2005, S/RES/2033 (2012), 12.1.2012.

[14] UN Doc. A/60/L.1, 15 September 2005, §139.

[15] E.g. the Act of Chapultepec among American states (39 AJIL, No 2 Supplement: Official Documents, April 1945, p. 108-111). The right to self-defence was not included in the Dumbarton Oaks Proposals that provided for a wide array of UNSC measures in cases of breaches of peace, see for a detailed analysis U. VILLANI, *, op.cit.* p. 254 et seq.

[16] T. CHRISTAKIS, K. MOLLARD-BANNELIER, *Volenti non fit injuria? Les effets du consentement à l'intervention militaire*, 50 AFDI, 2004, pp. 102-137.

[17] In the former case, ECOMOG relied on the invitation of the legitimate President of the country, Samuel Doe, to repel the advance of the rebels under Charles Taylor, and in the latter on the appeal by President Kabbah seeking ECOWAS assistance.

[18] Z. DEEN-RACSMANY, *A redistribution of authority between the UN and regional organisations in the field of maintenance of peace and security*, in *Leiden Journal of International Law*, 2000, pp. 297-331 (325).

2.3. *The attributes of regional organisations according to Chapter VIII UN Charter*

Chapter VIII does not provide a definition of the regional arrangements that fit into its provisions. The UN Charter refers to "regional arrangements or agencies". Despite the geographic character of the term "regional", it has been accepted that states participating in regional organisations do not necessarily need to fulfil a "geographic proximity" criterion. Rather, regional organisations in the sense of the UN Charter may also be organisations characterized by political, religious or linguistic relationships[19].

The phrase "relating to the maintenance of international peace and security that are appropriate for regional action" refers to the objectives and functions of the organisation. Regional arrangements such as the Organization of American States[20], the African Union[21] or the European Union[22] clearly respond to these requirements. However, this precondition should exclude *prima facie* organisations that have as their primary objective solely economic integration or regional development[23] However, the ECOWAS as well as SADC, although their primary objective is economy and development respectively, are both involved in matters of maintenance of regional peace and security, even before the adoption of their supplementary statutory acts on conflict resolution[24].

According to which criteria could one classify regional organisations? Much depends on whether the regional arrangement has at its disposal a procedure for the settlement of disputes between its member – states, a provision already present in ECOWAS' statutory acts since 1978. Moreover, the former UN Secretary General in his Agenda for Peace has opted for a broad interpretation of the term pointing out that: "The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and

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[19] There was a relevant academic discussion before granting observer status to the League of Arab States in the UN, see in that respect, M. KHADDURI, *The Arab League as a regional arrangement*, in 40 *AJIL*, 1946, pp. 756-777. It is interesting that in the past certain member states of the Arab League have declined a mediation offer by the regional agency, accepting nonetheless a UN mediation to peacefully resolve their differences (Lebanon and United Arab Republic in 1958, Morocco and Algeria in 1963). See for this issue, L. BOUONY, *La régime des décisions dans la Ligue des Etats Arabes – réalités et perspectives*, in 29 *AFDI*, 1983, pp. 543-563 (547). Nowadays there has been a revitalization of the Arab League activity. Apart from offering its good offices during the armed conflict in Syria (2011 onwards) – it has even formed an Observer Mission – there have been ongoing discussions regarding the establishment of a joint military force of member states that were precipitated by the Saudi Arabian intervention in Yemen, see Egypte: début du sommet arabe focalisé sur une force conjointe et le Yémen, 28.3.2015, http://www.romandie.com/news/Egypte-debut-du-sommet-arabe-focalise-sur-une-force-conjointe-et_ROM/579367.rom (last accessed 13.6.2015).

[20] See, M. AKEHURST, *Enforcement action by regional agencies with special reference to the Organization of American States*, in 62 *BYIL*, 1967, p. 175.

[21] C. PACKER, R. RUKARE, *The new African Union and its Constitutive Act*, in 96 *AJIL*, 2002, p. 365-379; T. MALUWA, *The Constitutive Act of the African Union and institution-building in postcolonial Africa*, in 16 *Leiden Journal of International Law*, 2003, pp. 157-170; D. WILLIAMS, *Regional arrangements and transnational security challenges: the African Union and the limits of the securitization theory*, in 1 *African Security*, 2008, pp. 2-23.

[22] F. NAERT, *International law aspects of the EU's Security and Defence Policy, with a particular focus on the law of armed conflict,* Intersentia, 2010; J. HOWORTH, *The Lisbon Treaty, CSDP and the EU as a security actor, in* M. TELÒ, F. PONJAERT (eds.), *The EU's foreign policy: what kind of power and diplomatic action?*, Ashgate, 2013, pp. 65-76.

[23] U. VILLANI, *op.cit.* p. 281.

[24] For the role of ECOWAS and SADC in peace-keeping and peace-enforcement, see E. DE WET., *The evolving role of ECOWAS and the SADC in peace operations: a challenge to the primacy of the United Nations Security Council in matters of peace and security?* in 27 *Leiden Journal of International Law*, 2014, p. 353-369.

security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern"[25].

Observer status in the UN General Assembly is not a safe criterion either, since a wide variety of regional organisations have acquired the status of observer and it is not certain whether they fulfil the requirements of Chapter VIII. OSCE is indeed a Chapter VIII regional organisation in spite of the fact that its legal nature is still a matter of controversy, since it is not based on a founding treaty but rather on various soft law acts[26]. On the contrary, Lake Chad Basin Commission "does not have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security" and therefore cannot be considered a regional arrangement for the purposes of Chapter VIII UN Charter[27]. There is however much controversy as to whether organisations of collective defence and basically NATO, since it is the only one left (Western European Union ceased to exist in 2011), fit into the definition of regional organisations envisaged in Chapter VIII UN Charter. The dispute focuses on the fact that collective defence organisations are established in order to respond to an external aggression and their actions to that effect are regulated by article 51 UN Charter and not articles 52-54[28].

2.4. *Regional and sub-regional organizations in Africa and their relationship with the UN. The cases of African Union and Economic Community of West African States*

2.4.1. *Issues of maintenance of peace and security in the statutory acts of the African Union*

When the UN Charter was adopted in 1945, regional cooperation in Africa was virtually non-existent, given that the process of decolonization and the following independence of African states had not yet kicked off. The Organization of African Unity, open to all African states and comprising by 1994 almost all of them, was formed in 1963[29]. Furthermore, the subregional organizations were formed several decades after the adoption

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[25] An Agenda for peace, op.cit. §61.

[26] See for the relevant discussion M. SAPIRO, *Changing the CSCE into OSCE: legal aspects of a political transformation*, in 89 *AJIL*, 1995, pp. 631-637; C. *BERTRAND., La nature juridique de l'Organisation pour la sécurité et la coopération en Europe*, in *RGDIP*, 1998, p. 365.

