Legal Restraints on Security Council Military Enforcement Action

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INTRODUCTION

The recent active role taken by the Security Council in the maintenance of international peace and security has provided a fertile ground for international lawyers. Many legal issues previously of theoretical

interest are now of considerable practical importance. Moreover, in the context of humanitarian law, much of the recent focus of commentators has understandably been concentrated on the potential of the Security Council to take a role in its implementation and enforcement.

2. For example, the general relationship between Article 51 and the other provisions of Chapter VII of the United Nations Charter assumed new significance with the Persian Gulf conflict. In particular, opinions differ as to whether the mere adoption of measures by the Security Council under Article 41 brings to an end the right of self-defence of States. Article 51 expressly states that this right is available “until the Security Council has taken measures necessary to maintain international peace and security.” See Christopher Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, 55 MoD. L. Rev. 153, 163-64 (1992).

The legal basis of the Security Council’s recent practice of “authorizing” States to use force is unclear. See infra note 8. The issue of consent in the context of peacekeeping activities has been highlighted by the actions of States and the Security Council in Somalia. Moreover, the very jurisdiction of the Security Council under Article 39 of the U.N. Charter, specifically the meaning of “threat to the peace,” warrants consideration in light of the broad interpretation this phrase has recently received.


For discussion of the Yugoslav war crimes tribunal, see generally James C. O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former
Considerable attention has also been paid to the problem of protecting peacekeepers.\(^4\)

This article considers an issue that, given its importance for the protection of combatants and civilians in armed conflict, has not attracted the attention it warrants: namely, the extent to which legal restraints derived from the \textit{ius in bello}\(^5\) and the \textit{ius ad bellum}\(^6\) apply to the Security Council when it is taking military enforcement action under Chapter VII of the United Nations Charter.\(^7\) Although a position not free from controversy, the recent practice of the Security Council in “authorizing” States to use force to restore international peace and security is treated as military enforcement action under Chapter VII of the U.N. Charter for the purposes of this paper.\(^8\) Even if these actions are more


\(^5\) The \textit{ius in bello} is the term used to describe the rules regulating the conduct of hostilities, otherwise referred to as humanitarian law or the law of armed conflict.

\(^6\) The \textit{ius ad bellum} refers to the rules regulating the legality of the resort to force in international law. D.W. Bowett puts forward the view shared by many writers that “the Charter has made the \textit{[ius ad bellum]} inapplicable to United Nations action.” D.W. BOWETT, UNITED NATIONS FORCES 506 (1964). See discussion infra note 32 and accompanying text.

\(^7\) For example, following the conclusion of the Gulf War, the then Secretary-General of the United Nations, Javier Perez de Cuellar, commented on:

> the need for a collective reflection on questions relating to the future use of the powers vested in the Security Council under Chapter VII. . . .

> . . . [T]hese questions should include the mechanisms required for the Council to satisfy itself that the rule of proportionality in the employment of armed force is observed and the rules of humanitarian law applicable in armed conflicts are complied with.


\(^8\) The international community is currently experiencing the development of a new form of enforcement activity under the U.N. Charter, based to some extent on the Persian Gulf and Korean precedents. The question of what amounts to an exercise of the military enforcement powers of the Security Council has been a question of ongoing concern to writers. Much scholarly attention has been devoted to this question, although undoubtedly the new practice
appropriately regarded as some sort of "hybrid" from a legal perspective, the issue warrants attention as it would be directly raised if a permanent military force were set up under the Charter. An analysis of the legal regime of military enforcement action lays the groundwork for any assessment of the application of the general principles of State responsibility to the Security Council and, moreover, the responsibility of "authorization" warrants a renewed focus on where such a practice fits within the Charter scheme. It is, however, not proposed to go over this ground again but rather to address the consequences on the assumption that this is Security Council military enforcement action.

The major objections to "authorization" as amounting to enforcement action will once again focus on the interpretation of the U.N. Charter that regards the Security Council's military enforcement powers as dependent on the implementation of Article 43 agreements. However, there is the widely held contrary view that Article 42 is consistent with various arrangements using national forces. See, e.g., Leland M. Goodrich & Edward Hambro, Charter of the United Nations: Commentary and Documents 281 (2d rev. ed. 1949). See also Oscar Schachter, United Nations Law in the Gulf Conflict, 85 Am. J. Int'l L. 452, 463-64 (1991) (arguing that the specific language of Article 42 does not prevent States from voluntarily making forces available to the Security Council to carry out resolutions adopted under Chapter VII). There is agreement, however, that the Security Council can only require Member States to take forceful action through the permanent military forces contemplated by Article 43. See Leland M. Goodrich & Anne P. Simons, The United Nations and the Maintenance of International Peace and Security 278 (1955); John W. Haldeman, Legal Basis for United Nations Armed Forces, 56 Am. J. Int'l L. 971 (1962); 2 Rosalyn Higgins, United Nations Peacekeeping: 1946-1967, at 175-78 (1970). This is also true of peacekeeping forces. See Rosalyn Higgins, A General Assessment of United Nations Peacekeeping, in United Nations Peacekeeping: Legal Essays 1 (Antonio Cassese ed., 1978) [hereinafter United Nations Peacekeeping]; Georg Schwarzenberger, Problems for a United Nations Force, 12 Current Legal Probs. 247, 247-62 (1959). The view has also been expressed that the practice of the Security Council of authorizing States to use force cannot be a Chapter VII military enforcement action because the Council does not control the operation. This was a widely debated issue in the context of the Persian Gulf conflict. The various arguments are assessed by Kaiyan Homi Kaikobad, Self-Defence, Enforcement Action and the Gulf Wars: 1980-88 and 1990-91, 63 Brit. Y.B. Int'l L. 299, 356 (1992). See infra note 29 for sources discussing the legal basis of the resort to force in the Gulf War.


10. See Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 179-80 (Apr. 11) [hereinafter Reparation Case]. Ian Brownlie states:

If an organization has a legal personality distinct from that of the member states, and functions which in the hands of states may create responsibility, then it is in principle reasonable to impute responsibility to the organization. In a very general way this follows from the reasoning of the Court in the Reparation case.

Ian Brownlie, Principles of Public International Law 688 (4th ed. 1990). However, as Brownlie points out, the law is as yet undeveloped. Id.

The question of the application of principles of State responsibility to the United Nations has received some attention in the context of peacekeeping activities. For example, the suggestion that the United Nations is responsible for actions of its forces is confirmed in Article 8 of the 1971 Zagreb Resolution of the Institute of International Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, reprinted in Adam Roberts and Richard Guelff, Documents on the Laws of War 371, 375 (2d ed. 1989) [hereinafter 1971 Zagreb Resolution]. See also
of States themselves.11

Commentators distinguish two categories of illegal acts of international organizations.12 The first comprise of illegal activities that are shared in common with States: that is, breaches of international law. The second class is limited to the special nature of international organizations and includes, for example, acts ultra vires the organization. The discussion in this paper addresses the second type of illegal act by considering whether certain actions of the Security Council exceed its powers under the Charter: namely, those not in conformity with the requirements of Article 24(2). A conclusion of ultra vires in such a case will then raise the question of responsibility of international organizations for acts contrary to international law.

Tihomir Komenov, The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICTS 169 (Frits Kalshoven & Yves Sandoz eds., 1989). The resolution of this issue, however, has become more pressing given the considerable amounts of force used by recent peacekeeping and peacemaking forces, raising questions as to the conformity of some of these actions with principles of international law, particularly humanitarian law. Somalia is a case in point.

On the question of the application of principles of State responsibility to the United Nations in general, see Bowett, supra note 6, at 491. See also Vera Gowlland-Debbas, Security Council Enforcement Action and Issues of State Responsibility, 43 INT'L & COMP. L.Q. 55, 90-4 (1994). See infra note 37 and accompanying text.

11. The so called primary rules of State responsibility determine whether a State is in breach of a requirement of international law, the secondary rules determine the consequences of such a breach. This article assesses the substantive rules in relation to actions of the Security Council and States acting under its authority. The issue as to the consequences is of considerable complexity. There are several inter-related aspects, all of which require careful analysis. There is the question as to what action an injured State can take if the Security Council exceeds its mandate under the Charter. This is an issue of some importance in light of the fact that the United Nations cannot be a party to any action before the International Court of Justice. Thus, even if the Security Council acts within legal restraints, how will a State enforce these?

A further fundamental point is whether the validity of Security Council actions is a justiciable issue. See infra note 38 and accompanying text. Related to this is whether State members can be responsible secondarily or concurrently in such cases. The issue arose in the Tin Council Cases (Maclaine Watson & Co. v. Dep't of Trade & Indus., 3 All E.R. 257 (C.A. 1988), and J.H. Rayner Ltd. v. Dep't of Trade & Indus., 3 W.L.R. 969 (H.L(E.) 1989)). See C.F. Amerasinghe, Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent, 85 AM. J. INT'L L. 259 (1991).


The distinctive nature of Chapter VII powers generally was recently highlighted by the judgement of the International Court of Justice in the *Lockerbie Case*. The Court has refocussed attention on the important question as to what extent the Security Council functions within the constraints of international law. As will become apparent from the later discussion, an assumption to this effect appears to have underlined analyses of the *ius in bello* and United Nations enforcement actions. It is, however, an assumption that requires reappraisal given the current significance of the question. The general question of the relationship between the regime of humanitarian law and the organs of the United Nations has already posed some difficult legal problems in the context of traditional peacekeeping operations of the United Nations. The extent to which the relevant parties are bound by the principles of humanitarian law has been an area of legal uncertainty that has never been satisfactorily resolved. These activities in theory are distinguishable from enforcement actions in several respects. The latter presup-

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13. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) 1992 I.C.J. 114 (Apr. 14) (Request for Provisional Measures) [hereinafter *Lockerbie Case*]. The Court was dealing with the Security Council's powers under Article 41. That these are enforcement powers is clear from Article 2(7) of the Charter. They are, however, outside the scope of this article since they do not involve the use of military force.

