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## Assessment for the Law in Global Context Module

The purpose of peace enforcement operations, as the term is used here, is to bring about or ensure compliance with some aspect of an existing mandate or agreement among the parties. These operations are in a grey area between peace-keeping, linked to Chapter VI of the Charter, and enforcement, from Chapter VII, because they share characteristics from both types of operations.<sup>1</sup> The UN peace enforcement operations have the following characteristics any discussion of the UN's international peace and security mechanisms is, of course, related to the concept of collective security. This thesis is very deliberately focused on the concept and experience of the use of force to compel compliance. It does not therefore, deal with the broader issue of collective security.<sup>2</sup> Similarly, the questions associated with the UN's involvement in "internal" conflicts are not directly addressing nor does the thesis address the ethics of the use of force by the international community, or the pros and cons of the various objectives, such as the delivery of humanitarian aid, for which the use of force is authorised.

The end of the cold war brought about a new era for the United Nations. The end of the animosity between the United States and the Soviet Union and their willingness to use the United Nations in the way in which it was first envisaged created a new belief in and desire to use the full range of mechanisms available in the United Nations Charter for dealing with international peace and security.<sup>3</sup> The resulting explosion in UN activity - in both quantity and scope - generated a parallel explosion in academic literature on the subject. Some distinct though inevitably overlapping themes emerged in the literature as UN activity increased. Reflecting the numerical increase in UN operations a large body of work emerged which is best characterized as a comparative case study approach.<sup>4</sup> Work in this area documents the new UN experiences, taking a historical approach, comparing them with cold war UN operations or using them to predict or call for future trends.

Strong bodies of case study work also exist in relation to each operation. Even when the fact of inherent decisions about the boundaries of the cases involved is accepted, there is no certainty

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<sup>1</sup> David Schweigman (2001) *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*. Publisher. Martinus Nijhoff Publishers. 71-86

<sup>2</sup> Erika De Wet (2004) *The Chapter VII Powers of the United Nations Security Council Studies in international law*. Publisher. Hart Publishing. 113-128

<sup>3</sup> Andrej Zwitter (2010) *Human Security, Law and the Prevention of Terrorism*. Publisher. Taylor & Francis. 97-108

that any two observers will formulate identical hypotheses or regard the same hypothesis as relevant and sufficient in a given case.<sup>5</sup> Inevitably, therefore, the choice of a case study approach as well as the case studies themselves is a reflection of some basic assumption on the part of the researcher. These assumptions and the basic analytical framework used in this thesis are described above.<sup>6</sup>

In addition, the Congo case is the only example of this kind of action during the cold war and makes the point that the idea of using force in this way is not a post-cold war creation.<sup>7</sup> As such it also provides a good counter case to the post-cold war examples of the Somalia and Bosnia operations. Although these operations had different objectives all three had mandates involving an authorization of the use of force to compel compliance with certain goals established by the Security Council. The three operations also involved major sustained multinational military operations.<sup>8</sup> This is a critical criterion since one of the purposes of this paper is to examine the experience of the actual use of force, as opposed, for example, to the threat to use force.

On 31 July 1994, the Security Council invoked Chapter VII and authorized the creation of a multinational force and the use of "all necessary means" to bring about the transition from the illegal military regime to the democratically elected government in Haiti.<sup>9</sup> Under US leadership a large military mission was prepared, known as the Multinational Force. Because force was not used, even though it was authorized, this experience is not considered here since the focus is on the actual experience of using force.<sup>10</sup>

Since the end of the Cold War the UN Security Council has displayed a hitherto unknown activism in using its enforcement powers to maintain international peace and security under the collective security system envisaged in Chapter VII of the UN Charter. The resolutions adopted by the Security Council since 1990 invoking Chapter VII are unprecedented both in number and

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<sup>5</sup> Bardo Fassbender (2008) UN Security Council Reform and the Right of Veto: A Constitutional Perspective. Publisher. Martinus Nijhoff Publishers. 159-167

<sup>6</sup> Danesh Sarooshi (2006) The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers. Publisher. Oxford University Press. 142-161