[27] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria),* Preliminary Objections, Judgment of 11.6.1998, ICJ Reports 1998, p. 275, §67.

[28] See for a discussion of the arguments, H. KELSEN*, Is the North Atlantic Treaty a regional arrangement?* in *AJIL*, 1951, p. 162-166. The issue received an impetus during the armed conflict in Bosnia-Herzegovina, where NATO was called in to conduct air strikes, see for the relevant discussion, I. DEKKER, E. MYJER*, Air strikes on Bosnian positions: is NATO also legally the proper instrument of the UN?*, in 9 *Leiden Journal of International Law*, 1996, pp. 411-416; N. BLOKKER, S. MULLER, *NATO as the UN Security Council's instrument: question marks from the perspective of international law?*, in 9 *Leiden Journal of International Law*, 1996, pp. 417-421.

[29] The signatories of the OAU Charter on 25 May 1963 were 32. The last country that was admitted as a member state was South Africa in 1994. When OAU was disbanded on 9 July 2002 it comprised 53 states of the African continent (including the Sahrawi Arab Democratic Republic, which is the reason behind Morocco's withdrawal in 1984). OAU was replaced in 2002 by the African Union which comprises 54 states (the last country that acceded to the AU Constitutive Act was South Sudan which became independent in 2011).

of the UN Charter[30]. Thus, it goes without saying that the UN Charter and in particular its Chapter VIII on "regional arrangements" had to adapt to the new reality that emerged from the decolonization process in Africa, especially in the post-Cold War era when the peacekeeping and peace enforcement operations of the UN alone or in cooperation with regional organizations have multiplied.

Established as a successor to the strongly criticized for its inaction OAU[31], the AU's Constitutive Act sets high ambitions for its role in the maintenance of peace and security among and within the African states, overcoming the stance of its predecessor of avoiding any interference with the sovereign affairs of other member states. Pursuant to article 4 of its founding instrument, the AU may authorize collective action in a member state in the following circumstances: a) in pursuance of a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity[32], and b) at the invitation of a member state, in order to restore peace and security within their territory[33].

According to the Protocol on Amendments to the AU Constitutive Act, the Assembly can decide on intervention, inter alia, following a serious threat to the legitimate order within a member state[34], a provision that was meant to cover situations where intervention due to genocide, war crimes and crimes against humanity would not be applicable (article 4 j). Definition of "the threat to legitimate order" is not provided and in theory it could also include the chaos resulting from a government's refusal to hand over power after losing an election, the so-called pro-democratic intervention. However, the Protocol has not yet entered into force (it requires 36 ratifications and the number so far is 28)[35]. Hitherto, threats to or disturbances of the democratic order were not treated through

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[30] Africa presents a plethora of sub-regional organizations, most of which have some kind of interference with the resolution of regional conflicts: Economic Community of West African States (1975); Intergovernmental Authority on Development (IGAD) (1996) (it was initially formed as the Intergovernmental Authority on Drought and Development (IGADD) in 1986); Southern African Development Community (SADC) [it was initially formed as the Southern Africa Development Coordinating Conference (SADCC) in 1981. It became SAADC in 1992]; CEN-SAD Community of Sahel-Saharan States; COMESA Common Market for Eastern and Southern Africa; EAC East African Community; League of Arab States. The Economic Community of Central African States was established in 1983. The Arab Maghreb Union was founded in 1989. For a synopsis of the functional and institutional identity of these organizations, see B. MØLLER, *Africa's sub-regional organizations: seamless web or patchwork?* Working Paper no 56, Danish Institute for International Studies, August 2009. See, also, Memorandum of Understanding on cooperation in the area of peace and security between the African Union, the Regional Economic Communities and the coordinating mechanisms of the regional standby brigades of Eastern Africa and Northern Africa, 2008, accessible at http://www.peaceau.org/uploads/mou-au-rec-eng.pdf (last visited 30.5.2015).

[31] See for an overview of OAU's stance in the face of humanitarian crises in the african continent, E. BERMAN E., K. SAMS., *Peacekeeping in Africa: capabilities and culpabilities*, UNIDIR/2000/3, United Nations, 2000, p. 45 et seq.

[32] Article 4h AU Constitutive Act. See for a thorough analysis of the article, especially in conjunction with the responsibility to protect doctrine, D. KUWALI, F. VILJOEN (eds.), *Africa and the responsibility to protect. Article 4h of the African Union Constitutive Act*, Routledge, 2014.

[33] Article 4j AU Constitutive Act.

[34] The amended article 4(h) reads: "[T]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council".

[35] The amendment was due to come into force 30 days after two-thirds of the AU member states had deposited their instruments of ratification. See for the list of ratifications,

military action. To the contrary, the strongest sanction that was adopted by the AU Peace and Security Council in relevant situations was suspension of membership[36].

Both provisions (articles 4h and 4j) and the AU Constitutive Act as a whole were designed to remedy the possible inaction or stalemate in the UNSC due to the veto procedure, especially in the face of flagrant human rights violations in the African continent as was the case during the genocide in Rwanda[37]. Therefore, neither of these provisions contains a reference to the need of a prior UNSC authorization. Nonetheless, practice demonstrates that the AU has never defied the UNSC, since all interventions undertaken by the AU are in fact authorized by it[38]. The reports of the UN Secretary General on the cooperation between the UN and the AU also underline the hierarchy between the UNSC and the relevant organs of the AU, in particular the Peace and Security Council[39].

The second instrument dealing with the prevention, management and resolution of conflicts of the African Union is the Protocol relating to the establishment of the Peace and Security Council of the African Union. It entered into force in 2004 establishing: "a standing decision-making organ for the prevention, management and resolution of conflicts", responsible for the: "efficient response to conflict and crisis situations in Africa" (article 1). In other words the Peace and Security Council is designed to be the UNSC's counterpart in the African continent, albeit somewhat more democratic, namely without permanent members and no veto[40]. Indeed the AU Assembly is implicated in every serious decision of the PSC, especially the ones that entail the use of force.

The PSC can respond to such crises through the following methods and always in conjunction with the chairperson of the Commission of the AU: authorize the deployment

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http://www.au.int/en/sites/default/files/Amendments%20to%20the%20Constitutive%20Act_0.pdf (last accessed 13.6.2015).

[36] Côte d'Ivoire [PSC/PR/COMM.1(CCLII), 9.12.2010. The suspension was lifted on 21 April 2011, see PSC/PR/COMM.1(CCLXXIII)]; Mali [PSC/PR/COMM(CCCXV), 23.3.2012]; Madagascar (PSC/PR/COMM.(CLXXXI), 20.3.2009); Guinea (29.12.2008)

[37] B. KIOKO, *The right of intervention under the AU's Constitutive Act: from non-interference to non-intervention*, IRRC No 852, 2003, p. 807-824 (812 et seq.).

