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SECURITY COUNCIL ACTION UNDER CHAPTER VII: Myths and Realities

Introduction

References to “Chapter VII” in Security Council resolutions have generated, over time, misunderstandings within the Council itself and the wider United Nations membership. What this phrase actually means lies at the heart of these problems.

There seems to be much uncertainty about the meaning and effect of these words, and also about what makes a Security Council resolution binding under international law.

The problem has become even more complex as the media has tried to make the debates in the Council understandable to wider audiences. But the effect has been to reinforce various myths.

This *Special Research Report* investigates Council practice. It analyses the history of various resolutions, and Charter provisions in the hope that the situation can be clarified.

Summary

This report addresses eight issues:

1. Does the Council have the power to impose binding obligations without using Chapter VII?
2. What makes a Council decision binding?
3. Does the form of a Council decision matter—is an explicit mention of Chapter VII necessary?

4. Who can be bound by a Council decision?
5. Is a reference to Chapter VII necessary to authorise member states to use force?
6. Is a reference to Chapter VII necessary to authorise a robust mandate for a UN operation involving the use of military force?
7. Is it the Council resolution or the rules of engagement (ROE) and concept of operations that determine whether a UN operation will be able to use force?
8. Is a reference to Chapter VII necessary to impose sanctions?

The analysis in this report suggests the following conclusions:

- The Council has general powers under articles 24 and 25 to adopt binding decisions and such decisions do not need to be always taken under Chapter VII.
- Even when the Council does use its Chapter VII powers, it is not essential to have an explicit reference to Chapter VII or a particular article thereof.
- Resolutions adopted under Chapter VII may also (and usually do) include provisions which are non-binding.
- Interpretation of Council resolutions is a complex art. In order to ascertain the Council’s intent and the powers it may be using in a particular resolution, it is necessary to analyse the overall context, the precise terms used in the resolution and sometimes the discussions in the Council—both at the time of adoption and subsequently.

Although the express mention of Chapter VII is not essential, the Council seems in recent times to recognise increasingly the significant importance of clarity. The clearer the language adopted, the better the prospects for effectiveness and credibility of Council decisions. This may not be possible on every occasion, but it seems that on balance the Council is conscious of the need to avoid ambiguity.

Other conclusions include:

- Although the Charter does not expressly prescribe a particular form for adopting binding decisions, Council practice suggests that resolutions are the primary vehicle for binding decisions. Presidential and press statements are not used as vehicles for such decisions.
- Council decisions bind member states and the United Nations itself—but there is uncertainty regarding non-member states and regional organisations. Sometimes it addresses individuals and non-state actors. Often, it appears to try to bind such parties. It remains to be seen how this practice will be viewed over time.

Our research and analysis also suggests that:

- Chapter VII powers must be used for the establishment of Council-mandated sanctions regimes—although an explicit reference to the chapter or article 41 is not essential.
- Similarly, use of Chapter VII powers is required to authorise member-states or a UN peacekeeping operation to

use force—but again an explicit reference to the chapter is not essential.

- However, the problems generated by uncertain consent, concern about legal ambiguity and deployment in increasingly hostile operational environments increasingly led the Council to begin to approve UN operations and to authorise the use of force with explicit reference to Chapter VII.
- The practical conduct of UN peace-keeping operations—and whether force is actually used or not—is typically more strongly influenced by other factors such as the concept of operations and ROE rather than the language of the mandate itself.

We hope that this *Report* will contribute to the debate and promote a better understanding of the use of Chapter VII.

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1. The Charter Landscape

Chapter V of the Charter lays out the general powers and functions of the Security Council. Article 24 (1) and (2) reads:

“1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.”

Article 25 goes on to provide that:

“[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Similarly, articles 48 (1) and 49 provide that:

“[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine”, and that

members “shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”

Article 103 provides that:

“[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

Under Chapter VI (peaceful settlement of disputes), the Council can recommend procedures, methods of adjustment and/or terms of settlement. Under its article 34, the Council may also “investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”

In Chapter VII, article 39 provides that:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

And article 40 provides:

“In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.”

Under article 41, the Council may:

“decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”

And article 42 provides:

“[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

2. Historical Perspective

In early Council practice, resolutions never expressly invoked Chapter VII. It seems that the Council simply took decisions, and whether it was acting under Chapter VII became clear from the context and from the actual words in the decisions.

For example, resolution 54 (1948) determined that the situation in Palestine was a threat to international peace and security and ordered a cessation of hostilities—utilising articles 39 and 40 (provisional measures). Although the chapeau “Acting under Chapter VII” was never mentioned as a basis for the action then taken, the chapter’s authority was being used.

Similarly, in resolution 83 (1950), the Council authorised the UN force to respond to the attack on South Korea by North Korea, after having determined the existence of a breach of the peace in resolution 82 (1950).¹ Again, there was no explicit reference to Chapter VII—but it nevertheless seems that the Council was relying on it.

Council practice evolved and, over time, the use of particular words—chiefly the determination of the existence of a threat to the peace, breach of the peace, or act of aggression tracking the language of article 39—seemed to be sufficient to indicate an intent to use Chapter VII powers.² Express reference to “acting under Chapter VII” was not considered necessary.

The first occasion in which an explicit reference to Chapter VII was made was apparently a draft resolution in 1968 on measures against the Ian Smith regime in Southern Rhodesia. Council discussions on that subject had started in 1965 in response to the unilateral declaration of independence by a white minority regime in the British colony of Southern Rhodesia. Discussions took place against the backdrop of broader issues of the day including the decolonisation movement and the policies of the apartheid regime in South Africa.

Major divisions existed among Council members, in particular between former colonial powers and recently-independent African states. This was reflected in disagreement on whether to label the situation in Southern Rhodesia a threat to international peace and security. (Some may have feared this would lead to the application of mandatory sanctions and even demands for a Council authorisation to use force.) Many draft resolutions therefore contained formulations indicating growing Council pressure, but stopped short of using language drawn from Chapter VII.

By April 1966, growing international pressure led to the adoption of resolution 221, with a limited authorisation to use force to prevent supply of oil to Southern Rhodesia through the then Portuguese colony of Mozambique. Subsequently, in December, resolution 232 adopted a wide array of sanctions,

but specified that this action fell under articles 39 and 41 (thereby excluding the use of force from the range of coercive measures available). Both resolutions were clearly adopted using the authority of Chapter VII, but neither made any explicit invocation of it.

A draft resolution introduced by Algeria, Ethiopia, India, Pakistan and Senegal on 16 April 1968 (S/8545) sought to open the door for broader use of force combined with strengthened sanctions. For the first time the resolution contained the general chapeau “acting under Chapter VII.” In introducing the draft on behalf of its co-sponsors, the representative of Ethiopia underlined that it represented a further step on the Council’s approach to the subject (S/PV.1413). Council divisions on Southern Rhodesia re-emerged, illustrated in particular by the introduction of an alternative draft resolution by the UK on 22 April limiting action to articles 39 and 41 (S/8554).

The resulting resolution, 253 (1968), was an unprecedented compromise. While largely embodying the UK proposal in substance, it retained the chapeau from the original five-power formulation “acting under Chapter VII” before the operative part of the text as a means possibly to indicate growing Council pressure on Southern Rhodesia.³

Thereafter, many Council resolutions (especially on sanctions) followed this precedent and included the same chapeau from resolution 253.

In recent times, practice has been more mixed. There have been a few resolutions that appear intended to be under Chapter VII that do not mention that chapter expressly. One such example is resolution 1376 (2001) on the Democratic Republic of the Congo (DRC), which determined that the situation in the DRC “continues to pose a threat to international peace and security in the region.”

Other resolutions—such as 1737 (2006) on sanctions in connection with Iran—are clearly intended as a measure under Chapter VII (article 41), but do not mention expressly the article 39 determination.

This lack of formal clarity is sometimes a result of the political environment in which resolutions are negotiated. Pressures to include ambiguities or omit explicit references to Chapter VII in Council resolutions are sometimes accommodated in order to secure political agreement.

Attempts have been made in the past 15-20 years to promote, as a form of best practice, a policy that, when a Council resolution is intended to contain binding provisions, it should include:

- a determination of the existence of a threat to international peace, a breach of the peace or an act of aggression in accordance with article 39;
- the chapeau “acting under Chapter VII;” and
- the verb “decides” in the resolution’s relevant operative paragraphs.

And indeed, on many occasions, the Council has begun to adopt resolutions that reflect the application of such a policy. It is probable that many such resolutions also reflected the existence of wide consensus among members on the substance, which therefore permitted the adoption of unequivocally binding language.

Some recent resolutions have become even more explicit and include references not only to Chapter VII but also to articles 40 or 41. This is in part to resolve concerns that there be no ambiguity that the resolution could constitute a possible authorisation to use of force. Such is the case with mandatory measures expressly under article 40 in resolution 1696 (2006) on Iran. Similarly, article 41 was expressly invoked in resolutions

1718 (2006) on North Korea and 1737 (2006), 1747 (2007) and 1803 (2008) on Iran. (The rationale for this even more explicit language seems to hark back to the disputes in the 1960s over Southern Rhodesia discussed above.)

Clearly, for many Council members the approach of explicitly labelling the provisions under which the Council was acting was a matter of establishing clear evidence of intent. And in some of these recent cases it was Russia and China who were champions of clarity.

By contrast, there are cases in which the formula is not so much applied for the purpose of giving clear evidence of intent, but rather it has been applied for purely rhetorical purposes. Resort to an express mention of Chapter VII is sometimes inspired by little more than a desire to ratchet up political pressure to change undesirable behaviour, and as a hint at the possible imposition of enforcement measures in the future.

One recent such example is resolution 1679 (2006), in which the Council under Chapter VII laid out a number of requests to the Secretary-General, including that the necessary preparatory planning for transition from the AU Mission in the Sudan (AMIS) to a UN operation be expedited. Chapter VII is never needed for requests to the Secretariat, since they are decisions internal to the UN. However, the political context of the resolution was marked by reluctance from the Sudanese government to allow the transition, and fears that a deployment by a preparatory technical assessment mission might be obstructed.

A second important feature is that it is not uncommon to find resolutions which specifically invoke Chapter VII, but which include language that is clearly not intended to be mandatory. One example is resolution 1782 (2007), in which the Council acting under Chapter VII urges

“all the Ivorian parties... to collaborate more actively with the [sanctions] Group of Experts and to provide it with the information and documentation it requests with a view to fulfilling its mandate.” Clearly, the term “urges” cannot be interpreted as imposing a mandatory obligation. Most recently, resolution 1803 (2008) not only strengthened sanctions against Iran but also included non-mandatory measures such as the call upon states to “exercise vigilance in entering into new commitments for public provided financial support for trade with Iran” and to “inspect the cargoes to and from Iran.”

This indicates that a resolution specifically invoking Chapter VII does not necessarily imply that all or indeed any of its content will be binding. In other words, a Chapter VII resolution may not be entirely binding. On the other hand—as we shall examine in the next sections—a binding resolution does not seem to need to invoke Chapter VII explicitly.

Over time, the heated atmosphere surrounding the negotiation of various resolutions has become clouded by mythology about Chapter VII and that has sometimes provided disagreement. This first became acute in the discussions on Namibia/South Africa and Israel/Palestine in the 1960s and 70s. Specific cases began to emerge in which disputes arose over the question as to whether all Council resolutions, and not necessarily only those under Chapter VII, could include binding provisions. Most recently, it strongly re-emerged in 2004-2007 over Lebanon—specifically during discussions on resolutions 1701 and 1757—and most notably non-proliferation, for example during an open debate on resolution 1540 (2004), and the discussions leading to resolution 1695 (2006) on the Democratic People’s Republic of Korea (DPRK).

For example, during an open debate on resolution 1540 on 22 April 2004, positions seemed to differ on whether the resolution required the powers of Chapter VII. The representative of Brazil stated that “the draft resolution should not need to invoke Chapter VII of the Charter, since article 25 of the Charter provides that all decisions by the Security Council shall be accepted and carried out by the Member States of the Organization.” Echoing that position, the Algerian representative stated that “it does not even seem necessary for the Security Council to take action under Chapter VII.” The UK representative, however, seemed to diverge from that position in saying that “[a] Chapter VII legal base also underlines the seriousness of our response to this issue and the binding nature of the requirement to establish sensible WMD controls.” Similarly, the US representative stated that “[t]he draft resolution is placed under Chapter VII... because the Council is acting under that Chapter and levying binding requirements. However, the draft resolution is not about enforcement” (S/PV.4950).

This debate became even more complex when the provisions of articles 24 and 25 as the basis of Council powers came into question and the issue arose as to whether the Council can take binding decisions other than under Chapter VII—an issue which is addressed in the next section.

3. Council Powers to Impose Binding Obligations

Chapter VII contains explicit powers to impose binding measures. The analysis in this report suggests that the Council has at times imposed binding measures under Chapter VII, without explicitly invoking it. But can the Council impose binding measures without relying on Chapter VII at all?

Divisions among Council members on these issues have ebbed and flowed. In 1971, the representative of Liberia said during the Namibia debates that, “*there is not and there has never been such a ‘clear understanding’ on the limits of Council decision-making authority*” (S/PV.1594).

Members’ positions seem to initially have been influenced by two major issues:

- resolutions 242 (1967) and 338 (1973) on Israel-Palestine; and
- the 1971 advisory opinion of the International Court of Justice (ICJ) on the nature of Council resolutions on Namibia.

Resolutions 242 and 338

Resolutions 242 and 338 are widely recognised in the Council and in the literature as two of the most significant pieces of Council action. While the resolutions concern a wide number of issues of ongoing significance for the Middle East, one relevant aspect in the context of this report is to whether they have binding nature.

Following the 1967 Middle East war, discussions within the General Assembly were centred upon reaching agreement on a text with an appropriate balance among the various concerns of the parties. Several drafts containing steps for the parties towards resolving the conflict were put forth—including a compromise draft sponsored by twenty Latin American members—but no agreement was reached, particularly in the absence of support from the parties for either proposal.

Discussions then switched to the Council. On 7 November 1967, two drafts were tabled: one, by India, Mali and Nigeria using the Latin American text as reference (S/8227), and another by the US (S/8229). Subsequently, other drafts were presented by the Soviet Union (S/8253) and the UK (S/8247). This latter

one eventually became the basis for resolution 242.

Just as there were considerable divisions on the issues of substance,⁴ there emerged differences of view as to whether the resolution was binding. Over the years a number of members stressed to the need for compliance with resolution 242 on the basis that, under article 25, it was binding on the parties.⁵ But there have been instances in which some seemed to signal that the agreement reached within the Council at the adoption of resolution 242 was that it was not intended to be legally mandatory.⁶

By contrast, resolution 338 of 22 October 1973 used more explicit language. It *decided* that, immediately and concurrently with a ceasefire, peace negotiations should start. The use of the word “decides” has since prompted a legal and political discussion as to whether it should be interpreted as a binding *decision* in the meaning of article 25.

Namibia

During broadly the same period, the Council was dealing with major differences among colonial powers and new member states with regards to South Africa (particularly its policy of *apartheid* and involvement in Namibia). This disagreement extended to the nature of Council resolutions and led to a Council request in resolution 284 (1970) for an advisory opinion by the ICJ on the “legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970).”

The Court decided that South Africa’s presence there was illegal, that it was under obligation to withdraw and that member states were under obligation to recognise the illegality and refrain from acts that may lend support to the South African occupation. The Court based its opinion in part on its conclu-

sion that the Security Council does not need to rely on Chapter VII to impose binding obligations.

Despite this opinion, there continued to be disagreement within the Council's *Ad Hoc* Sub-Committee on Namibia on whether to follow the Court's conclusion and reaffirm "the obligation of all Members of the United Nations, under Article 25 of the Charter, to accept and carry out the decisions of the Security Council" (S/10330).

In subsequent debates in the Council, the representatives of France, the UK and others pointed to their disagreement with the Court's opinion. The French representative argued that binding decisions are limited to those situations under Article 39 and that they must clearly have fallen "within the framework of Chapter VII of the Charter and have been adopted as a result of the establishment of threats to the peace, as required by Article 39" (S/PV.1588). The UK representative stated that his government considered that "the Security Council can take decisions generally binding on member states only when the Security Council has made a determination under article 39 that a threat to the peace, breach of the peace or act of aggression exists. Only in these circumstances are the decisions binding under Article 25" (S/PV.1589).

The underlying argument seems to be that the Council's power to make binding decisions is confined to Chapter VII and that the binding "decisions" referred to in article 25 are only those adopted by the Council under Chapter VII.

Some also contend—with some weight—that the explicit use of Chapter VII performs an important function in terms of providing legal certainty. This has an important impact on the implementation of Council resolutions. For example, domestic authorities would

have more solid grounds with which to apply the provisions of a particular Council resolution that, say, mandated an assets freeze, if the use of Chapter VII powers were explicit.

However, others also contend that this should not preclude a more detailed analysis of resolutions in which Chapter VII is not explicit, or not used at all. Those resolutions could contain binding provisions without reliance on Chapter VII powers, which they argue would be permissible under the Charter. This goes back to the underlying political reality—"constructive ambiguity" sometimes results from the delicate political context in which some resolutions are negotiated and in principle this should not prevent the adoption of binding Council decisions.