<sup>8</sup> Max Hilaire (2005) United Nations Law and the Security Council. Publisher. Ashgate Publishing, Ltd. 217-229

<sup>9</sup> Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (2010) The United Nations Security Council and War: The Evolution of Thought and Practice since 1945. Publisher. Oxford University Press. 263-279

<sup>10</sup> Jeremy Matam Farrall (2009) United Nations Sanctions and the Rule of Law. Publisher. Cambridge University Press. 173-192

in the scope of their content.<sup>11</sup> This includes the authorizations for the use of force in the cases of Iraq, former Yugoslavia, Somalia, Haiti and Rwanda. Moreover, the Security Council has creatively assumed new functions of various kinds under Chapter VII, by curtailing the sovereignty of a defeated aggressor state by imposing the conditions of a termination of hostilities, intervening with military forces for humanitarian reasons into the anarchy of another state, limiting the right of self defence of a UN member state through maintaining an arms embargo, imposing sanctions for providing shelter to alleged terrorists, and ordering to extradite two nationals allegedly responsible for acts of terrorism to the courts of two permanent members of the Security Council.<sup>12</sup>

In addition, the Security Council has created a new administrative instrument for the settlement of claims for war damages and changed the rules of state responsibility with the establishment of the United Nations Compensation Commission for Claims against Iraq in Geneva, denying the defendant state any meaningful standing in the sense of procedural justice.<sup>13</sup> The Security Council has also used its authority under Chapter VII to establish International Criminal Tribunals for war crimes committed in Rwanda and former Yugoslavia.

Face with the failure of the League and the disintegration of international relations into World War II, the great powers set out to develop a new international organization. With respect to the security provisions of the UN charter, the drafters took as their starting point the lessons of the League and the experience of World War II. The League of Nations experience demonstrated that if states were simply left to their own devices to provide forces and support to redress a situation, the response would be minimal.<sup>14</sup> This created a sense that any enforcement system must be mandatory. The successful cooperation of the allied powers during World War II led the Charter drafter to conclude that the most effective way to ensure international peace and security was to have the great powers working together to combat aggression. The ideas for a mandatory system of enforcement, run by the great powers, were derived from these experiences.

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<sup>12</sup> Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (2010) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*. Publisher. Oxford University Press. 263-279

<sup>13</sup> Marjorie Ann Browne (2011) *United Nations Peacekeeping: Issues for Congress*. Publisher. DIANE Publishing. 29-43

<sup>14</sup> Erika De Wet (2004) *The Chapter VII Powers of the United Nations Security Council*. Publisher. Hart Publishing. 81-101

The International peace and security provisions for the Charter are contained in Chapter VI, Pacific Settlement of Disputes, and Chapter VII, Action with Respect to Treaties to the Peace, Breaches of the Peace and Acts of Aggression.

Chapter VII further strengthens member states obligations and Security Council powers. In contrast to Chapter VI, which deals with situations which may lead to a breach or threat to international peace and security, Chapter VII deals with the existence of such threats, breaches of the peace or acts of aggression? Under this chapter, the Security Council determines the existence of a threat to international peace and security or breach of international peace and security.<sup>15</sup> It has the power to take or call for provisional measures in order to prevent an aggravation of the situation, and has at its disposal various options short of armed force to use in response to a situation. Finally and most importantly the Security Council has the power of use forces, if necessary to deal with international peace and security problems.

"Chapter VII" refers to the same paragraph of the Charter of the United Nations and regulated, as its title says, "Action with respect to threats to peace, breaches of the peace and acts of aggression".<sup>16</sup> Article 41 of the Charter, under Chapter VII, is given to the Security Council the power to decide measures "not involving the use of armed force" to enforce its decisions, basically measures "complete or partial interruption of the economic relations", communications and telecommunications, as well as "the severance of diplomatic relations."