[38] AMISOM, a multidimensional peace support operation in Somalia, mandated to "take all necessary measures to reduce the threat posed by Al Shabaab and other armed opposition groups" was authorised by virtue of UNSC res. 1744 (2007), 20.2.2007, while its mandate has been amended and renewed by several subsequent resolutions (the most recent one is res. 2182 (2014), 24.10.2014. UNAMID is an AU/UN hybrid operation in Darfur (Sudan), authorised by UNSC res. 1769 (2007), 31.7.2007, and extended by various subsequent resolution (the most recent is res. 2173 (2014), 27.8.2014), mandated to "take the necessary action" in order to protect its personnel and ensure the security and freedom of movement of its personnel and the humanitarian workers and to support early and effective implementation of the Darfur Peace Agreement and protect civilians. The African-led International Support Mission in Mali (AFISMA) was established pursuant to res. 2085 (2012) and was tasked to take all necessary measures to support the Malian authorities, *inter alia,* in recovering the areas in the north of its territory, rebuilding the capacity of the Malian Defence and Security Forces, protecting the population, securing the humanitarian assistance etc.

[39] See the most recent one, Report of the Secretary-General on United Nations-African Union cooperation in peace and security, UN doc. S/2011/805, 29.12.2011.

[40] The PSC is composed of 15 members: ten of them elected for a term of two years and five members elected for a term of three years in order to ensure continuity (article 5 Protocol). There is also a periodic review by the Assembly to assess the extent to which the Members of the Peace and Security Council continue to meet the requirements spelt out in article 5 (2) of the Protocol and to take action as appropriate. Its decisions are generally adopted by consensus. Where this is not feasible, the decisions on procedural issues are adopted by a simple majority, while decisions on all other matters are adopted by a two-thirds majority (article 8 par. 13).

of peace support missions, recommend to the Assembly intervention in case of war crimes, crimes against humanity, genocide (in contrast to the UNSC that is the only competent organ to authorize such an intervention), approve the modalities for intervention at the request of a member state and following a decision by the Assembly, impose sanctions in cases of unconstitutional changes of government etc. For the furtherance of the PSC's activities regarding the deployment of peace support missions, the Protocol provides for the establishment of an African Standby Force. Such Force will be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice (article 13 §1).

Notwithstanding the stipulations of the AU Constitutive Act, it remains indisputable that the African regional organization cannot act solely at its own instigation even if its action is in accordance with its statutory instrument. Article 17 of the Protocol stipulates that the PSC "shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security", while it will make recourse to the UN for the necessary financial, logistical and military support for its activities. In addition to the clear provisions of Chapter VIII of the UN Charter regarding the UNSC's primacy in the maintenance of international (including regional) peace and security, a number of unresolved issues remain, especially in relation to the use of force when the African state in question has not provided its consent[41].

2.4.2. *A particular case: the Economic Community of West African States and its involvement in matters of maintenance of sub-regional peace and security*

The sub-regional organisation that could endanger – mainly through its practice and partly due to its statutory reforms – the UN Security Council's primacy in matters of maintenance of international peace and security is the Economic Community of West African States (hereinafter ECOWAS). Unlike the AU, which defers explicitly to the UNSC by virtue of the Protocol relating to the establishment of the Peace and Security Council, the respective instrument of ECOWAS does not follow the same pattern. Moreover, unlike the AU, the ECOWAS has a history of unilateral interventions that did not enjoy the UNSC's endorsement when they were taking place – albeit the majority of them were retrospectively approved by subsequent resolutions of the primary UN organ[42].

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41 With regard to that see, J. SARKIN, *The role of the United Nations, the African Union and Africa's subregional organizations in dealing with Africa's human rights problems: connecting humanitarian intervention and the responsibility to protect*, in 53 *Journal of African Law*, 2009, pp. 1-33 (20).

42 We refer mainly to the conflicts in Liberia (1990-1997) and Sierra Leone (1991-2002), where ECOWAS undertook controversial interventions, preceding the adoption of the "Mechanism". Both operations received an *ex post facto* authorisation by the UNSC, see res. 788 (1992), 19.11.1992 for Liberia and res. 1162 (1998), 17.4.1998 for Sierra Leone. In the latter case, although the UNSC did not authorize ECOWAS to intervene, it did authorise it to "ensure strict implementation of the provisions" regarding the embargo on petroleum, petroleum products, arms and related matériel of all types [res. 1132 (1997), 8.10.1997]. ECOMOG troops overstepped their mandate, since they have later helped to the restoration of the elected president in power, receiving retrospectively the tacit approval of the UNSC through resolution 1162 (1998), 17.4.1998. See for an analysis, J. ALLAIN, *The true challenge to the United Nations system of the use of force: the failures of Kosovo and Iraq and the emergence of the African Union*, in 8 *Max Planck UNYB*, 2004, pp. 237-289 (260-262). On the contrary, ECOMOG's interposition between the conflicting parties in Guinea-Bissau was explicitly authorised by the UNSC by virtue of res. 1216 (1998), 21.12.1998. ECOMOG's role in this crisis was confined to classical peacekeeping as stipulated by §4 of the aforementioned resolution: "Approves the implementation by the ECOMOG interposition force of its mandate … in a neutral and impartial way and in conformity with

ECOWAS is a regional organisation of economic cooperation and integration. It was founded on 28 May 1975[43] and comprises 15 West African countries as member states. Although its founders envisaged an economic community similar to the European Community, in the post-Cold War era ECOWAS has been particularly active in military action in West Africa[44]. The need to respond to the proliferation of conflicts in the region, that had a negative impact on economic development, urged the Organisation to usher in a new era and include a provision on regional maintenance and security and conflict resolution in its revised treaty. Indeed, article 58 §2 of the 1993 Revised ECOWAS Treaty establishes the framework for cooperation in peace and security, in close cooperation with the UN, stipulating that detailed provisions on these issues would be regulated by subsequent relevant Protocols. This Protocol was adopted in 1999 and is named "Protocol relating to the mechanism for Conflict prevention, Management, resolution, peacekeeping and security". Long before these instruments were adopted, a series of previous acts that cover mainly issues of collective self-defence were invoked by ECOWAS when it was implicated in regional crises and conflicts.

The first one of this array of instruments was the Protocol on non-aggression, adopted in 1978[45], three years after the foundation of ECOWAS. It is clearly an instrument that aims at the prohibition of the threat or use of force or aggression, including acts of subversion, between member states, but what is interesting is that it includes a provision on peaceful settlement of disputes arising among member states (article 5).