This alternative view is based on the argument that articles 24 and 25 provide the bedrock of Council powers and functions. Article 24 confers on the Security Council primary responsibility for the maintenance of international peace and security. While specific powers are granted to the Security Council for the discharge of these duties in Chapters VI, VII, VIII, and XII, the specific articles do not limit the primary grant of power and the relevance of article 25 for conferring binding impact on decisions taken pursuant to the general power.

Under this view, both general and specific powers are granted to the Council. The Council may exercise general powers and also resort to specific action under the subsequent chapters, the only limitation being the organisation's principles and purposes. It is argued that this interpretation is most faithful to the letter of the Charter, since the "granting of 'specific powers' logically presupposes that the organ holding such 'specific powers' also has 'general' powers as well."⁷

The list of Council specific powers in article 24 (2) is structured more like a non-exhaustive list than a restrictive one. And it is also the case that the Charter grants powers to the Council in other chapters, such as:

- formulating plans for the establishment of an arms control system (article 26, Chapter V); and
- *deciding* "upon measures" to enforce ICJ judgments under article 94 (2).

It is also argued that the position of articles 24 and 25—not restricted to Chapter VII, but actually in Chapter V ("Functions and Powers" of the Security Council)—suggests that the articles apply to decisions under the general powers of the Council to create obligations, as well as the specific ones enumerated in subsequent chapters.

Article 25 says that members "*agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*" The word "decisions" in article 25 is not expressly limited to Chapter VII.

Council practice is interesting in this regard. The Council has tended to use the word "decides" in a broad sense, especially when establishing operations with no reference to Chapter VII. Such was the case with the missions in Nepal (UNMIN, in resolution 1740 (2007)) and in Ethiopia-Eritrea (UNMEE, for example in resolution 1798 (2008)).

It also seems that the Council has in the past seen itself as taking binding action when it adopted measures under Chapter VI, article 34 (on the power to investigate disputes or situations).

In December 1946, the Council created a commission to investigate charges from Greece that its neighbours Yugoslavia, Albania and Bulgaria had lent support to Greek guerrillas. Initial Council discussions on the conduct of the

investigations in May 1947 appeared to confirm that members were in agreement that Albania, Bulgaria and Yugoslavia were bound to implement Council decisions on the issue. The initial counter-arguments offered by the Soviet Union and Yugoslavia touched upon issues of competence of the commission but did not seem to challenge the binding nature of action under article 34.⁸ In its final report in June 1947, the majority of the commission's members found that the Greek charges were justified and recommended a Council "agency" to monitor the border and use good offices. The conclusions led to a month-long debate and strong criticism from the Yugoslavia, Albania, Bulgaria and the Soviet Union. The US, recalling article 25, tabled a draft establishing such a body. It was only then that the Soviet Union contended that decisions under Chapter VI are recommendations outside the scope of article 25.⁹

The International Court of Justice considered these issues in the Namibia opinion. It noted that:

"If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter."

The drafting of article 25 at the San Francisco Conference is also relevant. In a statement read to the Security Council during the debates on Trieste in 1947, the Secretary-General reminded members that:

"the records of the San Francisco Conference demonstrate that the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII... This power, it was

noted [during discussions at the Conference], was not unlimited, but subject to the purposes and principles of the United Nations..."

"The record at San Francisco also demonstrates that [article 25] applies to all the decisions of the Security Council... there was a proposal in Committee III/I to limit this obligation solely to those decisions of the Council undertaken pursuant to the specific powers enumerated of the Charter. This amendment was put to a vote in the Committee and rejected (document 597, 111//30). The rejection of this amendment is clear evidence that the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions made under Article 24 and to the decisions made under the grant of specific powers."¹⁰

Some commentators note that a restrictive view of articles 24 and 25 is incompatible with the Council's "primary responsibility for international peace and security" and the purposes of the Charter. A restrictive interpretation, they note, seems to run counter to the foundations of the current collective security system and would deprive the Council of important powers in the fulfilment of its large responsibility.¹¹ Again, the International Court addressed this aspect of the issue in the Namibia opinion, indicating that:

"when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision... To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter."

Prior to the Namibia and Middle East debates, a number of early Council precedents seemed to reveal relative agreement around the idea that the Council possesses general binding powers pursuant to articles 24 and 25. On at least two occasions, the Council had

decided on measures with a wider understanding of the extent of such powers.

In 1947, the Council engaged in active discussion of its functions and powers in the context of resolution 16 in the case of Trieste. The debate arose from a request for the Council to assume responsibilities for Trieste in connection with a peace agreement. Two members (Australia and Syria) questioned whether the Council had powers under the Charter in that regard. The majority seemed to be of the view that the Council's general powers were wide enough, based on the spirit of the Charter and the Council's general functions and powers.

All permanent members expressed support for that interpretation. Specifically, the UK representative noted that he "should have thought... that Article 24 of the Charter was sufficiently widely drawn." The French representative argued that "the text of the Charter confers upon the Security Council a very general mission: that of maintaining peace. ... Indeed, world opinion would certainly not understand it, if the Security Council were to give the impression of evading a responsibility so closely related to the maintenance of international peace and security, as it is precisely the main task and responsibility of the Security Council."¹²

And on 10 January 1947, the Secretary-General contended that:

"The words, 'primary responsibility for international peace and security', coupled with the phrase, 'acts on their behalf', constitute a grant of power sufficiently wide to enable the Security Council to... assume the responsibilities arising therefrom... the only limitations are the fundamental principles and purposes found in Chapter I of the Charter."¹³

In July 1960, the Council established the UN Operation in the Congo (ONUC) in

resolution 143. The resolution came after a request from Congolese authorities for UN military and technical assistance in the context of the country's independence and Belgian intervention. ONUC was deployed to maintain law and order as Belgian troops withdrew, yet resolution 143 made no reference to Chapter VII.

Difficulties soon arose with respect to the withdrawal of Belgian forces and generalised political fragmentation in the Congo, specifically in Katanga province. The Secretary-General then halted the movement of UN troops into Katanga in the face of military opposition, underlying the mission's exclusive use of force in self-defence, and turned to the Council for clarification on how to proceed.

Responding to these difficulties, the Council adopted resolution 146 (1960) on 9 August 1960, in which it:

1. Confirms the authority given to the Secretary-General by Security Council resolutions 143 (1960) and 145 (1960) and requests him to continue to carry out the responsibility placed on him thereby;
2. Calls upon the Government of Belgium to withdraw immediately its troops from the province of Katanga under speedy modalities determined by the Secretary-General and to assist in every possible way the implementation of the Council's resolutions;
3. Declares that the entry of the United Nations Force into the province of Katanga is necessary for the full implementation of the present resolution;
4. Reaffirms that the United Nations Force in the Congo will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise;
5. Calls upon all Member States, in accordance with Articles 25 and 49 of the Charter of the United Nations, to accept and carry out the decisions of

the Security Council and to afford mutual assistance in carrying out the measures decided upon by the Council."

The resolution was adopted by 9 votes, with France and Italy abstaining. There was no explanation of vote elaborating on the reference to articles 25 and 49 in that manner.¹⁴

Subsequently, article 25 was used as a source of authority in other decisions, including:

- on South Africa (resolution 269 (1969)), in which the Council, "mindful of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter," continued to press South Africa to withdraw from Namibia. That resolution played an important role in the ICJ Namibia opinion on the nature of Council resolutions on the region.
- In resolution 290 (1970) on the complaint from Guinea against Portugal, the Council strongly reprimanded the latter for "the armed attack and invasion" and called upon Portugal to comply with Council resolutions in accordance with its obligations under article 25.

Other instances exist in which the Council made no express reference to article 25 or Chapter VII, but nonetheless, characterised provisions therein as obligations. Such is the case with resolution 783 (1992) on Cambodia, which deplores the lack of compliance of one of the parties with the "obligations" in resolution 766 (1992). There are also cases in which resolutions refer to violations of previous Council decisions that were not under Chapter VII. Examples include the some of the resolutions on Bosnia in the early 1990s, in particular the strong list of demands in resolution 752 (1992), which was not under Chapter VII but whose

lack of compliance led to the sanctions in resolution 757 (1992).

The positions of members that have argued for a restrictive interpretation of binding Council powers can be weighed in light of their views on the same issue at earlier times:¹⁵

- During the Trieste debates of 1946-1947, all permanent members supported the view that the Council's primary responsibility for the maintenance of peace required a broad interpretation of its powers under the Charter.
- In 1954, during the debates on whether Egypt was under obligation to comply with resolution 95 (1951)—which did not mention Chapter VII—the representative of France stated that the call on Egypt was based on article 25.¹⁶
- In proceedings before the International Court of Justice on the *Corfu Channel Case*, a dispute between the UK and Albania in 1949, the UK argued before the Court that, under article 25, "one could not find in the Charter a shred of support for the view that Article 25 is limited in its application to Chapter VII of the Charter... all decisions of the Security Council are binding... [the article] is categorical in its terms."

The US position seems to be deliberately ambiguous. But it is worth noting that, in 1947, the Council's decision to investigate the Greek Frontier Incidents question was characterised by the US representative as follows: "Yugoslavia was bound, as a Member of the United Nations, to accept the decisions taken" and that "Albania and Bulgaria accepted the obligations of membership and the stipulations of the Charter for the purposes of this case."

The issue of the binding character of Security Council resolutions seemed to fade in the later Cold War years. And, in

the immediate post-Cold War period, the general cohesion in the Council seemed to ensure that members avoided divisive issues, especially complex legal problems with systemic implications. However, in recent years the issue has reappeared.

Similar issues were raised in the context of resolution 1695 (2006) on North Korea. That resolution did not refer to Chapter VII. Instead, the Council, “acting under its special responsibility for the maintenance of international peace and security,” demanded a halt to North Korea’s ballistic missile programme. At the adoption, the UK representative underlined that “[the] requirements of the resolution are clear, and the Democratic People’s Republic of Korea and all States concerned must now comply with these obligations” (S/PV.5490).

Historical divisions among the membership—informed in particular by discussions on the Middle East and Namibia—have marked past discussions of Council powers under articles 24 and 25. However, a close reading of Charter provisions, the Charter’s negotiating history and Council practice suggests that the Council has general binding powers under those articles, and that therefore binding Council decisions do not need to rely on Chapter VII. However, how can one tell that a Council decision is binding? This question will be addressed in the following section.

4. What makes a Council decision binding?

Our preceding analysis suggests that the Council may:

- adopt both binding decisions and non-binding language (such as recommendations) in resolutions explicitly under Chapter VII; and

- adopt decisions intended to be binding in resolutions not under Chapter VII, or where the source of authority is ambiguous.

The question as to whether the Council has imposed an obligation binding under articles 24 and 25 should be determined from the Council’s actual language in any given situation. And this seems true for resolutions adopted explicitly under Chapter VII as well, since they often also contain non-binding provisions such as recommendations. It is not the reference to a particular chapter that is the ultimate arbiter of whether a resolution contains binding provisions.

(It is important to emphasise, however, that this should not be interpreted as a “green light” for ambiguous drafting on the part of Council members. This word of caution seems relevant for both those who argue that only Chapter VII resolutions are binding, and for those who argue against it. As a matter of policy, the clearer the language adopted, the better the prospects for effectiveness and credibility of Council decisions. Clarity may not be possible on every occasion, but it seems critical that every effort be made to avoid decisions that only prolong the problem rather than solve it.)

Nevertheless it is a practical reality that Council language often does display a degree of ambiguity and that this stems from the complex bargaining that frequently precedes the adoption of a resolution. This process is governed by the need for political compromise and sometimes the urgency of a particular situation. These factors often trump a more careful consideration of wording and clarity.

Another is the absence of an authoritative source of interpretation of Council resolutions other than the Council itself.¹⁸

However, it should be noted that, in most cases, the Council does use relatively

clear language in its operative paragraphs. For example, it can be clearly established that by using “urges” and “invites,” as opposed to “decides,” the paragraph is intended to be exhortatory and not binding.

But some cases are unclear. This is particularly true when the Council adopts paragraphs beginning with words such as “calls upon” and “endorses”.

This is further complicated by the frequent references in resolutions to the Council’s primary responsibility for the maintenance of peace and to members’ obligations. These are allusions to articles 24 and 25 and are often used by the Council to indicate growing impatience or concern. For example, in 1986, in resolution 582 on the Iran-Iraq war, the Council referred to its previous “decisions” (which mentioned article 24) and reiterated its calls for a cessation of hostilities and the submission of the conflict to mediation or any other means of pacific settlement.

The ICJ *Namibia* opinion offered a broader and perhaps more useful approach to interpreting the Council’s will. The Court noted that the analysis should be guided by:

*“the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution.”*¹⁹

It is interesting to apply those tests to resolution 582 on the situation between Iran and Iraq. It would seem that the Council’s intent in this resolution was not to bind the parties into specific obligations to seek the pacific settlement of disputes and refrain from the use of force—beyond those already in the Charter.

The intention seems to have been to offer the parties a framework for settle-

ment and to urge them to accept it. This seems to be the import of members' interventions at the resolution's adoption, in which, for example, the representative of Thailand noted that the Council was "not in the position to impose any arrangement or terms on the parties", and the representative of Madagascar noted that "all that the Council can do is propose steps and solutions advocated by the Charter" (S/PV.2666).

By contrast, in its subsequent resolution 598 in July 1987, the Council seemed to intend to transform the earlier recommendations into obligations, in effect making such steps mandatory "provisional measures" under article 40.

It is also interesting to apply this analysis to resolution 1695 of 15 July 2006 on the North Korea issue—another case in which there is no explicit reference to Chapter VII. It would seem that the Council did create binding obligations for North Korea and for all states in respect of North Korea's nuclear programme. That resolution said:

"Acting under its special responsibility for the maintenance of international peace and security,...

2. Demands that the DPRK suspend all activities related to its ballistic missile programme, and in this context re-establish its pre-existing commitments to a moratorium on missile launching;

3. Requires all Member States, in accordance with their national legal authorities and legislation and consistent with international law, to exercise vigilance and prevent missile and missile-related items, materials, goods and technology being transferred to DPRK's missile or WMD programmes;

4. Requires all Member States, in accordance with their national legal authorities and legislation and consistent with international law, to exercise vigilance and prevent the procurement of missiles or missile related-items,

materials, goods and technology from the DPRK, and the transfer of any financial resources in relation to DPRK's missile or WMD programmes..."

The chapeau uses the language in article 24, as in the Iran-Iraq example. The resolution was not explicitly under Chapter VII (given strong Chinese reservations), but the intention to adopt binding decisions seems to be clearly indicated in the use of operative paragraphs that "demand" and "require" certain outcomes. The UK representative stressed that *"the Democratic People's Republic of Korea and all States concerned must now comply with these obligations."* The representative of Japan also emphasised that the resolution *"is strong in its message and binding on Member States under the United Nations Charter on measures related to the maintenance of international peace and security."* And the representative of Russia stated that *"we believe that the decision sends an appropriate signal to the Democratic People's Republic of Korea on the need to show restraint and to abide by its obligations regarding missiles"* (S/PV.5490).

There seems to have been no appetite among some members—particularly China and Russia—for a resolution explicitly under Chapter VII. And it appears problematic to make the argument that it is under Chapter VII by inference. The preamble makes a general reference to WMD proliferation as a threat to international peace and security, but not to the situation in the Korean peninsula or the DPRK's behaviour. The resolution used non-Charter language ("affirming that [the DPRK's missile] launches jeopardize peace, security and stability in the region"). And this kind of language, since the time of numerous resolutions on South Africa in the 1960s and the 1970s, seems to have come to be understood as indicating a

non-Chapter VII resolution. Presidential statement 2006/41 of 6 October appears to reinforce this interpretation by asserting that "a nuclear test, if carried out by the DPRK, would represent a clear threat to international peace and security."

The absence of Chapter VII in resolution 1695, and yet the apparent intent that the resolution impose binding obligations, seems to reinforce the wider interpretation of Council powers under articles 24 and 25. The opposition to placing the resolution under Chapter VII seems to have been more connected with carefulness regarding political connotations often associated with that chapter, particularly the use of force.

In the same way it seems that the Council's intention in some resolutions adopted partially under Chapter VII was not that the "non-Chapter VII" content be purely recommendatory. In the cases of Somalia (resolution 794 (1992)) and Rwanda (resolution 918 (1994)), the Council adopted resolutions with sections under Chapter VII establishing sanctions regimes or authorising the use of force. However, these resolutions also included important provisions outside the sections covered by the Chapter VII chapeau. It does not seem that members believed those provisions to be merely exhortatory, such as with the demand on all parties to facilitate the provision of humanitarian assistance in Somalia in resolution 794, or the demand for an end to the "mindless violence and carnage engulfing Rwanda" in resolution 918.

One possible explanation is that the use of Chapter VII in such resolutions was influenced by a "Chapter VII mythology," i.e., the perceived technical requirements for establishing enforcement action (say, for example, sanctions), which is clearly a Chapter VII matter under the Charter, rather than an indication of which provisions in the resolution are binding.