However, Article 42 provides that "if the Security Council consider that measures provided for in Article 41 would be inadequate or have proved inadequate, it may take such action by air forces, land or sea if necessary to maintain or restore peace, and international security. "It is in this sense that the designed strategy is aimed at the British letter, in a radical change in attitude to the assurances given barely a week ago by Jack Straw in the sense that military action was inconceivable".<sup>17</sup>

Note that it is not left to individual member states to determine when a situation requires a response. It is the Security Council that makes that determination on behalf of member states,

<sup>15</sup> Andrej Zwitter (2010) Human Security, Law and the Prevention of Terrorism. Publisher. Taylor & Francis. 97-108

<sup>16</sup> Erika De Wet (2004) The Chapter VII Powers of the United Nations Security Council Studies in international law. Publisher. Hart Publishing. 113-128

<sup>17</sup> David Schweigman (2001) The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice. Publisher. Martinus Nijhoff Publishers. 71-86

thereby obliging them to act as required in the charter. As evident in both Chapter VI and W, the Charter drafters opted for the use of the broad phrase "international peace and security" rather than "war" or even "use of force". This avoided the definitional problems, so acutely evident in the League's dealings during the Manchurian crisis, of needing a formal declaration of war before becoming involved.

There is a clear sense of a process of responses. When Chapter VI peaceful methods of dispute resolution fail or are resisted by states, the provisions of Chapter W can be invoked. As provided for in Article 39, the Security Council determines that the situation requires action. It can then recommend provisional measures and decide what measures "not involving the use of armed force" such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations" may be needed.

While a sequence of responses is evident there is no requirement that the Security Council begin with the first step and follow with the second. If the Security Council determines that the situation immediately requires the use of force outlined in Article 42, it can invoke that provision without going through any of the previous provisions. Conversely, there is no requirement for Security Council action in any given situation if the Security Council chooses not to act.<sup>18</sup> The remaining articles in Chapter VII deal with the mechanisms to make the responses possible. Under Article 43, member States agree to "make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, necessary for the purpose of maintaining international peace and security."

These agreements are to be negotiated and concluded with the Security Council. In contrast to the League Covenant's emphasis on peaceful settlement, the UN Charter's emphasis was in its enforcement provisions, providing the "teeth" that had so clearly been lacking in the League.<sup>19</sup> Taking a lesson from the League, the Security Council's ability to intervene in disputes and potential disputes is wide-ranging and almost unlimited and its decisions represent a binding obligation on all member states. To back up its decision making the Security Council is to be

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<sup>18</sup> Andrej Zwitter (2010) *Human Security, Law and the Prevention of Terrorism*. Publisher. Taylor & Francis. 97-108

<sup>19</sup> Kenneth Manusama (2005) *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*. Publisher. Martinus Nijhoff Publishers. 128-139

provided with military forces. The initial idea was that the permanent members of the Security Council, as during World War II, would work together and provide the bulk of the forces for UN military action. In recognition of this commitment and responsibility, the permanent members of the Security Council were given a veto over all non-procedural Security Council matters.

For the purposes of this study, the important element in the UN Charter is the collective willingness to meet force and even the threat of force with force. In order to answer the question of the legal limits to the Council's authority under Chapter VII of the Charter, the second chapter of this volume will provide an overview of that authority. Such an overview will necessarily involve an interpretation of the provisions of the Charter. Therefore this chapter will first examine the various ways in which such an interpretation can be approached.

Due to its complex nature, and the many issues involved, the interpretation of treaties is one of the most debated topics in international law. The following will provide an overview of the main schools of thought on the topic, the approach followed by the 1969 Vienna Convention on the Law of Treaties and the particular issues arising from the interpretation of constituent instruments of international organizations.

Organs of international organizations, states international courts and treaty provision or other legal texts, including resolutions of the Security Council, should be interpreted. A Chapter VII authorization was needed to make such an operation possible under the auspices of the United Nations. Although there was widespread acceptance of the Security Council view that the situation had become "intolerable" the exact to international peace and security is somewhat controversial. Under the terms of the Charter, the criterion for deciding when a situation threatens international peace and security is simply a decision by the Security Council that such a threat exists. Council says that a situation is a threat to international peace and security then the international peace and security mechanisms of the Charter are brought to bear on that situation, regardless of the specific nature of the situation.



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