14. See part II.A.


16. These forces are not specifically provided for by the provisions of the U.N. Charter. Their compatibility with its provisions was, however, confirmed by the International Court of Justice in Certain Expenses of the United Nations, 1962 I.C.J. 151, 164-65 (July 20). In that case, the Court was of the opinion that Chapter VII of the Charter envisages the Security Council policing a situation even when it does not take enforcement action against a State. *Id.* at 167.

17. The legal position of all the parties involved in peacekeeping actions has been extensively studied by commentators. See infra note 100. It is not proposed in this paper to go in any detail over all this well worn ground, but instead to consider what new challenges are posed in this area by the recent activities of the Security Council and any new insights that might be provided by the *Lockerbie Case*.

18. The distinction between peacekeeping and enforcement functions of the Security Council was drawn by the International Court of Justice in its advisory opinion in Certain
pose some use of force against a State or States, whereas peacekeeping functions do not. Thus, peacekeeping activities to date have not posed the same problems for humanitarian law, as the use of force in such operations has been restricted to self-defence. Moreover, there is generally speaking no situation amounting to a state of armed conflict between the United Nations peacekeeping forces and the other parties involved, so the application of the principles of humanitarian law has not been to date a major issue. In contrast, the use of force plays a

Expenses of the United Nations, supra note 16, at 165, 177. The Court was considering the meaning of “action” that was the exclusive province of the Security Council under Chapter VII by virtue of Article 11(2) of the Charter. The Court was of the view that in this context “action” meant coercive or enforcement action. Thus, the General Assembly had the power to recommend the establishment of peacekeeping forces without infringing the limitation contained in Article 11(2).

In recent times the distinction between peacekeeping and peace-enforcement has been almost impossible to maintain. Although the peacekeeping operation in the Congo in the 1960s involved a considerable degree of force to end the secession of Katanga, the use of force, generally speaking, has not been an issue in relation to peacekeeping activities. However, this is no longer the case. The starting point of such discussions is the report by Boutros Boutros-Ghali, the Secretary-General of the United Nations. The Secretary-General distinguishes between the United Nations roles of preventing conflict, keeping the peace, and attempting to bring the conflicting parties to agreement by peaceful means. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE, PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING 11 (1992).

Since the publication of the Secretary-General’s report, peacekeeping forces have been increasingly authorized to use significantly more force than previously was the case. A great deal of literature has been devoted to the implications of these new developments. See, e.g., Goulding, supra note 15; Rosalyn Higgins, The New United Nations and Former Yugoslavia, 69 INT’L AFF. 465 (1993); W. Michael Reisman, Preparing to Wage Peace: Towards the Creation of an International Peacemaking Command and Staff College, 88 AM. J. INT’L L. 76 (1994). For a description of the current categories of peacekeeping, some of which involve the use of substantial amounts of force, see Goulding, supra note 15, at 456–60 (1993). See also Higgins, supra.

19. BOWETT, supra note 6, at 268 (noting that although a peacekeeping force may be armed and may become involved in fighting, its main function is not the use of military force to maintain or restore international peace and security). See also ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING: 1946–1967, at ix (1969) (discussing the various meanings of the term “peacekeeping”).


21. Consequently, there are no legal rules protecting peacekeepers from the activities of the warring factions, a problem that has become more acute in recent peacekeeping operations such as Somalia. In response, the General Assembly adopted the Convention on the Safety of United Nations and Associated Personnel. See supra note 4. The Convention imposes obligations on individuals in relation to the protection of peacekeepers, the breach of which entails criminal responsibility. See infra note 23 & 109.
much more comprehensive role in peace-enforcement, increasing the relevance of the principles of humanitarian law.\textsuperscript{22} A situation of armed conflict would be envisaged in these actions.\textsuperscript{23} Moreover, the issues of consent and impartiality that have assumed considerable importance in recent peacekeeping operations are not relevant to enforcement actions.\textsuperscript{24} It is not, however, necessary in this paper to distinguish between the types of responses adopted by the Security Council to fulfill its mandate of maintaining international peace or assess the increasingly blurred distinction between traditional peacekeeping and the activities based on the military enforcement powers of the Security Council. The distinction of significance in this paper is not so much on what these forces are called but what they in fact do.\textsuperscript{25} If their mandate involves the use of the military enforcement powers of the Security Council under the U.N. Charter, their actions raise the questions that are being discussed here.

Where forces are involved in peacekeeping or peace-enforcement activities under the auspices of the Security Council, the application of the principles of humanitarian law concerns combatants and civilians alike. There is, however, another aspect of Security Council practice under Chapter VII whose impact on civilians is causing disquiet — the imposition of economic sanctions associated with an armed conflict. Although the focus of this paper is actions of the Security Council involving the use of force, sanctions have been, on several recent occasions, associated with enforcement actions as an integral part of the overall solution to the restoration of international peace and security. A graphic illustration of the effect of such measures on the civilian popula-

\textsuperscript{22} See Bowett, supra note 6, at 488–92 (discussing the principles of the law of armed conflict that are relevant to United Nations forces).

\textsuperscript{23} Thus, the Convention on the Safety of United Nations and Associated Personnel, supra note 4, does not cover Chapter VII forces as there are arguably existing rules applicable in such situations. Whether as a matter of law the provisions of the law of armed conflict apply between enforcement forces and other parties involved is examined later in this article. See infra note 88 and accompanying text. For a discussion of the key elements of the Convention, see Evan T. Bloom, Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel, 89 AM. J. INT'L L. 621 (1995).

\textsuperscript{24} For a discussion of consent in relation to peacekeeping forces, see Bowett, supra note 6, at 412–22. See also Dan Ciobanu, The Power of the Security Council to Organize Peace-Keeping Operations, in UNITED NATIONS PEACEKEEPING, supra note 8, at 15, 38–40.

\textsuperscript{25} In my view, there is no useful distinction to be drawn between forces exercising the enforcement powers of the Security Council based upon how they are established. The legal situation between the United Nations and Member States contributing forces will of course differ depending on the nature of the agreement between the parties. For a description of these agreements, see Bowett, supra note 6, at 361–71. There are, however, many practical and political problems arising from the recent practice of combining peacekeeping and peace-enforcement measures. The drawbacks of this approach, particularly in the context of Somalia, are described by Michael Bothe, Peacekeeping and the Use of Force — Back to the Charter or Political Accident?, INT'L PEACEKEEPING, Jan.–Feb. 1994, at 2.
ion is the Persian Gulf conflict where the mandatory sanctions regime has continued after the cessation of armed hostilities. The impact of economic sanctions on the civilian population is not a new phenomenon. But it has assumed a new aspect where economic sanctions are associated with enforcement action of the Security Council. The civilian population may well be devastated by the conflict. International initiatives to provide humanitarian assistance, however, have to overcome the hurdle of the Sanctions Committee to enable the effects of the forceful action on civilians to be minimized. This is one of the aspects of the new role of the Security Council that has not been fully appreciated. This article thus considers the additional limitations on the protection offered by humanitarian law that flow from the imposition of economic sanctions by the Security Council as part of its overall resolution of a situation within Article 39 of the Charter.

In the background of discussions of the Security Council and its powers in relation to enforcement measures, there is the question to what extent military enforcement actions of the Security Council can be constrained by principles derived from the *ius ad bellum*, such as necessity and proportionality. It was never an issue in relation to peace-keeping forces given their limited mandate to use force in self-defence, but it has now assumed considerable practical significance. While arguably not raised by the Persian Gulf conflict given the widely held view that this was an action in collective self-defence rather than a Security Council enforcement action, it is a fundamental question that urgently requires analysis in light of recent and potential future enforcement actions by the Security Council.


28. For a discussion of necessity and proportionality in the *ius ad bellum*, see infra notes 65–67.

A study of the issues indicates that the question of legal restraints on Security Council military enforcement action with respect to both the *ius ad bellum* and the *ius in bello* depends upon the view one takes as to what the Charter intends. On the assumption that the Security Council is governed to some extent by principles of international law, the task then is to identify what these rules might be. At this point a distinction becomes apparent between the *ius ad bellum* and the *ius in bello*. The former, under current international law, is to be found solely in the provisions of the Charter. There are arguably no principles of international law that are applicable to Security Council military enforcement action under the Charter. With respect to the latter, however, there is a body of existing customary rules independent from the Charter that are readily applicable to the Security Council when it is carrying out its functions. Moreover, there is a relatively straightforward solution available to the problem of the Security Council and the conventional rules of the *ius in bello*, namely a device by which the United Nations becomes bound by the relevant instruments.

Part I of this article examines whether the Charter scheme contemplates legal restraints on the resort to military force by the Security Council. The conclusion is reached that it is possible to argue that the purposes and principles of the Charter provide support for such a view. What these restraints may consist of is then examined and the general legal principles of necessity and proportionality are found to be appropriate for adaptation to the Charter scheme of collective enforcement action. Part II of the article considers the *ius in bello* in military enforcement actions. It is argued that there is a well developed body of humanitarian rules that in its entirety should be applicable to the Security Council as much as any other international entity that is involved in armed conflict. States, as a matter of priority, should take steps to overcome the technical difficulties for the United Nations in acceding to the relevant international instruments. Finally, the problems of Security Council sanctions and the limits of the *ius in bello* in this context is considered.

I. THE *IUS AD BELLUM* OF MILITARY ENFORCEMENT ACTIONS

A. Sources of Limits on Military Enforcement Actions

Recent practice has highlighted the question whether Chapter VII of the Charter contemplates military enforcement action that is permissive in nature and neither utilizes Article 43 forces nor is under the direct
control of the Security Council. If the answer is in the negative then this use of force is illegal. Such a conclusion flows from the nature of the Charter. In contrast to the ius in bello, the only current source of the ius ad bellum is the Charter itself. Under the UN Charter, the use of force is restricted to self-defence under Article 51 and collective enforcement action under Chapter VII. The Charter does incorporate to a limited extent the pre-existing ius ad bellum. The reference to the "inherent" right of self-defence in Article 51 is regarded as incorporating the customary principles relevant to its exercise, such as proportionality and necessity. Aside from the case of self-defence, however, the Charter represents the totality of the law on the use of force. To be lawful, "authorization" of States to use force to restore international peace and security must be contemplated by the Charter as a method by which the Security Council can exercise its enforcement powers. But what conditions such use of force apart from the Security Council itself? Do States acting under Security Council authorization need to

30. The relevant resolutions, although not specifying the Article under which they were adopted, all stipulate that the Security Council is acting under Chapter VII of the Charter. For details of these resolutions, see supra note 1.