For example, resolution 918 reconfigured the mandate of the UN Assistance Mission for Rwanda (UNAMIR) to protect civilians. It appears that the Council's intention was to reconfigure the mission as a limited deployment with limited enforcement powers. See, for example, the statements of Oman (“[d]espite our hesitation to involve peace-keeping forces in internal disputes, and in view of our desire to see a more successful UNAMIR, we support its expansion and the amendment of its mandate in order to enable it to contribute to the security and protection of civilians in Rwanda”) (S/PV.3377). Mention of Chapter VII in that resolution was limited to the sanctions part. (We will go back to the issues raised by the Rwandan genocide in Section 8.)

Instances do exist in which no conclusive answer can be made regarding the Council's intention. In those cases, the circumstances and positions of members are so ambiguous and divided that it is difficult to ascertain a coherent, unified will.

One example is resolution 1721 (2006). It contains unusual language endorsing a detailed power-sharing structure for Côte d'Ivoire adopted by the AU Peace and Security Council (PSC). The resolution, for example, endorses the PSC's decision that the prime minister shall not be eligible to stand in the next Ivorian presidential elections. The legal value of “endorses” is, in this case, ambiguous.²⁰ The situation was particularly complicated by the question of whether the PSC or only the Security Council had the power to make that kind of decision.²¹

Resolution 1701 on Lebanon is a very complex example. It established a cessation of hostilities in the war between Israel and Hezbollah in mid-2006. The resolution, after reiterating the Council's responsibilities and determining that the situation in Lebanon constitutes a threat to international peace and security, also:

- laid out the elements of a comprehensive ceasefire;
- mandated the UN Interim Force in Lebanon (UNIFIL) to monitor the ceasefire and accompany and support the deployment of Lebanese forces in southern Lebanon as Israel withdrew;
- authorised UNIFIL to “take all necessary action” in its areas of deployment and within its capabilities “to ensure that its area of operations is not utilized for hostile activities of any kind, to resist attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council, and to protect United Nations personnel, facilities, installations and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers and, without prejudice to the responsibility of the Government of Lebanon, to protect civilians under imminent threat of physical violence;”
- mandated UNIFIL to assist the Lebanese forces to establish a demilitarised area between the Blue Line and the Litani River;
- at the Lebanese government's request, further mandated UNIFIL to assist the government with securing borders and other entry points to prevent the entry of arms and related materiel; and
- *decided* on a number of measures designed to prohibit the supply of arms to Lebanon.

The precise intention of the Council regarding the binding nature of some of the resolution's provisions is complex. The negotiating history shows that Council members eventually acquiesced in a request from Lebanon that no specific mention should be made of Chapter VII. The statements of Council members at the resolution's adoption are somewhat contradictory.²² However, a number of provisions in resolution 1701 lean

towards the conclusion that Chapter VII powers were indeed the source of the authority for the resolution and that the Council had the intention to adopt binding provisions. The resolution contains a determination under article 39, which can be said to invoke that chapter.

Resolution 1701 uses the word “decides” when establishing the arms embargo, clearly resonating with article 25 and indicating a binding intention. And an analysis of the implementation of resolution 1701 is also telling.

In the months that followed the adoption of resolution 1701, violations by both sides took place, especially regarding the Blue Line between Lebanon and Israel. Reports of the Secretary-General noted such violations, as well as allegations of smuggling of arms into Lebanon through Syria and the responses of the Syrian government denying any involvement in “breaches” of the embargo (see, for example, S/2007/392 of 28 June 2007).

The Council has regularly called for the implementation of resolution 1701. In December 2006, it *urged* member states to implement the embargo and expressed its intention to consider further steps (S/PRST/2006/52). In April 2007, it underscored that certain Hezbollah statements were “an open admission of activities which would constitute a violation of resolution 1701” and reiterated that “there should be no sale or supply of arms and related materiel to Lebanon except as authorized by its Government” (S/PRST/2007/12).

In August 2007, the Council assumed a stronger tone in presidential statement 2007/29. It expressed its “grave concern at persistent reports of breaches of the arms embargo along the Lebanon-Syria border” and underscored “the obligation of all member states, in particular in the region, to take all necessary measures to implement paragraph 15 of

resolution 1701 to enforce the arms embargo” (our emphasis added).

At the adoption of resolution 1773 (which renewed UNIFIL’s mandate) later in August, some Council members further reiterated the existence of “obligations” for states deriving from resolution 1701. Examples are the statements of Qatar (“My delegation hopes that, with the adoption of the resolution, the parties will respect their responsibilities in accordance with the resolution in order to reach a permanent ceasefire”), Indonesia (“The extension of UNIFIL... will bring greater tangible results only when all parties concerned fulfill their obligations under resolution 1701”) and the US (“We join the Secretary-General in calling, yet again, on Syria and Iran to honour their obligations under the arms embargo established under resolution 1701”) (S/PV.5733).

While there seemed to be ambiguity at the time of the adoption of resolution 1701, the progression of language in Council statements and Syria’s response in particular (for example, in the letters referred to in the June 2007 report of the Secretary-General) suggest that the arms embargo was intended to be binding.

The key point is that the analysis of the nature of Council resolutions often needs to take into account not just the text or the general circumstances at the adoption, but also the possibility that this assessment may be conclusively determined only from subsequent Council discussions. In some cases, then, the possibility of evolution in the Council’s understanding of its own decisions is critical.

A Note on Council Recommendations

If certain provisions in a resolution are in the end seen as not binding, what value do they have?

Certain provisions in Council resolutions may be recommendations which, by their very nature, are not binding. However, they may also contain a degree of obligation. Judge Hersch Lauterpacht has suggested that,

*“[a] resolution recommending... a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation... The state in consideration, while not bound to accept the recommendation, is bound to give it due consideration in good faith.”*²³

(It could also be argued that the Charter creates the obligation of seeking a pacific solution to any situation. In making recommendations, the Council may bring to the surface that obligation if only by clarifying the link between a particular situation and the general duty to seek a peaceful solution.)

The same conclusion could logically be extended to other non-binding provisions, such as demands included in presidential statements. (For a more detailed analysis of Council statements, see Section 5 *infra*.) While states are not legally obliged to accept and carry out such provisions, the mere fact that the Security Council, the body conferred with primary responsibility for international peace and security, has pronounced itself on an issue may give rise to the obligation to duly consider Council messages in good faith.

5. Does the form of a Council decision matter?

The Charter does not state that binding decisions should be in the form of resolutions, or any other particular form.

The issue has assumed relevance since the Council increasingly relies on

instruments such as presidential and press statements. For presidential statements alone, there were 50 in 2007, almost equal to the number of resolutions in the same period (56) and more than three times the number of such statements in 1990. (For more statistical analysis, see our February 2008 *Monthly Forecast*.)

More importantly, the content of statements has assumed a more complex and substantive nature. For example, it is not uncommon to see the same subjects addressed in both resolutions and presidential statements. The Council in presidential statement 2008/1 of 11 January 2008 called on the parties to the conflict in Darfur to cease hostilities and to cooperate with the deployment of the UN-AU Mission in Darfur (UNAMID). Those exact same messages were also included in resolution 1784 two months earlier.

In practice certain matters are strictly reserved for resolutions. These include authorisations to use force and sanctions regimes, and the establishment of peacekeeping operations.

Individual events and unforeseen urgent developments are often addressed in statements. Certain statements appear to be vehicles for very important messages couched with strong language. (See, for example, the demands for an unconditional ceasefire and that the parties respect the humanitarian area in south-west Rwanda in presidential statement 1994/34 of 14 July 1994.) Others touch upon highly delicate matters such as the use of force, for example, in the expression of support for external military assistance to the Chadian government (S/PRST/2008/3), the tacit blessing for regional military activity in Sierra Leone (S/PRST/1997/36), and the finding in 1993 that Iraq was

in material breach of resolution 687 (1991) (S/25091).²⁴

These findings lead to the question of whether binding decisions can be adopted in a format other than resolutions, especially since, as mentioned above, the Charter places no formal restrictions.

First, press statements are not decisions of the Council. They are read out to the press after informal consultations, which, unlike the formal meetings in which resolutions are adopted and presidential statements are read out, are not meetings of the Council. No agenda is ever adopted under the Council's Provisional Rules of Procedure. Consultations are informal gatherings of members in their individual capacity of which no official records are kept and, as such, statements agreed in those sessions are technically not decisions. Reflecting this, press statements do not have official symbols, and some of them are not even publicised in writing through UN press releases.²⁵

The issue of presidential statements is more complex. Some contend that the practice of member states and the Secretariat confirms that those statements indeed constitute decisions.²⁶

On the other hand, Council practice goes to elaborate lengths to maintain the somewhat artificial appearance that presidential statements are conclusions of the "members" rather than of the Council acting collectively. Many seem to accept that Council decisions could be and are indeed made in statements, and historically that was sometimes the case. However, the scope tended to cover organisational matters (such as the creation of a Council subsidiary body) rather than imposing binding obli-

gations upon international actors under article 25.

Applying the intentions test referred to above, and taking into account the language of presidential statements, we have not found any example of cases in which members clearly intended to confer binding nature to the content of presidential statements. Obligations cannot therefore be said to have been created through such means.²⁷

The negotiating history of presidential statement 2008/3 on Chad is telling. The initial French draft appears to have contained a call upon member states to provide support to the Chadian government using "all necessary means," an expression associated with formal Council decisions authorising use of force. Some members opposed that language. A compromise was found in language calling upon member states "to provide support, in conformity with the United Nations Charter, as requested by the Government of Chad." This tended to limit the statement's object so it became an expression of support for such assistance and as a clarification of its legality, thereby excluding any inference that it was a decision constituting an authorisation to use force.

In summary, Council practice has evolved in response to practical needs with resolutions as the primary instrument and, increasingly in recent times, statements as a secondary instrument. Council decisions have no prescribed format required by the Charter. However, an analysis of Council practice suggests a remarkably consistent pattern of adopting resolutions as the sole vehicle for Council decisions intended to bind parties to a conflict. And, as we will see in the next section, Council practice has targeted those decisions at an increasing variety of actors.

6. Who can be bound by a Council decision?

In the context of binding resolutions, another key question is which international actors can be bound by the Council.

In general, international obligations are usually addressed to states. Member states have the responsibility under international law to implement Council decisions whether general or specific. Articles 25, 48 and 49 indicate that states have the obligation not just to tolerate binding Council decisions, but, depending on the specific content of those decisions, to carry them out and join in offering mutual assistance.

Council resolutions may:

- bind all member states when that is the clear intent; or
- bind those who are under specific obligations when the relevant paragraphs single out states or groups of states.

It is important to note that the Charter refers to "states", and not simply "governments." This suggests that not just the executive, but that the state as a whole is responsible for ensuring that the legislative and judiciary at all levels (local and national) observe and implement binding Council decisions.

But what is the situation regarding the binding character of resolutions for non-state actors, non-member states, and regional and international organisations?

With respect to entities other than states, there have been numerous cases in which the Council has addressed demands directly to non-state actors and individuals. This includes armed groups, *de facto* governments and political factions. Perhaps the two of the most prominent historical cases are Council

demands towards the Angolan rebel *União Nacional para a Independência Total de Angola* (UNITA), and Afghanistan's Taliban.

Confronted with defiance to its demands from such actors, the Council has sometimes decided to impose sanctions. These measures include natural resource and arms embargoes, as well as asset freezes and travel bans targeted at individuals.

In the case of Angola, for instance, violence flared up after tense elections in September 1992, held pursuant to the Peace Accords of 1991. On 30 October 1992, the Council adopted resolution 785, which included a demand that hostilities cease immediately and reaffirmed that the Council would "hold responsible" any party that refused to join in a reconciliation dialogue, and reiterated its readiness to consider "all appropriate measures" under the UN Charter to secure implementation of the Peace Accords. Similar messages were included in resolution 793 of 30 November.

The main focus of attention was UNITA, especially for its refusal to accept election results and continuation of hostilities. In resolution 811 of 12 March 1993, the Council demanded that UNITA "accept unreservedly the results" and that "the two parties, particularly UNITA, produce early evidence" of progress towards implementation of the Peace Accords.

In resolution 864 of 15 September 1993, the Council established an arms and petroleum embargo on UNITA. States were to prevent the sale or supply of such items to the territory of Angola other than through named points of entry on a list to be supplied by the Angolan government.

The obligations created by the sanctions regimes were on member states, who were bound to take steps to implement the measures. This includes not only the

state where the conflict occurred. It also fell on third states who, for example, were under a binding obligation to freeze bank accounts owned by individuals and entities named by the Council.

However, uncertainty remains regarding the obligations of non-state actors and individuals. Are Council demands directed at them legally binding? Certainly the Council's language on UNITA and the Taliban suggests that was in many delegations' minds. And there is no doubt that the Council action taken impacts on individuals very directly.

It seems that no consensus has emerged and existing positions may present problems—on the one hand, the Charter is silent about non-state actors, and there are concerns about the continuous, practical expansion of Security Council powers. On the other, there are problems from seeing Council demands against non-state actors, especially on UNITA, the Taliban and al-Qaeda as solely political statements.

The problem of binding non-member states was particularly sensitive in the early years of the United Nations, especially as many new states emerged after the Second World War and as a result of decolonisation.

The question was addressed cautiously in early Council practice. In resolutions 232 (1966), 277 (1970), 388 (1976) and 409 (1977), the Council urged states not members of the UN to act in accordance with its resolutions. This was based on article 2 (6), which determines that the organisation:

"shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

Under article 2 (6), the organisation collectively—including the Security Council—shall ensure that non-member states act in accordance with UN Charter principles so far as may be necessary for the maintenance of international peace and security. In meeting this obligation, the Security Council has at its disposal in principle a range of tools, from soliciting cooperation to more coercive measures.

In these initial stages, the Council seems to have preferred to appeal to non-members rather than issue demands.

During the 1970s the Council expanded the ambit of its reach and began the use of "all states" as opposed to "all states members." In resolution 418 (1977), the Council imposed an arms embargo on South Africa in which "all states" were required to comply.

This practice intensified after the Cold War, in particular in the context of resolutions related to the former Yugoslavia. One example is resolution 827 (1993), which established the international tribunal. In that resolution, the Council decided that:

"all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute."

But there remains some uncertainty as to whether non-member states are under a binding obligation to comply.

There are certain nuances that merit attention. Historically, if new entities

emerge as a result of a mutually agreed separation (such as in the case of Czechoslovakia), there usually are no disputes about the statehood of the emerging units. In these cases, the issue is whether the Council can bind non-member states.

Articles 34 and 35 of the Vienna Convention on the Law of Treaties provide that a treaty “does not create either obligations or rights for a third State without its consent,” and that an obligation from a treaty arises for a third State only if it “expressly accepts that obligation in writing.”

On the other hand, the Vienna Convention also states that “[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law,” to the extent that specific norms (and Council action to uphold them) can be recognised as such.

Practice is furthermore mixed and perpetuates the uncertainty. As we have seen, the Council has increasingly directed obligations at “all states”. But the behaviour of then non-members—particularly by Switzerland regarding various sanctions regimes and the Federal Republic of Germany in the context of the Rhodesia sanctions—appears to reinforce the conclusion that an “all states” resolution is not necessarily binding on non-members. Both countries exhibited varying degrees of cooperation with UN sanctions, but both states were insistent on emphasising the *voluntary* nature of their cooperation and/or their non-member status.²⁸

On the other hand, when the status of an emerging entity is challenged, then for some the issue is in fact whether the Council can bind non-state actors. Disagreement could exist as to whether the breakaway territory has become a state or whether it continues to be a non-state entity, and what the resulting obligations

are, for example, with respect to reporting to sanctions committees under various resolutions. Such questions may emerge in the future particularly in light of the status of Kosovo.

The issue of regional and international organisations is also complex. Article 103 provides that:

“in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

This provision seems to suggest that, at a minimum, states must not act in their regional organisations in ways that contradict Council decisions.

Moreover, Chapter VIII lays out the relationship between the Council and such organisations, emphasising in article 52 (1) that:

“Nothing in the present Charter precludes the existence of regional arrangements or agencies... provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.”

Article 53 (1) states 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...”

A combined reading of all these provisions suggests that regional organisations or agencies have a subordinate status vis-à-vis the United Nations and the Council in particular, and that regional organisations should comply with Council decisions.

This interpretation seems in accordance with article 48 (2), which mandates that measures “shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.” Nevertheless, while members of regional organisations seem to be under obligation to ensure that these regional organisations are in compliance with Council decisions, there is some ambiguity as to whether, as a matter of international law, Council decisions directly bind regional organisations as entities with international personality.

Perhaps as a result of this uncertainty, Council practice has tended to emphasise a cooperative approach, and it has refrained from imposing explicit demands or requirements.

The Council has in the past resorted to language emphasising such a cooperative relationship. For example, regarding NATO’s operation in Afghanistan (ISAF), in resolution 1776 (2007), the Council *encouraged* “ISAF and other partners to sustain their efforts, as resources permit, to train, mentor and empower the Afghan national security forces, in particular the Afghan National Police.”

The Council has also resorted to cautious language in situations, such as the call upon the AU in resolution 1679 (2006) to agree on requirements to strengthen its mission in Darfur (AMIS), or the request to the Kimberley Process to report “as appropriate” and “when possible” in resolution 1643 (2005) on Côte d’Ivoire.