The next instrument is the Protocol relating to the Mutual Assistance of Defence (hereinafter PMAD), adopted in 1981[46]. It is an agreement of collective self-defence in case of external aggression, armed conflict between member states or non international armed conflict that receives outside support (the so-called internationalized armed conflicts). In particular article 16 PMAD stipulates that ECOWAS may intervene in situations of armed threat or aggression directed against a member state at the request of the state, thereby establishing a mechanism of collective self-defence. In case of a conflict between two member states, ECOWAS shall first engage in mediation and if the need arises, it may order the interposition of the Allied Armed Forces of the Community between the troops engaged in the conflict (article 17 PMAD). This action resembles to traditional UN peacekeeping (under the so-called "Chapter VI ½" UN Charter, as labelled by former UN Secretary-General Dag Hammarskjold), namely monitor of a buffer zone in the aftermath of a cease-fire agreement, consent of the parties involved in the conflict, no use of enforcement measures under Chapter VII UN Charter, use of force in personal self-

United Nations peacekeeping standards to achieve its objective to facilitate the return to peace and security by monitoring the implementation of the Abuja Agreement".

[43] Treaty of the Economic Community of West African States, 28.5.1975, 1010 U.N.T.S. 17, in 14 *I.L.M.* 1200

[44] See in that respect C. GRAY *C.*, International law and the use of force, 3rd ed., Cambridge University Press, 2008, p. 383 et seq.

[45] Registration no. 29136, "Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations", volume 1690, New York, 1999. It was registered with the Secretariat of the UN by ECOWAS on 25.9.1992. Available at http://webfactory.co.za/csvr/africanunion/Regional%20Economic%20Community%20Policy%20Documents/ECOWAS/ECOWAS%20Protocol%20on%20Non-Aggression.pdf (last visited 28.5.2015).

[46] Not registered with the UN Secretariat, available at http://www.operationspaix.net/DATA/DOCUMENT/3827~v~Protocole_d_Assistance_Mutuelle_en_matiere_de_Defense.pdf (last visited 28.5.2015).

defence but not for the defence of territory and strict impartiality regarding the conflict and the parties embroiled in it[47].

Last but not least, article 18 §1 PMAD stipulates that force will be used against external aggression or internal crisis that is externally maintained and sustained, at the express request of the state, excluding thereby any forcible intervention of the sub-regional organisation against its own member states. This is further corroborated by article 18 §2 PMAD which stipulates that community forces shall not intervene if the conflict remains purely internal. It is clear, therefore, that the abovementioned instruments do not offer a legal basis for action even if flagrant human rights violations occur. The rationale for their application is not the gravity of the crimes perpetrated against innocent civilians but the external threat to the independence and sovereignty of the state.

However, this security apparatus has never functioned in its entirety. Although the PMAD was invoked as a legal basis for ECOWAS' intervention in Liberia[48] and Sierra Leone, the Allied Armed Forces of the Community were never used as such. Rather, they were later incarnated in ECOMOG, a monitoring group established in 1990 destined initially for classical peacekeeping, namely observing of cease-fires, engaged though also in enforcement action mainly in Liberia and Sierra Leone. Its legal basis remains still today a thorny issue[49], the more so because it was actually used not as interposition force but it was

[47] A salient example of operation of this type is UNFICYP in Cyprus, present in the island since 1964. UNPROFOR in Bosnia-Herzegovina tested the limits of Chapter VI ½ operations, since it overstretched the role of UN peace-keeping personnel, especially after the adoption of UNSC resolutions 819 and 836 (1993), 4.6.1993, regarding the protection of safe areas.

[48] The PMAD strictly prohibits intervention in internal armed conflicts. In order to outflank this legal obstacle, the West African countries justified their intervention pointing out that, owing to the large number of their own nationals trapped in Liberia and thousands of refugees fleeing to neighbouring countries, the conflict could no longer be characterised as purely internal, see *Human Rights Watch,* Waging war to keep the peace: the ECOMOG intervention and human rights, June 1993, available at http://www.hrw.org/reports/1993/liberia/ (last visited 30.5.2015). This is not precise and renders extremely shaky the legal bases used by ECOWAS intervening states. The conflict was indeed non-international, before the outside intervention took place, since the warring factions were the armed forces of the country and the rebels and it had not yet spilled over to neighbouring countries. The humanitarian emergency caused by thousands of refugees crossing the borders could potentially destabilize the region, creating what the UNSC aptly describes as "threat to international peace and security". But it does not change the qualification of the conflict as such. The intervention to protect nationals abroad is a wholly different issue and it is out of the scope of this paper, but it seems, by the facts on the ground, that the intention of the ECOMOG force was not limited to a rescue operation.

[49] It was established by the Standing Mediation Committee (which was created by the Authority – the Heads of States and Governments of ECOWAS – by virtue of decision A/DEC.9/5/90, 30 May 1990 and comprised the Gambia, Ghana, Mali, Nigeria and Togo, see E. BERMAN, K. SAMS, *Peacekeeping in Africa: capabilities and culpabilities*, UNIDIR/2000/3, United Nations, 2000, p. 85) at its meeting in Banjul on 6–7 August 1990 (see Lettre datée du 9 août 1990, adressée au Secrétaire Général par le Représentant Permanent du Nigeria auprès de l'Organisation des Nations Unies, UN doc. S/21485, 10.8.1990) and its backbone was the Nigerian armed forces which henceforth assumed a leading role, see A. ADEBAJO, *Liberia's civil war. Nigeria, ECOMOG and regional security in West-Africa*, Lynne Rienner Publ., Colorado, 2002; M. WELLER (ed.), *Regional peace-keeping and international enforcement: the Liberian crisis*, Cambridge International Law Series, vol. 6, Cambridge, Cambridge University Press, 1994. The legal procedure stipulated by the PMAD was totally ignored. The Allied Armed Forces of the Community could not be activated "because of the divide between francophone countries, who were in support of Charles Taylor, the rebel leader and the Anglophone countries who were in support of Samuel Doe, the president", see L . MALU, *Background note on ECOWAS, Pan African Strategic and Policy Research Group*, World Bank Headline Seminar on the Global and Regional Dimensions of Conflict & Peacebuilding, Addis Ababa, October 10 & 12, 2009.

involved in active combat, using lethal force for offensive purposes[50]. Be that as it may, ECOMOG as a standby force with civilian and military components is incorporated in the subsequent Protocol on the Mechanism for Conflict Prevention "as a supporting organ of the institutions of the Mechanism" (article 17 Protocol) with a broad mandate, as will be analysed in the following paragraphs.

It ensues from the above that ECOWAS lacked the legal framework to undertake operations for the maintenance of sub-regional peace and security in cases where flagrant human rights violations or serious violations of international humanitarian law occurred within the national territory of its member states[51]. This legal framework was adopted in 1999 as "Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security" (hereinafter Protocol on the Mechanism for Conflict Prevention)[52] and it was described as "the Organisation's Constitution on collective security in the West African sub-region"[53].