31. The Persian Gulf conflict can be distinguished to some extent since in that conflict, it was arguable that the coalition allies were acting in collective self-defence. Thus, an adverse finding as to the ability of the Security Council to "authorize" enforcement action would not have resulted in an unlawful use of force. Such an alternative is not available in the subsequent actions of States under such "authorizing" resolutions.


33. Compare this to the situation with respect to the ius in bello. The U.N. Charter does not deal with the ius in bello as such. Its provisions do not affect directly States’ obligations in relation to the principles of humanitarian law. These continue to be found in other conventional documents and in the principles of customary international law. The provisions of the ius in bello are incidentally affected, however, in relation to Article 43 forces by the combined operation of Articles 25 and 103 of the U.N. Charter which can impact on a State's humanitarian law treaty obligations. See discussion infra notes 121–22 and accompanying text.

34. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 102 (June 27) [hereinafter NICARAGUA CASE]. But note that the Court confirmed that the present content of the customary right of self-defence was as "confirmed and influenced by the Charter." Id. at 94.

35. Id. at 94, 103.

36. Under the Charter the Security Council in theory can always control any exercise of force by Member States; whether that action is by way of self-defence or pursuant to Security Council authorization.
take into account considerations of necessity and proportionality in carrying out their mandates? The answers must lie in the provisions of the Charter itself as, unlike self-defence, collective enforcement action is solely a creation of the Charter. Thus we must consider the Security Council’s own obligations in relation to limits on the permissible use of force, as these will determine the obligations of States acting under its authorization.37

The general question of limits on the Security Council is by no means new. Since the adoption of the Charter, the question of whether there are limits to the measures which the Security Council can adopt to fulfill its primary role of restoring international peace and security; and the related questions, of whether the assumption of jurisdiction by the Security Council under Article 39 is justiciable and in what forum,38 has from time to time attracted some attention from commentators.39 Recent

37. Once again the principles of State responsibility and their application to international organizations becomes relevant. Generally speaking, if States are acting as subsidiary organs of the United Nations, the responsibility, if any, for these forces lies with the organization. Clearly, however, there are some circumstances in which the corporate veil of the organization will be lifted and States will incur individual responsibility for their actions. See Komenov, supra note 10, at 188–89.

If it is accepted that the Security Council is governed by principles of international law, then, under the general rules of attribution, the effective control of the forces supplied to the United Nations is an indispensable condition precedent to liability of the organization. Undoubtedly the Security Council has theoretical control over such forces, but is that enough? The potential for difficulties in this area is exacerbated by the Security Council’s recent practice of delegating to States, in particular the United States, the determination of what amounts to “all necessary means.” This lack of Council control was a cause for concern for some States during the Persian Gulf conflict. It is arguable that the Coalition forces exceeded the Security Council mandate. This is irrespective of whether one takes the view that this was an action in collective self-defence sanctioned by the Council or an enforcement action. See John Quigley, The United States and the United Nations in the Persian Gulf War: New Order or Disorder?, 25 CORNELL INT’L L.J. 1, 25–28 (1992). China also expressed concern over this issue of control in the debates leading up to Resolution 794 establishing the Unified Task Force (UNITAF), a US led coalition established under Chapter VII to establish a secure environment for the delivery of humanitarian aid in Somalia.

The argument that the Security Council retains ultimate control over States acting under its authorization belies the reality that the Council does not have the established mechanisms for overseeing such operations, and that the United States is not ready to relinquish control over its forces to the Council. In fact, no effort has been made to follow the practice in the Korean conflict where the fiction was maintained that it was a United Nations operation.


Security Council action has revived interest in these topics. After all, the Security Council is a treaty body and dependent on treaty provisions. What then are the possible sources of any limits to Security Council military enforcement actions?

1. Article 1(1) of the U.N. Charter

It is clear that the U.N. Charter does not envisage the Security Council as being bound by customary rules developed in the context of the use of force between States. For a start, those rules are irrelevant as the Council does not resort to force in self-defence. Furthermore, even if the reference in Article 1(1) to international law is regarded as encompassing general principles as well as customary rules of international law, and thus perhaps of more potential relevance to the Security Council, the coverage of Article 1 is restricted to Chapter VI measures. Under Article 1(1), one of the purposes of the Charter with which the Security Council must comply by virtue of Article 24(2) is:

> to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Clearly the reference to international law is limited to when the Security Council is acting under Chapter VI. The implications from this paragraph are two-fold. First, that the Security Council, when acting under Chapter VII, can derogate from the existing rules of international law in its actions dealing with threats to the peace in order to restore international peace and security. As a general proposition this conclusion has never been seriously in doubt and Article 103 confirms it. But are there no limits? Second, it is possible to infer from Article 1(1) that if the

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[hereinafter Settlement of Disputes]. Moreover, it appears to have been assumed that the use of force in the Korean conflict had to bear some relationship to the aims. See infra notes 79–82 and accompanying text.

40. By this, I am referring to the argument set out below that proportionality and necessity are general principles of international law that apply to all uses of force. See part I.B.

41. The issue is far more significant in the context of Article 41 measures as there are many principles of international law that could be involved. The idea that general international law constrains the actions of the Security Council is not a novel argument. In Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) (Request for Advisory Opinion) [hereinafter Namibia Case], Judge Sir Gerald Fitzmaurice, in his dissenting opinion, stated that even when acting under Chapter VII of the Charter, the
Charter had intended otherwise to restrict the Security Council in any way, it would have made provision to that effect. Thus, a further examination of the provisions of the Charter is necessary to determine if these implications can be displaced.

2. Article 42 of the U.N. Charter

In relation to military enforcement actions, there are the words of Article 42 itself, which require the Security Council to satisfy itself that the "measures provided for in Article 41 would be inadequate or have proved to be inadequate" before actions involving military force are taken. Moreover, it can only take such actions as are "necessary to maintain or restore international peace and security." Thus, Article 42 may be viewed as providing a treaty test for necessity and proportionality. The question remains whether these words are perceived as imposing legal limitations.

The issue of whether the terms of the Charter constitute legal criteria has arisen primarily in the context of Article 39, and whether its requirements of the existence of a threat to the peace, breach of the peace or act of aggression must be objectively satisfied. There is considerable support for the view that the determination by the Security Council under this provision is a matter within its own discretion and is non-justiciable. This decision is regarded as incorporating a political

Security Council was subject to general principles of international law. Id. at 220 (dissenting opinion of Judge Sir Gerald Fitzmaurice).


42. See discussion infra note 74 and accompanying text.

43. Of course such an analysis is only valid to the extent that military enforcement actions are seen as sourced in Article 42. It is, however, hard to accept that the situations in which the Security Council can "authorize" States to use force are wider than its powers to take action itself under Article 42.


In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325 (Sept. 13) [hereinafter Genocide Case], Judge Lauterpacht, after rejecting the view that the Security Council acts free of all legal restraint, stated:
rather than a legal judgement.\textsuperscript{45} Recently this issue has become more controversial with the assumption of jurisdiction by the Council under Chapter VII in the \textit{Lockerbie Case}, the civil conflict in Somalia, and the unrest in Haiti. There is an increasing perception that there must be some limits to the Security Council's assessment of the situation.\textsuperscript{46}

Some would argue that it is difficult without more to envisage that the assessments in Article 42 are to be regarded as legal questions any more than the determination under Article 39. There is, however, no need to be drawn into the legal/political dichotomy that is integral to any discussion of Article 39. The determination to become seized of the situation and any subsequent action taken under Chapter VII are two different questions.\textsuperscript{47} It is one thing to allow the Security Council to determine its own jurisdiction and quite another to conclude that in the exercise of its powers it is similarly unrestrained. A distinction thus exists between, on the one hand, the jurisdiction of a treaty body such

there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination.

\textit{Id.} at 439 (separate opinion of Judge ad hoc Lauterpacht). However, there is support for the view that the powers of the United Nations cannot be used in an arbitrary or abusive fashion. Gowlland-Debbas argues that the doctrine of abuse of rights can be discerned in certain dissenting or separate opinions of the International Court of Justice in relation to the exercise of discretionary power by organs of the United Nations. Gowlland-Debbas, \textit{supra}, at 663.

45. See \textit{Kelsen, supra} note 44, at 735. It is not suggested that political and legal questions are inherently different or in any way mutually exclusive. In this context, the division comes down to what questions the organs of the United Nations will tolerate as having a legal dimension.

46. For a critical analysis of the Court's conclusion that the situation in relation to the Lockerbie suspects amounted to a threat to the peace, see Graefrath, \textit{supra} note 41, at 195-97, 199. "[L]imitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one." \textit{Id.} at 197 (quoting Judge Fitzmaurice, dissenting opinion in the \textit{Namibia Case}, \textit{supra} note 41). See also Thomas M. Franck, \textit{The Security Council and 'Threats to the Peace': Some Remarks on Remarkable Recent Developments, in Peace-Keeping and Peace-Building: The Development of the Role of the Security Council} 83 (René-Jean Dupuy ed., 1993).


47. As Judge Shahabuddeen stated in the \textit{Lockerbie Case}, \textit{supra} note 13, "[t]he question . . . is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences." \textit{Id.} at 142 (separate opinion of Judge Shahabuddeen).
as the Security Council which, for any number of reasons may be viewed as controlled by political means and, on the other hand, actions taken by such an organ that have always been regarded as having a legal dimension. The use of force in both municipal and international law traditionally has always constituted a primary area for legal regulation.\textsuperscript{48} This is merely another way of saying that the Council operates to some extent within the general system of law that governs all international legal persons. The issue, however, is not quite that straightforward. Since States agreed that the Charter was to constitute the code on the \textit{ius ad bellum}, the intention of the Charter is still the governing factor.