Regional legal developments may shed light on possible future understanding of this issue. In October 2005, in a case concerning the implementation of Council targeted measures in connection with the al-Qaeda/Taliban sanctions regime (resolution 1267 (1999)), the Court of

First Instance of the European Communities ruled that:

*“the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law,”*²⁹

and that, although the European Community is not directly bound by the Charter since it is not a UN member or an explicit addressee of Council resolutions,

*“the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it... By concluding a treaty between them [European Community members] could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under that Charter.”*³⁰

7. Is a reference to Chapter VII necessary to authorise member states to use force?

Authorisations to use force have become a major element of the Council’s work in recent years, but the practice actually dates back to the early days of the organisation.

There is no provision in the Charter specifically contemplating the Council granting such authorisations—in effect derogations from the general prohibition of the threat or the use of force.

It seems that authorisations surfaced initially due to the historical difficulties in concluding arrangements for the permanent provision by member states of military forces to the Security Council, in accordance with article 43 of the Charter.

The first such authorisation³¹ was in resolution 83 of 27 June 1950, in which, after recalling its prior determination that

“armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace,” the Council recommended that member states provide assistance to the Republic of Korea “as may be necessary to repel the armed attack and restore international peace and security in the area”. As previously discussed, there was no explicit invocation of Chapter VII.

The choice of words seems to reflect a perception that such authorisation was a deviation from the original model envisaged in the Charter. By virtue of articles 25 and 49, member states are bound to accept and afford mutual assistance in the carrying out of such an authorisation. However, the resolution did not bind members to use force—rather, it empowered them should they decide to join in.

Until the end of the Cold War, the authorisation model would be used in only one other situation—the case of Southern Rhodesia. Resolution 221, after determining that the situation constituted a threat to the peace (again, in accordance with article 39 requirements), “called upon” the UK to prevent, “by the use of force if necessary,” the arrival of tankers believed to carry oil for Southern Rhodesia. Again, the resolution did not explicitly mention Chapter VII.

The response to the invasion of Kuwait by Iraq in 1990 was the first time after Southern Rhodesia that the Council considered an authorisation to use force. Initially, sanctions were imposed against Iraq in resolution 661 (1990).

Following this, the US and the UK expressed the intention to enforce the sanctions through a blockade based on article 51 of the Charter (self-defence) and pursuant to a request for assistance from the Kuwaiti government to exercise its right to self-defence. However, in the face of considerable concern from other Council members about basing such

action simply on bilateral consent, a draft resolution was presented to the Council to authorise a blockade and the “use of such air, sea or land forces” in accordance with the Charter.

Tortuous negotiations followed, resulting in language in resolution 665 designed to bridge differences over the authorisation of unspecified forcible measures without active Council control—essentially a preview of the controversies in later years over such authorisations. It called upon:

“those Member States co-operating with the Government of Kuwait... to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping.”

At the adoption of resolution 665, several members expressed serious reservations. The representative of Colombia went further and argued that “we are under no illusion that when the Council comes to vote on this resolution, it will be establishing a naval blockade, even though it may not say so, and that—though the Council may not say so either—it is acting pursuant to Article 42 of the Charter.” The US statement, on the other hand, pointed to the need to secure implementation of the sanctions regime in resolution 661 and to the fact that a number of member states had already deployed naval units at the request of Kuwait. China, specifically, refuted the interpretation that the resolution had actually empowered member states to use force (S/PV.2938).

It may also have been a very important fact that members were aware that the Council was entering relatively uncharted territory. This was coupled with the fact that the US and UK did not feel a resolution was really necessary, since in their view a blockade and use of force if

necessary would be permissible under article 51, given the request by the government of Kuwait.

However, resolution 665 became an important precedent and, since August 1990, the Council has authorised the use of force by states numerous times, starting with resolution 678 (1990), which contained the authorisation for coalition forces to start the ground offensive against the Iraqi invasion of Kuwait.

Authorising resolutions do not always themselves contain the article 39 determination of a threat to the peace, breach of the peace or act of aggression, indicating that such a determination can be implicit in the decision itself. Such was the case with resolution 678 (1990), which authorised allied use of force to repel Iraq's invasion of Kuwait. However, it did recall other resolutions that spelled out such a determination.

(The value of provisions in Council decisions recalling past resolutions should be carefully looked upon case-by-case, however. For example, resolution 1793 (2007) on Sierra Leone, which extended the mandate of the UN residual presence in that country in the form of the UN Integrated Office for Sierra Leone (UNIOSIL), "reaffirmed" previous Council resolutions on Sierra Leone. But it does not seem to follow that it was the Council's intention to place resolution 1793 under the Chapter VII authority conferred to past resolutions.)

Some have in the past expressed doubts about the legality of the authorisation model and its conformity with the Charter. However, state practice now seems well-established and Council members routinely decide by consensus to employ authorisation models. There now also seems to be agreement that the model is an important (some would argue an essential) tool in the broad framework

for the discharge of Security Council powers provided by the Charter.

To be sure, criticism emerged among member states on the legality of the delegation of Council powers to coalitions of member states and the possible lack of Security Council oversight over actions taken on its behalf. Such criticisms surfaced in particular during debates preceding the authorisation of what would become Operation Desert Storm through resolution 678 and the operations in Somalia, Rwanda, the former Yugoslavia and Haiti in the early to mid-1990s, for example. It is argued, on the other hand, that the scope, length and reporting requirements of authorisations have become stricter over time, possibly in response to such criticisms.³²

It has been precisely when this authorisation is lacking in recent years that most controversies regarding the legality of the use of force have emerged, as we will see below.

In recent times, authorising resolutions have consistently included:

- a determination in accordance with article 39;
- the chapeau "acting under Chapter VII," and
- an operative paragraph containing a "decision" to authorise member states to use force.

Such was the case with authorisations regarding Iraq (resolutions 678, 1483 and 1511), Somalia (resolutions 794 and 1744), Bosnia (resolutions 770, 787, 816, 820, 836, 908, 1031, 1088, 1174 and 1575), Albania (resolutions 1101 and 1114), Rwanda (resolution 929), Haiti (resolutions 875, 940 and 1529), the Great Lakes/Democratic Republic of the Congo (resolutions 1080, 1484 and 1671), Central African Republic (CAR) (resolution 1125), Sierra Leone (resolution 1132), Kosovo (resolution 1244),

Timor-Leste (resolution 1264), Afghanistan (resolutions 1386 and 1510), Liberia (resolution 1497), Côte d'Ivoire (resolutions 1464 and 1528) and Chad/CAR (resolution 1778).

As discussed above, the Charter establishes general and specific Council powers. Among the specific powers granted to the Council is the responsibility to take measures under Chapter VII to "maintain or restore international peace and security." Such measures, under article 39, are justified when there is a threat to the peace, a breach of the peace or an act of aggression.

It seems that there are no instances in which a Council authorisation to use force was based on anything other than a Chapter VII situation. So it appears safe to conclude that, in view of Council practice and Charter provisions, an authorisation to use force based on Chapter VII powers is necessary.

Explicit mention of that chapter or its articles may not be formally necessary, but nonetheless, the Council now resorts to it as a matter of course to indicate in unequivocal terms the legal effect of such authorisations.

Over the years, important questions have been raised regarding the use of force without Council authority in Liberia, Sierra Leone, Kosovo and Iraq. The case for these actions included arguments that:

- Council decisions *ex post facto* authorised the use of force;
- the Council's action constitutes tacit acquiescence;
- intervention to rescue nationals; and
- a humanitarian imperative allows the use of force when the Council is unable to reach agreement.

These issues remain deeply controversial, with continuing differences of

opinion among member states and experts.³³ When compared with the high incidence of the prior authorisation model, practice in this regard is scant.

It should be noted that the Charter in article 53 states that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.” The text is silent about whether the authorisation needs to be prior to the intervention and whether it should be explicit. But it seems clear that, for regional organisations, use of force must have effective Council oversight.

In practical terms, the cases where there has been no Council authorisation increasingly lead to a new layer of legal questioning over the status of military operations that may in practice prolong the underlying issue rather than resolve the threat to international peace and security.

Two cases of use of force without Council authorisation, on the other hand, have been widely accepted: those based on consent or self-defence.

Use of Force Based on Consent

The deployment of forces from one member state or a coalition to another member state for exercises or in peacetime is quite common and happens under a range of bilateral status of forces and regional agreements. There is generally no controversy regarding this practice.

But questions can arise, however, when military operations are conducted in times of conflict by a state or a coalition in the territory of a member-state based solely on the consent of that country’s leadership. Most recently, in late March, the African Union deployed 500 troops with French support to quell a secession movement in the island of Anjouan in the Comoros. The Council was not notified

of the operation, nor was it asked to grant an authorisation. No member state appears to have publicly raised concerns about the issue.

Historically, such interventions were sometimes questioned on the basis that they unduly alter the military balance among internal belligerent parties or supported ongoing post-colonial relationships. But on balance there seemed to be a tacit acceptance among the UN membership that interventions based simply on consent and without a Council authorising resolution were admissible under the Charter.

However, there is evidence that they can become problematic, because:

- *Consent can be fragile (and may be withdrawn over time).*

In the case of Timor-Leste in 2006, Australia-led international troops were deployed in accordance with a request put forward by the government. Once the violence was quelled, Timor-Leste expressed the desire to have the troops replaced by UN contingents (S/2006/620). The Secretary-General recommended the creation of a UN peacekeeping operation comprising military and police components.

Disagreement resulted in a split within the Core Group on Timor-Leste, with Brazil and Portugal favouring a UN component and Australia, the US and the UK backing the continuation of the multinational force. Japan (with a degree of sympathy for the latter position, largely on financial grounds) and France assumed a more conciliatory role. However, in part due to strong pressure at the time, Dili eventually acquiesced to the continuation of existing arrangements (S/2006/651).

The Council eventually created the UN Mission in Timor-Leste (UNMIT) on 25

August 2006 through resolution 1704. UNMIT is capped at 1,608 police and 34 military liaison officers. The resolution did not include a military component for the mission—contrary to what had been recommended by the Secretary-General—nor did it authorise the continuation of the Australia-led multinational force.

As a result, the Australia-led international force remains in Timor-Leste under a bilateral understanding with the government. There is no formal mechanism for Council review of the conduct of the force and no set deadline for its mandate.

- *The government in question has questionable authority to grant consent.*

The case of the Transitional Federal Government (TFG) in Somalia is a current example. In late 2006, from its sole outpost in the city of Baidoa, the TFG consented to Ethiopian military intervention against the Union of Islamic Courts, which controlled most of southern and central Somalia at the time. The Council, although seized of the situation, was never requested to authorise the action—even though it had less than a month earlier authorised the deployment of an operation in Somalia (IGASOM) by the sub-regional organisation Intergovernmental Authority on Development (IGAD) in resolution 1725.

The Council has, nonetheless, been silent on the Ethiopian deployments (and on the possibility of related violations of the 1992 arms embargo). There have been expressions of support for Somali transitional institutions and the need for withdrawal of foreign troops, for example in resolution 1772 (2007). Some Council members appear sympathetic to Ethiopian and TFG security needs. But there is acute awareness of the widely negative effects of Ethiopian deployments on the prospects for politi-

cal reconciliation in Somalia and their uncertain legal basis.

The Sierra Leone case is also a useful example. Following the coup against Ahmed Tejan Kabbah by a military junta in May 1997, the Nigerian navy unsuccessfully attacked Freetown on 1 June to restore Kabbah into power.³⁴ This was followed by a decision by ECOWAS ministers—with the participation of members of the Kabbah government representing Sierra Leone—“to work towards the reinstatement of the legitimate government by a combination of three measures, namely, dialogue, imposition of sanctions and enforcement of an embargo and the use of force” (S/1997/499).

The ECOWAS decision was presented to the Security Council by then Nigerian foreign minister Chief Ikimi on 11 July 1997. The case for the use of force was laid in terms rather similar to those regarding resolution 665. Ikimi referred to the fact that “if ECOWAS were to mount a credible sanctions regime against the illegal authorities in Sierra Leone, the air, land and sea borders of Sierra Leone would have to be militarily blocked while negotiations would be enhanced by a show of force and a sustained military build-up in the area”, that “President Kabbah... endorsed the conclusions reached by the Ministers” and that the purpose of his briefing to the Council was to obtain “*support and encouragement*” (S/PV.3797) (our emphasis added).

After the meeting, the Council issued a statement in which it strongly supported “the decision of the Thirty-third Summit of the Organization of African Unity (OAU)...which appealed to the ECOWAS leaders and the international community to help the people of Sierra Leone to restore the constitutional order in that country.” However, there was no explicit mention of the ECOWAS operation (S/PRST/1997/36).³⁵ It was not until resolu-

tion 1132 in August 1997 that there was a Council reference to ECOMOG that was specifically linked to enforcing Council sanctions.

In Liberia, the ECOMOG intervention also seems to have been based at least partly on the consent of the government. However, in practice the government had been toppled and did not control its own territory. And consent from the Liberian government and the rebels—in particular Charles Taylor—proved shaky. (Observers have noted that ECOMOG sought to arrange internationally monitored elections while excluding the then head of government, Samuel Doe, as a candidate.)³⁶ The ECOWAS’ Standing Mediation Committee established ECOMOG to intervene in the Liberian crisis in August 1990, following months of unsuccessful attempts at a peace agreement. The mission was framed as a peace-keeping operation with a robust mandate including the use of force.

The Council took up the matter only in January 1991. No formal authorisation was issued, despite clear signals that the operation, rather than a peacekeeping mission, was an enforcement operation. Members went no further than ECOWAS’ efforts in a presidential statement (S/22133). Subsequently in resolution 788 (1992), the Council imposed a sanctions regime under Chapter VII with an exemption for ECOMOG.

In all these cases, it seems that the absence of formal Council authorisation contributed to ongoing unease about the basis of such interventions. And it may be that practice is increasingly growing that most members prefer to make the effort to adopt Chapter VII authorisations even when consent was present. Perhaps it is seen as a “legal cushion” against sudden changes in the political landscape of host countries. Cases include Bosnia after the Dayton accord, Albania, CAR, Côte d’Ivoire,

Guinea-Bissau, Timor-Leste in 1999, and NATO in Afghanistan.

Recently in the DRC and Chad/CAR, the EU has been asked to deploy troops in civilian protection missions with the consent of the host governments. Nonetheless, EU members (and in particular their national legislatures) saw prior Council authorisation as a necessary precondition for deployments. This most likely reflected the problems outlined above as well as internal domestic concerns in some countries.

This seems to point to a growing practice that military action may be based on both consent and Council authorisation but that, due to its political and practical importance—both for the success of operations and for galvanising international support—Council support is often perceived as a crucial and desirable element. In particular, the EU has developed a strong position on this issue.

The recent renewal of the authorisation for the Multinational Force-Iraq (MNF-I) in resolution 1790 (2007) is a particularly useful example.

That resolution had been preceded by intense discussions regarding the MNF-I’s future status and the interest among the Iraqi leadership for full regaining of control over its security and administrative affairs. On 26 November 2007, the US and the Iraqi government signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship. The document provided that the Iraqi government would request a renewal of the MNF-I authorisation under Chapter VII for a final time. Once the renewal expired, Iraq’s designation as a threat to international peace and security would end and the country would return to the “legal and international standing” it enjoyed prior to resolution 661 (1990). This would confirm “the full sovereignty of Iraq over its territories,

waters, and airspace, and its control over its forces and the administration of its affairs.” On 7 December 2007, members received a letter from the Iraqi government along those lines.

But important issues of competence to consent to the MNF-I’s proposed renewal emerged between the Iraqi government and Iraqi members of parliament. In a December 2007 letter to Council members, the parliamentarians requested that the Security Council not accept the government’s renewal request. They argued that consent for the MNF-I fell within the parliament’s constitutional powers. They also argued that in June 2007 a draft law was adopted requiring the renewal request to be referred to parliament; in their view, since the legislation had not been vetoed by the Iraqi president in due time, it was in force.

On 18 December 2007, the Council adopted resolution 1790. It renewed the MNF-I’s authorisation for one year, noting that the MNF-I presence is at the government’s request and recognising “the importance of consent of the sovereign” Iraqi government. It remains to be seen if the issue resurfaces when MNF-I’s current mandate expires and consideration is given to the request that relations with the force be governed on a bilateral basis without a Chapter VII resolution.

Use of Force Based on Self-Defence

The modalities and conditions for the exercise of the right of self-defence and the issues surrounding the concept of anticipatory self-defence are not within the scope of this report.

However, in the context of the role of the Council under the Charter, it is important to note that, under article 51, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs

against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 also provides that “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” The “report” requirement puts the Council on notice and various conclusions may (or may not) be able to be drawn from the way the issue is then handled in the Council. And it is important to recall that the continuation over time of action in self-defence also raises questions regarding the timing of the cessation of a threat and the possibility that an initially lawful defensive reaction needs over time to be transformed under some form of Council authorisation.

In conclusion, the analysis of Charter provisions and the evolution of Council practice suggests that Council authorisation for member states to use force indeed needs to be adopted under Chapter VII. In particular, the authorisation model seems to have evolved into a generally accepted framework under which force may be lawfully used in international affairs.