Article 1 of this instrument establishes a mechanism for collective security, whereby ECOWAS leaves the field of traditional peacekeeping – invitation of the state and use of force only in self-defence – and is vested with additional powers which include deployment of peacekeeping forces in internal armed conflicts mandated to use force for the protection of civilians. Whereas pursuant to PMAD, ECOWAS was not allowed to intervene if the conflict remained purely internal (article 18 §2 PMAD), article 25 of the Protocol on the Mechanism for Conflict Prevention empowers explicitly ECOWAS to intervene in internal conflicts of member states, not only in cases of gross human rights violations but also due to a breakdown of the rule of law.

In particular, the Mechanism is triggered by virtue of a decision of the Mediation and Security Council (article 26b of the Protocol on the Mechanism for Conflict Prevention) in cases of aggression or conflict or threat thereof in any member state or in case of conflict between two or several member states, situations already covered by the PMAD (albeit according to the latter a request of the state is necessary, while the "Mechanism" is activated even without the acquiescence of the state/states involved). Furthermore, the Protocol applies explicitly in case of internal conflict that threatens to trigger a humanitarian disaster or poses a serious threat to peace and security in the sub-region and in the event of serious and massive violation of human rights and the rule of law.

What is the real innovation is that the "Mechanism" is also activated in the event of an overthrow or attempted overthrow of a democratically elected government. The latter goes hand in hand with the political sanction of suspending a member state from

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[50] The legal paradigms applicable to multinational operations, on the basis of which the rules of engagement of each operation are adopted, are mainly the following two: the law enforcement paradigm (use of lethal force is based on the stipulations of international human rights law) and the armed conflict paradigm (use of force is based on the provisions of international humanitarian law). For a relevant discussion see, R. MCLAUGHLIN, *The legal regime applicable to use of lethal force when operating under a United Nations Security Council Chapter VII mandate authorising "all necessary means"*, in 12 *Journal of Conflict and Security Law*, 2008, pp. 389-417.

[51] The "Mechanism" has been aptly described as the "regional version" of the responsibility to protect, see I. SAMPSON, *The responsibility to protect and ECOWAS mechanisms on peace and security: assessing their convergence and divergence on intervention*, in 16 *Journal of Conflict and Security Law*, 2011, pp. 507-540 (529).

[52] Not registered with the UN Secretariat, available at http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/ECOWAS_Protocol_ConflictPrevention.pdf (last visited 28.5.2015).

[53] A. ABASS, *The new collective security mechanism of ECOWAS: innovations and problems*, in 5 *Journal of Conflict and Security Law*, 2000, pp. 211-229 (211).

participation in ECOWAS' organs in cases of disruption of the democratic order, as stipulated by the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the mechanism for conflict prevention[54]. This wide array of cases where the "Mechanism" may be activated and the absence of express deference to the UNSC contributes to the creation of an unsecure rather than secure and stable environment in West Africa. It is encouraging though that the "Mechanism" has not been activated in cases of breakdown of the rule of law, where the sanction that was preferred was the suspension of membership of the involved state[55]. Finally, the "Mechanism" may be also activated in "any other situation as may be decided by the Mediation and Security Council". In this framework, ECOMOG is established as a standing force and vested with more functions.

What still remains problematic is the cooperation with the UNSC under Chapter VIII UN Charter. Although article 52 of the Protocol on the Mechanism for Conflict Prevention makes reference to Chapter VIII UN Charter, it stipulates that ECOWAS will inform the UN of military action already undertaken, but it does not mention anything regarding the need of prior UNSC authorisation nor the obligation of regional arrangements to inform the UNSC on the measures contemplated (article 53 UN Charter). The "Mechanism" is initiated either by a decision of the Authority, the Mediation and Security Council, on the initiative of the Executive Secretary, at the request of a member state or at the request of the AU or the UN (article 26). This is in apparent conflict with the UN Charter, which recognises explicitly the primacy of the UNSC to decide on such matters. It is not clear yet whether ECOWAS has the intention to activate the Mechanism disregarding the UNSC or whether it will be used as a pressure mechanism to precipitate international reaction in the face of serious humanitarian emergencies[56].

Notwithstanding ECOWAS' statutory reforms, the question remains: does the practice of ECOWAS crystallize a customary rule whereby enforcement action by regional organisations can be undertaken without a prior UNSC resolution? Has the UNSC developed a practice of retrospective authorization or approval of such regional initiatives? From the point of view of the author of this paper, these questions should be answered in

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[54] Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the mechanism for conflict prevention, management, resolution, peacekeeping and security, adopted by the Economic Community of West African States (ECOWAS) in Dakar, in December 2001.

[55] During the 2010 turmoil in Côte d'Ivoire, as we shall examine later on in this paper, where the outgoing president, Laurent Gbagbo, refused to recognize Alassane Ouattara as the winner of the elections, the country had been suspended on 7 December 2010 from participation in the decision-making bodies of ECOWAS, by virtue of Art. 45 of the aforementioned instrument, until the democratically elected president effectively assumed power. The same sanction, along with an array of financial, economic and political measures, has been imposed against Mali on 30 March 2012, due to the violent overthrow of the government only a month before the national elections, see "Emergency mini-summit of ECOWAS Heads of State and Government on the situation in Mali", press release no 092/2012, 30.3.2012. On 10.1.2009, ECOWAS had also suspended Guinea, see press release no 003/2009 "ECOWAS leaders reject military transition in Guinea".

[56] West-African countries have been particularly acrimonious regarding late international response in serious crises that have affected thousands of people in the African continent. This bitterness about international indifference towards African problems is echoed in the words of the Director of Legal Affairs of ECOWAS: "whilst the sub-region appreciates the importance of its obligation under the UN Charter, its recent experience has shown that the cost of waiting for the UN authorization could be very high in terms of life and resources", in A. ABASS, *The New Collective Security Mechanism of ECOWAS: Innovations and Problems'*, in 5 *Journal of Conflict and Security Law*, 2000, pp. 211-229 (223-224).

the negative. Even if we accept that *opinio juris* exists, practice is not that broad and consistent as to create a customary rule superseding the framework established by the UN Charter. What is more important though in practice is that this absolute decentralisation and the absent of joint command (and control) of peace-keeping operations will not contribute to their smooth deployment in future regional crises. This will undermine the very substance of the maintenance of peace and security regime. As it was demonstrated in the second phase of the crisis in Sierra Leone, ECOWAS' refusal to be placed under the command of UNAMSIL (and ultimately under UN control) and the pursuit of its own peace-enforcement agenda, had created an unnecessary friction between the international and regional components which only jeopardised the whole endeavour[57]. In this respect, the cooperation between regional and international components in the Cote d'Ivoire crisis can be used as a model for future action.