Even if one accepts the view that the words of Article 42 standing alone cannot constitute words of legal limitation, a similar result that will allow the limitations expressed therein to constrain the Council’s actions can be reached by a somewhat different analysis. It can be argued that the Charter leaves open, and perhaps even contemplates, the possibility of applying appropriate general principles of international law\textsuperscript{49} to military enforcement actions by the Security Council that are consistent with the other principles of the Charter.\textsuperscript{50}

3. Article 1(3) of the U.N. Charter

Article 24 confers on the Security Council the primary responsibility for the maintenance of international peace and security. Article 24(2) states that the Security Council, in discharging its duties under Article 24(1), “shall act in accordance with the Purposes and Principles of the United Nations.” By virtue of Article 1(3), one of the purposes of the Charter is to promote and encourage respect for human rights. This reference to human rights could be interpreted as indicating that all Security Council action must be consistent with the standards of international law that have been developed in this area and that regulate all actors in the international arena. To the extent the Security Council operates within the general system of law, it is subject to appropriate

\textsuperscript{48} The regulation of the resort to force was regarded by some writers as a fundamental component of a legal system. The failure of international law at one stage in its development to regulate the resort to force was regarded by these commentators as an indication that the system was not legal. See the discussion of this issue by HANS Kelsen, \textit{GENERAL THEORY OF LAW AND STATE} 331–32 (Anders Wedberg trans., 1945) (20th Century Legal Philosophy series Vol. 1, 1945).

\textsuperscript{49} I am referring here to general principles of international law recognized by civilized nations in Art. 38 (1)(c) of the Statute of the International Court of Justice. See discussion \textit{infra} note 67 and accompanying text.

\textsuperscript{50} A similar argument could be made in the context of Article 41 and is suggested by Gowlland-Debbas, \textit{supra} note 10, at 91. \textit{See also} Watson, \textit{supra} note 41, at 33.
principles of international law. The reference to human rights in Article 1(3) provides the link for the argument that places the Security Council within the general international legal system.

Certainly a further connection has to be established between proportionality and necessity and the reference to human rights in that Article before they can be regarded as determinants of the legitimate use of force by the Security Council. Moreover, a technical approach to the expression "human rights" as it appears in Article 1(3) could be inimical to importing broader based humanitarian principles into the legal framework of the Security Council when it is undertaking military enforcement actions. These are not, however, insuperable obstacles. In the *ius ad bellum*, the requirements of proportionality and necessity have traditionally been regarded as based on considerations relating to territory, that is, as limiting the damage to a State's territory to what is warranted in the circumstances.\(^51\) The aspect of these principles of direct relevance to the protection of individuals as opposed to States has been reserved for the *ius in bello*, where proportionality at least\(^52\) has long been regarded as a customary principle of international law.\(^53\) The sharp distinction traditionally drawn between a State's territory and its people, however, is no longer in keeping with current notions of the role of international law. After all, what is a State without its people? The argument I am putting forward here is another aspect of developing critiques of the limitations of sovereignty, currently constructed in international law as a reflection of political power rather than justice.\(^54\) Thus, I suggest that the

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\(^{51}\) This is the general view of commentators. See, e.g., Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in *International Law at a Time of Perplexity* 273, 278 n.22 (Yoram Dinstein ed., 1989). See also Watson, *supra* note 41, at 38.

\(^{52}\) Necessity by its nature is inapplicable once the decision to resort to force is taken. See *infra* note 66 and accompanying text. Thus, since it is not a component of the *ius in bello*, there is all the more reason why its role in the *ius ad bellum* must be regarded as humanitarian in nature.


reference to human rights in the purposes of the Charter not only must be broad enough to include within its compass principles that have the potential to provide very real protection to individuals in that most destructive of activities — armed conflict — but should have a meaning outside the narrow context of how a State treats its own subjects. This approach is warranted by the overall context of the reference to human rights in Article 1(3), emphasizing as it does the resolution of problems of a humanitarian character and the promotion of fundamental freedoms.

The implications of this approach are undoubtedly radical. Traditionally the function of the regime of human rights in relations between States during armed conflict has been performed by the *ius in bello*. Thus, it could be argued that even if an expanded definition is given to Article 1(3), it should be restricted to applying the provisions of the *ius in bello* to the Security Council. It is becoming increasingly apparent, however, that to rely on the *ius in bello* to provide real protection to the civilian population in times of armed conflict is a failure to acknowledge the far greater potential of the *ius ad bellum* to achieve this goal.55

The *Lockerbie Case* has focussed attention on the extent to which the Security Council operates within the general system of international law,56 but is of little guidance here as it deals with measures taken by the Council under Article 41.57 The potential for actions of the Security Council under Article 41 to conflict with rights of States under general international law is significant as the *Lockerbie Case* illustrates.58 Thus, the question as to whether the Council is subject to the requirements of international law could be of great importance. On the other hand, with military enforcement action under Chapter VII, the fact that the Charter alone is the law on the topic simplifies the matter. While not directly relevant, dealing as it does with non-forcible measures by the Security


56. The point was not directly raised as the issue under consideration by the Court in the *Lockerbie Case* was the effect of a Security Council decision that conflicted with a State's existing treaty rights and duties. In the view of the Court, Article 103 of the Charter resolved this issue in favor of the Security Council. See Gowlland-Debbas, supra note 44, at 644–48.


58. Although the rights that Libya claimed as incompatible with the Security Council actions were derived from the Montreal Convention, *Lockerbie Case*, supra note 13, 1992 I.C.J. at 117–18, there was a general principle of international law that was relevant: namely, the right of a sovereign State to refuse to extradite its nationals. As Thomas M. Franck notes, "[i]t is interesting to speculate what might have happened had Libya been a party to the Court's mandatory jurisdiction under Article 36(2) of [the ICJ] Statute and had it brought its action 'under general international law' against Britain, as another party to 36(2), rather than under the Montreal Convention." Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 522 (1992).
Council, the **Lockerbie Case** is nevertheless instructive. Some of the judgements indicate possible approaches to the more general point as to whether the Security Council is subject to legal restraints and, moreover, the important question of the respective roles of the Court and the Council under the Charter system. There is nothing, however, in the judgements that indicates that the Security Council under Chapter VII operates without any legal restraints. The matter is left open.

In conclusion, in the context of military enforcement measures under the Charter, there appears to be no justification for the view that the Security Council is at liberty to completely disregard the purposes and principles of the Charter, and even less for the denial that it operates to a certain extent within the general system of international law. More-

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59. Article 103 is not relevant either in this context as it is predicated on a conflict with existing treaty rights and duties between the States concerned. There are no independent obligations of States under the existing *ius ad bellum*, treaty or otherwise. Their legal position is dependent on that of the Security Council itself. Thus, no clash of obligations can arise.

60. The question of *ultra vires* was not in issue in the **Lockerbie Case** since the Court, in reaching its decision, assumed a valid obligation on States, an approach consistent with the nature of an application for provisional measures. The broader theoretical issues were encapsulated by Judge Shahabuddeen:

> Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what these limits are?

**Lockerbie Case**, supra note 13, 1992 I.C.J. at 142 (separate opinion of Judge Shahabuddeen).

With the exception of Judge Weeramantry, no member of the Court indicated that the Security Council decisions under Chapter VII were beyond the scrutiny of the Court. In fact, several judges indicated that the Court had a definite role to play in relation to the Security Council but not in the particular fact situation before the Court. See, e.g., declaration of Acting President Oda, *id.* at 129; declaration of Judge Ni, *id.* at 133–34; separate opinion of Judge Lachs, *id.* at 138.

After a careful analysis of the choices available to the Court, Thomas M. Franck concludes that the Court somewhat tentatively adopted an approach that assumed an implicit right to review Chapter VII decisions. Franck, supra note 58, at 521. This view is shared by other commentators. See Graefrath, supra note 41, at 185. For a careful examination of this issue, see Gowlland-Debbas, supra note 44, at 663–65. Compare the view of W. Michael Reisman who is very critical of the approach taken by the Court in analyzing the fundamental issues before it, alleging that “the majority judgement manifests no understanding of the specific role requirements of the Council . . . . [n]or . . . . was the Court solicitous of its own complementary role.” Reisman, supra note 38, at 94.

over, there is a convincing argument that the presence of Article 103 in the Charter has no impact on the need for the Security Council to comply with general international law in its actions under Article 41. It is not necessarily inconsistent for the Security Council to override other treaty obligations of States while remaining bound itself by customary rules. States have differing treaty obligations but customary obligations bind all States equally. To allow some States to avoid Security Council resolutions on the basis of inconsistent treaty obligations is inappropriate in the context of the maintenance of international peace and security.

It would be regrettable if the attempts of the Security Council to perform an effective role within the overall goals of the Charter in these areas should become part of the problem rather than the solution. A textual analysis of the terms of the Charter is not going to provide the limits to the Security Council’s military enforcement powers. As one commentator writes, the limitations come from the system viewed as a whole. Any restraints will be derived from the increasing emphasis on human rights and humanitarian values that increasingly constitute the fundamental aim of the entire international legal system. As stated in Article 24(2) of the Charter, one of the purposes and principles of the United Nations to which the Security Council is bound is the promotion and encouragement of respect for human rights. Surely a State whose population is devastated by Security Council enforcement action seemingly out of proportion to the restoration of international peace and security can argue that the Council has breached the legal limitations on its powers that require it to act in accordance with the purposes and principles of the Charter? In what circumstances and to what extent the International Court of Justice will regard itself as having a role to play in determining the applicable limits remains to be seen. This is not, however, determinative of the question whether there are limits to Security Council enforcement action. As international lawyers are well aware, judicial review does not play the role in international law that it does in most municipal systems. The regulation of the behavior of actors in the international community is a much more subtle process. The very debate ensuing at the moment as to the role of the Security Council in the new world order is part of this process.