As seen in the Korea and Rhodesia examples above, the authorising resolution may sometimes not have explicit mention of Chapter VII, in which case a detailed analysis of historical evidence indicated that the Council’s intention was to use its Chapter VII powers. As a response, the best practice of combining article 39 determination, the Chapter VII chapeau and the verb “decides” has

been used as a means of clearly indicating Council intent.

Cases still exist, however, which demonstrate that the authorisation model does not constitute an exclusive framework for the use of force. These include consent and self-defence which are well-established. Much more controversial are the arguments that Council decisions *ex post facto* authorised the use of force; the Council’s subsequent action constituted acquiescence; the action responded to a material breach of past Council resolutions; the intervention was carried out to rescue nationals; and a humanitarian imperative allows the use of force when the Council was unable to reach agreement. Council practice on such cases is scant and offers little evidence of their acceptability.

8. Is a reference to Chapter VII necessary to authorise a robust mandate for a UN operation involving the use of military force?

The Charter makes no reference to the authorisation model for the use of force by states, nor is there any reference to the Council establishing peacekeeping operations. Council practice in this regard similarly commenced early in the history of the United Nations.

The first “wave” of UN peacekeeping operations started in 1948 with the UN Truce Supervision Organisation (UNTSO). Such missions are commonly referred to as “classical peacekeeping operations.” The Secretary-General’s report on the establishment of UN Interim Force in Lebanon (UNIFIL) in 1978 (S/12611) summarised their main aspects:

“Firstly, it must have at all times the full confidence and backing of the Security Council. Secondly, it must operate

with the full co-operation of all the parties concerned. Thirdly, it must be able to function as an integrated and efficient military unit."

Classical peacekeeping operations were always deployed with the consent of the parties and usually with a mandate only to verify and monitor compliance with the provisions of peace agreements and/or ceasefires. They were unarmed or only lightly armed military contingents allowed to employ force only in strict self-defence. As such, an authorisation to use force was not only seen as unnecessary, but also counter to the very nature of peacekeeping as it was then understood.

The second phase of peacekeeping represented a major departure from that initial concept. The UN Operation in the Congo (ONUC) established in 1960 under resolution 146 was very much at the robust end of the spectrum and had a mandate to use force (although as we have seen there was never any explicit reference to Chapter VII).

The third phase represented a retreat from the robust approach employed with ONUC, and was marked by a recognition (especially after the experience in the Sinai in 1967 of the UN Emergency Force (UNEF) being withdrawn in the face of the Egyptian attack on Israel) that the credibility of the UN could be undermined if a party could, with impunity, compel a UN mission to abandon its mission. In this regard, the Secretary-General's report referred to above foresaw one of the main challenges that would confront future peacekeeping operations. It noted that the concept of self-defence for UNIFIL, similarly to that of UNEF I and the UN Disengagement Observer Force (UNDOF) would include:

"resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council."

It is interesting, however, that the Security Council during this period steered away from addressing the practical implications of this approach in mandates. There are many such examples of this resort to minimalism. Usually, the Council would adopt a resolution approving the mission's mandate but only by indirect reference to principles contained in the relevant Secretary-General's report. This enlarged concept of defence of the mandate was therefore only implicit. Examples in this regard include:

- the UN Peacekeeping Force in Cyprus (UNFICYP), established in resolution 186 (1964). The Secretary-General's report (S/5950) had noted that the mission would "carry arms which, however, are to be employed only for self-defence, should this become necessary in the discharge of its function, in the interest of preserving international peace and security, of seeking to prevent a recurrence of fighting, and contributing to the maintenance and restoration of law and order and a return to normal conditions"—but this was not reflected directly in the resolution; and
- UNEF II, as laid out in resolutions 340 and 341 (1973) and the Secretary-General's report S/11052/Rev. 1.

Provision for such use of force tended to be incorporated in each mission's rules of engagement (ROE). However, ROE were not normally considered by the Council. They tended to be established under the authority of the Secretary-General and typically were never specifically approved or even discussed in the context of specific operations.

By the early 1990s, the nature of conflicts on the Council's agenda had changed dramatically. The Council was dealing with situations involving complex internal conflicts, increasing erosion of consent (to the point in which often only

nominal agreement remained) and even complete disintegration of the central government.

With the rapid growth of peacekeeping operations in the 1990s in complex environments where violence was still occurring, a growing number of operations were given more robust capacity as a result to exercise the self-defence provisions in their mandates or ROE. However, this limited authorisation for the use of force was scarcely ever discussed by the Council. The practice continued of establishing missions by endorsing the mandate and making indirect reference to the relevant report of the Secretary-General. In hindsight it is possible to see the fatal confusion which arose as a result of this minimalist approach.

Perhaps because of the complexity of the issues, a kind of mythology emerged under which it became common jargon to call peacekeeping operations with a classical "consent"-based mandate as "Chapter VI operations." And many commentators began using the colloquial term "Chapter Six-and-a-Half" to describe those more complex and difficult UN operations, which were increasingly finding the need to utilise an enlarged scope for self-defence.

However, in these new environments, authority to use force based on self-defence in ROE and sometimes ambiguous words in mandates (or more often only the Secretary-General's recommendations for the establishment of the operation) came to be seen as neither practically useful nor legally sufficient.

As a result, in recent times UN peacekeeping operations are now subject to increasingly explicit authorisations from the Council which itself addresses the request to use force. In part, this is to confer a more stable political and legal basis for the use of force. It is certainly

less controversial than relying on inherent rights of self-defence in the ROE and provides much more useful guidance to Secretariat, force commanders, and troop-contributing countries. Increasingly the Council saw the value of itself in determining whether its deployments should be able to use force beyond levels the parties themselves were prepared to accept.³⁷

The first UN peacekeeping operation with express authorisation under Chapter VII was the Iraq-Kuwait Observation Mission (UNIKOM) on 3 April 1991. It was established under Chapter VII by resolutions 687 and 689 (1991) and later authorised to use force in resolution 806 of 5 February 1993.

This first precedent was soon followed by authorisations under Chapter VII—albeit in rather dissimilar circumstances—for the UN Operation in Somalia (UNOSOM) and the former Yugoslavia (UNPROFOR).

At the outset in April 1992, UNOSOM was essentially a consent-based mission mandated to monitor a ceasefire in the capital, Mogadishu, provide protection for UN personnel and escort humanitarian convoys. In December 1992, worsening security conditions on the ground and the deterioration of consent from the parties led the Council to authorise member states in resolution 794 to form a multinational coalition force operating under Chapter VII (US-led UNITAF) to operate side-by-side with UNOSOM. This arrangement was subsequently replaced by a robust peacekeeping operation with a Chapter VII mandate (UNOSOM II) in resolution 814 (1993).

UNOSOM II's mandate was unprecedented in its scope and robustness. The mission was responsible *inter alia* for preventing any resumption of violence; seizing the small arms of all unauthor-

ised armed elements; securing all ports, airports and lines of communications for the delivery of humanitarian assistance; and assistance in the reestablishment of national and regional institutions and civil administration in the entire country. The death of Pakistani peacekeepers in June 2003 marked yet another shift in which UNOSOM II and UNITAF would actively seek to apprehend the leadership of one of the parties to the conflict for its role in the attack.

The failures in Somalia led to a number of studies, including a comprehensive report from the UN Department of Peacekeeping Operations. Many of the conclusions were related to the need for clear mandates, resources, better planning and coordination, and unity of command.

However, another aspect identified, and which would prove to be an emerging problem in many future operations was the fluidity and uncertainty of consent, in particular in the absence of a sustained political process.

On 21 February 1992, UNPROFOR was established by resolution 743. It was initially a (basically) consent-based operation with the usual understanding that force would only be used under the ROE in self-defence. However, in practice, there was increasing pressure for the force to operate in a non-consensual environment in particular for protection for humanitarian convoys and protection of civilians.

On 10 September 1992, the Secretary-General submitted a report to the Security Council recommending a new concept of operations for UNPROFOR under which the mission would add to its existing activities the provision of protective support to the delivery of humanitarian assistance. He said that UNPROFOR “would follow normal peacekeeping rules of engagement.

They would thus be authorized to use force in self-defence. It is to be noted that, in this context, self-defence is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate” (S/24540). The Council endorsed the new concept of operations in resolution 776 (1992) but made no reference to the use of force. It simply approved the report of the Secretary-General.

On 19 February 1993, the shift was made in resolution 807 to explicit Council approval. This was signalled by including a specific reference to Chapter VII, but again no reference to use of force was included.

In 1994, the Council adopted the so-called “safe areas” (i.e. zones “free from any armed attack or any other hostile act”) and added related monitoring and deterrence tasks to UNPROFOR's mandate in resolutions 819, 824 and 836.

The approach proved a failure in the light of unrelenting violence culminating in the fall of Srebrenica in July 1995. Many factors have been linked to the international community's failure vis-à-vis Bosnia, including mixed signals from the Council, deliberate lack of sufficient resources and clear mandate for UNPROFOR, reluctance to use force and unrealistic appraisals of the parties' intentions.

The balance among consent, a sustainable political process and credible force once again proved to be a critical problem. In his “Fall of Srebrenica” report, the Secretary-General concluded that “[p]eacekeepers must never again be deployed into an environment in which there is no ceasefire or peace agreement.” The report also argued that protected zones and safe areas “could have a role” in civilian protection, but that it was clear that “they either must be demilitarized and established by the

agreement of the belligerents, as with the 'protected zones' and 'safe havens' recognized by international humanitarian law, or they must be truly safe areas, fully defended by a credible military deterrent." (A/54/549)

In the short term, the consequence of the failures in Somalia and Bosnia was that, in the mid-1990s, an aversion developed to new peacekeeping operations in general and a political preference to resort to consent-based operations seemed to be emerging.

The case of Rwanda is also instructive. UN Assistance Mission for Rwanda (UNAMIR) was established in resolution 872 (1993), with a limited consent-based mandate but unusually the Council did for the first time address in the mandate itself a specific security objective to:

- assist in ensuring the security of the capital city of Kigali "inter alia within a weapons-secure area" established by the parties.

The other aspects of UNAMIR's mandate were classical peacekeeping goals:

- monitor the ceasefire agreement and the security situation; and
- assist in the coordination of humanitarian assistance.

The Council did not address the use of force as such and so the mission was to operate under normal ROE. A proposal by Force Commander Romeo Dallaire that the mission be allowed to use force against crimes against humanity and other abuses was not formally responded to by headquarters, thus generating considerable confusion (S/1999/1257).

Problems soon emerged. On 11 January, Dallaire sent a cable to New York detailing evidence of an impending mass slaughter and seeking authorisation to raid weapons caches kept by Hutu militias. The request was denied on

the basis that the mission had no authority, despite its mandate.

The deaths of the presidents of Rwanda and Burundi on 6 April 1994 marked the beginning of the Rwandan genocide. There were requests to headquarters for the mission to use force to protect politicians, which were denied on the basis of existing ROE. Headquarters, on the other hand, did not object to a new proposal to include action against crimes against humanity in the ROE, but the provision was never implemented. Other problems of command and control and lack of resources were also cited by Dallaire as preventing full discharge of the ROE (S/1999/1257).

In the midst of the genocide, on 17 May 1994, UNAMIR's mandate was revised in resolution 918 to include protection of civilians. The resolution recognised that UNAMIR might:

"be required to take action in self-defence against persons or groups who threaten protected sites and populations, United Nations and other humanitarian personnel or the means of delivery and distribution of humanitarian relief."

But resistance by the US to the force's actual deployment meant resolution 918 was not implemented and the mission was not able to protect civilians during the genocide. The mission only achieved full deployment in late 1994.

The reversal to "consent-based" operations was very short lived. By the late 1990s, events in Sierra Leone, Liberia, Timor-Leste, Côte d'Ivoire, and Haiti led to further rethinking on the need for robust UN operations and resulted in the emergence of large multidimensional peacekeeping operations starting with the UN transitional administrations in Kosovo (UNMIK) and East Timor (UNTAET) in 1999 (with an early

precedent in Cambodia in 1992, UNTAC), albeit this time under Chapter VII.

The conceptual issues were addressed in the 2000 Brahimi Report (S/2000/809). It identified the key underlying issue:

"consent of the local parties, impartiality and use of force only in self-defence should remain the bedrock principles of peacekeeping. Experience shows, however, that in the context of modern peace operations... consent may be manipulated in many ways by the local parties... In the past, the United Nations has often found itself unable to respond effectively to such challenges. It is a fundamental premise of the present report, however, that it must be able to do so. Once deployed, United Nations peacekeepers must be... capable of defending themselves, other mission components and the mission's mandate... Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles."

Given the complex security environments particularly for the large missions deployed in Africa, consent increasingly came to be seen in a tiered fashion ranging from the strategic macro-level to the tactical, local level.³⁸

That differentiation largely embodies the current concept of robust peacekeeping. Consent from key players at the macro level is seen as essential, but UN missions may use force with the limited objective of protecting civilians under imminent threat, and compelling recalcitrant marginal groups at the local level to adhere to the larger peace process.

Therefore, some operations in recent years—such as in Sierra Leone, DRC, and Liberia, for example—have been given robust mandates. For practical reasons, consent still remains a key element even if somewhat qualified in some

cases. The Bosnia and Somalia cases seem to have underlined for the Secretariat in particular, that a (sometimes quite thin) separation must be kept between enforcement operations and peacekeeping, given the limitations in UN resources and capabilities, and the inherent contradictions between war-fighting and peacekeeping. On the other hand, it is now recognised that too strong an emphasis on consent at all levels may encourage defiant behaviour from some parties and render the operation unviable.³⁹

There are nonetheless key differences between current operations with respect to the reach and extent of their Chapter VII mandates:

- Some mandates (such as those of the UN Operation in Burundi, ONUB, the UN Operation in Côte d'Ivoire, UNOCI, and the UN Mission in Liberia, UNMIL⁴⁰) were from the outset entirely under Chapter VII. This seems to reflect the existence of strong consensus within the Council and also from the parties and regional players vis-à-vis the deployment of a robust UN operation.
- Other mandates (such as those of the UN Mission in Sierra Leone, UNAMSIL, and the UN Mission in the DRC, MONUC⁴¹) were progressively strengthened and later entirely placed under Chapter VII. This was largely the result of initial divisions, particularly within the Council (for example, regarding MONUC's cost and viability) and the preferences of key troop contributors (such as with UNAMSIL), which were progressively overcome given difficulties in the peace processes in those countries.
- The UN Mission in the Sudan, UNMIS, only has a limited Chapter VII mandate to protect civilians under imminent threat and UN property and personnel, in support of the north-south peace agreement (resolution 1590 (2005)). This seems to be largely a

result of the interplay between international pressure, the complex political environment and the parties' concerns with the impact of UN peacekeeping in Sudan.

- A similar situation arose in connection with the UN-AU Mission in Darfur (UNAMID), established in resolution 1769 (2007). The Council's intention was to create an operation far more robust than UNMIS, as evidenced by the differences in mandate, size and operational environment. However, the divisions among Council members during the negotiations of UNAMID's mandate, as well as the fact that only part of its protection mandate is under Chapter VII, suggest the same interplay of international pressure and political environment surrounding the use of that Chapter. (For more details, see our August 2007 *Forecast*.)

The case of UNIFIL in 2006 is of particular interest. As seen above, resolution 1701 determined that the situation in Lebanon constituted a threat to international peace and security and established a robust mandate for UNIFIL.

It also *authorised* the mission to take all necessary action in areas of deployment of its forces and as it deems within its capabilities. This type of language is commonly employed in authorisations to use force and suggests that the Council's intention was to confer on UNIFIL robust powers. The new mandate does however contain a few limitations in that it seems clear that the Force will be dependent upon working with the government of Lebanon.

It is clear that the Council's intention was to authorise a robust peacekeeping operation. Furthermore, as indicated above, in terms of the binding nature of the obligations, even though there is no explicit reference to Chapter VII it seems clear that this resolution was indeed

adopted by the Council exercising its Chapter VII powers.

Following the adoption of resolution 1701, potential European troop contributors initially raised concerns about what they saw as ambiguities in the mandate, potential for hostile activity and lack of robust rules of engagement—a Secretariat document with modalities for the use of force. Agreement was eventually reached on more robust ROE. The discussions also underlined the critical practical reality that even though the Council established a robust operation, the complex and volatile realities on the ground created a practical need for cooperation from the parties and the mission's limited resources meant that the mission's operations would translate into low-key, rather than assertive, presence.

Far-reaching powers are also given to peacekeeping operations in the area of *law enforcement*. The 2006 case of the UN Mission in Timor-Leste (UNMIT) points to that possibility. Its mandate includes:

- the restoration and maintenance of public security in Timor-Leste through the provision of support to the Timorese national police, which includes interim law enforcement and public security; and
- the security and freedom of movement of UN and associated personnel, and protection of UN personnel and property.

Interestingly, those powers are not under Chapter VII. Negotiations within the Council and the Group of Friends reveal that there was no particular concern with giving UNMIT a mandate expressly under Chapter VII. But the divisions among key players on giving that type of mandate to the Australian military forces present in Timor-Leste meant that an explicit reference to Chapter VII in resolution 1704 was omitted for UNMIT as well. Although given the language of

the mandate, there can be little doubt that it was adopted using the Council's Chapter VII powers.