3. *The Cote d'Ivoire crisis: international and regional involvement*

3.1. *The historical framework*

The Republic of Côte d'Ivoire gained independence from France in 1960. Its first president, Félix Houphouët-Boigny, a former tribal chief and member of the French parliament, maintained close relationships with the former colonial power and western powers in general throughout his leadership, which terminated in 1993 with his death. Henceforth, the West African country is in an ongoing attempt to build stable democratic institutions and overcome the "guided democracy under a one-party State"[58]. This endeavour has proven extremely difficult, bearing in mind that the country was twice submerged in armed conflict, prompting the UN on the one hand and the regional and subregional African organizations on the other to take initiatives to end the bloodshed and restore the country's democratic path.

After the 1995 elections that were boycotted by the opposition, the 24 December 1999 coup d'etat and the post-election clashes of October 2000, the next major crisis that the country had to deal with was the internal armed conflict that erupted in 2002[59]. The causes are multifaceted, but they all have their roots in the adaptation to the democratic processes after decades under the rule of one president. In particular, one key reason was the recognition of the right to vote to foreigners, mainly from Burkina Faso who had been Ivorian citizens for two decades and a significant portion thereof belonged to the Mandinka race that is considered indigenous in the north of the country. These ethnic tensions had been simmering during the governance of Boigny, but they suddenly erupted after his death and the conduct of elections, on the occasion of the formation of electoral lists.

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[57] See for a thorough analysis, A. ABASS, *The Implementation of ECOWAS' New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention*, in 10 *University of Miami International and Comparative Law Review*, 2001-2002, p. 177-216, especially p. 194 et seq.

[58] See, *UN High Commissioner for Human Rights,* Report of an urgent human rights mission to Côte d'Ivoire, UN doc. S/2003/90, 24.1.2003, §10.

[59] Despite the Supreme Court's decision that Gbagbo was the winner, Guei tried to remain in power prompting reactions and clashes that left behind over 300 dead. In this context election observation acquires an additional significance, bearing in mind that many of the recent crises have sparked due to disputed electoral procedures.

In particular, the concept of "ivoirité" was highly contested during the first after-Boigny elections. Between 1960 and 1972 the Ivorian nationality was granted relatively easily. After 1972, it was subject to stringent regulations. It is interesting that persons holding non-Ivorian nationalities had held high office in the country throughout this period[60]. However, article 35 of the Constitution of 2002 provided that: "in order to be eligible for the presidency of the Republic, any candidate must be of Ivorian origin and born of parents who were themselves Ivorians"[61]. Based on this provision, the Constitutional Chamber of the Supreme Court rejected the candidacies of several politicians, including that of Alassane Ouattara, who were in the past particularly active in the management of public affairs. As a consequence large part of the Ivorian population was excluded from the democratic process[62].

3.2. *The first ordeal: the armed conflict of 2002*

3.2.1 *The implication of ECOWAS and France*

It is in this framework that part of the army rebelled in the early hours of 19 September 2002, launching attacks in several cities, including the capital Abidjan. Until around noon the rebels took control of the whole of the north, whereas the government forces maintained control of the capital and the south. The attacks were vindicated by the Patriotic Movement of Côte d'Ivoire (Mouvement Patriotique de Côte d'Ivoire, hereinafter MPCI). During this crisis the first intervention of foreign actors takes place, France initially and the sub-regional organization ECOWAS afterwards.

The French intervention, known by the code name "Operation Unicorn" ("Operation Licorne" in french), took place immediately after the outbreak of the conflict and was based on the defense agreement that the two countries had signed in August 1961[63], a year after the independence of Cote d'Ivoire. The Licorne forces helped in the evacuation of civilians in towns behind rebel lines, while following the signing of the ceasefire agreement on 17 October 2002 they deployed along the ceasefire line, on the basis of bilateral arrangements[64].

In that phase, the UN had not yet been activated. Nor the OAU, the predecessor of the African Union, had done so. At the regional level, ECOWAS bore the brunt of assisting the country in exiting the crisis. During an Emergency Summit on 29 September 2002, the member-states of the sub-regional organisation decided to take concrete steps to end the conflict, through mediation and peacekeeping. ECOWAS mediators succeeded in their mission and, as already mentioned, the belligerents agreed on a cease-fire on 17 October 2002. Furthermore, ECOWAS approved a peacekeeping mission with the

[60] See UN doc. S/2003/90, op.cit. §§11-12.
[61] ibid. §13.
[62] In addition to that, a new legislation on rural land ownership adopted in 1998 established the principle that only individuals possessing Ivorian nationality could be landowners and purchase land in rural areas, see ibid. §16.
[63] Accord de défense entre les gouvernements de la République de la Côte d'Ivoire, de la République de Dahomey, de la République Française et de la République de Niger, 24.4.1961, in *Journal Officiel de la République Française*, 5.2.1962, http://yanko.chez-alice.fr/ci/crise/docs/accord_def_24_avril_1961.pdf (last visited 2.6.2015).
[64] Report of the Secretary-General on the United Nations Mission in Cote d'Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003, UN doc. S/2003/3, 6.1.2004, §48.

following mandate: monitor the cessation of hostilities; facilitate the restoration of public services and the free movement of goods and services; make a general contribution to the peace process; guarantee the safety of observers, humanitarian aid personnel and insurgents[65].

The immediate deployment of the operation was delayed on the one hand due to logistics and financial issues and on the other due to the reluctance of neighbouring states to send their troops without an effective peace agreement in place, which would be indicative of the consent of the parties to the conflict. This delay gave to the sub-regional organisation the opportunity to obtain beforehand the consent and actually the invitation of the legitimate president of the war-affected country[66]. Thus, at an Extraordinary Summit of Heads of State and Government that took place on 18 December 2002, with the presence of Côte d'Ivoire's President, Laurent Gbagbo, an official invitation was extended by the head of the state, who requested that "the ECOWAS force be set up immediately"[67]. ECOWAS troops started to deploy in the country in January 2003 after the Linas-Marcoussis agreement and it was endorsed retroactively by the UNSC in its resolution 1464 (2003) of 4 February 2003 as we shall see in the following paragraphs. Initially, the operation was known as ECOFORCE (ECOWAS Force in Cote d'Ivoire) so as to be distinguished from ECOMOG's missions but later it was officially renamed into ECOMICI (ECOWAS Mission in Cote d'Ivoire)[68].