62. The situation in Somalia is a good illustration of how a humanitarian action can ultimately cost the lives of civilians. See AMNESTY INTERNATIONAL, supra note 4, at 19–20. See also Bothe, Peacekeeping and the Use of Force, supra note 25, at 4–5.

63. Conforti, supra note 46, at 55. See also Gowlland-Debbas, supra note 44, at 667 and infra note 116 and accompanying text.

64. Neither do the inherent difficulties in subjecting concepts such as necessity and proportionality to judicial review affect their legal status. See part I.B.3.
As I have argued, the legal position in relation to the Security Council and military enforcement actions is not on all fours with that governing its other functions under Chapter VII. To limit the Security Council in its military enforcement powers requires a determination of not only whether the Council operates within a legal framework when exercising those powers, but also whether there are any general principles of law that might arguably apply in such circumstances. Thus far the argument is that the reference to the promotion and encouragement of respect for human rights in the purposes of the United Nations provides the basis for the conclusion that the Security Council, in its military enforcement powers, operates subject to restraints derived from relevant and appropriate general principles of international law. The following section of this paper considers what these might be.

B. The Scope of the Ius Ad Bellum in Military Enforcement Actions

It was clearly not anticipated that the Security Council, when dealing with a threat to international peace and security, breach of the peace, or act of aggression, must consider all possible rules of international law before it acts. This suggestion is not only negated by the terms of the Charter itself but is politically unworkable. The previous discussion indicates that in my view, limitations that have a humanitarian component are the most likely to be regarded as prerequisites to valid Security Council action. A consideration of the development of the law on the use of force indicates that the twin requirements of necessity and proportionality have long been determinants of the legitimacy of the use of force.\(^6\) Necessity relates to whether the situation warrants the use of armed force, proportionality determines the amount of force that can legitimately be used to achieve the goal.\(^6\) Although the development of

65. Proportionality and necessity are in fact general principles with differing applications, one of which is in the area of the use of force. For an analysis of proportionality in a wider framework, see D.W. Greig, Reciprocity, Proportionality and the Law of Treaties, 34 VA. J. INT’L L. 295, 322–27 (1994), and in relation to necessity, see Bin Cheng, General Principles of Law As Applied by International Courts and Tribunals 58–77 (1953).

66. International law reflects the current view of States that in relation to unilateral State action, the overall evil of war always outweighs the good except in cases of self-defence. This balancing process is continued in the legal requirements of necessity and proportionality that determine a legitimate exercise of the right of self-defence. Unlike the assessment of proportionality, which is an ongoing process throughout the conflict, the assessment of necessity occurs at the time the initial decision is made to resort to force. Once that decision is made, the role of necessity is complete and the ongoing conduct of the campaign is determined by the requirements of proportionality.

Many commentators, while acknowledging these two requirements, tend to deal with them as if they were one. See generally Greenwood, supra note 51. On the other hand, some writers address all questions of necessity and proportionality under the umbrella of proportionality. See, e.g., Marc Weller, The Kuwait Crisis: A Survey of Some Legal Issues, 3 AFR. J.
these principles as legal requirements has previously occurred primarily in the context of self-defence, there is no reason to suppose that the scope of these principles is so limited. They are general principles of law that govern all uses of force, whether individual or through collective security systems. Moreover, they both have a substantial humanitarian basis. Before turning, however, to a closer consideration of proportionality and necessity and their content in the context of the Security Council, it is somewhat disingenuous to assert the existence of any general principles of international law without acknowledging the controversy that surrounds the issue as to whether they constitute a legitimate source of international law.

Readers will be familiar with the debate in this area. It is not proposed to retraverse that ground to any extent. The argument of this paper, however, that human rights and humanitarian principles are legal constraints on the Security Council through the doctrine of proportionality for example, does not depend on the importation of rules from national law, but is based on extrapolat-

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67. The early beginnings of necessity and proportionality as legal principles are in fact found in the idea of self-preservation. Bin Cheng, in his work on general principles of international law, identifies necessity and self-defence (including the Caroline requirements of necessity and proportionality) as components of the general principle of self-preservation. Cheng, supra note 65, at 69-97.

68. See Bothe, supra note 46, at 78-79. See also Watson, supra note 41. Compare Greig, supra note 65, at 322-27 (discussing whether the principle of proportionality can be viewed as a general principle of international law).

69. For the contrary view that proportionality and necessity in the ius ad bellum are based on territorial considerations, see supra note 51 and accompanying text.


71. Commentators differ as to whether general principles of international law are a separate source of international law, or are derived solely from existing customary and conventional rules. The majority view is that they are an independent source, but further disagreement exists as to whether they are restricted to principles of national law, or also include principles of international law. Many commentators accept the interpretation that the words "general principles" in Article 38(1)(c) are not limited to principles of national law. See Johan G. Lammers, General Principles of Law Recognized by Civilized Nations, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 53, 66-69 (Frits Kalshoven et al. eds., 1980). For a discussion of the general principles of international law, see van Hoof, supra note 70, at 131-67. See generally Cheng, supra note 65.

72. Although proportionality is accepted as part of the national law of a majority of States, Bothe, supra note 46, at 76-78, the appropriate analogy from national law is not so much the law on the right of individual self-defence, but the rules regulating the use of collective force by representatives of the State, such as the police. With some notable exceptions, most jurisdictions place legal restraints on the amount of force that may be used by such individuals in their public capacity.
ing existing principles of international law governing activities between States to an international organization. Proportionality and necessity are both concepts present in the Charter and arguably constitute legal limitations. The Charter, therefore, in effect provides a treaty test for these principles.

1. Proportionality

The only actions involving the use of force contemplated by the Charter are those taken to maintain or restore international peace and security under Article 42. In the face of a threat to the peace, breach of the peace, or act of aggression, Articles 39 and 42 read together constitute the yardstick for determining the application of proportionality, that is, the legitimate ends against which forceful actions are to be assessed. The same result is achieved in one of two ways: by either regarding the words to "restore international peace and security" as words of legal limitation, or, in the alternative, by placing the Council in the general system of law in which all international legal persons operate. Under the latter option, the Security Council, like other international legal persons, would be governed by the requirement that all use of force must be proportionate to its aim, and finding the determining criteria in a conventional source.

It can be argued that when the Security Council decision in question is authorizing the use of force, presumably as a last resort to restore international peace and security, it is somewhat unrealistic to discuss sovereign rights of States. To some extent a State whose conduct attracts this type of sanction might be regarded as having temporarily

73. This approach of relying on principles of international law to fill the gaps in conventional and customary law is particularly appropriate in the context of international organizations. For example, Sir Humphrey Waldock refers to the willingness of the International Court of Justice to rely on general principles of international law to supplement the undeveloped general law of international legal institutions. Humphrey Waldock, General Course on Public International Law, 106 RECUEIL DES COURS 5, 60-61 (1962). In the Reparation Case, the International Court of Justice observed that "[t]he Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law." Reparation Case, supra note 10, 1949 I.C.J. at 182.

74. Even if it is accepted that Article 42 of the U.N. Charter is not the source of the recent practice of authorizing States to use force, see supra note 8 and accompanying text, there is no reason to suppose that this aim of maintaining and restoring international peace and security is not equally applicable when the Security Council is delegating its enforcement powers to States rather than exercising them itself.

75. It is the deprivation of the rights of a sovereign State that has led to some disquiet about the decision of the Court in the Lockerbie Case. Acting President Oda commented on the issue of sovereign rights in regard to extradition in his declaration. Lockerbie Case, supra note 13, 1992 I.C.J. at 130-31 (declaration of Acting President Oda).
forfeited its sovereign rights based on such considerations as territorial integrity. But to what extent? Has it also forfeited rights that relate to the protection of its citizens rather than to the State in its sovereign capacity? This is not the result in the case of self-defence, even if there has been a flagrant breach of international law by a State. Why should it be the case under the collective security provisions of the Charter? Moreover, as I have argued, there are difficulties with regarding proportionality, even in its *ius ad bellum* sense, as dictated solely by the requirements of territorial integrity. Certainly there is a distinction in this context between the basis of proportionality in the *ius ad bellum* and the *ius in bello*, with only the latter traditionally derived from humanitarian considerations. However, I would argue that nowadays proportionality in the context of the *ius ad bellum* has a humanitarian component, namely to achieve a reasonable balance between the achievement of the legitimate goals under the Charter and the anticipated loss of life and suffering of those involved, particularly civilians. So viewed, proportionality fits within the analysis that certain restraints on the Security Council are consistent with the overall tenor of the Charter.

The view that there are limits to the powers of the United Nations when taking military enforcement action is supported by the Korean conflict and to a lesser extent by the Gulf conflict. Moreover, that these limits were perceived in some quarters as legal limits is clear from the following passage from Bowett:

> Whereas, traditionally, a State waging war was entitled to do so to the stage of complete annihilation and subjugation of the other side, it can scarcely be maintained that United Nations action can be pursued so far. Such “collective” or “enforcement” action, as distinct from war, is limited to the measures necessary to resist aggression and to maintain and restore international peace and

76. This is clear from the wording of Art. 2(7) of the U.N. Charter which excludes matters within the domestic jurisdiction of States from the province of the United Nations except when the Security Council is acting under Chapter VII.

77. See discussion supra notes 54–55 and accompanying text.

78. See Gardam, supra note 53, at 394–403 (discussing the basis of proportionality in the *ius in bello*).

79. See Bowett, supra note 6, at 43–45.

80. Any analysis of the Persian Gulf conflict is complicated by the fact that the legal basis for the use of force was arguably collective self-defence. See Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in *Law and Force in the New International Order* 65, 74–75 (Lori F. Damrosch & David J. Scheffer eds., 1991) (concluding that there are limits to the measures the Security Council can take to maintain and restore international peace and security). See generally Quigley, supra note 37.
security. To this extent the United Nations can only wage a "limited" war, and it is evident that it is this precise question of the constitutional limits on United Nation action which weighed heavily in the doubts of some United Nations members over the propriety of crossing the 38th parallel — quite apart from the political desirability of that course. The ends of war and of United Nations action thus differ.  