This sort of ambiguity in the mandates of peacekeeping operations with executive policing responsibility may create difficult situations in the future. The number of police authorised has increased acutely in the past three years, particularly in Timor-Leste, Darfur, Chad, the DRC and Liberia. Their recurrent use can be seen as a response to the rising need for law enforcement activities and the restoration of the rule of law while avoiding exclusive resort to military force.

Unlike the latter, however, no consistent model for Chapter VII mandates to use force has emerged for UN police, thus leaving some missions vulnerable to exclusive reliance on consent from the parties and a perception of lack of Council support for decisive action.

The inclusion of reference to Chapter VII and explicit authorisation to use force in the mandate of peacekeeping operations has only gradually emerged as both a legal and practical response to the challenges of more complex conflicts. It remains to be seen whether the kinds of political circumstances which influenced the cases of Lebanon and Timor-Leste above will be repeated, but overall the existing trend seems still to be to include explicit reference to Chapter VII.

An important evolution in terms of reaching more clarity on these issues was the recent publication of the Secretariat document "United Nations Peacekeeping Operations: Principles and Guidelines." It lays out the "nature, scope and business" of UN operations, reinforcing the notion that three principles remain cardinal for peacekeeping:

- consent of the main parties;
- impartiality; and
- non-use of force except in self-defence and defence of the mandate.

The document also places a strong emphasis on critical aspects for the success of a mission, including:

- the existence of a peace to keep;
- positive regional engagement;
- the full backing of a united Security Council;
- a clear and achievable mandate with resources to match;
- consultations with contributing countries;
- legitimacy and discipline;
- mission credibility as a function of capability, effectiveness and management of expectations; and
- promotion of national and local ownership.

Is it the Council resolution or the concept of operations and the rules of engagement that determine whether a UN operation will actually use force?

As seen above, a number of UN peacekeeping operations, either explicitly or implicitly in varying degrees, were authorised to use force, with the rules of engagement (ROE) and the concept of operations playing a key role in the actual implementation of mandates.

A mission's concept of operations is a detailed description of how its mandate is to be implemented. It includes:

- an assessment of the overall military situation;
- key mission planning assumptions (such as the parties' adherence to a ceasefire) and the phases in which deployments will gradually be made and the mandate implemented, especially for new missions; and
- the main military tasks associated with the mandate.

And the ROE:

"provide the parameters within which armed military personnel assigned to a peacekeeping operation may use different levels of force. They ensure

*that the use of force by UN military personnel is undertaken in accordance with the purposes of the UN Charter, the Security Council mandate and the relevant principles of international law, including the laws on armed conflict. The implementation of the rules of engagement is a command responsibility. The rules of engagement are addressed to the Force Commander, who is responsible for issuing them to all subordinate commanders."*⁴²

Based on the tasks set out in the mandate, and interpreted in light of the prevailing political and military circumstances, the ROE provide specific instructions for the use of force. They specify whether force will be used on a proactive basis (such as operations to engage and deny territory to militia) or on a reactive basis (such as a defensive measure against hostile activity) and in response to what levels of provocation.

The ROE should normally flow from the activities required by the mandate. But they do not necessarily flow from the chapter of the Charter under which the resolution was adopted. That may specify, for example, the use of force in self-defence and in defence of civilians—but equally it may not.

Accordingly, ROE do not refer to the specific chapter under which a mandate is adopted. Some rules of engagement for missions with a Chapter VII mandate to protect civilians under imminent threat contain language identical to those for missions without a Chapter VII mandate, but where self-defence of the mission task is understood to include civilian protection.

This suggests that, more important than the chapter under which a resolution is adopted, are the precise activities with which the Council tasks the mission and how these are reflected in the concept of operations and ROE.

These documents establish the practical modalities for a peacekeeping operation. They reflect an interpretation of the mandate and the Council's will. They will also reflect the political circumstances and security challenges surrounding the mission and are likely to embody a cautious approach for missions deployed in difficult scenarios in which the use of force may prove controversial.

An example is the first drafts of UN Transitional Administration in East Timor's (UNTAET) ROE. These seem to have initially contained a conservative interpretation of the mandate. This created difficulties for the members of the coalition International Force for East Timor (INTERFET) (which was about to be re-hatted as UNTAET). Most troop contributing countries supported ROE for UNTAET at least as robust as INTERFET's,⁴³ and this was eventually adopted.

The concept of operations and ROE for UN Interim Force in Lebanon (UNIFIL) are also useful examples of the difficulties of balancing delicate political circumstances with a robust mandate. The concept of operations emphasises that the mission was to be a monitoring and verification operation, in support of the Lebanese armed forces. However, a key concern for the force is to ensure that its area of operations is not used for hostile activities, which might attempt to prevent it from discharging its mandate. As mentioned above, considerable uncertainty surrounded UNIFIL's troop generation, reportedly in part due to a strong interest from some European troop contributors in having clear, robust ROE that could match the mission's extensive and difficult mandate. Observers have noted that under the ROE, UNIFIL does have the authorisation to use force against hostile activities in the area of operations, but the concept of operations and ROE clarify that it does

not include the forcible disarmament of militias other than in conjunction with the Lebanese authorities.

UNIFIL's protection and self-defence mandates—which could also imply a more extensive use of force—should probably not be read therefore as implying that UNIFIL will carry out offensive operations. Rather, the mission's role is focused on maintaining a defensive character supplemented by limited protection tasks. The use of force to defend civilians and humanitarian workers is clearly authorised. Interestingly, observers have noted that the previous UNIFIL ROE (i.e. prior to resolution 1701) already contained the same limited authorisation to use force to protect civilians under imminent threat as at present.

A comparison between UNIFIL's ROE and those of UN Mission in the Sudan (UNMIS) in south Sudan is also useful. It seems that UNIFIL's rules are very similar to those of UNMIS in south Sudan with regards to the protection mandate, despite the fact that UNMIS has an explicit Chapter VII mandate to protect civilians, whereas while UNIFIL has a similar mandate, there is no reference to Chapter VII.

UNMIS also faces a comparable delicate political environment. The mission was deployed in 2005 in support of the Comprehensive Peace Agreement between north and south Sudan. The challenging political circumstances in Sudan, balanced by international pressure, have meant that the mission (similarly to UNIFIL) is primarily a monitoring and verifying operation, with only a peripheral protection mandate. This set of circumstances is unequivocally reflected in UNMIS' ROE. This aspect was clearly underlined when calls for a larger UNMIS involvement in the protection of civilians surfaced following reports of abuses carried out by the Ugandan rebel group Lord's Resistance Army (LRA) in south

Sudan in late 2005. The Secretary-General then underscored that:

“UNMIS operates with the usual Chapter VI force composition and configuration and has very few robust assets at its disposal. The military component is structured to provide support and security for monitoring and verification of the Comprehensive Peace Agreement, rather than to conduct operations which may require an offensive capability... In resolution 1663 (2006), the Council urged UNMIS to ‘make full use of its current mandate and capabilities’ against LRA. The present configuration of UNMIS allows the Mission to undertake regular patrolling by military observers, in known LRA areas. These patrols are escorted by small protection elements which, due to their size, scope and mandate, are limited to carrying out a minimum defensive capability.”⁴⁴

Two **key conclusions** can be drawn from the examples above:

- the actual tasks in the mandate and the political circumstances surrounding the resolution's implementation (which will be reflected in the concept of operations) are likely to have a larger impact than whether Chapter VII is mentioned in the relevant resolution; and
- the actual use of force by a robust peacekeeping operation will depend on how the mandate is translated into the concept of operations, the ROE and the doctrine promulgated by the Secretary-General, as well as the situation in the field.

This last point highlights perhaps one of the key challenges faced by peacekeeping operations today, namely that often the key players, including troop contributors, the media, and the wider UN membership tend to focus more on whether a mandate is adopted under Chapter VII rather than the specific

language of the mandate. There seems to be a tendency to regard missions whose mandates are not under Chapter VII as relatively “easy” missions that will not demand enforcement action. This in turn leads to a tendency to disregard the actual wording of the mandate and the ROE and may affect the performance of missions both operationally and tactically.

Other factors may also have an impact on the use of force by a mission, such as:

- **key priorities set by the Secretariat and the mission over time.** This is also applicable for the more robust operations that have traditionally carried out offensive operations. With the UN Mission in the DRC (MONUC) and the UN Stabilisation Mission in Haiti (MINUSTAH), for example, the missions’ focus included both offensive action against spoilers, as well as the organisation and provision of security for national elections. In the case of MONUC, there were also calls for the forcible disarmament of the LRA and other foreign armed groups in the DRC.⁴⁵ The Secretary-General’s response at the time seemed unenthusiastic, given inter alia MONUC’s priorities related to the elections (S/2005/832 and S/2006/310).
- **command and control structures, in particular the presence of parallel chains of command linking field contingents to their national headquarters.** Several peacekeeping operations, particularly in times of crisis, have experienced some national officers refusing to carry out orders from the operation’s force commander, asking instead for permission from their national headquarters. This seems to have been the case with MONUC, for example, particularly after the 2003 Ituri and the 2004 Bukavu crises, and certainly with the UN Assistance Mission for Rwanda (UNAMIR) in 1994.

- **field commanders’ interpretation of the mandate, concept of operations and rules of engagement.** There are numerous cases in the history of peacekeeping operations in which field commanders have arrived at contradictory interpretations, and some with more conservative leanings effectively limited the authorised scope for the use of force.⁴⁶ This seems to have been the case, for example, with UNOSOM II,⁴⁷ UNAMIR⁴⁸ and UNAMSIL.⁴⁹

- **availability of resources and Council support.** The “Fall of Srebrenica” report notes the frustration of an UNPROFOR commander in that the mission had been beset by “a fantastic gap between the resolutions of the Security Council, the will to execute these resolutions, and the means available to commanders in the field”. The Secretary-General at the time reported that “against the authorized strength of 7,600 additional troops for the safe areas, fewer than 3,000 troops had arrived in theatre nearly seven months later,” leading to concern about a gap between expectations from the force and resources (A/59/549). Most recently, UN-AU Mission in Darfur has been plagued by similar problems. This led Under Secretary-General Jean-Marie Guéhenno to caution the Council last February that current resources were insufficient to provide protection or to meet “the high expectations of Darfur’s civilians” (S/PV.5832).

9. Is a reference to Chapter VII necessary to impose sanctions?

Council practice reveals a strong correlation between sanctions resolutions and explicit references to Chapter VII. However, there are some exceptions

and it seems—as with Council decisions to authorise the use of force or impose binding obligations—that an explicit reference to Chapter VII is not essential and should not always be expected.

Unlike the use of force, the imposition of sanctions individually or collectively by member states is not prohibited by the Charter, although international law, including rules established under the World Trade Organization (WTO), may limit certain kinds of sanctions.

But, when it comes to the establishment of a United Nations sanctions regime there is no doubt, in light of Council practice and Charter provisions, that this must be based on Chapter VII powers. All enforcement measures come within the domain of the specific powers expressly granted by the Charter under Chapter VII. And, again similar to the use of force, there seem to be no instances in which the Council has purported to establish a sanctions regime based on other chapters of the Charter.

The first sanctions were imposed in the case of Southern Rhodesia. In resolution 232 of 16 December 1966, the Council, “acting in accordance with Articles 39 and 41” of the Charter, determined that the situation in Southern Rhodesia constituted a threat to international peace and security and imposed a wide array of commodity-related and financial measures. Much of the Council discussions at the time focused on whether the circumstances in Southern Rhodesia actually amounted to a threat to international peace and security. By the time resolution 232 was adopted, there was wide agreement within the Council that this was the case, and a clear finding in terms of article 39 was included in the resolution.

Sanctions were applied again in the case of South Africa in 1977 in resolution 418. Again this resolution followed years of divisions inside the Council on whether

to adopt enforcement measures against the apartheid regime. In resolution 418, the Council used the explicit words “acting under Chapter VII.” It determined explicitly that the acquisition of arms by South Africa constituted a “threat to the maintenance of international peace and security” and imposed the arms embargo.

After a long hiatus, sanctions again became an important tool for the Security Council after the end of the Cold War in the 1990s. The practice of including a chapeau indicating explicitly the legal basis of the sanctions (Chapter VII), the article 39 finding, and a clear operative paragraph detailing the measures became a standard feature of sanctions resolutions for over a decade.

Examples include resolutions on Iraq (661, 687 and 1483), the former Yugoslavia (713, 724, 757, 787 and 820), Somalia (733), Libya (748), Liberia (788, 1343, 1521 and 1532), Haiti (841, 873 and 917), Angola (864, 1127 and 1135), Rwanda (918), Sudan (1054, 1070, 1556 and 1591), Sierra Leone (1132), Kosovo (1199), Afghanistan/Al-Qaeda/Taliban (1267 and 1333), Ethiopia and Eritrea (1298), terrorism (1373), Democratic Republic of the Congo (1493, 1596, 1649 and 1698), Côte d’Ivoire (1572 and 1643), Lebanon (1636), North Korea (1718) and Iran (1737, 1747 and 1803).

More recently, an even more explicit trend developed, under which the Council has also sometimes included a mention of the relevant article (article 41) on which the measures imposed are based. An example is resolution 1718 on North Korea. The original draft included the normal explicit reference to Chapter VII. However, a compromise was struck among the permanent members in that the chapeau would read acting “under Chapter VII... and taking measures under its Article 41.” Resolutions 1737, 1747 and 1803 on Iran

contain similar explicit language including reference to article 41.

The reasons for this additional specificity seem to be related to the concern, especially on the part of Russia, China and some others, that the Council should clarify that the measures were being taken under article 41 and that any inference that the Council might be including measures under article 42 (use of force) was excluded. As a result, in resolution 1718—after an amendment to the original US draft—the Council underlined that “further decisions will be required, should additional measures be necessary”. Similar language was repeated in resolutions 1737, 1747 and 1803 on Iran.

It is important to note, however, some even more recent trends in Council practice. These lean in the opposite direction and favour less explicit language in Council decisions.

Resolution 1701 determined that the situation in Lebanon constituted a threat to international peace and security and decided that all states should prevent the sale or supply to any entity or individual in Lebanon of arms, related material and technical assistance. Resolution 1701, however, does not explicitly mention Chapter VII or article 41. As discussed above, however, it is clear from the context that the Council’s intention was to adopt binding measures. This interpretation is reinforced by the fact that the language used in the resolution mirrors that of other sanctions regimes. The regular reports of the Secretary-General have a special section entitled “Arms Embargo.” (See, for example, S/2006/730 and S/2007/147.)

Another such case is resolution 1695. It reaffirmed that the proliferation of nuclear, biological and chemical weapons and their means of delivery constituted a threat to international peace and security and

required all member states to prevent the transfer to and from North Korea of missile and missile-related materiel and technology, as well as financial resources related to North Korea’s weapons of mass destruction (WMD) and missile programmes. The resolution also stated that the Council was acting “under its special responsibility for the maintenance of international peace and security,” a direct allusion to article 24. It did not, however, explicitly mention Chapter VII or article 41.

As with resolution 1701, there seems to be no doubt that the Council’s intention in resolution 1695 was to prevent the transfer of WMD and related technology by or to third states through binding measures. At the resolution’s adoption, the US, the UK, Japan and France alluded to this. No speaker rejected the view that the resolution indeed creates obligations (S/PV.5490). And resolution 1718 removes any doubt that the Council intended in resolution 1695 to impose binding measures.

Both early history and recent practice therefore seem to indicate that it is possible for the Council to adopt sanctions using its Chapter VII powers but without explicit reference to them.

10. Conclusions

Chapter VII is not the only basis in the Charter for the adoption of binding Council decisions. The Council can create obligations, based on its powers under articles 24 and 25.

Explicit reference to Chapter VII is not necessary, even when the Council is acting under that chapter. Council practice demonstrates (resolution 1695 being a classic example) that measures intended to be binding sometimes do not explicitly invoke Chapter VII.

In some cases, the Council invokes Chapter VII (for purely political purposes) but with no intent to impose binding obligations.

The powers in Chapter VII must be utilised for the imposition of enforcement measures such as sanctions and the use of force, or for a mandate for a UN operation to use force. However, Council practice clearly demonstrates that sometimes the use of Chapter VII powers is implicit rather than explicit.

It is important to emphasise, however, that this should not be interpreted as a “green light” for ambiguous drafting on the part of Council members. This word of caution seems relevant for both those who argue that only Chapter VII resolutions are binding, and for those who argue against it. As a matter of policy, the clearer the language adopted, the better the prospects for effectiveness and credibility of Council decisions. Clarity may not be possible on every occasion, but it seems critical that every effort be made to avoid decisions that only prolong the problem rather than solve it.

For resolutions with no mention of Chapter VII, there is therefore a zone of uncertainty.

In some cases that may be a deliberate political tactic—one which allows compromise on strong action or a binding measure while using softer or more ambiguous language in order to offer some olive branch to the country in question. However, as we have seen, such a tactic can also prove to be counterproductive, opening the way for future disagreements.

In other cases, this may be a result of the fact that the legal basis for the action in question may lie elsewhere, for instance in consent or the right of self-defence. The Council may be less inclined to consider a Chapter VII resolution in such instances. But, as explained above,

issues of erosion of consent and competence/legitimacy to grant it may emerge as complicating legal and political factors for a multinational force or a peacekeeping operation.