3.2.2. *The UN intervention*

The President of the French Republic convened a roundtable of the Ivorian political forces in Linas-Marcoussis from 15 to 23 January 2003 which ended with the signing of the Linas-Marcoussis Agreement and the adoption of the Programme of the Government of National Reconciliation with significant provisions regarding the citizenship law, the electoral system, the eligibility to the presidency of the Republic, the land tenure system etc.[69] In the wake of the Linas-Marcoussis agreement the UN Security Council adopts its first resolution on the country[70]. Acting under Chapters VII and VIII of the UN Charter, the UNSC tasked both the forces of ECOWAS (ECOMICI) and the French troops already stationed in the country to "take the necessary steps" to guarantee the security and freedom of movement of their personnel and to ensure the protection of civilians threatened with violence within their areas of responsibility for a period of six months[71]. Their mandate was extended with subsequent resolutions[72]. It is interesting that hereinafter the presence of French forces is not based on a bilateral defence agreement, but on a Security Council

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[65] T. MAYS, *Historical dictionary of multinational peace-keeping*, 3rd ed., Scarecrow Press, Maryland, 2011, p. 96.
[66] The operation seems to have had the consent of all the parties to the conflict, see UN doc. S/2003/472.
[67] See, Letter dated 19 December 2002 from the Permanent Representative of Senegal to the United Nations addressed to the President of the Security Council, UN doc. S/2002/1386, 19.12.2002, §11.
[68] T. MAYS, *Historical dictionary of multinational peace-keeping, op.cit.* It is also described as ECOMOG IV, the three previous being ECOMOG I in Liberia, ECOMOG II in Sierra Leone and ECOMOG III in Guinea-Bissau, see K. OMORAGBON, *The legality of ECOWAS intervention in peace support in terms of the UN Charter,* in Falola T., C. THOMAS (eds.), *Securing Africa. Local crises and foreign interventions*, Routledge, 2014, pp. 210-228 (212-218).
[69] See, Letter dated 27 January 2003 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, UN doc. S/2003/99, 27.1.2003.
[70] S/RES/1464 (2003), 4.2.2003.
[71] *Ibid.* §9.
[72] S/RES/1498 (2003), 4.8.2003; S/RES/1527 (2004), 4.2.2004.

resolution, thus expanding the mandate of the French troops which now includes not only the protection of French nationals but also the protection of civilians in general.

The first mission of the United Nations in the country is authorized in May 2003[73]. The United Nations Mission in Cote d'Ivoire (MINUCI) was a political mission and not a peacekeeping operation, mandated to oversee the implementation of the Linas-Marcoussis Agreement. Its military component was mandated to complement the operations of the French forces and ECOWAS troops. In resolution 1514 (2003) the UNSC, while extending MINUCI's mandate, requested the Secretary-General to examine the possible reinforcement of the UN presence in Côte d'Ivoire[74].

Based on the relevant report of the Secretary-General and given that the situation had not stabilized, the UN Security Council decided in February 2004 to replace the original political mission with a UN peacekeeping operation. The United Nations Operation in Côte d'Ivoire (UNOCI) was established by virtue of resolution 1528 under Chapter VII of the UN Charter[75], completely replacing the forces of ECOWAS, and to date its mandate has been altered and extended several times in order to respond to the evolving situation in the field, the signing of several subsequent agreements (Accra III Agreement, Pretoria Agreement, Ouagadougou Political Agreement and Supplementary Agreements) and the need to hold elections[76], but had from the beginning broad powers. In particular, it was mandated to monitor the cease-fire and movements of armed groups, assist in the implementation of the national programme of disarmament, demobilization and reintegration of combatants, as well as their voluntary repatriation and resettlement, to protect the UN personnel, institutions and civilians under imminent threat of physical violence, to support the humanitarian assistance and the implementation of the peace process, to contribute to the promotion and protection of human rights, to assist the national government in re-establishing the authority of the judiciary and the rule of law throughout Côte d'Ivoire.

It is interesting that under the same resolution, while the ECOWAS forces are replaced, the French forces are explicitly authorized to remain and assist militarily the UNOCI where necessary. In particular, they were mandated to contribute to the general security, intervene at the request of UNOCI in support of its elements or against belligerent actions outside the areas of responsibility of UNOCI and to assist in the protection of civilians[77]. Their presence is renewed in parallel with the renewal of the UNOCI mandate. As far as the AU is concerned, its involvement was political, since it was

[73] S/RES/1479 (2003), 13.5.2003.
[74] S/RES/1514 (2003), 13.11.2003, §2.
[75] S/RES/1528 (2004), 27.2.2004.
[76] An arms embargo, supervised by the UNOCI and French forces, was imposed with the subsequent resolution 1572 (2004), S/RES/1572 (2004), 15.11.2004. See, also, for the extensions of the mandate, S/RES/1584 (2005), 1.2.2005, S/RES/1594 (2005), 4.4.2005, S/RES/1600 (2005), 4.5.2005, S/RES/1603 (2005), 3.6.2005, S/RES/1609 (2005), 24.6.2005, S/RES/1632 (2005), 18.10.2005, S/RES/1633 (2005), 21.10.2005, S/RES/1643 (2005), 15.12.2005, S/RES/1652 (2006), 24.1.2006, S/RES/1657 (2006), 6.2.2006, S/RES/1682 (2006), 2.6.2006, S/RES/1708 (2006), 14.9.2006, S/RES/1721 (2006), 1.11.2006, S/RES/1726 (2006), 15.12.2006, S/RES/1727 (2006), 15.12.2006, S/RES/1739 (2007), 10.1.2007, S/RES/1761 (2007), 20.6.2007, S/RES/1763 (2007), 29.6.2007, S/RES/1765 (2007), 16.7.2007, S/RES/1782 (2007), 29.10.2007, S/RES/1795 (2008), 15.1.2008, S/RES/1826 (2008), 29.7.2008, S/RES/1842 (2008), 29.10.2008, S/RES/1865 (2009), 27.1.2009, S/RES/1880 (2009), 30.7.2009, S/RES/1893 (2009), 29.10.2009, S/RES/1911 (2010), 28.1.2010, S/RES/1924 (2010), 27.5.2010, S/RES/1933 (2010), 30.6.2010, S/RES/1942 (2010), 29.9.2010, S/RES/1946 (2010), 15.10.2010, S/RES/1951 (2010), 24.11.2010.
[77] Res. 1528, §16.

engaged in mediation and good offices[78]. In this capacity, it has requested for the increase of the UNOCI strength when the situation deteriorated in fall 2005[79].

3.3. *The crisis of November 2010*

3.3.1 *The factual background*

With the adoption of various political agreements incompletely implemented by the parties and the repeated postponements to the holding of elections until the situation was stabilized, we reach the crisis of November 2010. In the presidential elections that were held in October-November 2010 and were supervised by international electoral observers the country's incumbent president Laurent Gbagbo refused to cede power to the winner of the elections Alassane Ouattara, prompting a new round of post-electoral violence that mobilized the international institutions. The results were declared by the Independent Electoral Commission and certified by the Special Representative of the Secretary General of the United Nations in Cote d'Ivoire in accordance with Resolution 1765 of the United Nations Security Council. Both the United Nations and regional and subregional African organizations took initiatives to defuse the crisis. Furthermore, the International Criminal Court authorised an investigation into the situation in Cote d'Ivoire[80], subsequently issuing arrest warrants for Laurent Gbagbo, Charles Blé Goudé (former Minister of Sports and Youth) and Simone Gbagbo (the incumbent president's wife) accused of crimes against humanity during the period at issue[81]. The UN Human Rights Council established an international commission of inquiry to investigate allegations of serious abuses and violations of human rights following the presidential election and identified in its report flagrant human rights and international humanitarian law violations[82]. As far as maintenance of regional peace and security is concerned the United Nations reacted militarily, while the African organizations undertook mainly political initiatives.