Bowett concludes that although this action was constitutionally valid, he could nevertheless envisage examples of United Nations actions that could have gone "beyond the necessity and purposes of United Nations action," such as the wholesale destruction by aerial attack of all the major towns in North Korea.

The argument that some principles of international law may be perceived as unduly fettering the Security Council in its role of maintaining international peace and security does not apply to proportionality. The recognition that the legitimate ends for the use of force have been changed by the Charter is sufficient to allow the Security Council the scope to fulfill its mandate. The achievement of these aims does not justify the use of any means.

2. Necessity

Turning to the question of necessity in collective enforcement actions, the Charter system leaves to the Security Council the difficult assessment of whether the overall good to be gained from the resort to force is balanced by the overall evil in situations other than self-defence. The assessment of necessity also incorporates factors based on respect for human life and the suffering of the civilian population and is the sort of limitation that, in common with proportionality, is consistent with the overall aims of the Charter. Article 42 imposes two conditions which must be satisfied before the Security Council can make a decision to use force: (1) there must be a "threat to the peace, breach of the peace, or act of aggression" within the meaning of Article 39; and, (2) the Council must consider that "the measures provided for in Article 41 would be inadequate or have proved to be inadequate." In all other situations, the use of force, irrespective of its benefits, is outside the jurisdiction of the

81. See Bowett, supra note 6, at 54–55.
82. Id. at 55. See also Reisman, supra note 18, at 76 (arguing that peacemaking will tolerate much less collateral destruction than warmaking, a proportionality argument).
83. The significance of these words of limitation in Article 42 is lessen by the broad interpretation that the Security Council has recently placed on the phrase "threat to the peace." See, e.g., Boisson de Chazournes, supra note 3, at 251–56.
Security Council. Thus the international community determined the parameters of necessity in relation to Security Council action as the existence of a threat to the peace, breach of the peace, or act of aggression. However, in common with the right of self-defence in the case of an armed attack, the use of force in response is not an automatic right. The Security Council must first satisfy itself of the inadequacy of other measures. Article 42, as with proportionality, provides a treaty test for this general principle of international law. To what extent it differs from the rule in relation to self-defence depends on the view one takes as to the requirements of necessity in self-defence. The Charter makes it clear that the consideration of all peaceful alternatives, one way of regarding the law on self-defence, is not a prerequisite to the resort to non-pacific means by the Council. Only measures pursuant to Article 41 are subject to that requirement. It was this very issue that attracted a great deal of comment in the Persian Gulf conflict although it was rarely identified clearly as a legal question. Nevertheless, the existence of this debate indicates that there was a view among legal commentators that the requirements of Article 41 are of some significance and cannot be dismissed summarily. Interestingly, proportionality has not received the same sort of critical attention, perhaps because its requirements are not expressed so explicitly in Article 41.

3. Assessment of Proportionality and Necessity

It could be argued that proportionality and necessity are concepts too imprecise to apply in any objective fashion to the complex situations that can confront the Security Council in exercising its responsibility for the maintenance of international peace and security. The assessment of these requirements is undoubtedly a much more straightforward process in the law of self-defence. The prevailing view is that a State can only


85. See, e.g., Quigley, supra note 37, at 5-10; Weston, supra note 29, at 528-32.

86. The International Military Tribunal at Nuremberg discussed the justiciability of self-defence in the following terms: “whether action taken under the claim of self-defence was in
legitimately use force in response to an armed attack to the degree necessary to defend itself. The determination of the existence of an armed attack and measures that qualify as defensive, although not beyond dispute, are capable of being determined with some precision. In the Nicaragua Case, the only judicial precedent to consider the application of the requirements of necessity and proportionality in the context of self-defence under the Charter, the International Court of Justice had little difficulty applying these concepts. In contrast, the restoration of international peace and security is a much more nebulous concept. There would be vast differences of opinion as to what actions were, for example, proportionate to achieve this goal. It is in the area of "threats to the peace" rather than breaches of the peace or acts of aggression that the assessment of proportionality and necessity becomes extremely difficult, particularly in light of the recent practice of the Security Council of interpreting that phrase so widely. If the activity against which the response must be judged is inherently vague, as is the case with a "threat to the peace," the comparison with the means required by proportionality becomes very complex. At the very least, the characterization of the dispute as a threat to the peace would, generally speaking,

fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 208 (1947). See also Nicaragua Case, supra note 34, 1986 I.C.J. at 108, 112-14 (referring to the legal dimension of the right of self-defence under the U.N. Charter).

87. As one would expect, there are considerable differences as to what amounts to defensive actions. See, e.g., Yoram Dinstein, War, Aggression and Self-Defence 213-20 (2d ed. 1994); Greenwood, supra note 51.


89. Admittedly, the facts before the Court in the Nicaragua Case could be regarded as presenting relatively clear cut examples of disproportionate and unnecessary actions in the context of self-defence, although this was not a view shared by Judge Schwebel. See Nicaragua Case, supra note 34, 1986 I.C.J. at 279 (dissenting opinion of Judge Schwebel). In the Nicaragua Case, the United States had alleged a right of collective self-defence in support of El Salvador based on the provision of aid by Nicaragua to the armed opposition in that State. The activities of the United States that came under scrutiny were the laying of mines in Nicaraguan ports and some ten attacks involving the use of force on such targets as oil installations. Id. at 48, 50 (for a discussion of the activities that the Court found were established by the evidence and that it took into account in its assessment of proportionality). The Court concluded "[w]hatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid." Id. at 122. It appears, therefore, that both the choice of targets and the scale of the response led to the conclusion of illegitimacy by the Court. On the issue of necessity, the Court found problematic the time lapse between the actions alleged to provoke the response and the response itself. Id. at 122-23.
warrant a more restrained response in terms of the use of force than a breach of the peace or act of aggression. Similarly, establishing the requisite state of necessity to use military force would be a more significant task in a situation that merely constitutes a threat to the peace as opposed to a situation involving an act of aggression.

In conclusion, assuming the threshold question, as to whether the Security Council acts to some extent within a legal framework when it is exercising its military enforcement powers, is answered in the affirmative, then a consideration of the historical regulation of the use of force indicates the primary position of necessity and proportionality as determinants of the legitimacy of actions involving the use of force. Their application to the emerging new system of forceful actions involving the Security Council are not only appropriate but warranted by elementary considerations of humanity.

II. MILITARY ENFORCEMENT ACTIONS AND THE IUS IN BELLO

There are two main issues in relation to humanitarian law and the enforcement actions of the Security Council that warrant examination. There is the set of threshold questions, already considered in relation to the ius ad bellum, as to if and when such actions become subject to legal rules, what these are. Assuming this is the case, another characteristic of Security Council activities poses distinct problems for humanitarian law, namely the effect of economic sanctions imposed by the Council.

A. The Security Council and the Requirements of Humanitarian Law

The first issue to consider is whether the Security Council is governed by the requirements of international humanitarian law. 90 These rules, unlike those of the ius ad bellum, operate independently of the Charter. They are a separate body of rules that are theoretically unaffected by the Charter's provisions. States continue to be bound in their

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relationships *inter se* according to their treaty commitments and the relevant rules of customary international law. As a consequence, the question of the relationship between the law of armed conflict and enforcement actions is much more complex. Several situations have to be distinguished: the position of the United Nations itself, the individual States participating in the enforcement actions, and the State(s) against which forceful action is taken. The focus of this paper is the obligations of the United Nations. Arguably a conclusion that the Security Council is not bound by principles of humanitarian law does not have the same implications as in relation to the *ius ad bellum*. It is assumed by most writers that States involved in military enforcement actions remain bound by their individual obligations under the *ius in bello*.\(^9\) As we will see, there are difficulties with this assumption. It is not beyond debate that State forces are bound in Security Council sanctioned enforcement actions by their legal obligations derived from the rules regulating inter-State conflicts, even less so if Article 43 forces were established. Moreover, given the existence of such a force, the view that the contingents involved retain their independent status when acting in accordance with a Security Council decision insofar as the requirements of humanitarian law are concerned activates Articles 25 and 103 of the Charter. The Council could thus theoretically override States' treaty obligations. It is thus important to determine the position of the Security Council itself.

Under the Charter system, the question of the relationship between the *ius ad bellum* and the *ius in bello* arises both in relation to conflicts between States and United Nations enforcement action.\(^9\)\(^2\) In the context of the exercise of force by the United Nations, it was suggested shortly after the adoption of the Charter that these forces should only be required to comply with the laws of war as were fit for their purposes.\(^9\)\(^3\) There were basically two justifications provided for this view. One position was that since the use of force was prohibited under the Charter, any forcible action that the United Nations took would necessarily

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92. For a discussion of the issue in the context of conflicts between States, see Brownlie, *supra* note 11, at 406 n.1.

be in response to unlawful aggression.\textsuperscript{94} The other approach focused on the compatibility of United Nations enforcement action with the concept of warfare and the rules developed to regulate its conduct.\textsuperscript{95} For some time after the adoption of the Charter this topic received a degree of attention. The consensus, however, was against drawing such a distinction between United Nations forces and an aggressor State in relation to the application of the principles of humanitarian law — the same position that had been reached in relation to inter-state conflicts.\textsuperscript{96} The growing emphasis on the humanitarian basis of these rules and the increasing acceptance that their primary objective was to provide protection for individuals in armed conflict reinforced this approach.\textsuperscript{97} Thus it seemed to be accepted that an unlawful aggressor was entitled to the benefits of the \textit{ius in bello} irrespective of whether the lawful parties' use of force was by way of self-defence or by way of collective enforcement action.\textsuperscript{98} Certainly from the perspective of humanitarian law this is the desirable position, but does it also represent the legal position?