For UN peacekeeping, the role of Chapter VII has also been confusing and initially led to the complex mythology about Chapter VI and Chapter “Six-and-a-Half” operations. In recent years this problem seems to have receded in light of the increasing tendency for the Council to adopt clear mandates addressing use of force issues often referring to Chapter VII.

The actual conduct of operations may be strongly influenced by other factors such as the concept of operations and rules of engagement. In such cases, what happens in practice may be largely dependent upon the political and operational environment in which the mission is expected to discharge its mandate.

Where there is unity in the Council, the explicit use of Chapter VII enables clarity. For many UN members clarity is particularly important when Council decisions have to be translated into domestic law. It is often important to be able to demonstrate to parliaments that Council enforcement measures are legal and valid.

This was the case with the proposal to transfer Charles Taylor’s trial to International Criminal Court facilities in the Netherlands. The Dutch government signalled that it would be prepared to accept the transfer only if, *inter alia*, the Council adopted a Chapter VII resolution to avoid Taylor’s detention from being contested in Dutch courts (S/2006/207). This resulted in resolution 1688 of 16 June 2006.

Explicit use of Chapter VII therefore offers, to some extent, a desirable “cushion” clarity and predictability.

“Pragmatic” use of Chapter VII is likely to continue, in some cases where

surrounding circumstances and Council dynamics will mean that ambiguity will prevail over clear evidence of intent.

UN Documents Referred to in this Report

Security Council Resolutions

- S/RES/1803 (3 March 2008) strengthened sanctions against Iran.
- S/RES/1798 (30 January 2008) renewed UNMEE.
- S/RES/1793 (21 December 2007) renewed UNIOSIL.
- S/RES/1790 (18 December 2007) renewed the mandate of the Multinational Force in Iraq.
- S/RES/1784 (31 October 2007) renewed UNMIS.
- S/RES/1782 (29 October 2007) urged Ivorian parties to collaborate with the sanctions Group of Experts.
- S/RES/1778 (25 September 2007) authorised EU deployments in Chad/CAR.
- S/RES/1776 (19 September 2007) encouraged ISAF and other partners to sustain their efforts, as resources permit, to train, mentor and empower the Afghan national security forces, in particular the Afghan National Police.
- S/RES/1773 (24 August 2007) renewed UNIFIL.
- S/RES/1772 (20 August 2007) expressed the need for withdrawal of foreign troops from Somalia, *inter alia*.
- S/RES/1769 (31 July 2007) established UNAMID.
- S/RES/1757 (30 May 2007) decided on the entry into force of the agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon.

- S/RES/1747 (24 March 2007) strengthened sanctions in connection with Iran.
- S/RES/1744 (20 February 2007) authorised the deployment of the AU Mission in Somalia (AMISOM).
- S/RES/1740 (23 January 2007) established UNMIN.
- S/RES/1737 (23 December 2006) imposed sanctions in connection with Iran.
- S/RES/1725 (6 December 2006) authorised IGASOM.
- S/RES/1721 (1 November 2006) endorsed a power-sharing structure for Côte d'Ivoire.
- S/RES/1718 (14 October 2006) imposed sanctions in connection with the DPRK.
- S/RES/1704 (25 August 2006) established UNMIT.
- S/RES/1701 (11 August 2006) strengthened UNIFIL and established an arms embargo in Lebanon.
- S/RES/1698 (31 July 2006) strengthened sanctions in connection with the DRC.
- S/RES/1696 (31 July 2006) imposed measures under article 40 on Iran.
- S/RES/1695 (15 July 2006) contained a list of demands for the DPRK in connection with non-proliferation.
- S/RES/1688 (16 June 2006) endorsed Charles Taylor's trial by the Special Court in International Criminal Court (ICC) facilities.
- S/RES/1680 (17 May 2006) strongly encouraged Syria to respond positively to the request made by the government of Lebanon to delineate their common border.
- S/RES/1679 (16 May 2006) called upon the AU to agree on requirements to strengthen AMIS.

- S/RES/1671 (25 April 2006) authorised the deployment of EUFOR R.D. Congo
- S/RES/1663 (24 March 2006) urged UNMIS to make use of its mandate and capabilities against the Ugandan rebel group LRA.
- S/RES/1649 (21 December 2005) strengthened sanctions in connection with the DRC.
- S/RES/1643 (15 December 2005) strengthened sanctions and requested the Kimberley Process to report as appropriate and when possible on Côte d'Ivoire.
- S/RES/1636 (31 October 2005) strengthened sanctions in connection with Lebanon (political assassinations).
- S/RES/1609 (24 June 2005) adjusted UNOCI.
- S/RES/1596 (18 April 2005) strengthened sanctions in connection with the DRC.
- S/RES/1591 (29 March 2005) strengthened sanctions in connection with Darfur.
- S/RES/1590 (24 March 2005) established UNMIS.
- S/RES/1575 (22 November 2004) authorised the deployment of EU forces (EUFOR) in Bosnia and Herzegovina.
- S/RES/1572 (15 November 2004) imposed a sanctions regime in connection with Côte d'Ivoire.
- S/RES/1556 (30 July 2004) imposed sanctions in connection with Darfur.
- S/RES/1562 (17 September 2004) adjusted UNAMSIL.
- S/RES/1545 (21 May 2004) established ONUB.
- S/RES/1540 (28 April 2004) established a sanctions regime in connection with non-proliferation of weapons of mass destruction and non-state actors.

- S/RES/1532 (12 March 2004) and 1521 (22 December 2003) established sanctions in connection with Liberia.
- S/RES/1529 (29 February 2004) authorised the deployment of a multinational force in Haiti.
- S/RES/1528 (27 February 2004) authorised ECOWAS and French deployments in Côte d'Ivoire, and established UNOCI.
- S/RES/1511 (16 October 2003) authorised the presence of multinational forces in Iraq.
- S/RES/1510 (13 October 2003) authorised the deployment of ISAF outside Kabul.
- S/RES/1509 (19 September 2003) established UNMIL.
- S/RES/1497 (1 August 2003) authorised an ECOWAS force for Liberia.
- S/RES/1493 (28 July 2003) strengthened MONUC and imposed sanctions.
- S/RES/1484 (30 May 2003) authorised the deployment of a multinational protection force in Ituri, DRC.
- S/RES/1483 (22 May 2003) inter alia recognised the occupying powers, requested the Secretary-General to appoint a Special Representative for Iraq, and established sanctions against the previous Iraqi government.
- S/RES/1464 (4 February 2003) authorised ECOWAS and French deployments in Côte d'Ivoire.
- S/RES/1386 (20 December 2001) authorised the deployment of ISAF in Kabul.
- S/RES/1376 (9 November 2001) determined that the situation in the Democratic Republic of the Congo continued to pose a threat to international peace and security in the region.

- S/RES/1373 (28 September 2001) imposed sanctions in connection with terrorism.
- S/RES/1368 (12 September 2001) recognised the inherent right of individual or collective self-defence in accordance with the Charter in connection with the terrorist attacks in US soil of 11 September 2001.
- S/RES/1343 (7 March 2001) established sanctions in connection with Liberia.
- S/RES/1333 (19 December 2000) strengthened sanctions in connection with al-Qaeda/Taliban.
- S/RES/1298 (17 May 2000) imposed sanctions in connection with Ethiopia-Eritrea.
- S/RES/1291 (24 February 2000) strengthened MONUC.
- S/RES/1279 (30 November 1999) established MONUC.
- S/RES/1270 (22 October 1999) established UNAMSIL.
- S/RES/1267 (15 October 1999) imposed a sanctions regime in connection with al-Qaeda/Taliban.
- S/RES/1264 (15 September 1999) authorised the deployment of INTERFET in Timor-Leste.
- S/RES/1244 (10 June 1999) authorised the deployment of the NATO-led Kosovo Force (KFOR).
- S/RES/1216 (21 December 1998) welcomed and approved the mandate of an ECOWAS interposition force in support of a peace agreement in Guinea-Bissau.
- S/RES/1193 (28 August 1998) demanded that Afghan factions refrain from harbouring terrorists, inter alia.
- S/RES/1174 (15 June 1998) renewed the authorisation for the NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina and authorised member states to provide military assistance in support of SFOR.

- S/RES/1159 (27 March 1998) established MINURCA.
- S/RES/1135 (29 October 1997) strengthened sanctions in connection with Angola.
- S/RES/1132 (8 October 1997) imposed sanctions and authorised ECOWAS to enforce them in Sierra Leone.
- S/RES/1127 (28 August 1997) strengthened sanctions in connection with Angola.
- S/RES/1125 (6 August 1997) authorised the use of force by the Inter-African Mission (MISAB) deployed in the CAR.
- S/RES/1114 (19 June 1997) and 1101 (28 March 1997) authorised the use of force by a multinational protection force in Albania (Operation *Alba*).
- S/RES/1088 (12 December 1996) authorised the deployment of SFOR in Bosnia and Herzegovina.
- S/RES/1080 (15 November 1996) authorised the deployment of a multinational protection force in Zaire.
- S/RES/1070 (16 August 1996) strengthened sanctions in connection with Sudan.
- S/RES/1054 (26 April 1996) imposed sanctions in connection with Sudan.
- S/RES/1031 (15 December 1995) authorised the deployment of NATO-led Implementation Force (IFOR) in Bosnia and Herzegovina.
- S/RES/955 (8 November 1994) established the international criminal tribunal for Rwanda.
- S/RES/940 (31 July 1994) authorised the deployment of a multinational force in Haiti and established UNMIH.
- S/RES/929 (22 June 1994) authorised the French-led *Opération Turquoise* in Rwanda.

- S/RES/918 (17 May 1994) imposed sanctions in connection with Rwanda and adjusted UNAMIR.
- S/RES/917 (6 May 1994) strengthened sanctions in connection with Haiti.
- S/RES/912 (21 April 1994) adjusted UNAMIR.
- S/RES/908 (31 March 1994) authorised the use of force in support of UNPROFOR in Croatia.
- S/RES/875 (16 October 1993) authorised a naval blockade in Haiti.
- S/RES/873 (13 October 1993) strengthened sanctions in connection with Haiti.
- S/RES/872 (5 October 1993) established UNAMIR.
- S/RES/864 (15 September 1993) imposed sanctions in connection with Angola.
- S/RES/841 (16 June 1993) imposed sanctions in connection with Haiti.
- S/RES/836 (4 June 1993), 824 (6 May 1993) and 819 (16 April 1993) established safe areas in Bosnia and related UNPROFOR responsibilities.
- S/RES/827 (25 May 1993) established the international criminal tribunal for the former Yugoslavia.
- S/RES/820 (17 April 1993), 787 (16 November 1992), 757 (30 May 1992), 724 (15 December 1991), and 713 (25 September 1991) strengthened sanctions and/or their enforcement in the context of the conflict in Bosnia and Herzegovina.
- S/RES/816 (31 March 1993) authorised enforcement of the flight ban on Bosnia and Herzegovina.
- S/RES/814 (26 March 1993) authorised UNOSOM II.
- S/RES/807 (19 February 1993) authorised UNPROFOR to use force under Chapter VII for the mission's security.

- S/RES/806 (5 February 1993) expanded UNIKOM's mandate.
- S/RES/804 (29 January 1993) condemned UNITA's rejection of election results in Angola.
- S/RES/794 (3 December 1992) authorised the use of force in Somalia.
- S/RES/793 (30 November 1992) demanded that hostilities in Angola cease immediately.
- S/RES/788 (19 November 1992) imposed a sanctions regime in connection with Liberia.
- S/RES/787 (16 November 1992) authorised a naval blockade in the context of the conflict in Bosnia and Herzegovina.
- S/RES/785 (30 October 1992) demanded that hostilities in Angola cease immediately.
- S/RES/783 (13 October 1992) deplored the lack of compliance of one of the parties with resolution 766 on Cambodia.
- S/RES/776 (14 September 1992) strengthened UNPROFOR.
- S/RES/770 (13 August 1992) authorised the use of force in Bosnia and Herzegovina to facilitate the delivery of humanitarian assistance.
- Resolution 766 (21 July 1992) on Cambodia demanded that one of the parties to permit without delay the deployment of the UN Transitional Authority in Cambodia (UNTAC).
- Resolution 752 (15 May 1992) contained a list of demands to the parties in Bosnia and Herzegovina.
- Resolution 751 (24 April 1992) established UNOSOM I.
- Resolution 748 (31 March 1992) established sanctions in connection with Libya.
- Resolution 743 (21 February 1992) established UNPROFOR.

- Resolution 733 (23 January 1992) established sanctions in connection with Somalia.
- Resolution 689 (9 April 1991) established UNIKOM.
- Resolution 687 (3 April 1991) contained the terms for Iraq of a ceasefire in the context of its invasion of Kuwait, foresaw the establishment of UNIKOM and imposed sanctions.
- Resolution 678 (29 November 1990) authorised the use of force in the context of the Iraqi invasion of Kuwait.
- Resolution 673 (24 October 1990) insisted that Israel comply fully with resolution 242 and that it permit a mission of the Secretary-General to proceed.
- Resolution 672 (12 October 1990) called upon Israel as the occupying power to abide by its obligations and responsibilities under the Fourth Geneva Convention.
- Resolution 665 (25 August 1990) authorised a naval blockade in the context of the Iraqi invasion of Kuwait.
- Resolution 661 (6 August 1990) imposed sanctions in connection with the Iraqi invasion of Kuwait.
- Resolution 598 (20 July 1987) adopted provisional measures under article 40 in the context of the Iran-Iraq war.
- Resolution 582 (24 February 1986) reiterated calls for a cessation of hostilities in the Iran-Iraq War.
- Resolutions 426 and 425 (19 March 1978) established UNIFIL.
- Resolution 418 (4 November 1977) imposed an arms embargo in connection with South Africa.
- Resolution 409 (27 May 1977) urged compliance with Council resolutions on Southern Rhodesia, inter alia.

- Resolution 388 (6 April 1976) urged compliance with Council resolutions on Southern Rhodesia, inter alia.
- Resolutions 340 and 341 (25-27 October 1973) established UNEF II.
- Resolution 338 (22 October 1973) decided that, concurrently with a ceasefire, peace negotiations should start in the context of the 1973 Arab-Israeli War.
- Resolution 290 (8 December 1970) reprimanded Portugal for the armed attack against Guinea.
- Resolution 284 (29 July 1970) contained a request for an advisory opinion from the ICJ on Namibia.
- Resolution 279 (12 May 1970) demanded the withdrawal of Israeli forces from Lebanon.
- Resolution 277 (15 March 1970) urged compliance with Council resolutions on Southern Rhodesia, inter alia.
- Resolution 269 (12 August 1969) continued to press South Africa to withdraw from Namibia.
- Resolution 253 (29 May 1968) strengthened sanctions on Southern Rhodesia.
- Resolution 242 (22 November 1967) affirmed that the establishment of just and lasting peace in the Middle East should include the application of certain principles inter alia.
- Resolution 232 (16 December 1966) imposed a sanctions regime in connection with Southern Rhodesia.
- Resolution 221 (9 April 1966) authorised the UK to use force to prevent the supply of oil to Southern Rhodesia.
- Resolution 186 (4 March 1964) established UNFICYP.
- Resolutions 169 (24 November 1961), 161 (21 February 1961),

and 146 (9 August 1960) strengthened ONUC.

- Resolution 143 (17 July 1960) established ONUC.
- Resolution 83 (27 June 1950) authorised the use of force in the context of the Korean War.
- Resolution 82 (25 June 1950) determined the existence of a breach of the peace related to an armed attack by forces from North Korea into the Republic of Korea.
- Resolution 54 (15 July 1948) determined that the situation in Palestine was a threat to international peace and security and ordered a cessation of hostilities.
- Resolution 27 (1 August 1947) called upon the Netherlands and Indonesia to cease hostilities.

Security Council Presidential Statements

- S/PRST/2008/3 (4 February 2008) contained an expression of support to external military assistance to the Chadian government.
- S/PRST/2008/1 (11 January 2008) called on the parties in Darfur to cease hostilities inter alia.
- S/PRST/2007/29 (3 August 2007) underscored the obligation of all member states to take all necessary measures to implement paragraph 15 of resolution 1701 to enforce the arms embargo in Lebanon.
- S/PRST/2007/12 (17 April 2007) reiterated that there should be no sale or supply of arms and related materiel to Lebanon except as authorized by its government.
- S/PRST/2006/52 (12 December 2006) urged member states to implement the embargo and expressed intention to consider further steps regarding Lebanon.
- S/PRST/2006/41 (6 October 2006) asserted that a nuclear test, if carried out by the DPRK, would

represent a clear threat to international peace and security.

- S/PRST/2001/3 (31 January 2001) decided to establish the Council's working group on peacekeeping operations.
- S/PRST/1997/36 (11 July 1997) expressed support for the OAU decision to appeal to ECOWAS leaders for support for the Sierra Leonean government.
- S/PRST/1994/34 (14 July 1994) demanded an unconditional ceasefire in Rwanda.
- S/25091 (11 January 1993) found Iraq in material breach of resolution 687.
- S/22133 (22 January 1991) welcomed ECOWAS efforts in Liberia.