3.3.2. *The reaction of regional and subregional African organizations*

At the regional level the sanction imposed was the suspension of the country's membership from both the ECOWAS and the African Union until the power was yielded to the democratically elected president. In particular, ECOWAS did not react through the use of force, as was the case in 2002, opting for the road of political sanctions. It is

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[78] Letter dated 18 October 2006 from the Chargé d'affaires a.i. of the Permanent Mission of the Congo to the United Nations addressed to the President of the Security Council, Communiqué of the 64th Meeting of the Peace and Security Council, S/2006/829, 19.10.2006.

[79] Letter dated 6 October 2005 from the Permanent Representative of Nigeria to the United Nations addressed to the President of the Security Council, Communiqué of the 40th meeting of the Peace and Security Council, UN doc. S/2005/639, 11.10.2005.

[80] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, ICC-02/11, 3.10.2011.

[81] Laurent Gbagbo's and Charles Blé Goudé's case were joined on 11.3.2015 and their trial is scheduled to begin on 10 November 2015. Simone Gbagbo is not in the custody of the court. See, for relevant developments, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/Pages/situation%20index.aspx (last visited 7.6.2015).

[82] *Report of the International Commission of Inquiry on Côte d'Ivoire*, UN doc. A/HRC/17/48, 1.7.2011.

important in this respect to note that non military sanctions are not considered enforcement actions in the sense of article 53 UN Charter[83].

On the basis of article 45 of the Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the mechanism for conflict prevention, management, resolution, peacekeeping and security, which allows for the suspension of membership if democracy is disrupted or massive violations of human rights occur, the country had been suspended on 7 December 2010 from participation in the decision-making bodies of ECOWAS, until the democratically elected president effectively assumed power[84]. While the use of legitimate force was never off the table[85], the sub-regional organisation never resorted to this solution, recognising, albeit implicitly, the UNSC primacy in this regard.

As to the AU, the legal basis for such an initiative rests on the African Charter on Democracy, Elections and Governance (2007)[86], and it is interesting that the decision in question was taken even before the Charter entered into force (the instrument entered into force on 15 February 2012)[87]. The sanctions in question were lifted by the regional organizations a few days before A. Quattara was officially sworn in as president of the country on 6 May 2011, while both organisations were involved in active mediation to help the country overcome the crisis.

3.3.3. *The reaction of the United Nations – responsibility to protect or pro-democratic intervention?*

On the other hand, the UNSC adopted two resolutions related to the crisis, both under Chapter VII of the UN Charter. In resolution 1962 it called on all sides to respect the free will of the people and the outcome of elections, given that Alassane Ouattara has been recognized by all international institutions as the elected president of the country, while renewing the mandate of UNOCI as this has been framed in resolution 1933. In a later decision 1975 (2011) the UNSC was even clearer on the need to grant the power to the elected president, but it did not authorize the use of force for this purpose. To the contrary, the UNOCI and French forces have been authorized by the UNSC to use all necessary means to carry out their mandate to protect civilians under imminent threat of physical violence, including the prevention of the use of heavy weapons against the civilian population. Though it was not a pro-democratic intervention, resembling more to implementation of the responsibility to protect doctrine, like the previous UNSC authorization on Libya[88], one could contend that the siege of Gbagbo's compound and his

[83] G. RESS, '*Article 53'*, in B. SIMMA (ed.), *The United Nations Charter: A Commentary* (2002) 722, at 733.
[84] Final Communiqué on the Extraordinary Session of the Authority of Heads of State and Government on Cote d'Ivoire, N°: 188/2010, 7.12.2010, available at http://news.ecowas.int/presseshow.php?nb=188&lang=en&annee=2010 (last visited 7.6.2015).
[85] Cote d'Ivoire: Briefing on AU and ECOWAS, 15.2.2011, http://www.irinnews.org/report/91930/cote-d-ivoire-briefing-on-au-and-ecowas (last visited 7.6.2015).
[86] Accessible at http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (last visited 7.6.2015).
[87] Communiqué of the 252nd meeting of the Peace and Security Council, PSC/PR/COMM.1(CCLII), 9.12.2010, available at http://www.aefjn.org/tl_files/aefjn-files/Africa/Crisis%20Watch%20eng/Ivory%20Coast/CommuniqueAU252CouncPeaceSecurity_Eng.pdf (last visited 7.6.2015).
[88] Res. 1973 (2011).

forced removal from the country demonstrates that the actual intention of the use of force was to remove Gbagbo who was defeated in the elections from power for the sake of stability.

4. *Concluding observations*

A main conclusion one can draw is that the UN welcome and support political initiatives by regional and subregional organizations to defuse a regional crisis, but they still maintain the initiative with regard to the use of force, in exactly the same framework as was outlined by former Secretary General B. Boutros-Ghali in his "Agenda for Peace", almost 20 years ago. Especially in the case of Africa, possible cooperation with regional organisations in establishing peace-keeping operations is addressed primarily to the AU, rather than sub-regional organisations such as ECOWAS, despite the efforts made by the latter to consolidate a multifunctional profile, in particular after the adoption of the Protocol on the Mechanism for Conflict Prevention in 1999.

Especially in the case of Côte d'Ivoire, after the first major crisis of 2003, when ECOWAS intervened unilaterally and the UNSC validated retrospectively its presence, we see that gradually its military presence is set aside until it is finally replaced by a United Nations operation. Since then, its role is purely political and intermediary. In particular, in the crisis of 2010, the authorisation to protect civilians was given only to UNOCI, while ECOWAS and the African Union were not involved militarily, using only political sanctions (suspension of membership). Although the AU has in theory this capacity following a decision of the Peace and Security Council in cases of war crimes, crimes against humanity and genocide, and also at the invitation of a national Government, according to its statutory act, it did not unilaterally proceed to such a reaction, nor did it receive relevant authorization by the UNSC under Chap. VIII of the Charter.

Finally, the immediate activation of all international institutions in the post-electoral violence of 2010 (UN, ICC, Human Rights Council, AU, ECOWAS) demonstrated in practice that the "responsibility to protect" is not merely a rhetoric and that timely international reaction can save a country from a bloodshed that was not avoided some years ago in neighbouring Liberia and Sierra Leone.