Although the legal issues were never formally resolved, the policy adopted in relation to United Nations peacekeeping forces, where the issue has been of some practical importance,\textsuperscript{99} was consistent with the view that the United Nations should be bound to the extent necessary by

\begin{itemize}
\item \textsuperscript{94} Bowett refers to this view as the "reprisal theory" and explains its strengths and weaknesses. Bowett, \textit{supra} note 6, at 493–96.
\item \textsuperscript{95} Id. at 496–99.
\item \textsuperscript{96} See, e.g., Resolutions and Voeux Adopted by the Institute at its Zagreb Session (26 August–4 September 1971), \underline{54} \textsc{Annuaire de l'Institut de Droit International}, pt. 2, at 465–80 (1971). For the situation in relation to inter-State conflicts, see Protocol I, \textit{supra} note 3, 1125 \textsc{U.N.T.S.} at 6–7, \underline{16} \textsc{I.L.M.} at 1396 (preamble to Protocol I). The principle of equal application of the \textit{ius in bello} has always been difficult to maintain in practice. For example, despite its acceptance by the States involved, it came under considerable pressure in the Persian Gulf conflict. See Gardam, \textit{supra} note 53, at 410–12. See also Schachter, \textit{supra} note 8, at 466.
\item \textsuperscript{97} Prior to the developments during this century that culminated in the outright ban on the use of force in the Charter, the resort to war was a sovereign right of States. The law of armed conflict played a secondary role to the law of war in regulating relationships between States upon the outbreak of war. This latter body of law, through such institutions as belligerency, neutrality, blockade and prize, minimized the disruption to States caused by war. It is only this century, as a consequence of the ban on the use of force and the developing emphasis on human rights, that the law of armed conflict has assumed a more prominent role and an increasingly humanitarian aspect.
\item \textsuperscript{98} This position remains largely unchallenged by the Gulf conflict. See Henri Meyrowitz, \textit{La guerre du Golfe et le droit des conflits armés}, \underline{96} \textsc{Revue Générale de Droit International Public} 551, 553–54 (1992).
\item \textsuperscript{99} Until recently, peacekeeping has been predicated on there being no active hostilities taking place and no situation of armed conflict between the United Nations forces and other parties. Given these conditions, the applicability of the provisions of the law of armed conflict was a peripheral concern. See \textit{supra} notes 18–19 and accompanying text.
\end{itemize}
the same principles of international humanitarian law as States. Since there were difficulties with the United Nations becoming a party to these conventional rules flowing from its status as an organization, there was necessarily a distinction drawn between the conventional and customary rules. Otherwise the view prevailed that "[i]t is uncontested that the United Nations is bound by the customary rules of IHL when engaged in hostilities."

The legal basis underlying this assertion, however, has always been somewhat unclear. Presumably it is on the basis that the Security Council is bound by principles of general international law. Moreover, national contingents as a matter of practice regard themselves as bound by their States' treaty obligations. Derek Bowett writes that "it is difficult [apart from the unlawful aggressor theory which, in my view, he quite correctly finds unsustainable] to posit any persuasive theories that would release a State's military forces from the binding force of the laws of

100. There are many works detailing approaches that have been taken to the question of United Nations peacekeeping forces and international humanitarian law. See, e.g., Schindler, supra note 16; Yves Sandoz, The Application of Humanitarian Law by the Armed Forces of the United Nations Organization, 206 INT'L REV. RED CROSS 274, 283 (1978). The practice evolved of negotiating agreements between the United Nations, the host State and the States supplying peacekeepers that determined such matters as the status of the forces involved, issues as to the exercise of criminal jurisdiction and the application of humanitarian law to the activities of these forces. For full details of these agreements in relation to peacekeeping operations, see 1-4 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING: 1946-1967 (1969, 1970, 1980, 1981). These agreements resolved the legal issues between the United Nations and the supplying States as well as many of the issues in relation to third parties, since the latter would in most cases be covered by the agreements with the host State.


However, there are particular difficulties in applying humanitarian law treaties to the United Nations. Bowett comprehensively describes the legal and practical obstacles to such a course of action. See BOWETT, supra note 6, at 505–15. See also Umesh Palwankar, Applicability of International Humanitarian Law to United Nations Peace-keeping Forces, 294 INT'L REV. RED CROSS 227, 231–34 (1993).

102. Schindler, supra note 16, at 526. But compare SEYERSTED, supra note 16, at 187, 201, 314, 395. For a more cautious assessment, see BOWETT, supra note 6, at 506. See also Article 2 of the 1971 Zagreb Resolution, supra note 10, DOCUMENTS ON THE LAWS OF WAR at 373, which states that "[t]he humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities."
war, as a matter of law, simply because they are engaged in fulfilling a United Nations mandate. Thus, Bowett concludes that national contingents remain bound by the treaty and customary obligations that would apply if they were engaged in an international armed conflict against another State. This approach, although adopted by other commentators and supported by the practice of States, has its unsatisfactory aspects. In practical terms it means that different national contingents, although engaged in the same conflict, may have differing obligations in relation to the other party, a most confusing and unsatisfactory situation. Moreover, as Bowett notes, it is conceivable that the State against whom the United Nations forces are engaged will have difficulty in determining its obligations in relation to humanitarian law, with foreseeable consequences for United Nations forces.

Despite these difficulties, this approach to peacekeeping forces and the requirements of the law of armed conflict seemed to work relatively well. The situation has changed with the development of the peace-enforcement function of the Security Council. The unresolved legal position that exists in relation to peacekeeping forces is neither satisfactory nor analogous to peace-enforcement forces that are intended to use force not just as a last resort in self-defence, but as part of the Security Council's mandate to restore international peace and security by more forceful measures. In contrast to peacekeeping activities, enforcement functions envisage the possibility of armed conflict between the United Nations forces and the other parties involved. All the difficult issues of international humanitarian law, such as the determination of what sort of attacks are legitimate in terms of the likelihood of civilian casualties, the lawfulness of the use of certain weapons in light of their potential to cause unnecessary suffering, and the determination of what constitutes a military target, never arose in peacekeeping actions.

103. Bowett, supra note 6, at 503-04.
104. Schachter, supra note 80, at 76; Seyersted, supra note 16, at 197-209.
105. See Bowett, supra note 6, at 503.
106. Id. at 505. Moreover, some of the conventional rules are only binding if all participants are parties to them. The legal effect of the participation of U.N. forces who cannot accede to these instruments is to release the other parties from their obligations thereunder. See Howard J. Taubenfield, International Armed Forces and the Rules of War, 45 Am. J. Int'l L. 671, 674 (1951).
107. It is also unsatisfactory for peacekeeping forces in light of their greatly increased activity in recent years.
108. However, the operation in the Congo (ONUC) did involve resort to considerable amounts of force. For a description of the factual background to that conflict and the attitude of the United Nations and Member States to the question of the application of the law of armed conflict, see Bowett, supra note 6, at 222-24. See also Seyersted, supra note 16, at 192-97.
Moreover, it is by no means "uncontested" that the rules of customary international law apply to the forces acting in pursuance of Chapter VII Security Council powers. Indeed, it is arguable if this were ever the correct legal position even in relation to peacekeeping forces. Certainly the force of arguments based on the unequal application of the *ius in bello* arising from the ban on the use of force under Article 2(4) of the Charter have largely dissipated. However, the legal source for States' military actions — other than those in self-defence — is the Security Council, and from this flows their legal obligations and rights in relation to humanitarian law.¹⁰⁹ It seems manifestly incorrect to argue that States supplying the forces are each in a state of armed conflict with the State(s) against whom the action is taken. If they are, what is the legal basis of their action under the *ius ad bellum*? In my view, this is the case irrespective of whether these are Article 43 forces or forces volunteered by States for Security Council action under Article 42 or some other provision of Chapter VII. The agreements entered into between the supplying States and the United Nations in the context of peacekeeping may resolve many issues between the respective parties to the agreements, but they do not and cannot resolve the position in relation to third States. Moreover, there are no such agreements in relation to peace-enforcement forces.¹¹⁰

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¹⁰⁹ The weight of authority appears to be against this view. Bowett, *supra* note 6, at 493; Schachter, *supra* note 80, at 76; Seyersted, *supra* note 16, at 197–207. For the purpose of discussing the applicability of the law of armed conflict, Bowett distinguishes between the position of national forces themselves and the United Nations itself. He concludes that both remain bound by the relevant laws of armed conflict, in the case of the United Nations it is necessarily the relevant customary rules. Seyersted distinguishes between forces under national command and those under United Nations command. The former are bound by their national obligations and so by analogy are the latter.

I do not find either of these distinctions particularly helpful except in the context of relations between the States supplying forces and the United Nations itself. The recently adopted Convention on the Safety of United Nations and Associated Personnel, *supra* note 4, also supports the view that States remain bound by the law regulating hostilities between States in "authorized" enforcement action under Chapter VII. Article 2 of the Convention excludes "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." Id. at 4. This provision suggests that the drafters of the Convention believe that the law regulating the conduct of hostilities between States applies as between the various forces involved in an enforcement action under Chapter VII Security Council authorization. On this point, see Bloom, *supra* note 23, at 624–25.

The International Committee of the Red Cross (ICRC) quite understandably is not interested in the doctrinal purity of the situation in relation to United Nations forces. The ICRC has consistently put forward the view that peacekeeping forces are bound by the principles of international humanitarian law. It has reiterated this view in relation to peace-enforcement actions. See International Conference of the Red Cross, *Report of the Protection of War Victims*, reprinted in 296 *Int’l Rev. Red Cross* 391, 428–29 (1993). In general, the ICRC documents refer to the "applicable" or "relevant principles" of humanitarian law, a reference that avoids the very issue that needs urgent attention.