Security Council Meeting Records

- S/PV.5832 (8 February 2008) on Darfur.
- S/PV.5733 (24 August 2007) on the Middle East.
- S/PV.5685 (30 May 2007) on the establishment of a Special Tribunal for Lebanon.
- S/PV.5511 (11 August 2006) on the Middle East.
- S/PV.5490 (15 July 2006) on the DPRK.
- S/PV.4950 and Resumption 1 (22 April 2004) on the adoption of resolution 1540.
- S/PV.4525 (3 May 2002) on the Middle East.
- S/PV.4506 and Resumption 1 (3 April 2002) on the Middle East.
- S/PV.4139 (11 May 2000) on Sierra Leone.
- S/PV.3921 (28 August 1998) on Afghanistan.
- S/PV.3797 (11 July 1997) on Sierra Leone.
- S/PV.3377 (16 May 1994) on Rwanda.
- S/PV.2965 (5 December 1990) on the Middle East.

- S/PV.2666 (24 February 1986) on Iran-Iraq.
- S/PV.2200 (25 February 1980) on the Middle East.
- S/PV.2157 (19 July 1979) on the Middle East.
- S/PV.2938 (25 August 1990) on Iraq-Kuwait.
- S/PV.2085 (18 September 1978) on the Middle East.
- S/PV.1894 (22 March 1976) on the Middle East.
- S/PV.1735 (26 July 1973) on the Middle East.
- S/PV.1718 (7 June 1973) on the Middle East.
- S/PV.1594 (14 October 1971) on Namibia.
- S/PV.1589 (6 October 1971) on Namibia.
- S/PV.1588 (5 October 1971) on Namibia.
- S/PV.1541 (15 May 1970), 1540 (14 May 1970) and 1538 (12 May 1970) on the Middle East.
- S/PV.1428 (29 May 1968) on Southern Rhodesia.
- S/PV.1413 (18 April 1968) on Southern Rhodesia.
- S/PV.1382 (22 November 1967) on the adoption of resolution 242 on Israel-Palestine.
- S/PV.1373 (9-10 November 1967) on the Middle East.
- SCOR, 15th Year, 886th Meeting (8-9 August 1960), 917th Meeting (10 December 1960) and 920th Meeting (13-14 December 1960) on the Congo.
- SCOR, 9th Year, 663rd Meeting (25 March 1954) on the Middle East.
- SCOR, 2nd Year, 133rd-137th Meetings (May 1947), and 147th and 160th Meetings (July 1947) on the Greek Frontier Incidents.
- SCOR, 2nd Year, 193rd Meeting (22 August 1947) on the Indonesian Question.

- SCOR, 2nd Year, 89th Meeting (7 January 1947) and 91st Meeting (10 January 1947) on Trieste

Secretary-General's Reports

- S/2007/392 (28 June 2007) and 147 (14 March 2007), and S/2006/730 (12 September 2006) on Lebanon.
- S/2006/478 (29 June 2006) on the Great Lakes/LRA.
- S/2006/310 (22 May 2006) on the DRC.
- S/2005/832 (28 December 2005) on the DRC.
- A/59/549 (15 November 1999) on the fall of Srebrenica.
- S/24540 (10 September 1992) on UNPROFOR.
- S/12611 (19 March 1978) on Lebanon.
- S/11052/Rev.1 (27 October 1973) on the Middle East.
- S/5950 (10 September 1964) on Cyprus.

Draft Resolutions

- S/8554 (22 April 1968) was a draft resolution on Southern Rhodesia introduced by the UK.
- S/8545 (16 April 1968) was a draft resolution on Southern Rhodesia introduced by Algeria, Ethiopia, India, Pakistan and Senegal.
- S/8227 and 8229 (7 November 1967), S/8247 (16 November 1967) and S/8253 (20 November 1967) were draft resolutions on Israel-Palestine

Other

- S/2006/651 (14 August 2006) and 620 (4 August 2006) were Timorese letters in connection with deployments following the 2006 violence.
- S/2006/219 (12 April 2006) was a Secretary-General's letter on EUFOR R.D. Congo.
- S/2006/207 (31 March 2006) was

the Dutch letter on Charles Taylor's trial.

- S/2005/667 (21 October 2005) was a letter from the Tripartite Plus One Joint Commission.
- A/RES/60/1 (15 September 2005) was the World Summit Outcome.
- S/2000/809 (21 August 2000) was the Brahimi Report.
- S/1999/1257 (16 December 1999) was the report on UN actions during the Rwandan genocide.
- S/1997/499 (27 June 1997) was a letter containing an ECOWAS communiqué in connection with the conflict in Sierra Leone.
- S/10330 (23 September 1971) was the report of the Ad Hoc Sub-Committee on Namibia.
- S/8495 (22 March 1968) was a letter from the Soviet Union on resolution 242

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- ICJ Reports 1986, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1986
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Endnotes

¹ This is not entirely uncontroversial. Some believe that perhaps it was simply UN recognition of action that was essentially bilateral cooperation in self-defence. Danesh Sarooshi, on the other hand, argues that the action "could not be included within the rubric of [collective] self-defence, since the Council in resolution 83 recommended that Members furnish such assistance as may be necessary in order to repel the armed attack and, more importantly, 'to restore international peace and security in the area'... The latter objective specified by the Council will in some cases involve Member States clearly going beyond the scope of measures which they could take acting pursuant to their right of self-defence. Accordingly, the actions in Korea were not Security Council authorized measures of self-defence but Council authorized enforcement action." (*The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, 1999, p. 170). Contra: Jochen Frowein and Nico Krisch, "Article 39," in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, Oxford University Press, 2nd ed., 2002, pp. 727-8.

² Some members even went as far as saying that some resolutions were under Chapter VII despite there being no reference to its language. For example, some—particularly the US—expressed the view that resolution 27 (1947) on the Indonesian question in fact contained provisional measures in the sense of article 40, despite there being no express reference to that article or Chapter VII (SCOR, 2nd Year, 193rd Meeting (22 August 1947), p. 2175). A similar situation took place vis-à-vis resolution 279 (1970), which demanded the withdrawal of Israeli forces from Lebanon. On that the occasion, Syria, Poland and Colombia manifested the view that the resolution adopted had implicitly contained measures in accordance with article 40. (S/PV.1538, 1540 and 1541).

³ After the adoption of the resolution, delegates emphasised its compromise nature. Some voiced a degree of frustration with the lack of comprehensive military enforcement measures (S/PV.1428).

⁴ See our Special Research Report *Middle East 1947-2007: Sixty Years of Security Council Engagement on the Israel/Palestine Question* (17 December 2007) for details.

⁵ In a statement dated 22 March 1968, for example, the Soviet Union argued that the resolution "is not a recommendation or an opinion that Governments are free to follow or ignore. In joining the United Nations, every State has undertaken to fulfil unconditionally the decisions of the Security Council taken in accordance with the United Nations Charter" (see UN document S/8495, 22 March 1968, p. 4, quoted in Sydney Bailey and Sam Daws, *The Procedure of the UN Security Council*, Oxford University Press, 3rd ed., 1998, pp. 270-271). See, also, the statements of Nigeria (S/PV.1718, 7 June 1973, para. 57), India (S/PV.1735, 26 July 1973, para. 81), and Pakistan (S/PV.1894, 22 March 1976, para. 147). Over the years, a number of delegations have criticised Israel for failing to abide by its obligations under article 25 (See, for example, Kuwait (S/PV.2157, 19 July 1979, para. 7), Tunisia (S/PV.2200, 25 February 1980, para. 66), China (S/PV.2965, 5 December 1990, p. 10), Canada (S/PV.4525, 3 May 2002, p. 13), Singapore and Mexico (S/PV.4506, Resumption 1, 3 April 2002, pp. 30, 37)). Other debates on the Middle East also involved repeated calls from Council members for the observance of Council resolutions with a reference to article 25. Such was the case with a call from the US representative for states to take steps to allow the deployment of the

UN Interim Force in Lebanon (S/PV.2085, 18 September 1978, para. 25).

⁶ See, for example, the representative of Brazil at the adoption of resolution 242 (S/PV.1382, 22 November 1967, para. 124). And similar language was used by the representative of Nigeria when introducing the 7 November draft. See UN document S/10330, 23 September 1971, para. 14.

⁷ Jost Delbrück, "Article 24", in Simma et al. (eds.), *The Charter of the United Nations*, p. 448

⁸ SCOR, 2nd Year, 133rd-137th Meetings (May 1947). See also Delbrück, "Article 25," in Simma et al., *The Charter of the United Nations*, p. 461.

⁹ SCOR, 2nd Year, 147th and 160th Meetings (July 1947).

¹⁰ SCOR 2nd Year, 91st Meeting (10 January 1947), on Trieste, p.45.

¹¹ Cf. Delbrück, "Article 24" in Simma et al., *The Charter of the United Nations*, p. 448.

¹² SCOR, 2nd Year, 89th Meeting (7 January 1947), on Trieste, pp. 10, 16.

¹³ SCOR 2nd Year, 91st Meeting (10 January 1947), on Trieste, pp. 44-5.

¹⁴ SCOR, 15th Year, 886th Meeting (8-9 August 1960). There is no further direct evidence that the mention of article 49 in the resolution constitutes an implicit use of Chapter VII. Subsequently, the Secretary-General, when commenting on the issue in December 1960, noted that members had not challenged his interpretation that ONUC's mandate was not under articles 41 or 42 of the Charter, and neither had the Council confirmed his interpretation that the basis had implicitly been article 40. Indeed, members' interventions seemed more focused on the need to respond to the appeal of the Congolese government for UN action, and that this was the basis for ONUC's activities (SCOR, 15th Year, 920th Meeting (13-14 December 1960)). Writing in 1980, however, Rosalyn Higgins concluded that ONUC was implicitly based on article 40. See *United Nations Peacekeeping*, Vol. 3: Africa, Oxford University Press, 1980, pp. 54-60.

¹⁵ Bailey and Daws, *The Procedure of the UN Security Council*, p. 271. See also Rosalyn Higgins, "The Advisory Opinion on Namibia," 21 *ICLQ* (1972), p. 279.

¹⁶ SCOR, 9th Year, 663rd Meeting (25 March 1954), p. 9.

¹⁷ SCOR, 2nd Year, 135th Meeting (20 May 1947), p. 874.

¹⁸ See Sir Michael Wood, "The Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law*, Vol. 2 (1998), especially pp. 82-85.

¹⁹ ICJ Reports 1971, p. 53.

²⁰ "Endorses" could mean "supports" (in which case it seems to be more inclined towards a non-binding nature), "approves," or "gives permission." (See *Cambridge Advanced Learner's Dictionary*, available at <http://dictionary.cambridge.org/>).

²¹ Interestingly, however, in light of the recent Ouagadougou Agreement and the impending appointment of Guillaume Soro as prime minister (thus rendering the framework in resolution 1721 in abeyance), there seemed to be an interest in the Council in having at least a statement confirming support for the appointment, and, arguably, the continuing Council origin of the constitutional framework in Côte d'Ivoire. That interest, nonetheless, did not find support from other members and thus arguably may shed light on the will of Council members on the subject.

²² At the resolution's adoption, the Qatari foreign minister said that, "once the draft resolution is adopted, it obligates both parties to halt hostilities and provides for the immediate withdrawal of Israeli forces from southern Lebanon." The UK foreign minister stressed that the resolution "sets out a framework for establishing peace, security and stability in southern Lebanon" and that "we look first and foremost to all the parties to respect its terms.

But we also look to those with influence to play their part." The representative of Russia underlined that "[we] call upon the parties to show the necessary political will and strictly follow the course of action outlined in the resolution" (S/PV.5511).

²³ ICJ Reports 1955, *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion of 7 June 1955, Separate Opinion of Judge Lauterpacht, pp. 118-9.

²⁴ See Stefan Talmon, "The Statements by the President of the Security Council," *Chinese JIL* (2003), p. 442.

²⁵ Cf. Talmon, "The Statements by the President of the Security Council," pp. 427-430.

²⁶ Cf. Talmon, "The Statements by the President of the Security Council," pp. 447-8, who notes that the *Repertoire* lists presidential statements as decisions. Talmon also notes that, on occasion, the Council has made decisions in presidential statements, such as when it decided "to establish a Working Group of the Whole on United Nations peacekeeping operations" (S/PRST/2001/3 of 31 January 2001).

²⁷ Cf. Talmon, "The Statements by the President of the Security Council," p. 452, who notes that "neither the Security Council nor any member State has ever claimed that a certain presidential statement was binding," and that "while the Security Council regularly calls upon States and non-State actors to abide by their obligations under relevant resolutions no such calls have been made with respect to presidential statements."

²⁸ Cf. Wolfgang Graf Vitzthum, "Article 2(6)," in Simma et al. (eds.), *The Charter of the United Nations*, p. 143.

²⁹ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (T-315/01), para. 181. See also Dinah Shelton, "Normative Hierarchy in International Law," 100 *AJIL* (2006), 311. Judgment of an appeal of this decision was pending at press time, however.

³⁰ *Kadi v. Council*, paras. 192-5.

³¹ See fn. 1 above.

³² See Niels Blokker, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'," 11 *EJIL*, (2000), 541-568. See also Helmut Freudenthuß, "Between Unilateralism

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³³ See Jürgen Bröhmer and Georg Röss, "Article 53" in Simma et al. (Eds.), *The Charter of the United Nations*, p. 864, and Christine Gray, "From Unity to Polarization: International Law and the Use of Force against Iraq", 13 *EJIL* (2002)

³⁴ W. Otuatye-Kodjoe, "Sierra Leone," in Jane Boulden (Ed.), *Dealing with Conflict in Africa: The United Nations and Regional Organizations*, Palgrave, 2003, pp. 132-133.

³⁵ See also Otuatye-Kodjoe, "Sierra Leone," p. 133.

³⁶ See David Wippman, "Military Intervention, Regional Organizations, and Host-State Consent," 7 *Duke Journal of Comparative and International Law* (1996), p. 227. Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, 2001, p. 136. Herbert Howe, "Lessons of Liberia: ECOMOG and Regional Peacekeeping," *International Security*, Vol. 21 No. 3 (Winter 1996-1997), pp. 145-176, and 'Funmi Olonisakin, "Liberia," in Boulden (ed.), *Dealing with Conflict in Africa*, pp. 111-125.

³⁷ The possibility of erosion of consent as an issue first arose in the context of ONUC. The Secretary-General, in commenting on the notion that ONUC's authorisation did not require mention to Chapter VII since it was backed by an invitation by the Congolese government, pointed out that Council members were in fact facing a situation in which, notwithstanding the consent, ONUC may have been called to act against one of the signatories of the invitation in question (SCOR, 15th Year, 917th Meeting (10 December 1960), p. 16).

³⁸ For a more detailed exposition of that debate, see Neil Fenton, *Understanding the Security Council: Coercion or Consent?*, Ashgate, 2004, pp. 23-36.

³⁹ See Michal J. Matheson, *Council Unbound: The Growth of UN Decision-Making on Conflict and Post-Conflict issues after the Cold War*, USIP, 2006, pp. 120-122.

⁴⁰ See, for example, resolution 1545 (2004) for ONUB, 1528 (2004) and 1609 (2005) for UNOCI, and 1509 (2003) for UNMIL.

⁴¹ See, for UNAMSIL, resolutions 1270 (1999) and 1562 (2004), and, for MONUC, resolutions 1279 (1999), 1291 (1999) and 1493 (2003).

⁴² UN Peacekeeping Best Practices Unit, *Lessons Learned from United Nations Peacekeeping Experiences in Sierra Leone* (September, 2003), p. 36.

⁴³ Michael G. Smith and Morgan Dee, *Peacekeeping in East Timor: the Path to Independence*, IPA Occasional Paper Series, Lynne Rienner, 2002, p. 71.

⁴⁴ See UN document S/2006/478, 29 June 2006.

⁴⁵ See, for example, the letter from the Tripartite Plus One Joint Commission (comprising the DRC, Rwanda, Uganda and Burundi) of 21 October 2005 (S/2005/667). The Council itself urged MONUC to consider this possibility in resolution 2649 (2006), by recalling that it had "mandated MONUC to support operations led by the Armed Forces of the Democratic Republic of the Congo to disarm foreign combatants."

⁴⁶ Michael Doyle and Nicholas Sambanis argue that mandates "can be seen either as 'ceilings' or 'floors.' Conservative, risk-averse UN officials or commanders constrained by their home governments will interpret the mandate as a ceiling. By contrast, creative and decisive commanders will take a leadership role by interpreting the mandate as a floor, defining it operationally and using all their capabilities to implement the spirit, not just the word, of the mandate." Doyle and Sambanis, *Making War & Building Peace: United Nations Peace Operations*, Princeton University Press, 2006, p. 273.

⁴⁷ UN Department of Peacekeeping Operations, *The Comprehensive Report on Lessons Learned from the United Nations Operation in Somalia (UNOSOM): April 1992-March 1995*, para. 46.

⁴⁸ *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* (S/1999/1257), pp. 35-36; Doyle and Sambanis, *Making War & Building Peace*, p. 294.

⁴⁹ UN Peacekeeping Best Practices Unit, *Lessons Learned from United Nations Peacekeeping Experiences in Sierra Leone*, p. 36.

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