¹¹⁰ Admittedly, this approach is consistent with the view that seems to be taken by the States involved and the United Nations itself in relation to "authorized" uses of force: namely,
There is no straightforward resolution to the question of the *ius in bello* and the Security Council. It is accepted that the United Nations has rights and obligations in international law that are appropriate to its role.\(^\text{111}\) As the Court stated in the *Reparation Case*, those rights and obligations “depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”\(^\text{112}\) There are two approaches to resolving the question of the *ius in bello* and the Security Council in the exercise of its military enforcement powers. First, one that is based on the terms of the Charter itself. Second, an approach that draws on the broader point that the United Nations operates to some extent within the general system of international law. As I stated earlier, there is an important distinction in this context between the *ius ad bellum* and the *ius in bello*. In contrast to the *ius ad bellum*, the Charter does not deal with the *ius in bello*, so it is easier to infer that the application of these rules to the organs of the United Nations is consistent with the purposes of the Charter. Thus a consideration of the requirements of Article 1 and 24(2) of the Charter may provide a solution.

The fact that Article 1(1) of the Charter only specifically refers to the role of international law in the peaceful adjustment or settlement of international disputes or situations that might lead to a breach of the peace does not necessarily inferentially exclude the application of legal constraints in other circumstances. As with the *ius ad bellum*, the reference to human rights and fundamental freedoms in Article 1(3) supports the view that the requirements of international law consistent with these aims are applicable to the Security Council. Alternatively, an analysis based on the relationship between the Security Council as an international organization and the general system of international law appears to be an appropriate starting point to unravelling the difficulties posed by the new activities of the Council. Although developed in the context of States, currently the *ius in bello* is more correctly understood as serving the purpose of regulating the conduct of all international entities engaged in armed conflict.\(^\text{113}\) To illustrate this point we only need to recall the extension by Protocol I to the Geneva Conventions of the rules regulating international armed conflict to certain entities engaged in the struggle for self-determination.\(^\text{114}\) The claim of the *ius in bello* to

\(^{111}\) See supra notes 10, 101.
\(^{112}\) See *Reparation Case*, supra note 10, 1949 I.C.J. at 180.
\(^{113}\) See Bloom, supra note 23, at 624 n.11.
\(^{114}\) Protocol I, supra note 3. Bowett points to the practice of political entities who, though not amounting to States in the traditional sense, have been regarded as engaged in
this broad role is a strong one. Moreover, its rules are clearly based on humanitarian considerations and for many years its development has been premised on universality and the irrelevance of the status of a parties’ resort to force.  

An interpretation of the Charter that places such limits on the Security Council is in keeping with the views being expressed by writers in the context of sanctions. If it is the case that the Security Council cannot require States to breach fundamental humanitarian values in the sanction regimes it imposes on States, it is surely anomalous to regard it as able to do so itself. It is inconceivable that with the current emphasis on human rights and humanitarian principles, the Security Council can be regarded as operating outside the constraints on the conduct of armed conflict that have been painstakingly developed over the years by States. Moreover, unlike the ius ad bellum, there is a highly developed body of rules that are available once the threshold question of applicability is resolved.

To apply the customary law of armed conflict to the Security Council is not, however, the ideal situation. For example, as we have seen, some of its provisions are not adapted for the United Nations. Moreover, customary rules inevitably lag behind treaty developments and there is always scope for disagreement as to the exact status of any particular rule at any particular time. The solution to this dilemma, and one currently being actively pursued, is to devise some mechanism by which the United Nations can undertake to comply with the conventional rules of international humanitarian law and to ensure that the States involved in peacekeeping and peace-enforcement activities are aware of these

Warfare to which the customary rules of armed conflict applied. Bowett, supra note 6, at 497.

115. See supra note 97 and accompanying text.

116. For example, in the context of the International Court of Justice and sanctions, Gowlland-Debbas writes:

Until now, the Court’s adoption of a teleological and evolutionary approach to Charter interpretation has resulted in expanding international jurisdiction, and hence the powers of the Organization, vis à vis restrictive assertions of sovereignty of member States.

The application of these principles today, however, could serve not to expand, but to constrain, the use of these powers in certain situations. This is particularly relevant with respect to the powers of the Council under Chapter VII.

Gowlland-Debbas, supra note 44, at 667.

obligations. 118 In the ultimate analysis, it is the responsibility of the United Nations to train peacekeepers and peace-enforcers in the requirements of international humanitarian law. 119 Doubtless it can delegate this function to States and make any agreements it likes as to the discipline of the armed forces involved, but this does not obscure the basic legal position that it is the United Nations that bears the primary responsibility for these forces.

B. The Security Council and Economic Sanctions

Even if it were the case that the Security Council was obliged to comply with the rules of international humanitarian law, there would still be aspects of its activities that reveal deficiencies in that regime. The Lockerbie Case has reinforced a situation that has begun to concern commentators, namely the question of sanctions. 120 An exact parallel of the fact situation before the Court in the Lockerbie Case could not arise in the context of humanitarian law and United Nations enforcement actions. Articles 103 and 25 only come into operation where there is a decision of the Security Council that is inconsistent with a State’s treaty obligations vis-à-vis another State. The current practice of “authorization” does not meet the criteria of decision within these provisions so as to bring them into operation. 121 Moreover, even if Article 43 were to come into operation and a permanent force were established, its members would be United Nations forces and governed by the principles of law applicable to the United Nations itself. The parallel situation of the Lockerbie Case has arisen, however, in the case of economic sanctions. Decisions of the Security Council to impose sanctions against States

118. See Claudio Caratsch, Humanitarian Design and Political Interference: Red Cross Work in the Post-Cold War Period, 11 INT’L REL. 301, 312 (1993). See also supra note 100. There are various possibilities that have been canvassed by other writers. See, e.g., BOWETT, supra note 6, at 515–16.

119. This is neither a recent nor original suggestion. See Article 4 of the 1971 Zagreb Resolution, supra note 10, DOCUMENTS ON THE LAWS OF WAR at 374, that urged the United Nations to take a coordinating role to ensure that individuals participating in United Nations forces received adequate instructions in relation to humanitarian law.


121. If the practice of “authorization” does not bring these forces under the corporate veil of the Security Council, it would theoretically be possible for the Security Council to adopt a decision under Chapter VII instructing States to take action inconsistent with their treaty obligations in respect of humanitarian law as a measure to restore international peace and security. This does not seem so far fetched given the recent activities that the Security Council has viewed as measures to restore international peace and security.
under Article 42 of the Charter are mandatory. As a consequence of the combined operation of Articles 25 and 103 of the Charter, any such decision must be complied with by States irrespective of whether they may be in breach of their obligations under the conventional rules of international humanitarian law. 122 Although in one sense a limited problem, in that such a situation could only arise while the conflict continues, 123 it is also part of the wider challenges caused by the Security Council's broad mandate to restore international peace and security and the limitations of the present regime of humanitarian law.

CONCLUSION

In this article I have argued for the rejection of the view that the Security Council is controlled exclusively by political means when it is exercising its military enforcement role under the United Nations Charter. In light of the wide ranging impact of such actions, it is essential to recognize that the law has some role to play in setting the limits of these powers. The text of the Charter, a legal document, is not only compatible with but arguably, through its emphasis on human rights and humanitarian values, requires the Security Council to measure its responses against legal criteria. These criteria can be extrapolated from those that have been painstakingly developed in the context of States. To regard the purposes and principles of the Charter as merely words of exhortation allows for dangerous leeways of choice to an unrepresentative body necessarily swayed by considerations that may be antithetical to the ideals of the Charter. In my view, the *ius ad bellum* of the Charter in relation to collective security actions incorporates the general principles of proportionality and necessity, adapted as they must be to their context. Less controversially, I regard the Council as under a legal obligation to ensure that forces acting under its auspices comply with the appropriate customary rules of humanitarian law.

122. See Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 Am. J. Int'l L. 104, 108 (1991). Meron appears to accept that the Security Council theoretically could disregard the requirements of humanitarian law although he does not expressly deal with the customary law issue. See also Gowiland-Debbas, supra note 10, at 91-93.

123. In general, the rules of humanitarian law, with some exceptions such as the Fourth Geneva Convention, see supra note 90, only apply while there is a situation amounting to armed conflict. However, the Sanctions Committee of the Security Council does not appear to be applying the letter of the law in its practice in relation to sanctions. See also Hans-Peter Gasser, supra note 120, who states that "the provisions of international humanitarian law are applicable to economic sanctions. This holds true for . . . sanctions decided as a measure of collective security." *Id.* at 1. See also *Commentaire des Protocoles Additionnels du 8 Juin 1977 aux Conventions de Genève du 12 Août 1949*, at 1035 (Yves Sandoz et al. eds., 1986).
There are still many important and complex issues that require detailed analysis before any conclusions can be confidently drawn about the legal regime in which the Security Council operates. Consequently, much of the discussion in this paper has had to be hedged with qualifications. For example, a determination of the legal basis of the recent practice of "authorizing" States to use force is a prerequisite to any firm conclusion as to its legal consequences. The relationship between the Security Council and the general rules of State responsibility, particularly issues relating to control, also require analysis. Thus, to some extent, the discussion of enforcement actions awaits further examination. This flows from the complexity of the issues that has been demonstrated over the years by States' experience with peacekeeping operations. One thing is clear, if the Security Council is to continue its active role in situations that involve the use of armed force, the question of what restraints apply needs to be resolved as a matter of urgency in the interests of all participants, both civilian and combatant. With respect to the *ius in bello*, it is already difficult enough to ensure compliance with the provisions of humanitarian law without the added problems associated with an unclear legal position in relation to United Nations forces. A code for such situations should be drawn up and the legal mechanisms by which United Nations forces can assume such obligations should be resolved. The question of humanitarian law and economic sanctions also needs resolution.

As for the *ius ad bellum*, one of the major purposes of international law throughout its development has been to impose restraints on the use of force. It is inconceivable that it was intended that the use of force in all circumstances, except self-defence, would be granted to a political body subject to no legal controls whatsoever. This runs counter to the increasingly important role that international law is perceived to play in the international community, particularly in the area of human rights. Moreover, one method by which the Security Council can fulfill its Charter duty to encourage respect for human rights and humanitarian principles is to set an example and ensure its military enforcement actions are conducted in an exemplary fashion. In the final analysis the legal questions are by no means insuperable. Commentators have over the years provided workable and satisfactory solutions. They must be adopted forthwith in the interests of all victims of war, combatants and civilians alike.